No. 23-6103

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ALVIN CELIUS ANDRE — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALVIN CELIUS ANDRE, REG # 155955-104
(Your Name)

USP TUCSON, P.O. BOX 24550
(Address)

TUCSON, AZ 85734
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

I. Does a constructive amendment occur when the government substitutes Congress's intended object of the actus reus of 18 U.S.C. § 2422(b), "any individual who has not attained the age of eighteen years" with its opposite, an adult?

II. When a trial court finds sufficient evidence of inducement to permit an entrapment defense, is it prosecutorial misconduct for the government to relieve themselves of the burden of proving predisposition by repeatedly telling the jury that it is unnecessary for the government to prove the essential element?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

NONE

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STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A & C to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is

[X] reported at 2022 U.S. Dist. LEXIS 181781; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 6/29/2023.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 9/11/2023, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2422(b)

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

STATEMENT OF THE CASE

1. On or about October 25, 2021, Petitioner Andre moved, in pro se, for 28 U.S.C. § 2255 relief in the district court. App. H.

2. The government filed their response in opposition on December 21, 2021. App. G.

3. With leave for extension of time, Andre replied to the government's response on February 1, 2022. App. F.

4. The district court denied relief on all grounds, and denied issuance of a Certificate of Appealability ("COA") on October 4, 2022. App. E.

5. Andre filed a timely notice of appeal from the district court's denial to the Eleventh Circuit on October 28, 2022.

6. Andre applied for issuance of a COA to the Eleventh Circuit on December 21, 2022. App. D.

7. The Eleventh Circuit denied Andre's request for a COA on June 29, 2023. App. C.

8. Andre petitioned the Eleventh Circuit for rehearing on July 17, 2023. App. B.

9. The Eleventh Circuit denied Andre's petition for rehearing on September 1, 2023. App. A.

REASONS FOR GRANTING THE PETITION

I. A constructive amendment occurs when the government's closing argument substitutes Congress's intended object of the actus reus of 18 U.S.C. § 2422(b), "any individual who has not attained the age of eighteen years" with its opposite, an adult.

The entire purpose of the constructive amendment doctrine is to ensure that a defendant is not convicted of a crime that was not considered by the Grand Jury when deciding to indict the defendant. See Stirone v. United States, 361 U.S. 212, 215-16 (1960). A constructive amendment to an indictment occurs when the government, through its argument, or the district court, through its instructions to the jury, broadens the possible bases for conviction beyond that contained in the indictment. Barnes v. United States, 2018 U.S. Dist. LEXIS 53306 (U.S.D.C. S.D. Fl. March 28, 2018); citing United States v. Castro, 89 F.3d 1443, 1452-53 (11th Cir. 1996).

In the instant case, Andre was charged in a superseding indictment with two counts. Count One alleged a violation of 18 U.S.C. § 2422(b), and Count Two a violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1), all in violation of 18 U.S.C. § 1594(a). App. J. As is relevant here, Count one specifically alleged that Andre "did knowingly attempt to persuade, induce, entice, and coerce an individual who had not attained the age of eighteen years." Id.

The statute at issue, 18 U.S.C. § 2422(b), reads in relevant part:

> (b) Whoever ... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of eighteen years, to engage in ... sexual activity[.]

18 U.S.C. § 2422(b).

Andre's case involved communications with an undercover agent posing as a fictitious minor's father. Trial was held on January 29-30, 2019. During closing arguments, the prosecutor stated no less than six (6) times that Andre persuaded an adult. For example, the prosecutor argued "He's persuading the father who is bringing the daugther. That's enticing. That's persuading." Doc 90:72 at App. I-2 through I-4. The government's theory of the case was that Andre only attempted to persuade the adult intermediary (id. at 73; App. I-3), and that there was no attempt to actually cause assent on the part of the minor, a theory that was not considered by the Grand Jury or alleged in the indictment, and is in fact at odds with the statute. No objection was made by trial counsel, and after deliberations, the jury found Andre guilty on both counts.

In the jury instructions, the district court declined to mention that the individual being persuaded must be under eighteen. Instead, element no. 1 of the jury instructions pertaining to § 2422(b), stated "the defendant knowingly attempted to persuade, entice, or induce an individual to engage in sexual activity as charged;" leaving the jury to believe that if Andre persuaded an adult, then the element could be satisfied. Doc. 90:59 at App. I-1.

