

No. _____

In the Supreme Court of the United States

RODNEY GOODWIN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL T. MORLEY
COOLIDGE-REAGAN FOUNDATION
1629 K Street, N.W.
Suite 300
Washington, DC 20006
(860) 778-3883
michaelmorleyesq@hotmail.com

JAMES M. CAILAO
Counsel of Record
VOGEL LAW FIRM
215 30th St. N.
Moorhead, MN 5656
(218) 236-6462
jcailao@vogellaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

I. May a U.S. Circuit Court of Appeals reject an appeal based on a statute that the circuit court raised *sua sponte*, which no party had ever previously mentioned in the litigation, without considering a party's substantial, timely raised, fully briefed challenge to that law's constitutionality?

II. May a U.S. Circuit Court of Appeals ignore a constitutional question for which a petitioner in a § 2255 proceeding obtained a certificate of appealability?

III. May a state prohibit a person in another state from soliciting its citizens to travel to that other state to engage in conduct—particularly constitutionally protected conduct—that is legal in that other state?

PARTIES TO THE PROCEEDING

Petitioner Rodney Goodwin was the Petitioner-Appellant below.

Respondent United States was the Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rodney Goodwin received a mandatory ten-year sentence under the Mann Act, 18 U.S.C. § 2423(a), (e), exclusively for engaging in pure, constitutionally protected speech: soliciting a person to travel from North Dakota to Texas to engage in consensual, non-commercial sexual contact that would have been fully legal under Texas law. In *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975), this Court held that a state may not punish a defendant for soliciting and offering to help a person travel to another state to engage in conduct that is legal in that other state. *Carey v. Population Services, Int’l*, 431 U.S. 678, 700-02 (1977), held that this principle applies even if the solicitations might contribute to the “legitimation” of “sexual behavior” among young people. And *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 194-96 (1999), reaffirmed that this principle applies even when the underlying conduct being solicited does not involve a constitutionally protected fundamental right.

In North Dakota, the age of consent for sexual relations is 18. N.D. Cent. Code § 14-10-01. In Texas, the age of consent for sexual relations is 17. Tex. Pen. Code §§ 21.11(a)(1), 22.011(a)(2), (c)(1), 22.021(a)(1)(B), (b)(1). Goodwin was convicted for inviting and offering to provide bus schedules and bus fare to help J.B., a 17-year-old North Dakota resident he met over the Internet, travel from North Dakota to Texas to engage in sexual relations in Texas that would have been legal there. Pet. App. 2a. Goodwin never left Texas, J.B. never made it to Texas,

and the two never met in person. *See id.* at 2a. Goodwin has nevertheless been in prison for nearly a decade.

Goodwin moved to set aside his conviction under 28 U.S.C. § 2255, arguing that the North Dakota extraterritorial jurisdiction statute upon which his Mann Act conviction was predicated violated the First Amendment, as construed in *Bigelow* and its progeny, both facially and as-applied. *Id.* at 3a. The district court rejected his claims on the merits, but granted a certificate of appealability on them. *Id.* at 3a.

The U.S. Court of Appeals for the Eighth Circuit rejected Goodwin’s as-applied claim, concluding Goodwin’s solicitation fell outside the First Amendment because it violated Tex. Pen. Code § 43.25(b), which makes it illegal to “employ[], authorize[], or induce[]” someone under 18 to “engage in sexual conduct,” despite the fact that the underlying sexual conduct remains fully legal under Texas law. *Id.* at 6a. The court invoked this provision *sua sponte*; neither the Government nor the district court had ever raised this statute at any point in either Goodwin’s original trial or the § 2255 litigation.

Goodwin argued, in both a timely submitted supplemental brief as well as a motion for panel rehearing, that Tex. Pen. Code § 43.25(b) was unconstitutional as applied to him under *Bigelow* and its progeny on the same grounds as the North Dakota law: § 43.25(b) makes it illegal to solicit a person to engage in conduct—potentially even constitutionally protected conduct, *see Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003)—that is legal under state law. *See Ex Parte Fujisaka*, 472

S.W.3d 792, 801 (Tex. App. 2015). The Eighth Circuit refused to even consider Goodwin’s constitutional challenge to the statute it *sua sponte* invoked to reject his appeal.

After rejecting Goodwin’s as-applied challenge to the North Dakota extraterritorial jurisdiction statute, the Eighth Circuit also refused to consider his facial challenge to the law, despite the fact that the issue was squarely presented in Goodwin’s certificate of appealability and fully briefed. In doing so, it created a direct split with the U.S. Court of Appeals for the Tenth Circuit, which has held an appellate court “must review the merits of each claim” within a certificate of appealability. *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999). The U.S. Court of Appeals for the Ninth Circuit has expressly recognized that “circuits appear to be split on this particular question.” *Phelps v. Alameda*, 366 F.3d 722, 726 (9th Cir. 2004).

The Eighth Circuit effectively deprived Goodwin of his day in court. This Court should grant *certiorari* to address whether a court is obligated to adjudicate timely raised, fully briefed constitutional challenges to a statute that the court itself *sua sponte* chooses to invoke. It should likewise clarify a circuit court’s obligation in a § 2255 proceeding to address fully briefed, substantial issues raised in a certificate of appealability. Section 2255 proceedings are an important part of the federal docket; the Court should address both petitioners’ rights and courts’ responsibilities in these proceedings. Refusing to consider substantial, squarely presented, fully

preserved constitutional claims in § 2255 proceedings is tantamount to suspending the Great Writ for those petitioners. *Cf.* U.S. Const. art. I, § 9, cl. 2.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit is published at 869 F.3d 636 and reproduced at Pet. App. 1a to 6a. The Eighth Circuit's order denying panel rehearing is unpublished and reproduced at *id.* 7a. The district court opinion is unpublished and reproduced at *id.* 8a to 19a.

JURISDICTIONAL STATEMENT

The Eighth Circuit issued its opinion on August 25, 2017. Pet. App. 1a. The court denied panel rehearing on September 28, 2017. *Id.* 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Pursuant to Sup. Ct. R. 29.4(c), 28 U.S.C. § 2403(b) may apply because the constitutionality of North Dakota and Texas statutes has been called into question. It does not appear that any lower court certified to any state attorney general the fact that the constitutionality of state statutes has been drawn into question. Counsel certifies that the notifications required by Sup. Ct. R. 29.4(c) have been made upon the Attorneys General of North Dakota and Texas.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I – First Amendment

Congress shall make no law . . . abridging the freedom of speech

U.S. Const. amend. XIV, § 1 – Due Process Clause

[N]or shall any State deprive any person of life, liberty, or property, without due process of law

18 U.S.C. § 2423 – Transportation of minors

(a) Transportation with intent to engage in criminal sexual activity. A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life. . . .

(e) Attempt and conspiracy. Whoever attempts or conspires to violate subsection (a) . . . shall be punishable in the same manner as a completed violation of that subsection.

28 U.S.C. § 2253 - Appeal

(a) In a habeas proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. . . .

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255 – Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the

United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

N.D. Cent. Code § 12.1-20-05 – Corruption or solicitation of minors

An adult who . . . engages in . . . a sexual act when the adult is at least twenty-two years of age and the victim is a minor fifteen years of age or older, is guilty of a class C felony.

N.D. Cent. Code § 14-10-01 – Minors defined

Minors are persons under eighteen years of age. . . .

N.D. Cent. Code § 29-03-01.1 – When persons liable to prosecution in this state

Any person who commits one or more of the following acts is liable to prosecution under the laws of this state:

3. Soliciting, while outside this state, sexual contact with a person believed to be a minor who at the time of the solicitation is located in this state. . . .

Tex. Pen. Code § 21.11 – Indecency with a child

(a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person:

(1) engages in sexual contact with the child or causes the child to engage in sexual contact;

(c) In this section, “sexual contact” means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or

(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person. . . .

Tex. Pen. Code § 22.011 – Sexual assault

- (a) A person commits an offense if: . . .
 - (2) regardless of whether the person knows the age of the child at the time of the offense, the person intentionally or knowingly:
 - (A) causes the penetration of the anus or sexual organ of a child by any means;
 - (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
 - (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
 - (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
 - (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor. . . .
- (c) In this section:
 - (1) “Child” means a person younger than 17 years of age. . . .

Tex. Pen. Code § 22.021 – Aggravated sexual assault

- (a) A person commits an offense:
 - (1) If the person:
 - (A) regardless of whether the person knows the age of the child at the time of the offense, the person intentionally or knowingly:
 - (i) causes the penetration of the anus or sexual organ of a child by any means;
 - (ii) causes the penetration of the mouth of a child by the sexual organ of the actor;

(iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor. . . .

(b) In this section:

(1) “Child” has the meaning assigned by Section 22.011(c).

Tex. Pen. Code § 43.25 – Sexual Performance by a child

(b) A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance. . . .

STATEMENT OF THE CASE

1. As the circuit court correctly summarized:

In June 2010, 45-year-old Goodwin began an online relationship with 16-year-old J.B. through a social-networking site. Many of their messages were sexual. *After J.B. turned 17*, they began planning for J.B to travel from her home in North Dakota to visit Goodwin in Texas, where they planned to have sex. On October 17, 2010, J.B. began to travel to Texas, but eventually returned home before leaving North Dakota. *Any sexual act would have occurred in Texas.*

Pet. App. 2a (emphasis added).

Goodwin was indicted and convicted for attempting to violate the Mann Act, *id.* 2a, which makes it illegal to knowingly transport anyone under 18 years old in interstate commerce “with intent that the individual engage in . . . any sexual activity for which any person can be charged with a criminal offense.” 18 U.S.C.

