23-7535

ORIGINAL

SUPREME COURT OF THE UNITED STATES

DEQWON SAQUOD LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITION TO FILE WRIT OF CERTIORARI

DEQWON SAQUOD LEWIS
REG. NO. 62723-380
FCI Memphis
P.O. Box 34550
Memphis, TN 38184-0550

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I. QUESTIONS PRESENTED

ISSUE ONE

Whether A COA Should Issue Because Jurists Of Reason Could Debate Or Agree That Congress Could Did Not Authorize Federal Enforcement Of § 1591 To Purely Local Pandering and Prostitution Cases As A Matter Of Law And The Due Process Clause And Whether The Claim Was Subject To Procedural Default Doctrine? If Not, Whether A COA Should Issue Because Jurists Of Reason Could Debate Or Agree That § 1591 Enforcement Invades The Powers Reserved To The States By The Tenth Amendment To The Constitution And Whether The Claim Was Subject To Procedural Default Doctrine?

ISSUE TWO

Whether A COA Should Issue Because §1591 Is Unconstitutionally Vague As-Applied To The Petitioner In Violation Of The Due Process Clause And Whether The District Court Was Incorrect The Claim Was Procedurally Defaulted?

ISSUE THREE

Whether 18 U.S.C. §§ 1591 And 2443(a) Are Unconstitutionally Overbroad As-Applied To The Petitioner In Violation Of The Fifth Amendment Due Process Clause And Whether The District Court Was Incorrect That The Claim Was Procedurally Defaulted?

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IV. PETITION FOR WRIT OF CERTIORARI

Deqwon Saquod Lewis, an inmate currently incarcerated at FCI Memphis in Memphis, Tennessee, proceeding pro se, respectfully petition this Court for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

V. OPINIONS BELOW

The order of the district court denying the petitioner's Certificate of Appealability is attached at Appendix[1] at 107-14. The decision of the Fifth Circuit Court of Appeals denying his Certificate of Appealability is attached at App. 1-2.

VI. JURISDICTION

The petitioner's Certificate of Appealability to the United States Court of Appeals for the Fifth Circuit was denied on December 2, 2021. This Court granted a sixty (60) day extension of time, until May 2, 2022, to file the petition for writ of certiorari. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within sixty (60) from the grant of the extension of time.

[1] The record is cited as (D-__) for Docket Entry and (App.__) for Appendix and page number.

VII. STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1591:

18 U.S.C. § 2443(a):

18 U.S.C. § 3231:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the United States, of all offenses against the laws if the United States."

Id @ ¶ 1.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Id @ ¶ 2.

VIII. CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor 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 compensation.

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

IX. STATEMENT OF THE CASE

On December 1, 2015, the petitioner and his co-defendant were indicted in the Western District of Texas for violating 18 U.S.C. §§ 1591 and 2443(a). (D-1; App. 13). The evidence presented at trial implicated the petitioner and his co-defendant in the local prostitution of two underage females within the borders of America. On May 27, 2016, they were convicted on all three counts. (D-88; App. 6). On August 12, 2016, the petitioner was sentenced to 300 months imprisonment on all counts. (D-108; App. 8).

On August 23, 2017, the Fifth Circuit Court of Appeals affirmed his conviction and sentence. See *United States v. Lewis*, 705 Fed. Appx. 234 (2017). (D-154; Appx. 11). On April 2, 2018, the petitioner's petition for writ of Certiorari was denied by this Court. See *Lewis v. United States*, 138 S. Ct. 1454 (2018). (D-157; App. 11).

On April 1, 2019, the petitioner filed his timely Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. (D-168; App. 14-23). On June 16, 2019, the petitioner filed his memorandum of law in support of his § 2255 motion. (D-178; Appx. 24-53). On July 10, 2019, the petitioner filed a Motion to Amend and Memorandum in support of § 2255 motion, arguing that Congress never intended for § 1591 to extend to local pandering and prostitution cases. (D-185; App. 54-74). The same day the government filed its response to the § 2255

motion. (D-181; Appx. 75-80). On September 9, 2019, the petitioner filed his reply brief. (D-186; Appx. 81-106). On April 23, 2020, the district court denied the petitioner's § 2255 motion and motion to amend. (D-187; App. 107-114). On May 19, 2020, the petitioner submitted a brief to the Fifth Circuit Court of Appeals for a COA, (App. 115-153), and the Appeals Court denied it on December 2, 2021. (App. 1-2).

