No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DARRIUS DECNAN REDD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
From The United States Court Of Appeals For The Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

i. In this case alleging sex trafficking by force, fraud, or coercion, whether the district court violated the Defendant's Due Process and Confrontation rights by excluding video wherein the victim had consensual sex with the Defendant and made statements consenting to prostitution (including that having a pimp was the "perfect situation" for her because she "like[d] to be controlled and told what to do").

ii. Whether the Government engaged in prosecutorial misconduct and deprived the Defendant of a fair trial by asking the Defendant over 80 times on cross-examination whether he had heard the testimony of other witnesses, thus prompting him to comment on their credibility.

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RELATED PROCEEDINGS

I. *United States v. Darrius Decnan Redd*, S.D. Iowa No. 4:20-CR-00156-RGE-1; Judgment entered June 23, 2022.

II. *United States v. Darrius Decnan Redd*, Eighth Circuit Court of Appeals No. 22-1676; Judgment entered September 5, 2023.

III. *United States v. Darrius Decnan Redd*, Eighth Circuit Court of Appeals No. 22-1676; Order denying rehearing en banc issued October 17, 2023.

IV. *United States v. Darrius Decnan Redd*, Eighth Circuit Court of Appeals No. 22-1676; Mandate issued October 24, 2023.

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On May September 5, 2023, the Eighth Circuit affirmed the district court for the Southern District of Iowa's verdict and denial of a new trial in a published opinion. *United States v. Redd*, 81 F.4th 822 (8th Cir. 2023). App. A14.[1]

JURISDICTION

Jurisdiction of the district court was pursuant to 18 U.S.C. §3231. Judgment entered June 23, 2022. App. A2. The Notice of Appeal was filed March 29, 2022. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. §1291. Judgment entered September 5, 2023, App. A34, and the Mandate entered October 24, 2023. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

[1] "App. A#" refers to the attached appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …

18 U.S.C. §1591

Section 1591 of Title 18 of the United States Code provides in pertinent part:

(a)Whoever knowingly—

> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b)The punishment for an offense under subsection (a) is—

> (1)if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the

time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

Fed. R. Evid. 401

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Fed. R. Evid. 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 412

Federal Rule of Evidence 412 state in pertinent part:

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) ***Criminal Cases.*** The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

STATEMENT OF THE CASE

A. Factual Background.

On September 17, 2020, Redd was charged by indictment with:

Count 1: Sex Trafficking by Force, Fraud, and Coercion, in violation of 18 U.S.C. §§ 1591(a)(1) and 1591(b)(1);

Count 2: Travel Act—Facilitate Prostitution, in violation of 18 U.S.C. § 1952(a)(3)(A); and

Count 3: Distribution to Person Under Age Twenty-One, in violation of 21 U.S.C. §§ 841(a)(1) and 859.

(DCD 1).[2] The victim for both Counts I and III was a woman named A.E. (DCD 137, at 12, 19). When A.E. met Redd, she was a twenty-year-old college student. (TT 626:8–19, 627:11–16, 646:10–11). Her college tuition was completely covered by scholarships. (TT 728:4). While in college, A.E. lived in a sorority house. (TT 627:15–21). During her time in college, but before meeting Redd, A.E. began to use various drugs including molly, marijuana, acid, and cocaine. (TT 630:5–6, 632:6–17).

Redd and A.E. first met on the night of February 2, 2020 at a gas station. (TT 115:22–116:11). Per the indictment, this is when the Government alleged Redd began trafficking A.E. through force, fraud, or coercion. (DCD 1). After exchanging social media information, the two went on their separate ways. Then, on March 2, 2020,

[2] "DCD #" refers to the document as numbered in the District Court Docket.

A.E. invited Redd over to her sorority house. (TT 636:8–9). Under the house rules, no men were allowed inside between the hours of 8:00 pm to 8:00 am, but A.E. invited Redd inside anyway. (TT 639:3–6). A.E. took molly, and per her own testimony, was not forced by Redd to do so. (TT 743:20–21). Redd began to record what was happening on his cellphone and then on A.E.'s cellphone. (TT 743:20–21, 640:13). A.E. then took her clothes off and voluntarily performed oral sex on Redd while he continued to record. (TT 642:4–22, 644:15–17). After Redd left the sorority house, A.E. sent the videos that were recorded on her phone to Redd.