§ 2423(a). At trial, the Government conceded that it would have been legal under Texas law for Goodwin and J.B. to have sexual relations in Texas:

THE COURT: Can we agree Mr. Delorme, that the age of consent in Texas is 17?

GOVERNMENT: I would agree with that, Your Honor.

* * *

THE COURT: [U]nder Texas law you can have sex with a consenting 17-year-old girl, but if you take her picture or you shoot video of her having sex with a defendant, that's illegal.

Trial Trans. Vol. III, taken Feb. 9, 2012, D.E. #70, at 412 (July 10, 2012).

The jury convicted Goodwin of attempting to transport 17-year-old J.B. from North Dakota to Texas with the intent of violating North Dakota's statutory rape law, N.D. Cent. Code §§ 12.1-20-05(2), 14-10-01, in Texas.¹ North Dakota law purportedly applied to Goodwin's intended sexual activities with J.B. in Texas by virtue of North Dakota's extraterritorial jurisdiction statute, N.D. Cent. Code § 29-03-01.1(3), which provides that a person who "[s]olicit[s], while outside this state, sexual contact with a person believed to be a minor who at the time of the solicitation is located in this state," is "liable to prosecution" under North Dakota law. Thus, Goodwin violated North Dakota's statutory rape and extraterritorial

¹ Goodwin's conviction originally was supported by two other predicate offenses, as well: the Texas pornography statute and the federal pornography statute. On direct appeal, however, the U.S. Court of Appeals for the Eighth Circuit held the evidence was legally insufficient to uphold Goodwin's conviction on either of those grounds. See *United States v. Goodwin*, 712 F.3d 1238, 1243-44 (8th Cir. 2013), *as amended*, 719 F.3d 857 (8th Cir. 2013), *reh'g & reh'd en banc denied*, No. 12-2175, 2013 U.S. App. LEXIS 16726 (8th Cir. Aug 12, 2013), *cert. denied*, No. 13-7384, 2014 U.S. LEXIS 309 (Jan. 13, 2014). Consequently, the only basis for Goodwin's conviction is that he attempted to transport J.B. to Texas with the intent of violating North Dakota's statutory rape law *in Texas*.

jurisdiction laws, while in Texas, by inviting and offering to help a 17-year-old North Dakota resident travel to Texas to engage in conduct that would have been perfectly legal in Texas.

The court sentenced Goodwin to a mandatory ten-year prison term. Pet. App. 2a. The U.S. Court of Appeals for the Eighth Circuit ultimately denied Goodwin's direct appeal, *United States v. Goodwin*, 712 F.3d 1238, 1243-44 (8th Cir. 2013), *as amended*, 719 F.3d 857 (8th Cir. 2013), and denied rehearing *en banc* (with two judges dissenting), *United States v. Goodwin*, No. 12-2175, 2013 U.S. App. LEXIS 16726 (8th Cir. Aug 12, 2013). This Court denied certiorari. *Goodwin v. United States*, No. 13-7384, 2014 U.S. LEXIS 309 (Jan. 13, 2014)

2. On January 12, 2015, Goodwin filed a motion to vacate his conviction under 28 U.S.C. § 2255. *See* Motion to Vacate Under 28 U.S.C. 2255, D.E. #83 (Jan. 12, 2015) [hereafter, § 2255 Motion]. It raised three issues:

Ground I: [North Dakota's extraterritorial jurisdiction statute,] N.D. Cent. Code § 29-03-01.1(3) is facially unconstitutional under the First Amendment and *Bigelow v. Virginia*, 421 U.S. 809 (1975), because it is impermissibly overbroad.

Ground II: [North Dakota's statutory rape law and extraterritorial jurisdiction statute,] N.D. Cent. Code §§ 12.1-20-05(2) and 29-03-01.1(3) are unconstitutional as applied to Goodwin.

Ground III: Ineffective assistance of counsel in violation of the Sixth Amendment [for failing to raise these issues at trial].

Id. at 5.

Goodwin's motion pointed out that it was undisputed that any sexual activity between J.B. and Goodwin was to occur, if at all, in Texas. *Id.* at 19. It was further undisputed that J.B. was 17 years old at the time, and that sexual intercourse in

Texas would have been legal under Texas law. *Id.*; *see also* Tex. Pen. Code §§ 21.11(a)(1), 22.011(a)(2), (c)(1), 22.021(a)(1)(B), (b)(1). The only basis for applying North Dakota’s statutory rape law, N.D. Cent. Code § 12.1-20-05(2), to conduct intended to occur in Texas was North Dakota’s extraterritorial jurisdiction statute, *id.* § 29-03-01.1(3). The motion argued that Goodwin’s conviction violated this Court’s ruling in *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975), which squarely holds that the First Amendment prohibits a state such as North Dakota from punishing a person in another state for inviting and offering to help its residents travel to that other state to engage in conduct that is legal there.²

The motion presented separate theories for Goodwin’s facial and as-applied challenges. It demonstrated that North Dakota’s extraterritorial jurisdiction statute violated the First Amendment as applied to Goodwin because *Bigelow* and its progeny squarely protected his solicitations to J.B. § 2255 *Motion, supra* at 29-30. The motion independently argued that the statute was facially unconstitutional, regardless of whether Goodwin’s own solicitations were constitutionally protected, because it applied to broad swaths of solicitations that indisputably did fall within *Bigelow*. *Id.* at 20-29. The motion explained that North Dakota is among only about a dozen states that set 18 as of the age of consent for sexual relations; the overwhelming majority of states set the age of consent at 16 or

² *See also* *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 194-96 (1999) (applying this principle to gambling advertisements); *Carey v. Population Servs., Int’l*, 431 U.S. 678, 700-02 (1977) (holding a state may not “completely suppress the dissemination of concededly truthful information about lawful activity,” even when the communications are “offensive” and may “legitimize sexual activity of young people”).

17. A “substantial number” of solicitations that fall within North Dakota’s extraterritorial jurisdiction statute therefore are for sexual acts that would be legal in the places where they are to occur. *Id.* at 23-24 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *New York v. Ferber*, 458 U.S. 747, 769-71 (1982)).

Goodwin’s motion was accompanied by the Declaration of First Assistant Public Defender William D. Schmidt, who had represented him at trial and on direct appeal. D.E. #84 (Jan. 12, 2015). Schmidt acknowledged that he did not raise any arguments under either *Bigelow* or the First Amendment at trial or on appeal. He admitted that he “did not omit [such] arguments . . . for any strategic purpose, because [he] did not know about or consider them.” *Id.* at 3. He further stated, “Raising arguments under the First Amendment and *Bigelow* would have bolstered my overall strategy of having the court instruct the jury exclusively as to Texas law, rather than North Dakota law.” *Id.*

Schmidt’s declaration concluded by emphasizing that, based on his knowledge and experience as a federal public defender:

a reasonable attorney would have recognized that the solicitations and offer for which Mr. Goodwin was convicted . . . were protected by the First Amendment, as interpreted in cases such as *Bigelow*, and that the U.S. Constitution bars the State of North Dakota from attempting to apply its laws to such solicitations and offer, and asserted those arguments.

Id.

In its opposition brief, the Government admitted “it would have been legal” for Goodwin and J.B. “to engage in sexual activity . . . in Texas.” *United States’*

Response to Motion Under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, D.E. #86 at 9 (Mar. 10, 2015).

The district court denied Goodwin's § 2255 motion without a hearing a year later. The court began by noting that, although Goodwin had not raised any of the issues included in the motion at trial, it was free to reach their merits because the Government did not argue procedural default. Pet. App. 11a. The court further recognized, "Goodwin's conviction under the Mann Act is valid only as a violation of North Dakota's extraterritorial jurisdiction and statutory rape laws." *Id.* at 10a to 11a. Finally, the court acknowledged that Goodwin and J.B. could have engaged in "legal sexual relations" in Texas under Texas law. *Id.* at 15a.

Misapprehending the substance of Goodwin's claims, the court claimed that Goodwin was asserting "a substantive due process right to engage in sexual relations with a minor (a person under the age of eighteen), so long as the minor has reached the age of consent in the state where the sexual activity is to occur." *Id.* at 11a to 12a. Rejecting that notion, the court held that "adults do not have a constitutionally protected substantive due process right to engage in sexual activity with minors." *Id.* at 12a. It declared that "any First Amendment protection extended to the solicitation of minors for sex" is therefore "severely diminished, if not eliminated." *Id.* The court added that Goodwin's solicitation of J.B. "is vastly different than the content of the advertisement in *Bigelow*." *Id.* at 14a.

The court nevertheless granted a certificate of appealability on three issues:

1. Whether N.D.C.C. § 29-03-01.1(3) is facially overbroad because it renders a person liable to prosecution for a wide range of conduct protected by the First Amendment.
2. Whether N.D.C.C. §§ 12.1-20-05(2) and 29-03-01.1(3) are unconstitutional as applied to Goodwin.
3. Whether Goodwin received ineffective assistance of counsel.

Id. at 19a.

3. Goodwin timely appealed the denial of his § 2255 motion. Yet again, Goodwin briefed his facial and as-applied challenges separately. *Compare* Appellant’s Br. at 16-28 (as-applied challenge), *with id.* at 28-31 (facial challenge). And yet again, the Government conceded “it would have been legal” for Goodwin and J.B. “to engage in sexual activity . . . in Texas.” Appellee’s Brief at 18 (June 6, 2016). Indeed, at oral argument, the Government emphasized that Goodwin’s contemplated sexual conduct would have been “legal there [in Texas], but the solicitation took place in North Dakota.” *Goodwin v. United States*, oral argument recording, at 16:30-16:38 (emphasis added), *available at* <http://media-oa.ca8.uscourts.gov/OAaudio/2016/11/161669.MP3>. Later in the argument, the Government reiterated, “By law, [J.B.]’s still a minor in Texas, however the age of consent is 17. . . . There’s a little bit of a distinction there” *Id.* at 24:18-24:24 (emphasis added).