X. REASONS FOR GRANTING THE WRIT

1). According to its legislative history, Congress never intended federal enforcement of 18 U.S.C. § 1591 to local pandering and prostitution of persons (i.e., so-called domestic sex trafficking) cases confined solely within the borders of America. The Constitution forbids a defendant to be convicted of conduct Congress has not outlawed. Because the evidence at trial only proved that Mr. Lewis engaged in local pandering and prostitution of underage females, the district court was in want of subject-matter jurisdiction on Counts One and Two in the indictment, and his conviction and sentence should be reversed not only as a matter of law but pursuant to the Due Process Clause as well. In addition, his conviction and sentence violates the Tenth Amendment and 18 U.S.C. § 3231, ¶ 2. These issues are of first impression in the nation, and his attorneys cannot be faulted for not raising issues never squarely addressed in any federal court's opinion. Therefore, the district court's assessment these claims were procedurally barred was wrong.

2) § 1591 is unconstitutionally vague. On its face, it is impossible for a person of ordinary intelligence to determine whether it prohibits international sex trafficking conduct or extends to local commercial sex crimes as well. Federal prosecutors use the statute as a tool to discriminatorily pick and choose among which local panderers to prosecute for prostituting underage persons confined within the borders of America. Because the statute is facially vague as-applied to the petitioner, his conviction and sentence violates the Due Process Clause. This issue is of first impression in the nation, and his attorneys cannot be faulted for not raising an issue never squarely address in any federal court's opinion. Therefore, the district court's assessment whether the claim was procedurally defaulted was incorrect.

3) Decades ago, this Court signified that the age of consent of a minor engaging in sexual activity was inconsequential. Now it appears that the Court is taking another look at the starting point when a person is deemed an adult for the purposes of engaging in sexual conduct.

XI. CONTROLLING AUTHORITIES

A. Standard of Review:

A certificate of appealability (COA) should issue if "the appellant makes a substantial showing of a denial of a constitutional right. 28 U.S.C. §2253(c)." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). To obtain a COA "[w]hen the district court denies a habeas petition of procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct it its procedural ruling." *Slack v. McDaniels*, 529 U.S. 473, 484 (2000).

"The COA determination under 2253(c) requires an overview of the claims in the habeas petition and a general assessment of the merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Buck*, supra. (quotations omitted). "In fact, it forbids it." *Miller-El*, supra. "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." Id @ 338 (quotations omitted).

B. Procedural Default Doctrine:

When a petitioner fails to raise a claim at trial or on direct appeal, he must overcome the cause and prejudice standard in order to have his claim heard in a § 2255 proceeding. See *United States v. Frady*, 456 U.S. 152, 167 (1982). "Under this standard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show (1) 'cause' excusing his double default, and (2) 'actual prejudice' resulting from the errors of which he complains." Id.

"[T]he existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort's to comply with the States procedural rule," *Murray v. Carrier*, 477 U.S. 478, 488 (1986), such as a factual or legal basis for a claim that was not reasonably available to counsel, *Reed v. Ross*, 468 U.S. 1, 16 (1984), or that some interference by officials, *Amando v. Zant*, 486 U.S. 214, 222 (1988), "made compliance impracticable, would constitute cause under this standard." *Carrier*, supra. There are also exceptions to this doctrine.

The cause and prejudice standard "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Issac*, 456 U.S. 107, 135 (1982). For example, "victim of fundamental miscarriage of justice will meet the cause-and-prejudice-standard." *Carrier*, 477 U.S. @ 495-96. "*[W]here a conviction and*

punishment are for an act that the law does not make criminal[,] [t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justifies collateral relief under § 2255," Davis v. United States, 417 U.S. 333, 346-47 (1974) (quotations and punctuations omitted), "even in the absence of a showing of cause for procedural default." *Carrier*, supra @ 96.