Andre, in a pro se motion under 28 U.S.C. § 2255 (App. H), challenging both of his convictions premised on ineffective

assistance of counsel, asked both the district court and the Eleventh Circuit to review the prosecutor's comments and the jury instructions *in context* to determine whether or not a constructive amendment had occurred. If indeed so, then trial counsel's failure to object constituted ineffective assistance given the fact that a constructive amendment is per se reversible error. See also, Government's Response at App. G, and Andre's Reply at App. F.

However, the district court ruled that the prosecutor clearly stated the law, and that Andre's claim was therefore meritless. See Order at App. E-5. The law the district court was referring to was the Eleventh Circuit's precedent generally allowing a conviction to stand if a defendant arranges to have sex with a minor, or a supposed minor through communications with an adult - but this precedent does not confront Andre's constructive amendment claim. See United States v. Lanzon, 639 F.3d 1293 (11th Cir. 2011); see also United States v. Murrell, 368 F.3d 1283 (11th Cir. 2004), upon which the district court relied. In Lanzon and Murrell, however, there was no constructive amendment, and moreover, both Lanzon and Murrell, unlike Andre, both attempted to actually cause assent on the part of the minor.

When appealed to the Eleventh Circuit (App. D), Andre's request for a COA was denied with a simple statement that Andre "has failed to make a substantial showing of the denial of a constitutional right." See App. C-2. When Andre filed for reconsideration (App. B), his request was denied on the ground that he "has offered no new evidence or arguments of merit to warrant relief." See App. A-2.

The Supreme Court has never had, or taken the opportunity to address the question as to whether communicating only with and adult, or an adult intermediary, violates § 2422(b), and the instant case presents an excellent vehicle to resolve this question which the circuits are split on.

Some circuits, including the First, Fourth, Sixth, Seventh, and District of Columbia, have held that a defendant can violate § 2422(b) by communicating only with an adult intermediary - so long as the defendant's communications with the intermediary are intended to persuade, induce, entice, or coerce the minor child's assent to engage in prohibited sexual activity. See United States v. Berk, 652 F.3d 132 (1st Cir. 2011); United States v. Engle, 676 F.3d 405 (4th Cir. 2012); United States v. Roman, 795 F.3d 511 (6th Cir. 2015); and United States v. McMillan, 744 F.3d 1033 (7th Cir. 2014). See also App. H at 37-39 (collecting cases).

Other circuits, including the Second, Third, Fifth, Eighth, and Eleventh, interpret and apply § 2422(b) differently. These circuits have held that as long as the government proves the defendant *believes* he was communicating with someone who *could* arrange for the child to engage in unlawful activity, then it is sufficient to violate § 2422(b). See United States v. Douglas, 626 F.3d 161 (2nd Cir. 2010); United States v. Nestor, 574 F.3d 159 (3rd Cir. 2009); United States v. Caudill, 709 F.3d 444 (5th Cir. 2013); United States v. Spurlock, 495 F.3d 1011 (8th Cir. 2007); and United States v. Murrell, 368 F.3d 1283 (11th Cir. 2004). See also App. H at 37-39 (collecting cases).

Although the Supreme Court has never weighed in on this topic, nor the circuit split it has caused, it was squarely addressed by

Justice Kentanji Brown Jackson - before becoming a Supreme Court Justice. Her dissenting opinion in United States v. Laureys, 653 F.3d 27 (D.C. Cir. 2011), addressed this very question. In Laureys, the district court instructed the jury that Laureys could be found guilty of attempted enticement of a child if the government proved Laureys tried to persuade an adult to grant him access to a minor. On appeal, then-Circuit Court Judge Brown made clear that the jury instructions thwart the plain meaning of § 2422(b) by replacing the statutory object ("any individual who has not attained the age of 18 years") with its opposite ("an adult"). Id.

Indeed, then-Circuit Court Judge Brown went on to state that each verb of the statutory actus reus ("persuades, induces, entices, or coerces") has a person as its object, and the statutory text leaves *no doubt* but that the personal object *must be* a minor. Id. at 38. By that conclusion, it is clear that the intended object of the actus reus of 18 U.S.C. § 2422(b) cannot be changed from the minor to the adult.