As these repeated concessions demonstrate, the Government never contested that Goodwin’s conduct was legal under Texas law. Nevertheless, several months after oral argument, the Eighth Circuit *sua sponte* issued an order “request[ing] supplemental briefing on the effect of Texas Penal Code § 43.25(b) on this case.”

Pet. App. 57a. No party had ever raised Tex. Pen. Code § 43.25(b) at any point in either Goodwin’s initial criminal proceedings or the § 2255 proceedings. Section 43.25(b) states, “A person commits an offense if, knowing the character and content thereof, he **employs, authorizes, or induces** a child younger than 18 years of age to engage in sexual conduct or a sexual performance.” Tex. Pen. Code § 43.25(b) (emphasis added). The term “sexual conduct” includes, among other things, “sexual contact” and “sexual intercourse.” *Id.* § 43.25(a)(1).

In his supplemental brief, Goodwin explained that § 43.25(b) prohibits a defendant’s employment, authorization, or inducement of a person under 18 to engage in sexual conduct—not the sexual conduct itself. *See* Appellant’s Supp. Br. 10-11 (May 9, 2017). In other words, Texas law draws a distinction between actually having sex, for which the age of consent is 17, Tex. Pen. Code §§ 21.11(a)(1), 22.011(a)(2), (c)(1), 22.021(a)(1)(B), (b)(1),³ and attempting to induce a person to have sex, for which the permissible age is 18, Tex. Pen. Code § 43.25(b). As both the trial court and the Eighth Circuit in Goodwin’s direct appeal found, Goodwin had solicited J.B. to travel to Texas to have sex. Accordingly, Goodwin argued, his solicitations fell within *Bigelow*, notwithstanding § 43.25(b), because the conduct he solicited was legal under state law. Appellant’s Supp. Br. at 11.

³ *See also* Ex Parte *Fujisaka*, 472 S.W.3d 792, 801 (Tex. App. 2015) (“[S]eventeen years is the age of consent to sexual relations in Texas.”); In re *E.N.C.*, 384 S.W.3d 796, 804 n.11 (Tex. 2012) (holding that, for “sex with a minor . . . [i]n Texas, the age of consent is seventeen”); *cf. Phelps v. State*, No. 06-16-00116-CR, 2017 Tex. App. LEXIS 3104, at *8 (Tex. App. Apr. 10, 2017) (“[A] person under the age of seventeen is legally incapable of giving consent to intercourse.”).

Goodwin’s supplemental brief also challenged § 43.25(b)’s constitutionality, *id.* at 12-16, arguing that “it suffers from the same constitutional defect under *Bigelow* and its progeny as North Dakota’s extraterritorial jurisdiction statute,” because it prohibits a defendant from soliciting conduct (i.e., sexual relations with 17-year-olds) that is actually legal under Texas law, *id.* at 12. It emphasized that the Texas Court of Appeals already had recognized the substantial constitutional problems of applying § 43.25(b) to solicitations aimed at 17-year-olds in *Ex Parte Fujisaka*, 472 S.W.3d 792, 799 n.6, 801 (Tex. App. 2015) (“[A]pplication of section 43.25(b) to the authorization or inducement of seventeen-year-old children to engage in sexual conduct or a sexual performance is the most problematic application of the statute.”) (quoted in Appellant’s Supp. Br. at 14).

Goodwin’s supplemental brief concluded by explaining that, even if the Eighth Circuit concluded that § 43.25(b) somehow excluded Goodwin’s own solicitations from constitutional protection, his facial challenge to North Dakota’s extraterritorial jurisdiction statute remained independently valid. Appellant’s Supp. Br. at 17-20. He pointed out:

[A] defendant’s standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. . . . We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute.

Bigelow, 421 U.S. at 815-16 (quoted in Appellant’s Supp. Br. at 18).

Goodwin also moved the court to either supplement the record with, or take judicial notice of, a declaration from former Texas state representative Sue

Schechter, the author of the amendment to Tex. Pen. Code § 43.25(b) that lowered its age to 17 (Amendment No. 35). The Schechter Declaration stated:

Amendment No. 35 had absolutely nothing to do with private, voluntary, non-commercial sexual relations.

a. It did not change the age of consent for private, voluntary, non-commercial sexual relations under Texas law.

b. It did not change the age of persons who could be legally induced to engage in sexual conduct under Texas law.

c. It did not make it illegal to engage in private, voluntary, non-commercial sexual conduct with a 17-year-old.

d. It did not make it illegal for a person to induce a 17-year-old to engage in private, voluntary, non-commercial sexual conduct.

e. It did not make it illegal for a person to induce or solicit sexual conduct that is legal under Texas' laws concerning statutory rape and sexual assault, Tex. Pen. Code § 22.011; aggravated sexual assault, Tex. Pen. Code § 22.021; or indecency with a child, Tex. Pen. Code § 22.11.

The law was not drafted, intended, or understood by me as having any of these effects. So far as I am aware, as the sole sponsor of Amendment No. 35[,] who interacted with many colleagues about this amendment, no legislator ever recognized, claimed, stated, warned, desired, intended, or understood that the amendment would have any of these effects.

* * *

To the extent Amendment No. 35 to S.B. 1067 has caused Tex. Pen. Code § 43.25(b) to make it illegal for a person to induce a 17-year-old to engage in sexual conduct outside the context of a sexual performance, any such amendment was a wholly inadvertent, unintended, and unrecognized scrivener's error that should not be given legal effect. Properly drafted and understood, Amendment. No 35 related solely to the provisions of § 43.25(b) governing sexual performances, not sexual conduct. But for my inadvertent scrivener's error in drafting the Amendment on the floor of the House, its scope would have been more clearly limited. Had such an error been brought to my attention during my time as a legislator, I would have introduced an amendment to correct the mistake.

Without explanation, the Eighth Circuit refused to allow this declaration into the record, however. Pet. App. 66a.

The Eighth Circuit went on to reject Goodwin's appeal. In a six-page opinion, the court held that Goodwin's solicitation of J.B. was not constitutionally protected because it violated § 43.25(b). Pet. App. 1a. The court did not consider the Schechter declaration. It did not address Goodwin's constitutional challenge to Tex. Pen. Code § 43.25(b), raised in both his court-ordered supplemental brief and supplemental reply brief. Moreover, it completely failed to adjudicate Goodwin's facial challenge to the North Dakota extraterritorial jurisdictional statute.

Goodwin moved for panel rehearing, asking the court to adjudicate his timely-raised, fully briefed constitutional challenge to Tex. Pen. Code § 43.25(b), as well as his facial challenge to N.D. Cent. Code § 29-03-01.1(3). *See* Appellant's Motion for Panel Rehearing (Sept. 5, 2017). The motion reiterated, in great detail, how § 43.25(b) violated *Bigelow* by punishing a defendant for soliciting a person to engage in conduct that was fully legal under Texas law. *Id.* at 5-9. The motion also pointed out that Goodwin retained the right to maintain a facial challenge to North Dakota's extraterritorial jurisdiction law, regardless of whether his own solicitation of J.B. was permissible. *Id.* at 9-12. The court refused rehearing without explanation. Pet. App. 7a.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT DENIED GOODWIN FUNDAMENTAL DUE PROCESS BY *SUA SPONTE* INVOKING TEX. PEN. CODE § 43.25(b) AS ITS SOLE BASIS FOR AFFIRMING HIS CONVICTION WITHOUT CONSIDERING HIS SUBSTANTIAL, TIMELY RAISED, FULLY BRIEFED CONSTITUTIONAL CHALLENGES TO THAT STATUTE

This Court should grant *certiorari* in the exercise of its supervisory powers over the lower federal courts to establish the following basic principle: if a court *sua sponte* invokes a new statute never previously raised at any point in the case as the dispositive basis for its judgment, it must adjudicate any timely raised, fully briefed challenge to the constitutionality of that law.

This Court has given lower courts latitude to raise issues *sua sponte* in habeas and § 2255 cases on the Government's behalf. *See, e.g., Day v. McDonough*, 547 U.S. 198, 209 (2005) (“[D]istrict courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition.”); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (holding that a court “may, but need not,” raise non-retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989) (plurality op.), *sua sponte*); *Granberry v. Greer*, 481 U.S. 129, 134 (1987) (permitting courts to *sua sponte* raise “an arguably meritorious nonexhaustion defense”); *see also Wood v. Milyard*, 566 U.S. 463, 473 (2012).

Recognizing the intense pressure *sua sponte* consideration of non-jurisdictional issues places on the adversarial process and tremendous risk of unfairness it creates for litigants, *Wood*, 566 U.S. at 472-73 (citing *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008)), this Court has imposed substantial

limits on lower courts' discretion in this respect. A court may consider an issue *sua sponte* in a habeas or § 2255 case only when “the interests of justice would be better served” by adjudicating it, *Granberry*, 481 U.S. at 135, and the petitioner “is not significantly prejudiced,” *Day*, 547 U.S. at 210.