Another example are jurisdictional claims. This Court has held that "because [subject-matter jurisdiction] involves a court's power to hear a case, it can never be forfeited or waived . . . , and defects in subject-matter jurisdiction requires correction regardless of whether the error was raised in the district court." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

B. Subject-matter Jurisdiction Authorities:

Because "[t]here has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases," *In re Bonner*, 151 U.S. 242, 246-47 (1894), it is necessary to set forth the relevant authorities governing these issues.

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . ." Article III, § 2, U.S. Const. Congress has granted district courts subject-matter jurisdiction over all federal crimes:

> "The district court of the United States shall have original jurisdiction, exclusive of the States, of all offenses against laws of the United States."

18 U.S.C. § 3231, ¶ 1. This authority, however, is not limitless; the federal Government cannot override States' enforcement of its criminal statutes:

> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Id @ ¶ 2. Within this framework lies federal courts' statutory and constitutional power to adjudicate [criminal] case[s]." *Steel Co. v. Citizen For A Better Environment*, 523 U.S. 83 (1998).

The term "subject-matter jurisdiction is defined as "[t]he subject, or matter presented for consideration; the thing is dispute." Black's Law Dictionary, 6th Ed., pg. 1425 (1990). As stated, the phrase "subject-matter jurisdiction" means the court's statutory power to hear and determine cases and of the general class or category to which the proceeding belong." Id.

To start with there are two essential factors that establishes district courts' subject-matter jurisdiction under § 3231, ¶ 1. First, the indictment or information must allege acts or omissions that constitute an "offense" (the subject-matter). Secondly, and most importantly, the "offense" must have been outlawed by Congress in the form of a criminal statute (jurisdiction); see also, *Bowles v. Russell*, 551 U.S. 205, 213 (2007). ("Within constitutional bounds Congress decides what cases federal courts have jurisdiction to consider"). Only then may district courts'

invoke "jurisdiction" to adjudicate an "offense[] against the laws of the United States." § 3231. ¶ 1; *Bowles*, supra ("[T]he notion of subject matter jurisdiction obviously extends to classes of cases . . . falling within a court's adjudicatory authority"). But it is not the indictment tracking the "generic" language of a statute in and of itself that give rise to an "offense," see e.g., *Russell v. United States*, 369 U.S. 749, 765 (1962) ("[I]t is not sufficient that the indictment charge the offense in the same generic terms"), it is the underlying criminal conduct the Government seek to punish that is the real "offense," § 3231, ¶ 1—"[t]he subject . . . matter, the thing in dispute." Black's, supra; see also, *Fasulo v. United States*, 272 U.S. 620, 629 (1926) ("there are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute").

Simply put, the term "offense" is the subject-matter component of § 3231, ¶ 1, and the phrase "against the laws of the United States" is the jurisdictional component of § 3231, ¶ 1. These two, taken together, enables district courts to exercise subject-matter jurisdiction in criminal cases pursuant to § 3231, ¶ 1. See *Kontrick v. Ryan*, 540 U.S. 443, 444 (2004) ("Only Congress may determine a lower court's subject-matter jurisdiction"). Consequently, if either are lacking, then there can be no jurisdiction upon which district courts' adjudicatory authority may operate. See *United States v. Williiams*, 341 U.S. 58, 67-68 (1951) ("It is true that there are certain essential factors that must exist to give any power to a court. As the existence

of those facts are so plainly necessary . . . examples of decisions are rare. Absence of such facts makes the proceeding a nullity"); *Scott v. McNeal*, 154 U.S. 34, 46 (1894) ("And a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist")

XII. ARGUMENT

ISSUE ONE

A COA Should Issue Because Jurists Of Reason Could Debate Or Agree That Congress Could Did Not Authorize Federal Enforcement Of § 1591 To Purely Local Pandering and Prostitution Cases As A Matter Of Law And The Due Process Clause And That The Claim Was Subject To Procedural Default Doctrine. If Not, A COA Should Issue Because Jurists Of Reason Could Debate Or Agree That § 1591 Enforcement Invades The Powers Reserved To The States By The Tenth Amend-ment To The Constitution And That The Claim Was Not Subject To Procedural Default Doctrine:

(A). Statutory Claim:

The petitioner argues that because he was convicted of a nonexistence federal offense on Counts One and Two in the indictment, the district court was without subject-matter jurisdiction over those counts, and conviction and sentence are void as a matter of law and the Due Process Clause

(i). Federal Sex Trafficking Legislation

18 U.S.C. § 1591 states in relevant part that:

"(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, or maintains by any means a person

* * * * * * * * *

Knowingly, or in reckless disregard of the fact, that by means of force, fraud or 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 had not attained the age of 18 years and will be cause to engage in a commercial sex act*, shall be punished as provided by in subsection (b).