These recordings captured A.E. engaging in numerous consensual sex acts with him in the basement of the sorority house. (Def. Proposed Ex. A, A1; TT 643:3–19). The videos further captured A.E. discussing her interest in engaging in prostitution, why she believed she was well suited for having a pimp, that she liked to be "controlled," and that she would introduce Redd to other girls who would work as prostitutes. What can be clearly seen in these videos is that A.E. was not only coherent, but that she was enthusiastically discussing the details of becoming a prostitute for Redd. At no point in the videos is Redd depicted making any threats or using any force against A.E.

The next day, March 3, 2020, Redd, set up an online escort account for A.E. with her help. Through this account, the pair scheduled appointments for A.E. to meet with clients. A.E. went to both appointments, had sex with the clients in exchange for money, and gave the money she earned to Redd. A.E. testified that she was "going along" with everything at this time. (TT 654:13–16). From March 3 to

March 14, Redd and A.E. met with multiple clients. A.E. shared ideas with Redd about how to make the prostitution venture more efficient and profitable. A.E. adopted a pseudonym for herself and began to schedule her own appointments with her own rates.

The pair traveled together to various locations in the state for A.E. to meet with clients. And, during their two-week prostitution venture, the pair continued to have sex themselves. March 14 was the last time the two saw each other before trial. At no point while the two were engaged in prostitution did A.E. call the police or seek help from anyone.

B. District Court Proceedings.

Before trial, Redd sought to admit the video evidence showing A.E.'s statements. The district court withheld ruling on the admissibility of the videos until the issue arose at trial such that the court could understand the context they would be offered for. (DCD 111). The case was tried before a jury on September 20–24, 2021. Redd was present in court during the whole trial. A.E. testified and was subject to cross-examination. During her cross-examination, A.E. testified that Redd used force or coercion to get her to engage in sex and prostitution on March 3, 2020 at the sorority house. A.E. also testified that Redd used force to make A.E. engage in non-consensual sex. Redd then sought to introduce the videos that Redd and A.E. recorded from March 3, 2020. The videos were offered as both substantive evidence of A.E.'s consent to prostitute for Redd, have sex with Redd, and to impeach A.E.'s testimony/credibility. The district court excluded the videos in their entirety.

Towards the end of the trial, Redd elected to testify in his own defense. During the Government's cross-examination of Redd, dozens of questions were asked specifically to compel Redd to call the prosecution's witnesses liars. After Redd would answer a question asked by the Government, he was routinely asked if he *heard* a witness testify differently before him. Trial counsel initially objected to these "did-you-hear" questions, but after unsuccessful objections, the Government proceeded with this strategy unabated. These questions, by their design, forced Redd to undermine his own testimony and weigh the credibility of other witnesses.

At the end of the trial, the jury returned a verdict finding Redd guilty of all three counts. (DCD 136). Redd was sentenced to 45 years of imprisonment.

C. The Eighth Circuit's Decision.

Notice of appeal was filed on March 29, 2022 (DCD 193). The Eighth Circuit affirmed the verdict and denied Redd's request for a new trial. App. A28. Judge Kelly, however, filed a concurring opinion which called special attention to the questions presented in this Petition. App. A29. First, the concurrence observed:

> Redd argues that the videos are evidence that A.E. voluntarily agreed to *prostitute* for him. That is a different question than what the videos show about whether A.E. voluntarily agreed to have sex with Redd at the sorority house…Excluding the videos in their entirety kept the jury from hearing conversations between A.E. and Redd that were relevant to Redd's defense that he did not coerce A.E. to engage in prostitution.

(App. A30–A31) (emphasis original). Then, when discussing the "did-you-hear" questions, the concurrence found the questions were improper on their face because they were irrelevant, forced Redd to judge the credibility of witnesses, and ultimately invaded the province of the jury. (App. A32). Nonetheless, the concurrence agreed

with the majority that without clear authority stating that this form of questioning constitutes plain error, that the outcome was correct.

This Petition follows.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This case presents two important questions which reflect on-going problems that will continue to fester without clear direction from this Court.