By *sua sponte* invoking Tex. Pen. Code § 43.25(b) as its sole basis for affirming Goodwin's conviction without considering his substantial, timely filed, fully briefed constitutional challenge to that provision, the Eighth Circuit “significantly prejudiced” him, *Day*, 547 U.S. at 210, and acted flatly contrary to “the interests of justice,” *Granberry*, 481 U.S. at 135. This Court should grant certiorari to enforce these provisions by establishing that, when a court invokes a statute *sua sponte*, it must resolve substantial, timely raised, fully briefed challenges to its constitutionality before enforcing it against a litigant.

Here, the Government repeatedly conceded over the course of several years that the age of consent to sexual relations in Texas was 17, and that the sexual contact Goodwin solicited with J.B. in Texas would have been legal under Texas law.⁴ The Eighth Circuit nevertheless invoked Tex. Pen. Code § 43.25(b) *sua sponte* as its sole basis for rejecting Goodwin's appeal. Pet. App. 6a. It held that Goodwin's solicitation of J.B. to travel to Texas to engage in sexual relations with him there could not be constitutionally protected because it violated § 43.25(b). *Id.* Goodwin

⁴ See Trial Trans. Vol. III, taken Feb. 9, 2012, D.E. #70, at 412 (July 10, 2012) (trial proceedings); *United States' Response to Motion Under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody*, D.E. #86 at 9 (Mar. 10, 2015) (§ 2255 trial-level proceedings); Appellee's Brief at 18 (June 6, 2016) (§ 2255 appellate proceedings); *Goodwin v. United States*, oral argument recording, at 16:30-16:38, 24:18-24:24 (emphasis added), available at <http://media-oa.ca8.uscourts.gov/OAaudio/2016/11/161669.MP3> (appellate argument).

repeatedly argued that § 43.25(b) violated the First Amendment as interpreted in *Bigelow* and its progeny. See Appellant’s Supp. Br. at 12-16; Appellant’s Supp. Reply Br. at 4, 6-7; Appellant’s Motion for Panel Rehearing at 6-8. The Eighth Circuit, however, refused to consider or adjudicate this issue.

In *Bigelow v. Virginia*, 421 U.S. at 824-25, an abortion provider in New York, where abortion was legal, ran an advertisement in a Virginia newspaper stating, “UNWANTED PREGNANCY LET US HELP YOU FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST We will make all arrangements for you and help with information and counseling.” *Id.* at 812. The Commonwealth of Virginia prosecuted the newspaper publisher under a state law that prohibited any person from “encourag[ing] or prompt[ing] the procuring of abortion.” *Id.* at 812-13 (citing Va. Code § 18.1-63).

This Court held that the law violated the First Amendment, as well as inherent constitutional limits on the scope of States’ legislative authority. It began by noting that “The Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, prosecute them for going there.” *Id.* at 824 (citations omitted).

This Court went on to declare:

A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. . . . [I]t may not, under the guise of exercising internal police powers, bar a citizen

of another State from disseminating information about an activity that is legal in that State.

Id. at 824-25. It ultimately invalidated the statute under the First Amendment.⁵

Likewise, in *Carey*, 431 U.S. at 700, this Court invalidated a state’s prohibition on the contraceptive advertisements. The state argued that the ban was necessary to ensure that young people were not encouraged to have sex. *Id.* at 701. This Court flatly rejected that rationale, recognizing that it is “classically not [a] justification[] validating the suppression of expression protected by the First Amendment.” *Id.* It further emphasized that the advertisements concerned “products and services” that were “entirely legal.” *Id.* The Court concluded, “[A] state may not completely suppress the dissemination of concededly truthful information about entirely lawful activity.” *Id.* at 700.

Greater New Orleans Broadcasters Association, 527 U.S. at 194-95, applied the *Bigelow* principle to solicitations to engage in constitutionally unprotected conduct: gambling. This Court struck down a federal statute insofar as it

⁵ *Bigelow* establishes a special First Amendment prohibition that supplements the general restriction on extraterritorial application of state laws. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.”); *Nielsen v. Oregon*, 212 U.S. 315, 321 (1909) (“[O]ne state cannot enforce its opinion against that of the other . . . as to an act done within the limits of that other state.”); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.”); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”); *FTC v. Travelers Health Ass’n*, 362 U.S. 293, 301 (1960) (noting “the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska’s power to regulate any given aspect of extraterritorial activity”).

prohibited casinos in states where gambling was legal from broadcasting advertisements into states where gambling was illegal, to induce those states' citizens to travel to the casinos to engage in legally permissible gambling. *Id.* at 180-81. This Court pointed out that the law failed to “accommodat[e] the rights of speakers in States that have legalized” gambling. *Id.* at 195. It concluded that “the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct.” *Id.*; *see also New England Accessories Trade Ass’n, Inc. v. City of Nashua*, 679 F.2d 1, 4 (1st Cir. 1982) (“If New York, or some other state, decided to legalize the sale and use of marijuana, New Hampshire would have greater difficulty under *Bigelow* prohibiting an advertisement suggesting that the Big Apple was the place to get high on marijuana.”); *Coyote Publ., Inc. v. Miller*, 598 F.3d 592, 597-98 (9th Cir. 2010) (“It is consistent with fundamental precepts of our federal system that the law of the jurisdiction where the transaction is proposed should govern the legality of those transactions, as citizens of one state ordinarily are free to travel to another state and have their behavior governed by the law of that second state.”).

Tex. Pen. Code § 43.25(b) flatly fails this test because it prohibits a person from soliciting a 17-year-old to engage in voluntary, non-commercial sexual conduct that is fully legal under Texas law. In Texas, the age of consent to sexual conduct is 17. *See supra* p. 15 & n.3. Section 43.25(b) nevertheless makes it illegal to “induce[]” a 17-year-old to engage in such legally permissible conduct, including by “persuading” her to do so. *Garay v. State*, 954 S.W.2d 59, 64-65 (Tex. App. 1997); *see also Dumas v. State*, No. 11-05-00413-CR, 2006 Tex. App. LEXIS 9678, at *6

(Tex. App. Nov. 9, 2006) (holding that § 43.25(b) does not prohibit “sexual activity” itself); *see, e.g., Scott v. State*, 173 S.W.3d 856, 859, 864 (Tex. App. 2005) (reversing § 43.25(b) conviction based on insufficient evidence of inducement), *aff’d in part and rev’d in part on other grounds*, 235 S.W.3d 255 (Tex. Crim. App. 2007).

The Texas Court of Appeals itself recognized § 43.25(b)’s constitutional infirmities, declaring:

Because seventeen years is the age of consent to sexual relations in Texas, and thus speech incidental to such relations would not be categorically excluded from protection under the First Amendment, we agree with appellant that application of section 43.25(b) to the authorization or inducement of seventeen-year-old children to engage in sexual conduct or a sexual performance is the most problematic application of the statute.

Ex Parte *Fujisaka*, 472 S.W.3d 792, 801 (Tex. App. 2015). *Fujisaka* elsewhere reiterated, “[T]he most problematic application of [§ 43.25(b)] involves authorization or inducement of seventeen-year-old children that have reached the age of consent under Texas law.” *Id.* at 799 n.6. The Eighth Circuit declined to even mention—much less reject, distinguish, or otherwise address—this precedent.

The Eighth Circuit erred in rejecting Goodwin’s appeal on the grounds his solicitation of J.B. violated § 43.25(b), since that statute violates *Bigelow* and its progeny as applied to him. The court denied *Bigelow* due process, and violated this Court’s guidance in *Granberry*, 481 U.S. at 135, and *Day*, 547 U.S. at 210, by *sua sponte* invoking this statute without even considering Goodwin’s constitutional challenge to it. This Court should grant certiorari to clarify a federal court’s obligations when raising an issue *sua sponte*, enforce the limitations on courts’

discretion under *Granberry* and *Day*, and confirm speakers' fundamental First Amendment right to solicit and persuade others to engage in wholly lawful activity.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER A CIRCUIT COURT IN A HABEAS OR § 2255 CASE MAY IGNORE A SUBSTANTIAL, FULLY BRIEFED ISSUE AUTHORIZED BY A CERTIFICATE OF APPEALABILITY

This Court should also grant certiorari to resolve whether a U.S. Circuit Court of Appeals is required to adjudicate an issue set forth in a certificate of appealability in a habeas or § 2255 case that the petitioner fully briefed. 28 U.S.C. § 2253(c)(1)(B) specifies, “Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255.” A court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right,” and the certificate must “indicate which specific issue or issues satisfy” that requirement. 28 U.S.C. § 2255(c)(2)-(3).

The U.S. Court of Appeals for the Tenth Circuit has held that, once a district court issues a certificate of appealability, the appellate court “must review the merits of each claim” it embraces. *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999) (citing *Nowakowski v. Maroney*, 386 U.S. 542, 542 (1967)); *see, e.g., Rowe v. Lemaster*, 225 F.3d 1173, 1174 n.2 (10th Cir. 2000); *see also* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 35.4[b][i] (7th ed. Matthew Bender 2017) (noting that § 2253 treats “a certificate of appealability as setting a *floor* on additional review” (emphasis added)). The Eighth Circuit created a direct split with the Tenth Circuit by flatly refusing to consider the merits of

Goodwin’s facial challenge, despite the fact that his certificate of appealability expressly authorized him to pursue it on appeal. Pet. App. 19a (“[T]he court certifies the following issues for appeal: Whether N.D.C.C. § 29-03-01.1(3) is facially overbroad because it renders a person liable to prosecution for a wide range of conduct protected by the First Amendment.”).