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

(1) if the offense was so effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or any combination of such means, or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment of any term of years not less than 15 years or for life; or

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

18 U.S.C. § 1591(a)(1), (b)(1-2).

(ii). Argument

On its face, it is not apparent whether § 1591 applies to international sex trafficking of persons only or to local, commercial sex crimes as well. Yet for over two decades the statute has been indiscriminately applied to both. This conundrum, however, is resolved against its enforcement to domestic by the very legis-

lation that created it. See Trafficking Victims Protection Act of 2000 (TVPA), H.R. 3244.

In his memorandum below, the petitioner submitted a comprehensive analysis of the federal sex trafficking legislation (App. 24-74). He pointed out that the sole purpose of Congress's 2000 enactment was to combat the sex trafficking of immi-grant women and children into the United States:

> "(3) Since the enactment of the Trafficking Victims Protection Act of (2000), *United States efforts to combat trafficking in persons have focused primarily on the international trafficking in persons, including the international trafficking of foreign citizens into the United States.*"

Id. (TVPRA) (2005) (H.R. 972, § 2, ¶ 3).

He further noted that Congress indicated that its limited role regarding domestic sex trafficking was to assist State and local authorities in addressing the crises—not to displace States laws in favor of federal enforcement, and went so far as to promulgate a model sex trafficking statute so States could construct their own sex trafficking laws:

> "(a) RELATIONSHIP AMONG FEDERAL AND STATE LAW. Nothing in this Act, the Trafficking Victims Protection Act of 2000, the Trafficking Victims Protection Reauthorization Act of 2003, the Trafficking Victims Protection Reauthorization Act of 2005, chapters 77 and 117 of title 18, United States Code, or any model law issued by the Department of Justice to carry out the purposes of any aforementioned statutes—
>
> (1) may be construed to treat prostitution as a valid form of employment under Federal criminal law; or

(2) *shall preempt, supplant, or limit the effect of any State or Federal criminal law.*

(b) MODEL STATE CRIMINAL PROVISION.—In addition to any model State anti-trafficking statutes in effect on the date of this Act, the Attorney General shall facilitate the promulgation of a model State statute that—

(1) Furthers a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes; and

(2) based in-part of the provisions of the Act of August 15, 1935 (49 Stat. 651; D.C. Code 22-2701 et seq.) (relating to prostitution and pandering)."

See H.R. 7311, TVPRA of 2008, Sec. 225.

(1). A COA Should Issue:

No federal court in the nation has ever addressed the issue presented here. The primary basis for the authority supporting the claim is the legislation itself. So viewed, reasonable jurists could debate or agree that Congress never intended for § 1591's proscription to reach local commercial sex crimes. Likewise, reasonable jurist could debate or agree that the statute only extends to the international trafficking of persons into the United States. Moreover, reasonable jurists could debate or agree that Congress left the enforcement of domestic sex crimes to the States. If that were not the case then why would Congress promulgate a domestic sex trafficking statute model for the States to follow." See H.R. 7311, TVPRA of 2008, Sec. 225.

"[N]o judgment of a court is due process of law, if rendered without jurisdiction in the court." Scott, 154 U.S. @ 46. In short, the petitioner "has made a substantial showing of the denial of a constitutional right," § 2253(c), and the claim "prove[s] something more than the absence of frivolity or the existence of mere good faith on his . . . part." Miller-El, supra @ 338.

(2). Claim Not Procedurally Defaulted:

The petitioner states that reasonable jurists could debate or agree that the district court's procedural ruling was incorrect. He advances three arguments in support.

First and foremost, reasonable jurists could debate or agree that conduct Congress has never outlawed is jurisdictional and "can never be forfeited or waived." Cotton, 535 U.S. @ 630.