First, as video evidence recorded on personal cellphones becomes more abundant in sex trafficking cases, the Rules of Evidence must be interpreted in a way that does not run afoul of the Constitution. The Sixth Amendment right to confrontation not only includes the right to confront adverse witnesses, but it includes the right effectively cross-examine those witnesses as well. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). If a witness makes testimonial statements prior to trial, and then provides contradictory statements at trial, the Sixth Amendment requires effective cross-examination of that witness. Redd was denied that right. A.E.'s statements and actions in the videos contradicted her trial testimony, and Redd was unable to effectively question her about those statements without actually playing the videos in court.

Courts like the district court below have interpreted Rule 412 expansively to preclude the admission of relevant evidence, while other courts have recognized the constitutional problems of barring such highly relevant evidence. *Govt. of Virgin Islands v. Jacobs*, 634 F. Supp. 933, 938 (D.V.I. 1986) ("When the accused makes a showing of proof that the victim has perjured herself or which otherwise significantly

undermines her credibility, the protective policies of Rule 412 must give way to the accused's right to confrontation."); *U.S. v. Harrington*, ACM 39223, 2018 WL 4621100, at *5 (A.F. Crim. App. Sept. 25, 2018) (applying military rule equivalent of Rule 412(b)(1)(B) and holding the alleged victim's "willingness to remove her pants and in particular to permit Appellant to drink alcohol from her mouth, breasts, and buttocks has some tendency to lead the court members to find she may also have consented to engage in sexual intercourse with Appellant later that night . . . ."). This case provides an opportunity to establish the constitutional bounds of Rule 412(b)(1)(B). As it stands, key video evidence, with high probative value of an alleged victim's consent, may be excluded from future §1591 trials, increasing the odds that those merely engaged in prostitution will be convicted of the aggravated offensive of sex trafficking.

The second issue in this case presents a creative but improper cross-examination strategy. Courts widely hold that it is inappropriate to ask a witness if another witness lied. Aware of this prohibition, the Government did not ask Redd if other witnesses were lying, but instead, asked if he "heard" their testimony that contradicted his own. By asking Redd this question numerous times, the Government implied that Redd was lying and goaded him into repeatedly commenting on the credibility of other witnesses. This invaded the province of the jury and violated Redd's right to a fair trial. The Eighth Circuit's decision will is a green light permitting prosecutors to use these improper "did-you-hear" questions even more.

The questions presented are both important and likely to recur. This Court should

grant the petition to reverse the Eighth Circuit's decision and bring clarity to these important questions regarding the constitutional rights of criminal defendants.

I. EXCLUDING THE VIDEO EVIDENCE ALLOWED RULE 412 AND 403 TO PREDOMINATE OVER DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS.

By excluding Redd's video evidence, the district court violated the Fifth Amendment's Due Process Clause and the Sixth Amendment's Confrontation Clause. While a defendant's right to introduce evidence in their defense is limited by "legitimate interests in the criminal trial process," any such restriction must not be "arbitrary or disproportionate to the purposes they are designed to serve." *United States v. Zephier*, 989 F.3d 629, 636 (8th Cir. 2021) (quoting *United States v. Scheffer*, 523 U.S. 303, 308–09 (1998)). The videos refute one of the essential elements of 18 U.S.C. § 1591, that Redd used "force, fraud, or coercion" to cause A.E. to engage in prostitution. Because the entirety of these videos should not have been barred by the Rules of Evidence, the district court's restriction on this evidence was disproportionate.

These particular videos fall into an exception to Rule 412. In criminal cases, evidence of a victim's sexual behavior is admissible when such evidence is "offered by the defendant to prove consent." Fed. R. Evid. 412 (b) (1) (B). This was the exact purpose Redd sought to introduce this evidence. Because A.E. testified that Redd used force, fraud, or coercion against her on the date the video was taken, Redd had the right to confront her and impeach that testimony. "When … the victim has perjured herself or … the protective policies of Rule 412 must give way to the accused's right to confrontation. A contrary view would provide a witness with an impermeable

shield against contradiction of perjured testimony." *Government of Virgin Islands v. Jacobs*, 634 F.Supp. 933, 938 (D.V.I. 1986) (citing *Walder v. United States*, 347 U.S. 62, 65 (1954)). And the most effective way to confront that testimony would be to show the jury A.E.'s own words, actions, and demeanor.