Several courts, disagreeing with the Tenth Circuit, have held that an appellate court may contract or vacate a certificate of appealability if it concludes that a certified issue does not satisfy § 2253’s standards. *See, e.g., Phelps v. Alameda*, 366 F.3d 722, 728 (9th Cir. 2004); *Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir. 2002). The Eighth Circuit’s approach is inconsistent with those precedents, as well, because it did not purport to either revoke or narrow Goodwin’s certificate of appealability, but rather simply ignored the very first issue contained within it. Indeed, Goodwin even moved for panel rehearing in part on the grounds that the court had failed to address his facial challenge, Appellant’s Motion for Panel Rehearing 9-12, but the court denied the motion without explanation, Pet. App. 7a. Moreover, as demonstrated below, Goodwin’s facial challenge to North Dakota’s extraterritorial jurisdiction statute was substantial and more than enough to satisfy § 2253’s threshold. In light of Goodwin’s valid certificate of appealability, the Eighth Circuit erred, failed to perform its basic adjudicative function, and added a new prong to a pre-existing circuit split by refusing to address the substantial, fully briefed constitutional issue Goodwin raised.

A law is facially overbroad under the First Amendment if “it prohibits a substantial amount of protected expression.” *Ashcroft v. Free Speech Coalition*, 535

U.S. 234, 244 (2002). It must be invalidated if a “substantial number” of its applications are unconstitutional, “judged in relation to [its] plainly legitimate sweep.” *New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). This analysis applies even “where conduct and not merely speech is involved,” particularly where the conduct occurs “in the shadow of the First Amendment,” *Broadrick* 413 U.S. at 614-15 (citing *United States v. Harriss*, 347 U.S. 612 (1954)).

Goodwin argued that North Dakota’s extraterritorial jurisdiction law, § 29-03-01.1(3), is unconstitutionally overbroad under *Bigelow* because a substantial amount of the expression to which it applies is protected by the First Amendment and may not be prohibited by States. Appellant’s Br. at 28-29; Appellant’s Supp. Br. at 18-19. The law applies to individuals who solicit anyone under 18 years old in North Dakota to engage in sexual activity, regardless of whether the solicited sexual acts would violate the law of the state in which they are to occur. *Bigelow* and its progeny, however, hold that a State may not impose criminal sanctions on a person who solicits or offers to help that State’s citizens travel to a different State to engage in conduct that is legal in that other State.

North Dakota is one of only eleven states that set 18 as of the age of consent for sexual relations. The overwhelming majority of states set the age of consent at 16 or 17.⁶ A “substantial number” of interstate solicitations from out-of-state

⁶ See Carol E. Tracy & Jennifer Gentile Long, Women’s Law Project & AeQuitas, *Rape and Sexual Assault in the Legal System* 14 fig. 3 (2013) (“Minimum Age for Consent”), at <http://jpp.whs.mil/Public/docs/04-Meetings/sub-20150507/03 Rape SexAsslt LegalSystem WLP AEQuitas 20120605.pdf>; Joanne Sweeny, *Do*

defendants covered by § 29-03-01.1(3) therefore will be for sexual acts that would be legal in the places where they are to occur. *Ashcroft*, 535 U.S. at 244; *Ferber*, 458 U.S. at 769-71. Thus, § 29-03-01.1(3) imposes criminal liability for a substantial number of communications that, under *Bigelow* and *Carey*, are protected by the First Amendment.

Importantly, this facial challenge was based on a separate theory from Goodwin’s as-applied challenge. While Goodwin’s as-applied challenge rested on the premise that his own solicitation of J.B. was constitutionally protected under *Bigelow* and its progeny, his facial challenge arose from § 29-03-01.1(3)’s overbreadth, and did not depend on whether Goodwin’s own solicitation was constitutionally protected.⁷ Under an exception to the traditional rules governing Article III standing, a defendant may challenge a statute due to facial overbreadth

Sexting Prosecutions Violate Teenagers’ Constitutional Rights?, 48 San Diego L. Rev. 951, 954 & n.13 (2011) (“[T]hirty-nine states have an age of consent of seventeen years or younger.”) (citing statutes); Matthew D. Henry & Scott Cunningham, Working Paper, *Do Statutory Rape Laws Work?* 21 tbl. 2 (May 2010) (“Summary of State Laws”) (citing statutes); at <https://www.csuohio.edu/class/sites/csuohio.edu.class/files/media/economics/documents/14.pdf>; Asaph Glosser, et al., *Statutory Rape: A Guide to State Laws and Reporting Requirements* 6 tbl. 1 (Dec. 15, 2004) (“State Age Requirements”), at <https://aspe.hhs.gov/system/files/pdf/75531/report.pdf>; see also Charles A. Phipps, *Children, Adults, Sex, and the Criminal Law: In Search of Reason*, 22 Seton Hall Legis. J. 1, 55-62, *136-41 app. tbl. 3 (1994) (citing statutes).

⁷ See Appellant’s Supp. Br. at 17-20 (“[E]ven if this Court concludes that Goodwin was not himself soliciting legal sexual conduct due to Tex. Pen. Code § 43.25(b), his facial First Amendment overbreadth challenge to North Dakota’s extraterritorial jurisdiction law, N.D. Cent. Code § 29-03-01.1(3), remains meritorious.”); Appellant’s Supp. Reply Brief at 17-20 (“Goodwin may challenge N.D. Cent. Code § 29-03-01.1(3) as facially overbroad in violation of the First Amendment—regardless of whether his own solicitations were constitutionally protected or violated Tex. Pen. Code § 43.25(b)—because § 29-03-01.1(3) penalizes a wide range of other constitutionally protected solicitations.”); Appellant’s Motion for Panel Rehearing at 9-12 (“This Court should grant panel rehearing because it did not adjudicate Goodwin’s facial overbreadth challenge to N.D. Cent. Code § 29-03-01.1(3).”).

under the First Amendment regardless of whether his own speech is constitutionally protected. As the Supreme Court explained in *Bigelow* itself:

[A] defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. . . . We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute.

Bigelow, 421 U.S. at 815-16; *see also Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 957 (1984) (“[W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another . . . with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.” (quotation marks omitted)); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (“[A] litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.”).

As discussed above, the Eighth Circuit denied Goodwin's appeal solely on the grounds that Goodwin's solicitation of J.B. was purportedly not entitled to constitutional protection since it violated Tex. Pen. Code § 43.25(b). Pet. App. 6a (“Goodwin's attempted inducement of J.B. is not protected speech because it was used as an integral part of conduct in violation of a valid statute.” (quotation marks omitted)). This holding left Goodwin's facial challenge wholly unresolved, however, in light of Goodwin's right to maintain a facial challenge to N.D. Cent. Code § 29-03-01.1(3) under the First Amendment on overbreadth grounds, regardless of whether

his own speech is constitutionally protected. This Court should grant certiorari to resolve the circuit split over whether federal appellate courts are required to adjudicate issues such as this included within a certificate of appealability in a habeas or § 2255 case.⁸

III. THIS COURT IS THE ONLY FORUM IN WHICH TO ADJUDICATE THE EIGHTH CIRCUIT'S VIOLATION OF GOODWIN'S RIGHTS UNDER THE SUSPENSION CLAUSE

The Eighth Circuit's refusal to adjudicate Goodwin's substantial, timely raised, and fully briefed constitutional challenge to Tex. Pen. Code § 43.25(b), which the Eighth Circuit *sua sponte* invoked, or his facial challenge to N.D. Cent. Code § 29-03-01.1(3), which the Eighth Circuit ignored, violated Goodwin's rights under the Suspension Clause of the U.S. Constitution. The Suspension Clause provides, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2.

The writ has "evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). Even when a petitioner contends "the statute under which he stands convicted is unconstitutional, . . . his grievance is that he is being unlawfully subjected to physical restraint, and . . . habeas corpus has been accepted

⁸ Though not directly related to these issues, Petitioner Goodwin himself personally insists upon noting, "The prohibition of capricious and divergent standards in criminal statutes is a well-recognized requirement, consonant alike with ordinary, [day-to-day] notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

as the specific instrument to obtain release from such confinement.” *Id.* at 486. 28 U.S.C. § 2255 is the modern substitute for the writ of habeas corpus for federal prisoners. *United States v. Hayman*, 342 U.S. 205, 219 (1952).

This Court has held, “There is no higher **duty** of a court, under our constitutional system, than the careful processing and **adjudication** of petitions for writs of habeas corpus” *Harris v. Nelson*, 394 U.S. 286, 292 (1969) (emphasis added). The federal judiciary “may not impose a *de facto* suspension by abstaining from . . . controversies” concerning a federal prisoner’s right to be heard. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). By refusing to adjudicate Goodwin’s constitutional claims in his § 2255 appeal, the Eighth Circuit abrogated its duties under the Suspension Clause and effectively denied the possibility of habeas relief to Goodwin.

This Court should grant certiorari because there is literally no other forum in which these claims may be addressed. Moreover, having granted certiorari to entertain Suspension Clause challenges from foreign unlawful enemy combatants, *see, e.g., Boumediene*, 553 U.S. 723; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004), it should exercise its broad discretion in favor of a nonviolent American citizen whose conviction rests solely on pure speech.

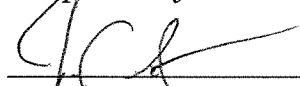
CONCLUSION

For a court such as the Eighth Circuit to flatly refuse to adjudicate a petitioner’s substantial, timely raised, fully briefed constitutional issues in a habeas or § 2255 appeal—especially when the court itself raised a new statute *sua sponte*,

or a certificate of appealability has been granted on the issue—is tantamount to suspending the availability of habeas relief altogether for that petitioner in violation of the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. It is undisputed that Goodwin’s speech was repulsive and contemptable; it is precisely in such cases, however, that the First Amendment has its most urgent application.