Second, reasonable jurists could debate or agree that "a conviction and punishment . . . for [conduct Congress has not made] criminal[,] results in a complete miscarriage of justice and presents exceptional circumstances that justifies collateral relief under § 2255," Davis, 417 U.S. @ 346-47, "even in the absence of a showing of cause for procedural default." Carrier, 477 U.S. @ 96.

And last, reasonable jurists could debate or agree that the factual or legal basis was not reasonably available to counsel. Reed, 468 U.S. @ 16. The Supreme Court made clear that a claim of novelty is not narrowed to assessing claims

regarding the retroactivity of a constitutional principle. Id @ 17 ("[T]he question whether an attorney as a reasonable basis upon which to develop a legal theory may arise in a variety of contexts").

Unless the Constitution requires an attorney (or defendant) to search the legislative history of a criminal statute in order to divine its meaning while the case is pending before the trial or appellate court to avoid later defaulting any potential claims in collateral proceedings, cf., *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonableness performance under Strickland'), a COA should issue here. Prejudice is obvious.

(B). Constitutional Claim:

The petitioner argues that by prosecuting him under § 1591 for local pandering and prostitution cases within the borders of America, violated his Ten Amendment Rights.

(i). Tenth Amendment Authorites

Under the United States Constitution, the Tenth Amendment states that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const., 10th Amdt. Congress codified this Amendment in the context of criminal adjudication:

> "Nothing in this title shall be held to take away or impair the jurisdiction of the court of the court of the several States under the laws thereof."

18 U.S.C. § 3231, ¶ 2.

In interpreting the Tenth Amendment, this Court stated that: "[i]n our federal system, the National Government possess only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what [this Court] ha[s] often called a 'police power.'" *Bond v. United States*, 572 U.S. 844, 854 (2014) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995). By contrast, "[t]he Federal Government has nothing approaching a police power," id @ 600 (Thomas, J., concurring); it "can exercise only the powers granted to it." *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). "A criminal act committed wholly within a State 'cannot be made an offense against the United States, unless it has some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *Bond*, supra (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

(ii). Argument

In the instant case, the petitioner and his co-defendant were convicted on Counts One and Two of the indictment with sex trafficking persons under the age

of 18 years in the State of Texas, in violation of § 1591(a)(1) and (b)(2). However, there was no allegation in the indictment, nor was there any evidence adduced at trial, that the underage persons were foreign citizens hauled across America's borders for the purpose of prostitution. For that reason alone, the conduct alleged under Counts One and Two involved nothing more than violations of the State's anti-pandering and prostitution statutes, since the pandering of prostitutes "is a paradigmatic common-law state crime." *Jones v. United States*, 529 U.S. 848, 858 (2000); see also, *Hoke v. United States*, 227 U.S. 308, 321 (1913) ("There is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States').

As such, § 1591 is not being administered in accordance with Congressional intent—i.e., "the international trafficking of persons." See 2005 TVPRA. Instead, the Federal Government has weaponized the statute to prosecute all commercial sex crimes—to the inclusion of commercial sex crimes occurring solely within the borders of a State—but to the exclusion of State commercial sex crime laws.

Currently, federal enforcement of § 1591 to local pandering offenses blurs the distinction between State and federal sex crimes—and, as a result "obliterate[s] . . . the distinction between what is truly national and what is truly local." *Lopez*, supra @ 557. This practice not only violates § 3231, ¶ 2, prohibition against the

Federal Government for preempting, supplanting, ousting, overriding, encroaching, displacing or limiting State courts' jurisdiction to enforce their own criminal laws, but also violates the principles of federalism enshrined in the Tenth Amendment. See *Bond v. United States*, 564 U.S. 211, 225 (2011) ("Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermine the sovereign interest of the States") (citations omitted). More importantly § 3231, ¶ 2, and the Tenth Amendment are jurisdictional.

(1). A COA Should Issue:

No court in the nation has ever addressed the issue presented here. With that being said, reasonable jurists could debate or agree that federal enforcement of § 1591 to purely local sex crimes violates § 3231, ¶ 2, and the Tenth Amendment. Therefore, the petitioner "has made a made a substantial showing of the denial of a constitutional right," § 2253(c), and the claim "prove[s] something more than the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, supra @ 338.