Contrary to the Eighth Circuit's ruling, the video evidence was not repetitive or irrelevant. Redd was unable to testify about the statements in the video, paradoxically, because the videos were offered, but not accepted, as evidence. TT 1018:16–21 ("…but I don't think it's a good use of our time for you to ask him about conversations that we have recorded that you believe should be admitted."). The probative effect of this ruling was not minimal at all; "Excluding the videos in their entirety kept the jury from hearing conversations between A.E. and Redd that were relevant to Redd's defense that he did not coerce A.E. to engage in prostitution." App. A31. Likewise, the contents of the video were crucial to A.E.'s credibility. *See Giles v. Maryland*, 386 U.S. 66, 69–70 (1967) (finding that credibility determinations are critical in sex crime cases). Instead of only hearing Redd testify about what A.E. said, the videos would have been irrefutable proof of A.E.'s consent to have sex with Redd and prostitute for him. And in light of the second issue discussed *infra*, not having this clear evidence left the jury to decide that only Redd or A.E.'s testimony was true. The Government improperly influenced that determination.

In reaching the incorrect conclusion, the Eighth Circuit largely relied its decision in *United States v. Roy*, 781 F.3d 416, 419 (8th Cir. 2015). *Roy* correctly applied Rules 403 and 412 to exclude what was essentially propensity evidence of a

victim's willingness to have sex. *Id.* at 419–20. This conclusion makes sense because everything the defendant testified about al of the conversations captured on the video they sought to introduce. *Id.* at 419. But now *Roy* is being extended too far. Redd and A.E. did not testify about all of the conversations contained in the video. Denying Redd's ability to present this evidence in his defense deprived him of his right to Due Process and his right to fully confront his accuser.

This will not be the last time a defendant charged with sex trafficking will have this kind of highly probative but also prejudicial video evidence. Human trafficking is becoming more prevalent, and the use of technology to facilitate and record human trafficking are as well. *See* HUMAN TRAFFICKING DATA COLLECTIONS ACTIVITIES, *supra*. This kind of evidence will be offered in subsequent trials to prove guilt, and to prove innocence like it was in the case. As these issues are likely to recur, this Court can resolve any confusion about the admissibility of this kind of evidence. Human trafficking is a serious crime, especially when done by force, fraud, or coercion. But that means there are equally serious consequences for those charged with the crime. The Constitution requires that defendants be allowed to introduce evidence in their defense.

II. "DID-YOU-HEAR" QUESTIONS ARE WHOLLY IMPROPER AND A DECISION FROM THIS COURT WILL PREVENT FUTURE MISCONDUCT.

Almost the entirety of the Government's cross-examination of Redd consisted of "did-you-hear" questions. No other witness was asked this type of question. In contrast, the Government asked Redd this type of question 85 times in total. A majority of the courts of appeals have prohibited a similar kind of question. The

consensus is that it is improper for any attorney to ask a witness if another witness lied during their testimony; "It is black letter law that a prosecutor may not ask a defendant to comment on the truthfulness of another witness." *United States v. Combs*, 379 F.3d 564, 572 (9th Cir. 2004); *see United States. v. Pereira*, 848 F.3d 17, 29 (1st Cir. 2017); *United States v. Harris*, 471 F.3d 507, 511 (3d Cir.2006); *United States v. Thomas,* 453 F.3d 838, 846 (7th Cir.2006); *United States v. Williams*, 343 F.3d 423, 437 (5th Cir.2003); *United States v. Sanchez*, 176 F.3d 1214, 1219–20 (9th Cir.1999); *United States v. Sullivan*, 85 F.3d 743, 749–50 (1st Cir.1996); *United States v. Boyd*, 54 F.3d 868, 871 (D.C.Cir.1995); *United States v. Joiner*, 727 F. App'x 821, 824 (6th Cir. 2018); *United States v. Richter*, 826 F.2d 206, 208 (2d Cir.1987); *see also* § 611:18 Question calls for conjecture, speculation or judgment of veracity, 5 Handbook of Fed. Evid. § 611:18 (9th ed.).

A majority of state supreme courts agree. *State v. Graves*, 668 N.W.2d 860, 871 (Iowa 2003); *State v. Singh*, 259 Conn. 693, 793 A.2d 226, 236 (2002); *State v. Flanagan*, 111 N.M. 93, 801 P.2d 675, 679 (Ct.App.1990); *State v. Emmett*, 839 P.2d 781, 787 (Utah 1992); *State v. Casteneda-Perez*, 61 Wash.App. 354, 810 P.2d 74, 79 (1991); *Beaugureau v. State*, 56 P.3d 626, 635–36 (Wyo.2002); *Tumblin v. State*, 29 So.3d 1093, 1101–02 (Fla. 2010); *State v. Parker*, A.2d 314, 322 (N.H. 2010). Therefore, the accepted and usual course of judicial proceedings is to prohibit any such question.