Thus, this case presents an excellent vehicle to address an important question upon which the circuits are split, and of which unequally affects a vast number of defendants nationwide. This Court should therefore grant the writ to provide a bright line limitation on what actions constitute a violation of 18 U.S.C. § 2422(b), particularly when a defendant communicates solely with an adult intermediary absent any attempt to cause assent on the part of the minor. In doing so, the Court will not only resolve the circuit split, but will simultaneously answer whether a constructive amendment occurs when the government's arguments, or the district court's instructions, change Congress's intended

object of the actus reus of § 2422(b).

II. This Court should also grant the writ because it is prosecutorial misconduct for the government to relieve themselves of their burden of proving predisposition by repeatedly telling the jury that it is unnecessary for the government to prove the essential element, when the trial court had already found sufficient evidence of inducement to permit an entrapment defense.

The case underlying this petition for a writ of certiorari was the result of a sting operation that took place over the course of nine months. Petitioner Andre's defense at trial was entrapment. According to this Court's ruling in Jacobson v. United States, the government is required to prove the defendant was predisposed to commit the crime prior to government interaction, when the defense at trial is entrapment. See Jacobson, 503 U.S. 540 (1992). However, during closing argument, the prosecutor in the instant case relieved themselves of the burden of proving the essential element of predisposition by stating - no less than four (4) times - that, for example:

"we do not have to show that he had a predisposition." (Doc. 90:87 at App. I-7; see also App. B at 10; App. D at 19; App. F at 9; and App. H at 7, 21, 23-25);

"what does he say about his predisposition? Which I -- just to be clear, I'm not conceding we have to show that[.]" (Id.); and,

"we don't have to prove that he was predisposed[.]" (Doc. 90:89 at App. I-8; see also App. B at 10; App. D at 19; App. F at 9; and App. H at 7, 21, 23-25).

The prosecutor's statements did not only relieve themselves of

their burden of proof, but it was also a misstatement of the law of entrapment as set forth by this Court. See Jacobson, 503 U.S. 540. Furthermore, the prosecutor's statements relieved the petit jury of their duty of determining whether or not Andre was predisposed to commit the crime. Subsequently, Andre was denied a fair trial and due process of law; with no objection made by trial counsel, and no curative instruction given by the trial court sua sponte.

In fact, the only time the jury was instructed by the trial court before closing arguments, with a fifteen minute break between those instructions and the closing arguments, so that the petit jury could place their lunch orders. When trial counsel gave closing arguments, he merely stated to the petit jury that predisposition was but "an important element for [the jury] to *consider*," (Doc. 90:83 at App. I-5 (emphasis added)), instead of correctly arguing that it was *absolutely necessary* for the government to prove predisposition as part of their burden.

When Andre raised these ineffective assistance of counsel errors in his § 2255 motion, the district court denied the claim, finding (in a vacuum) that the prosecutor's comments were not improper and therefore did not warrant any relief, to include a new trial. The district court's decision hinged upon an unrelated decision made by the Eleventh Circuit on direct appeal, when confronted with a markedly different question. The question raised on direct appeal challenged the sufficiency of the evidence; whereas the claim in the § 2255 was premised on trial counsel's ineffectiveness for failing to object to the prosecutor's misstatement of the law, and for failing to request a curative

instruction.

Nevertheless, the district court relied solely on the decision reached by the Eleventh Circuit on direct appeal, when they concluded that the government's evidence was sufficient to prove that Andre was predisposed to commit the crimes, foreclosing Andre's claims made in his § 2255 motion. The district court's reliance on the Eleventh Circuit's decision on a separate issue to dispose of and deny Andre's § 2255 claim, resulted in the denial of Andre's constitutional rights, even to the point of ignoring the holdings of this Court in Jacobson, as well as in Kotteakos v. United States, 328 U.S. 750 (1946).

In Kotteakos, it was said "[i]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos, 328 U.S. at 765.

The fact that the district court's decision was based on the evidence that was presented, rather than the actual error made by the prosecutor, was a violation of Andre's substantial rights. When appealed, the Eleventh Circuit affirmed the district court's denial, by simply stating that Andre "has not made a substantial showing of the denial of a constitutional right." App. C.

Thus, this Court should grant the writ to determine whether it

is prosecutorial misconduct for the government to relieve themselves of the burden of proving the essential element of predisposition when the defense at trial is entrapment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: NOVEMBER 9th, 2023