(2). Claim Not Procedurally Defaulted:

The petitioner argues that a COA should issue because reasonable jurists could debate or agree whether the district court's procedure ruling was correct. He advances arguments why the district court's ruling was incorrect.

First, reasonable jurists could debate or agree federal enforcement of § 1591 to criminal conduct fully condemn by the States violates § 3231, ¶ 2, and the Tenth Amendment, and is jurisdictional and "can never be forfeited or waived." *Cotton*, 535 U.S. @ 630.

Second, reasonable jurists could debate or agree that a federal conviction and sentence that intrudes upon a State sovereign in violation of § 3231, ¶ 2, and the Tenth Amendment results in a complete miscarriage of justice and present exceptional circumstances that justifies collateral relief under § 2255, *Davis*, 417 U.S. @ 346-47, "even is the absence of a showing of cause for procedural default." *Carrier*, 477 U.S. @ 96.

And last, reasonable jurists could debate or agree the factual or legal basis was not reasonably available to counsel. *Reed*, 468 U.S. @ 16. The Supreme Court made clear that a claim of novelty is not narrowed to assessing claims regarding the retroactivity of a constitutional principle. Id @ 17 ("[T]he question whether an attorney as a reasonable basis upon which to develop a legal theory may arise in a variety of contexts").

Unless the Constitution requires an attorney (or defendant) to search the legislative history of a criminal statute in order to divine its meaning while the case is pending before the trial or appellate court to avoid later defaulting any potential claims in collateral proceedings, cf., *Hinton*, supra ("An attorney's ignorance of a

point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonableness performance under Strickland'), a COA should issue here. Prejudice is obvious.

ISSUE TWO

A COA Should Issue Because §1591 Is Unconstitutionally Vague As-Applied To The Petitioner In Violation Of The Due Process Clause And The District Court Was Incorrect The Claim Was Procedurally Defaulted:

The petitioner argues that § 1591 is unconstitutionally vague as-applied to him and conviction and sentence violates the Fifth Amendment Due Process Clause.

(A). Void-For-Vagueness:

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, when a legislative Act is not "unconstitutional in all its applications," *City of Chicago v. Moralas*, 527 U.S. 41, 78 (1999) (Scalia, J., dissenting), the challenger may still advance an as-applied challenger to the Act. *Salerno*, supra @ fn. 3.

Although this Court has "not recognized an overbreadth doctrine outside the limited context of the First Amendment," id, it has indicated that a challenge to an overly broad statute can be made on other grounds, see *New York v. Ferber*, 458

U.S. 747, 768 fn. 21 (1982) (stating that "[o]verbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted is invalid on its face"), such as the Fifth Amendment Due Process Clause['s]," *Osborne v. Ohio*, 495 U.S. 103, 121 (1990) ("In the latter event, there would be no conviction under the law even of those who own conduct is unprotected by the First Amendment. Even if construed to obviate overbreadth, applying the statute to pending cases might be barred under the Due Process Clause"), void for vagueness doctrine. *United States v. Williams*, 528 U.S. 285, 304 (2008) ("Vagueness doctrine is an outgrowth not of the First Amendment but of the Due Process Clause of the Fifth Amendment").

The void for vagueness doctrine "requires that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, supra.

Facially, § 1591 fails to provide fair notice of what is prohibited and is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, supra. First, it is impossible to discern from the text of the

statute whether it applies to persons who engage in international sex trafficking only, or to persons involved in local commercial sex offenses as well. Second, it encourages federal prosecutors to discriminatorily pick and choose which local panderers to prosecutor in the State's domain, especially those who pander under-age persons.

(1). COA Should Issue:

No court in the nation has ever squarely addressed the issue. As such, reasonable jurists could debate or agree § 1591 is so vague that it fails to give notice and of what conduct is prohibited and encourage federal prosecutors to supplant State criminal laws for federal criminal laws.

"[N]o judgment of a court is due process of law, if rendered without jurisdiction in the court." *Scott*, 154 U.S. @ 46. In short, the petitioner "has made a substantial showing of the denial of a constitutional right," § 2255(c), and the claim "prove[s] something more than the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, supra @ 338.