Several reasons support this prohibition. Asking a witness, particularly a criminal defendant, if another witness is lying improperly forces the defendant to

either undermine their own case or make credibility determinations about another witness for the jury. *United States v. Schmitz*, 634 F.3d 1247, 1268–70 (11th Cir. 2011). The United States Supreme Court "has never ruled on the propriety" of these kinds of cross-examination questions before. *See id.* at 1271. Considering the uniformity amongst the courts of appeals, it hasn't had to. But, because the "were-they-lying" questions are uniformly banned, the Government instead employed "did-you-hear" questions, which at their core, serve the same improper purposes. The Eighth Circuit held that without controlling precedent, "we cannot conclude the district court plainly erred by failing to sua sponte intervene during Redd's cross-examination." App. A27. A decision from this court is clearly necessary to establish these improper questions constitute plain error.

"Did-you-hear" questions only serve as a disguise for the impermissible "were-they-lying" question. The *sub-silentio* inference by asking Redd if he heard testimony contrary to his own is that someone must have lied. And, because Redd was the one charged with a crime, the jury was far less likely to believe him after 85 of these questions. This distrust sown amongst the jury was exacerbated by the government asking these questions repeatedly, often asking the same question twice: "But, did you hear…." TT 1085:15–21, TT1081:11–18. In *Commonwealth v. Alvarado*, the Massachusetts Supreme Court recognized that questions designed "to tempt [a] defendant to comment on inconsistencies between his testimony and that of … other witnesses" were improper. 737 N.E.2d 905, 909 (Mass. 2003) (citing *Commonwealth v. Long*, 462 N.E.2d 330, 331–32 (1984)). It is clear that the Government intended to,

and succeeded in, tempting Redd to comment on other witnesses' testimony. Because these questions served the same purpose of "were-they-lying" questions, all of the harms associated with them are present here. *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1194 (9th Cir. 2015) ("There is only one plausible explanation for the prosecutor's persistent effort to confirm that Alcantara had heard Agent Hunter's previous testimony: to induce Alcantara to comment on whether that testimony was true.").

The "did-you-hear" questions were improper at the onset—they are not permitted by the Federal Rules of Evidence. *See United States v. Henderson*, 409 F.3d 1293, 1299 (11th Cir. 2005). Under Fed. R. Evid. 401 (b), evidence is admissible if "the fact is of consequence in determining the action." Whatever Redd heard another witness testify to does not matter in resolving the case. Asking a witness to give information they do not have, i.e., if another is intentionally misleading the jury, only confuses the witnesses, which in turn confuses and misleads the jury. *United States v. Harris*, 471 F.3d 507, 511 (3d Cir. 2006).

By systematically using the "did-you-hear" line of questioning, the Government improperly invaded the province of the jury. It is a bedrock principle that making credibility determinations is a task that belongs solely to the jury. *See United States v. Trotter*, 837 F.3d 864, 868 (8th Cir. 2016) (citing *United States v. Malloy*, 614 F.3d 852, 861 (8th Cir. 2010)); *Thomas*, 453 F.3d at 846; *Schmitz*, 634 F.3d at 1268–69. It is not a task that belongs to any witness, least of all a criminal defendant. "Unfairly questioning the defendant simply to make the defendant look

bad in front of the jury regardless of the answer given is not consistent with the prosecutor's primary obligation to seek justice, not simply a conviction." *Graves*, 668 N.W.2d at 873. A defendant can be questioned about their own credibility "just like any other witness, [but] there are limits placed upon the prosecutor." *Jensen v. State*, 116 P.3d 1088, 1095 (Wyo. 2005).

The government's interest in any criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Therefore, prosecutors have an affirmative duty "to refrain from improper methods calculated to produce a wrongful conviction [even] as it is to use every legitimate means to bring about a just one." *Id.* Because the government's cross examination questions were improper, this Court should grant review to send a clear message: such improper questions constitute plain error. This will correct the ruling of the Eighth Circuit and give guidance to every court that encounters such impermissible strategies in the future.

CONCLUSION

Mr. Redd respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

Respectfully submitted,

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