This Court should grant this petition and issue a writ of certiorari in this case. In the alternative, it should grant the petition, vacate the Eighth Circuit’s judgment, and remand for further proceedings to require that court to adjudicate both Goodwin’s as-applied challenge to the constitutionality of Tex. Pen. Code § 43.25(b), as well as his facial challenge to N.D. Cent. Code § 29-03-01.1(3).

Respectfully submitted,



JAMES M. CAILAO

Counsel of Record

VOGEL LAW FIRM

215 30th St. N.

Moorhead, MN 56561

(218) 236-6462

jcailao@vogellaw.com

MICHAEL T. MORLEY

COOLIDGE-REAGAN FOUNDATION

1629 K Street, N.W., Suite 300

Washington, D.C. 20006

(860) 778-3883

michaelmorleyesq@hotmail.com

Counsel for Petitioners

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 16-1669

Rodney Goodwin

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: November 15, 2016

Filed: August 25, 2017

Before BENTON and SHEPHERD, Circuit Judges, and STRAND, District Judge.¹

BENTON, Circuit Judge.

A jury convicted Rodney A. Goodwin of attempted transportation of a minor with intent to engage in sexual activity under the Mann Act, 18 U.S.C. § 2423. After this court affirmed, Goodwin moved under 28 U.S.C. § 2255 to vacate his conviction.

¹The Honorable Leonard T. Strand, United States District Judge for the Northern District of Iowa, sitting by designation.

The district court² denied the motion. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

In June 2010, 45-year-old Goodwin began an online relationship with 16-year-old J.B. through a social-networking site. Many of their messages were sexual. After J.B. turned 17, they began planning for J.B. to travel from her home in North Dakota to visit Goodwin in Texas, where they planned to have sex. On October 17, 2010, J.B. began to travel to Texas, but eventually returned home before leaving North Dakota. Any sexual act would have occurred in Texas.

The single-count indictment charged Goodwin with attempted violation of the Mann Act: knowingly transporting anyone under 18 in interstate commerce “with intent that the individual engage in . . . any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.” **18 U.S.C. § 2423(a)**. The “criminal offense” was North Dakota statute § 12.1-20-05(2): attempting to “engage in a sexual act” with a minor. A “minor” in North Dakota is a person under 18. **N.D. Cent. Code § 14-10-01**. North Dakota claims jurisdiction under § 29-03-01.1(3): “Any person who commits one or more of the following acts is liable to prosecution under the laws of this state . . . Soliciting, while outside this state, sexual contact with a person believed to be a minor who at the time of the solicitation is located in this state.”

A jury convicted Goodwin. The district court sentenced him to 121 months’ imprisonment and 60 months’ supervised release. Goodwin appealed, alleging insufficient evidence. This court affirmed. *United States v. Goodwin*, 719 F.3d 857, 865 (8th Cir. 2013).

²The Honorable Daniel L. Hovland, United States District Judge for the District of North Dakota.

Goodwin moved to vacate his conviction under 28 U.S.C. § 2255, asserting a violation of the First Amendment and ineffective assistance of counsel. The district court denied Goodwin’s motion, but certified the issues for appeal.

II.

A federal prisoner may seek relief if his “sentence was imposed in violation of the Constitution or laws of the United States.” **28 U.S.C. § 2255(a)**. A sentence is “imposed in violation of the Constitution” if the statute of conviction is unconstitutional, either facially or as applied. *See Turchick v. United States*, 561 F.2d 719, 721 (8th Cir. 1977).

The Government did not assert procedural default or another affirmative defense, so those defenses normally are waived. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) (citation omitted) (“[P]rocedural default is normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter.”); *West v. United States*, 994 F.2d 510, 512 (8th Cir. 1993) (“Because the government never raised procedural default, however, and the district court considered the merits of the claims, we will do likewise.”). This court reviews de novo the legal issues in the denial of a § 2255 motion. *See Covey v. United States*, 377 F.3d 903, 906 (8th Cir. 2004).

III.

Goodwin argues he did not attempt to commit a “criminal offense.” *See 18 U.S.C. § 2423(a)*. He challenges the North Dakota statutes both facially and as applied to him.

Goodwin contends that the First Amendment prohibits North Dakota from punishing him for soliciting J.B. to travel to Texas to engage in sexual acts legal

there. In Texas, the age of consent to sexual acts is 17. *See Tex. Penal Code Ann. § 22.011(c); In re E.N.C.*, 384 S.W.3d 796, 804 n.11 (Tex. 2012) (“In Texas, the age of consent is seventeen.”). Goodwin relies on *Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975), which held that Virginia could not punish a newspaper publisher for running a New York abortion clinic’s advertisement soliciting Virginia residents to have abortions in New York, where they were legal. Virginia prosecuted the publisher under a state law that prohibited any person from “encourag[ing] or prompt[ing] the procuring of [an] abortion.” *Id.* at 812-13. The Court held that the statute, as applied to the publisher, violated the First Amendment:

A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. . . . [I]t may not, under the guise of exercising internal police powers, bar a citizen of another state from disseminating information about an activity that is legal in that State.

Id. at 824-25, 829. *See Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 194-96 (1999) (holding that states where gambling was illegal could not prohibit broadcasts advertising casinos from states where gambling was legal); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 700 (1977) (invalidating a New York statute prohibiting advertisements for contraceptives because “a state may not completely suppress the dissemination of concededly truthful information about entirely lawful activity” (quotation omitted)).

IV.

Goodwin’s argument assumes that his proposed sexual activity with J.B. was “activity that is legal in [Texas].” *See Bigelow*, 421 U.S. at 825. The Government argues that Goodwin’s attempted conduct violates Texas Penal Code § 43.25(b): “A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual

conduct or a sexual performance.” The statute’s definition of sexual conduct includes “sexual contact, actual or simulated sexual intercourse.” § 43.25(a)(2). *See also* § 15.01 (criminal attempt). Texas courts have defined “induce” to mean “‘to move by persuasion or influence’ or ‘to bring about by influence.’” *See Dornbusch v. State*, 156 S.W.3d 859, 866 (Tex. App. 2005).

Goodwin believes the Government conceded that his proposed sexual activity is legal in Texas. This court is not bound by a party’s concession of law. *See, e.g., Embrey v. Hershberger*, 131 F.3d 739, 740-41 (8th Cir. 1997); *Rodgers v. Office of Pers. Mgmt.*, 87 F.3d 471, 475 (Fed. Cir. 1996).

Goodwin asserts that § 43.25(b) does not apply because other Texas statutes set the age of consent at 17. *Dornbusch* addresses the issue:

Whether or not consensual sex with a seventeen-year-old is a crime under section 21.11 does not control the interpretation of an entirely different offense in a different section of the penal code [A]lthough an adult’s consensual sexual contact with a seventeen-year-old cannot be prosecuted as indecency with a child, the teenager’s consent to sex does not de-criminalize the adult’s conduct under section 43.25(b) because the adult’s conduct is a crime against the public, not against the teenager.

Dornbusch, 156 S.W.3d at 871. Here, § 43.25(b) refutes Goodwin’s premise that his “proposed sexual activity would have been legal under Texas law.”

The First Amendment does not protect “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *United States v. Anderson*, 759 F.3d 891, 893-94 (8th Cir. 2014), *citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). One such class is “speech or writing used as an integral part of conduct in violation of a valid criminal statute.” *Giboney v. Empire Storage & Ice*

Co., 336 U.S. 490, 498 (1949). “Specific criminal acts are not protected speech even if speech is the means for their commission.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). “The Government, of course, may punish adults who provide unsuitable materials to children, and it may enforce criminal penalties for unlawful solicitation.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 251-52 (2002) (internal citation omitted). Cf. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (invalidating a statute where it was “directed to speech alone where the speech in question is . . . not words tantamount to an act otherwise criminal”).

Texas has a “compelling interest in protecting the physical and psychological well-being of minors.” See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). J.B.’s age at the time of Goodwin’s inducement—17—brings Goodwin’s conduct within § 43.25(b). Goodwin’s attempted inducement of J.B. is not protected speech because it was “used as an integral part of conduct in violation of a valid criminal statute.” See *Giboney*, 336 U.S. at 498; *Packingham*, 137 S. Ct. at 1737. Because § 43.25(b) applies to Goodwin, see *Dornbusch*, 156 S.W.3d at 871, his argument under *Bigelow* and its progeny fails.³

* * * * *

The judgment of the district court is affirmed.

³Goodwin alleges “his attorney was constitutionally ineffective for failing to raise the First Amendment/*Bigelow* issue at trial or on appeal.” Because there is no “reasonable probability” that Goodwin’s First Amendment argument would have altered “the result of the proceeding,” Goodwin’s ineffective-assistance argument fails. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-1669

Rodney Goodwin

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:15-cv-00004-DLH)

ORDER

The petition for rehearing by the panel is denied.