(2). Claim Not Procedurally Defaulted:

The Petitioner argues that a COA should issue because reasonable jurists could debate or agree whether the district court's procedure ruling was correct. He advance arguments why the district court's ruling was incorrect.

First, reasonable jurists could debate or agree § 1591 fails to give notice and perpetuate discriminatory enforcement. *Williams*, supra, and a statute that is unconstitutionally vague implicates jurisdiction which "can never be forfeited or waived." *Cotton*, 535 U.S. @ 630.

Second, reasonable jurists could debate or agree that a federal conviction and sentence based on an unconstitutionally vague statute results in a complete miscarriage of justice and present exceptional circumstances that justifies collateral relief under § 2255, *Davis*, 417 U.S. @ 346-47, "even is the absence of a showing of cause for procedural default." *Carrier*, 477 U.S. @ 96.

And last, reasonable jurists could debate or agree the factual or legal basis was not reasonably available to counsel. *Reed*, 468 U.S. @ 16. The Supreme Court made clear that a claim of novelty is not narrowed to assessing claims regarding the retroactivity of a constitutional principle. Id @ 17 ("[T]he question whether an attorney has a reasonable basis upon which to develop a legal theory may arise in a variety of contexts"). Prejudice is obvious.

ISSUE THREE

18 U.S.C. §§ 1591 And 2443(a) Are Unconstitutionally Overbroad As-Applied To The Petitioner In Violation Of The Fifth Amendment Due Process Clause And The District Court Was Incorrect That The Claim Was Procedurally Defaulted.

The petitioner argues that because federal statutes have different starting points for the age of sexual consent, §§ 1591 and 2443 are overinclusive and there-

fore unconstitutionally as-applied to him in violation of the Fifth Amendment Due Process Clause.

(A). Overbroad Statutes:

The United States Codes criminal statutes has variant times when a person is considered a minor—or, more specifically—when a person is legally capable of consenting to sex. While 18 U.S.C. §§ 2241(c) and 2243(a)(1), indicates that the statutory age of sexual consent is 16 years old, 18 U.S.C. §§ 1591, 2443 and 2256, all establish that the age of majority is 18 years old. This apparent inconsistency has led to the disparate treatment among similar situated criminal defendants. As a threshold matter, the simply question here is why two age classifications for sexual consent in the Federal System. No reasons are given by Congress why the two co-exists, and none are readily apparent in the statutes themselves.

In *United States v. X-Citement*, 513 U.S. 64 (1994), for instance, the defendant argued—as an alternative ground for relief—that § 2256 was "unconstitutionally vague and overbroad because it makes the age of consent 18, rather than 16." Id @ 78. This Court summarily rejected the defendant's argument as "insubstantial . . . for the reasons stated by the Court of Appeals in its opinion in this case," and reversed the Court of Appeals judgment granting him relief. Id @ 78-79.

Although this Court stated that the two-year gap between 16 and 18 was "insubstantial" to justify invalidating the statute on constitutional overbreadth grounds, id @ 78, when a similar issue was addressed by this Court 23 years later, this Court reached an opposite conclusion. See *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

In *Esquivel-Quintana*, the petitioner was facing deportation proceedings based on his prior state conviction for statutory rape of a person under the age of 18 years old. Id @ 1567. "An immigration Judge concluded that the conviction qualified as sexual abuse of a minor . . . and ordered the petitioner removed to Mexico." Id. This Court reversed, holding that "[a]bsence some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA, regardless of the age differential between the two participants." Id.

The district court in *United States v. Kantor*, 677 F. Supp. 1421, 1429-30 (C.D. Cal. 1987), made several profound observations as to what constitutes a minor. The court stated that Congress has an interest to protect children but "only . . . those who are truly children." Id @ 1429. The court noted "that [a] point is reached when . . . [persons] are sufficiently adults so as to no longer be legitimate subjects of protection of children." Id. The court went on to state "[i]n . . . [its] view, the societal interest in protecting 16 and 17 years old 'children' began to be

strained." Id. The court brought this point home by stating that "[f]uthermore, as children reach the age of 16 and 17, it becomes . . . no longer clear that Congress is protecting them from engaging in acts with which they would otherwise have no experience." Id @ 1430 fn. 43.