September 28, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Rodney Goodwin,	)	
	)	
Petitioner,	)	ORDER DENYING DEFENDANT’S
	)	MOTION TO VACATE, SET ASIDE,
vs.	)	OR CORRECT SENTENCE UNDER
	)	28 U.S.C. § 2255
United States of America,	)	Case No. 1:15-cv-04
	)	
Respondent.	)	

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Rodney Goodwin,	)	Case No. 1:11-cr-38
	)	
Defendant.	)	

On February 9, 2012, a jury convicted the Defendant, Rodney Goodwin, of attempted transportation of a minor with intent to engage in criminal sexual activity, under 18 U.S.C. § 2423(a) and (e). See Docket No. 35. Goodwin was sentenced to 121-months imprisonment on May 9, 2012. See Docket No. 56. Goodwin is incarcerated at Fort Worth, FCI. On January 12, 2015, Goodwin filed a motion to set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. See Docket No. 83. Goodwin claims his conviction should be set aside for three (3) reasons. First, North Dakota’s extraterritorial jurisdiction statute, upon which his conviction rests, is facially unconstitutional because it purports to subject citizens of other states to criminal liability for a broad range of constitutionally protected conduct. Second, North Dakota’s extraterritorial jurisdiction and statutory rape laws (N.D.C.C. §§ 12.1-20-05(2) and 29-03-01.1(3)) are unconstitutional as applied to Goodwin, because they allowed him to be convicted solely for

inviting and assisting a North Dakota citizen to travel to Texas to engage in conduct that is legal in Texas, in violation of Bigelow v. Virginia, 421 U.S. 809 (1975). Third, Goodwin claims to have received ineffective assistance of counsel because his attorney failed to raise any constitutional objections based on binding Supreme Court precedent, despite the complete absence of any conceivable strategic justification for the omission. On March 10, 2015, the Government filed a response in opposition to Goodwin's habeas motion. See Docket No. 86. Goodwin filed a reply on June 8, 2015. See Docket No. 91.

I. BACKGROUND

The Eighth Circuit Court of Appeals outlined the factual background of this case in its opinion affirming Goodwin's conviction:

In June 2010, Goodwin began an online relationship with 16-year-old J.B. through Mbuzzzy, a social-networking site. Many of their messages were sexual. Through messages and phone conversations with Goodwin, J.B. described the unhappiness and abuse she was experiencing living with her grandparents. On J.B.'s 17th birthday, Goodwin wrote her, saying they could be together in "364.25 days." According to J.B.'s testimony, Goodwin became impatient, and the two began planning for her to travel from North Dakota to Dallas, Texas, to visit Goodwin.

Goodwin discussed the plan with J.B. He provided her information about the Bismarck bus schedule. He told her to buy a prepaid cell phone and obtain a "Green Dot Card" (a debit card) as a way for him to provide funds. On a page of J.B.'s journal that included Goodwin's phone number, J.B. listed parts of what she testified was "Rodney's plan": "Green Dot card, Verizon phone, panties, done, go to the bus stop, pay for a ticket, leave. Transfers in Fargo, Minneapolis, Kansas City, and Tulsa."

On Sunday, October 17, J.B. took her grandparents' car and drove to Bismarck. Most local businesses were closed until noon, so J.B. could not obtain the phone or debit card. Goodwin's phone records show he made approximately ten phone calls to Bismarck businesses on October 17. The two decided she should go to Fargo, where she was able to make her purchases at Walmart. The phone did not work, and J.B. informed Goodwin she was going home.

In interviews with authorities, Goodwin said that J.B. was living in an abusive household with her grandparents. He received a call from a friend of J.B.'s family on October 17, telling him she was a minor and they would be contacting the police. After that call, Goodwin told J.B. to go home or contact the local police for help getting home. A Department of Homeland Security agent testified, "[Goodwin] said he had every intention of being in a relationship with [J.B.], to include a sexual relationship" J.B. testified that the plan when she arrived in Texas was to get a meal, then go to a hotel to engage in sexual intercourse.

Goodwin moved for a judgment of acquittal at the close of the Government's case, alleging that the evidence was insufficient for a conviction. [] The district court denied the motion. The jury convicted Goodwin. He was sentenced to 121 months' imprisonment.

See Docket No. 72-1; United States v. Goodwin, 719 F.3d 857, 859-60 (8th Cir. 2013).

Goodwin was convicted of a single count of attempting to violate the Mann Act, 18 U.S.C. § 2423(a) and (e). The Mann Act makes it a federal crime to "knowingly transport[]" in interstate commerce a person under 18 years of age "with intent that the individual engage . . . in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2423(a). To convict a defendant under 18 U.S.C. § 2423(a) and (e), the Government must show the defendant transported, or attempted to transport, the victim in order to engage in conduct for which he could have been prosecuted under some other law. Thus, a defendant cannot be convicted under the Mann Act unless his actions also violate some other predicate statute.

At Goodwin's trial, the district court concluded that Goodwin could be convicted under the Mann Act based on any of three predicate offenses: (1) North Dakota's statutory rape law, which applied extraterritorially; (2) Texas' pornography law; and (3) federal pornography statutes. On appeal, the Eighth Circuit Court of Appeals held there was insufficient evidence to instruct the jury or allow Goodwin to be convicted based on the Texas and federal pornography statutes. Goodwin, 719 F.3d at 862-63. As a result, Goodwin's conviction under the Mann Act is valid

only as a violation of North Dakota's extraterritorial jurisdiction and statutory rape laws. See N.D.C.C. §§ 12.1-20-05(2) and 29-03-01.1(3).

II. STANDARD OF REVIEW

"28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the maximum authorized by law.'" King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a "fundamental defect" resulting in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion is not a substitute for a direct appeal, and it is not the proper way to complain about simple trial errors. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994). A 28 U.S.C. § 2255 movant "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis, 417 U.S. at 343. The Government has not attempted to invoke the procedural default doctrine or any other affirmative defenses, therefore the Court will reach the merits of Goodwin's motion. See West v. United States, 994 F.3d 510, 512 (8th Cir. 1993).

III. LEGAL DISCUSSION

Goodwin argues that N.D.C.C. §§ 12.1-20-05(2) and 29-03-01.1(3) collectively infringe upon his First Amendment right to solicit minors to engage in sexual activity. Goodwin's First Amendment claims are built upon the premise there is a substantive due process right to engage in

sexual relations with a minor (a person under the age of eighteen), so long as the minor has reached the age of consent in the state where the sexual activity is to occur. In support of this contention, Goodwin cites Lawrence v. Texas, 539 U.S. 558 (2003) (upholding substantive due process right of same-sex couples, with full and mutual consent from each other, to engage in private sexual practices). The Court does not find this argument persuasive.

The substantive due process right enjoyed by adult same sex couples to engage in consensual sexual activity in the privacy of their home cannot be stretched to protect the type of sexual activity proposed in this case. As the United States Supreme Court stated in Lawrence:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

539 U.S. at 578. Unlike Lawrence, this case involves a minor. Minors, by their nature, are generally individuals who may be injured or coerced or who are situated in relationships where consent may not be easily refused. Because Goodwin and other similarly situated adults do not have a constitutionally protected substantive due process right to engage in sexual activity with minors, any First Amendment protection extended to the solicitations of minors for sex is severely diminished, if not eliminated. It is for these reasons the Court finds little merit in Goodwin's overarching argument that interstate solicitations of North Dakota minors for sex are protected under the First Amendment. Accordingly, his facial and as-applied challenges, as well as the ineffective assistance of counsel claim, fail.

Even if the Court were to stretch Lawrence beyond its bounds as Goodwin requests, any First Amendment protection extended to interstate solicitations of North Dakota minors for sex

would be outweighed by the state’s interest in exercising its police powers to protect minors from interstate sexual solicitations, as articulated below.

1. SEXUAL SOLICITATIONS OF MINORS AND THE FIRST AMENDMENT

Goodwin relies upon Bigelow v. Virginia, 421 U.S. 809 (1975) to support his argument that the interstate solicitation of minors for sex deserves substantial First Amendment protection. In Bigelow, the United States Supreme Court struck down a Virginia statute that made it a misdemeanor for “any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, [from] encourage[ing] or prompt[ing] the procuring of abortion or miscarriage” as violative of the editor’s First Amendment rights. Bigelow, 421 U.S. 809, 811-12 (1975). Bigelow, the director and managing editor of the Virginia Weekly, was convicted under the statute when his newspaper ran an advertisement for an organization which referred women to clinics and hospitals for abortions in New York¹. The Supreme Court found the editor’s First Amendment rights were unconstitutionally abridged by the statute, stating that “speech is not stripped of First Amendment protection merely because it appears in that form.” Bigelow, 421 US at 818. The Supreme Court noted the advertisement deserved First Amendment protection because it contained factual material of clear public interest and involved the freedom of disseminating an opinion regarding a constitutional right, as opposed to merely proposing a commercial transaction. Id. at 822.

¹ The advertisement read: “UNWANTED PREGNANCY LET US HELP YOU. Abortions are now legal in New York. There are no residency requirements. FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST We will make all arrangements for you and help with information and counseling.” Bigelow, at 812.

Goodwin claims N.D.C.C. § 29-03-01.1(3) is unconstitutionally overbroad under Bigelow because a substantial amount of conduct to which it applies is protected by the First Amendment, namely, the solicitation of minors in North Dakota to engage in sexual activity in a different state where the sexual conduct would be legal. The Court is not convinced that an adult's right to solicit sex from a North Dakota minor, regardless of the legality of the potential sexual act, enjoys the same protections under the First Amendment as a newspaper editor's choice to run an advertisement regarding the availability of safe and legal abortions in a different state. The advertisements presented in Bigelow and similar commercial speech cases are distinct from the sexual solicitation of a minor in North Dakota.

The First Amendment protections bestowed upon the advertisement in Bigelow rested primarily upon the content of the advertisement and the public's interest in being exposed to the contents. "The advertisement published . . . did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message . . . involve[d] the exercise of the freedom of communicating information and disseminating [an] opinion." Bigelow, 421 U.S. at 822. The Bigelow advertisement conveyed a message of "potential interest and value to a diverse audience." Id. An audience not only interested in receiving an abortion, but those curious or interested in differing state laws and the potential reform of Virginia state laws. Further, the advertisement pertained to a constitutionally protected activity (abortion), and therefore the newspaper editor's "First Amendment interests coincided with the constitutional interests of the general public." Id.