At issue here is the constitutionality of §§ 1591 and 2443(a). Currently, both set the statutory age of consent at 18. By extending the Esquivel-Qunitana rule to those statutes on constitutional grounds, it is arguable that they are overinclusive and, therefore, unconstitutional—insofar as they establish the age of majority at 18 instead of 16 years old—and that the outcome of this case would have produced a different result.

For instance, the petitioner and his co-defendant were cognizant that Texas law defined a minor, for purposes of consensual sex, as a person under the statutory age of 17. The record in this case reveals that he would not allow C.M. to join the crew until she turned 17 in May of 2015. The record also indicates that K.M. had repeatedly lied to him that she was 17 in order to join the crew.

In light of the foregoing facts, and the fact that there were no force, fraud or coercion, the federal government would have been prohibited by statute to charge the petitioner with federal trafficking offenses if the statutory age for sexual consent would have been 16 rather than 18 years old. At most, the case would have been prosecuted in a Texas court for pandering and prostitution offenses.

This Court stated in *Ferber* that "the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial." 458 U.S. @ 773. Presently, federal law classifies a minor as a person under the age of 16 years old in some statutes and under the age of 18 in others. The two classifications are substantial because of the particularly harsh sentences meted out for sex crimes involving minors, let alone the lifetime stigma attached to labels such as a sex offender or pedophile.

Therefore, by establishing a bright-line constitutional rule that the age of sexual consent is 16 would not only synthesize federal criminal statutes with regards to what constitutes a minor (with respect to the age of sexual consent) and prevent inequity among similarly situated defendants charged with crimes involving quasi-adults (16-and-17-year-olds), it would also bring much needed continuity to the States' systems as well.

In sum, because §§ 1591 and 2443(a) are overly broad because they set the statutory age for sexual consent at 18 instead of 16 years old, the statutes are unconstitutional as-applied to the petitioner in violation of his Fifth Amendment rights under the Due Process Clause.

(1). A COA Should Issue:

No court in the nation has ever squarely addressed the issue. As such, reasonable jurists could debate or agree §§ 1591 and 2443(a) are substantially overbroad and therefore unconstitutional.

"[N]o judgment of a court is due process of law, if rendered without jurisdiction in the court." *Scott*, 154 U.S. @ 46. In short, the petitioner "has made a substantial showing of the denial of a constitutional right," § 2253(c), and the claim "prove[s] something more than the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, supra @ 338.

(2). Claim Was Not Procedurally Defaulted:

The Petitioner states that a COA should issue because reasonable jurists could debate or agree whether the district court's procedure ruling was correct. He advance arguments why the district court's ruling was incorrect.

First, reasonable jurists could debate or agree §§ 1591 and 2443(a) are overinclusive and unconstitutional, "which implicates the very power of the [Government] prosecute [him]." See *Class v. United States*, 138 S. Ct. 798, 803 (2018), and, of course, is jurisdictional and "can never be forfeited or waived." *Cotton*, 535 U.S. @ 630.

Second, reasonable jurists could debate or agree that a federal conviction and sentence based on an unconstitutionally statute results in a complete

miscarriage of justice and present exceptional circumstances that justifies collateral relief under § 2255, *Davis*, 417 U.S. @ 346-47, "even is the absence of a showing of cause for procedural default." *Carrier*, 477 U.S. @ 96.

And last, reasonable jurists could debate or agree the factual or legal basis was not reasonably available to counsel. *Reed*, 468 U.S. @ 16. The Supreme Court made clear that a claim of novelty is not narrowed to assessing claims regarding the retroactivity of a constitutional principle. Id @ 17 ("[T]he question whether an attorney has a reasonable basis upon which to develop a legal theory may arise in a variety of contexts"). Prejudice is obvious

CONCLUSION

WHEREFORE, the petitioner prays that this Court grant the petition and reverse his conviction and sentence.

Respectfully submitted,

Deqwon Saquod Lewis

Deqwon Saquod Lewis
Reg. No. 62723-380
FCI Memphis
P.O. Box 34550
Memphis, TN 38184-0550

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