It is clear to the Court that the content of interstate solicitations of North Dakota minors for sex in another state with a lower age of consent is vastly different than the content of the advertisement in Bigelow. There is no evidence that an adult who solicits sex from a North Dakota

minor wishes to editorialize on any cultural, philosophical, or political subject matter. The solicitation of a North Dakota minor to travel to the state of Texas for sex does not communicate factual material or opinions of public interest to a diverse audience. The solicitor only wishes to persuade a North Dakota minor to travel to another state (Texas) where they can engage in legal sexual relations. The Court finds there is simply no “substantial individual and societal interests” in the free flow of sexual solicitations of North Dakota minors. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763-66 (1976).

2. POLICE POWERS AND THE PROTECTION OF MINORS

Goodwin also contends the right to engage in non-commercial, consensual sexual activity with a person of legal age (in the jurisdiction where the sex act is to be consummated) is entitled to the same constitutional protection as the right to seek an abortion. Goodwin argues North Dakota cannot criminalize the interstate solicitations of minors to engage in sexual activity in a state where it would be legal to do so. In support of this contention, Goodwin cites Bigelow:

A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.

421 U.S. at 824-25.

North Dakota may not have a role in preventing two consenting adults from soliciting sex from one another, but when one of the parties is a minor, the state’s police powers arguably expand under the Constitution. Minors in North Dakota do not have the same constitutional interest in receiving these sexual solicitations as the general public did in receiving the advertisement regarding safe and legal abortions in Bigelow. A state has wide latitude under its police powers

to regulate the activities of its minors. “The power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” Prince v. Massachusetts, 321 U.S. 158, 170 (1944). North Dakota has a clear interest in “protect[ing] the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed . . . citizens.” Ginsberg v. New York, 390 U.S. 629, 640-41 (1968) (internal citations omitted). “The State’s interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.” Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part).

Section 29-03-01.1 of the North Dakota Century Code highlights North Dakota’s concern that its minors generally lack the maturity and understanding necessary to make decisions concerning sexual relationships. It is within North Dakota’s police power to protect its minors from these types of sexual solicitations, for “a child – like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.” Ginsberg, 390 U.S. at 649-50 (Stewart, J., concurring). North Dakota has wide latitude in the use of its police powers to regulate the sexual activity of minors, up to and including protecting them from interstate solicitations for sex. Any interest Goodwin or similarly situated adults in other states may have in soliciting North Dakota minors for sex is outweighed by the State’s interest in exercising its police powers to shield minors from such sexual solicitations. The Court finds that whatever First Amendment protection is arguably afforded to the interstate solicitation of minors for sex is outweighed by a State’s interest in exercising its police powers to protect minors from the sexual solicitations.

For the reasons outlined above, Goodwin's facial and as-applied challenges to N.D.C.C. §§ 12.1-20-05(2) and 29-03-01.1(3) fail, regardless of Lawrence's applicability.

3. **INEFFECTIVE ASSISTANCE OF COUNSEL**

Because Goodwin's facial and as-applied challenges fail, his ineffective assistance of counsel claim must fail as well. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. To be eligible for habeas relief based on ineffective assistance of counsel, a defendant must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, a defendant must establish that counsel's representation was constitutionally deficient, which requires a showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Id. at 687-88. In considering whether this showing has been accomplished, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. If the underlying claim (i.e., the alleged deficient performance) would have been rejected, counsel's performance is not deficient. Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996). Courts seek to "eliminate the distorting effects of hindsight" by examining counsel's performance from counsel's perspective at the time of the alleged error. Id.

Second, it must be demonstrated that defense counsel's performance prejudiced the defense. Strickland, 466 U.S. at 687. In other words, under this second prong, it must be proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 198, 203 (2001).

There is a strong presumption that defense counsel provided “adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690; Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996). A court reviewing defense counsel’s performance must make every effort to eliminate hindsight and second-guessing. Strickland, 466 U.S. at 689; Schumacher v. Hopkins, 83 F.3d 1034, 1036, 37 (8th Cir. 1996).

The Court finds that Goodwin has failed to establish ineffective assistance of counsel under Strickland. Goodwin claims his defense counsel was constitutionally deficient because he failed to raise the constitutional claims the Court rejects in this order. The Court cannot simply reject Goodwin’s constitutional claims, and in the same breath, fault his counsel for not bringing them up at trial or on direct appeal. Having rejected the substance of Goodwin’s argument, the Court concludes Goodwin suffered no prejudice from the failure of his defense counsel to raise the issue before trial.

IV. MOTION FOR CERTIFICATE OF APPEALABILITY

Goodwin has moved the Court for a certificate of appealability on all issues on which the Court may decline to grant full relief under 28 U.S.C. 2253(c)(1). Although confident its ruling is correct under the applicable law, the Court finds under 28 U.S.C. § 2253(c)(2) that “reasonable jurists” could arguably find the Court’s “assessment of the constitutional claims debatable or wrong. Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Accordingly, the Court will grant Goodwin a certificate of appealability.

V. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons set forth above, the Court **DENIES** Goodwin's motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Docket No. 83) and Goodwin's motion for hearing (Docket No. 92). The Court also issues the following **ORDER**:

- 1) Based upon the entire record before the Court, dismissal of the motion is debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, Goodwin's motion for certificate of appealability (Docket No. 93) is **GRANTED**. Under 28 U.S.C. § 2253(c)(3), the Court certifies the following issues for appeal:
 1. Whether N.D.C.C. §29-03-01.1(3)) is facially overbroad because it renders a person liable to prosecution for a wide range of conduct protected by the First Amendment.
 2. Whether N.D.C.C. §§ 12.1-20-05(2) and 29-03-01.1(3) are unconstitutional as applied to Goodwin.
 3. Whether Goodwin received ineffective assistance of counsel.
- 2) The Court certifies that an appeal may be taken in forma pauperis because such an appeal would not be frivolous. .

IT IS SO ORDERED.

Dated this 19th day of January, 2016.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

APPENDIX D

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

UNITED STATES,	)	
	)	Docket No. 1:11-CR-038
	)	
v.	)	
	)	
RODNEY GOODWIN.	)	
	)	

MOTION TO VACATE CONVICTION AND SENTENCE UNDER 28 U.S.C § 2255

Rodney Goodwin respectfully moves that this Court set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. Goodwin presently is incarcerated at Fort Worth Federal Correctional Institution (“FCI”). His prisoner register number is 42901-177.

INTRODUCTORY INFORMATION REQUESTED IN FORM AO-243

1. The United States District Court for the District of North Dakota, Southwestern Division, entered the judgment of conviction and imposed the sentence that Goodwin challenges. See 28 U.S.C. § 2255(a). The docket number in his criminal case was 1:11-CR-038 (Hovland, J.).

2. The jury convicted Goodwin on February 9, 2012, and this Court sentenced him on May 9, 2012.

3. This Court sentenced Goodwin to 121 months in prison (including a mandatory 10-year term, see 18 U.S.C. § 2423(a)), a five-year period of supervised release, and a special assessment of \$100.

4. Goodwin was indicted for, and convicted of a single count of “attempted transportation of a minor with the intent to engage in criminal sexual activity” under 18 U.S.C. § 2423(a).

5. Goodwin pled not guilty.
6. Goodwin was tried before a jury.
7. Goodwin did not testify at any pretrial hearing, trial, or post-trial hearing.
8. Goodwin appealed his conviction.
9. Goodwin appealed to the U.S. Court of Appeals for the Eighth Circuit. He argued

that:

- the evidence was insufficient to establish that Goodwin “transported” J.B., *see* Appellant’s Brief (“App. Br.”) at 26, or that he did so for the purpose of engaging in illegal sexual activity, *id.* at 31. The brief argued that North Dakota law did not govern Goodwin’s anticipated sexual activities with J.B. in Texas, but did not raise any First Amendment or other constitutional arguments concerning the issue. *See id.* at 33-34; and
- the court erred by instructing the jury as to Texas and federal pornography laws, because there was no evidence that Goodwin intended to produce pornography involving J.B., *see id.* at 46, 48, and as to North Dakota’s statutory rape law, because the anticipated sexual activity was to occur in Texas, *see id.* at 43. Again, the brief did not raise any First Amendment or other constitutional arguments concerning the applicability of North Dakota law.

The Eighth Circuit affirmed Goodwin’s conviction on March 13, 2012. *United States v. Goodwin*, No. 12-2175, 712 F.3d 1238, 2013 U.S. App. LEXIS 7683 (8th Cir. 2013) (“*Goodwin I*”). It held that the evidence was sufficient to establish that Goodwin attempted to transport J.B., *id.* at 1243. It further held that this Court erred by instructing the jury as to Texas and federal pornography charges. *Id.* at 1244. The court explained:

Even in the light most favorable to the verdict, only three pieces of evidence support [these instructions]: Goodwin’s statement to J.B. that he was looking at pornography and thinking about her; one comment from J.B. that she could not wait to “make [her] first porn”; and J.B.’s answer during cross-examination that if

she went to Texas they “possibly” would have “eventually” created pornography. This evidence does not establish that creating pornography was a purpose of the trip. At most, it illustrates that pornography was “merely incidental” to the transportation.

Id.

The court nevertheless affirmed Goodwin’s conviction, however, because N.D. Cent. Code § 29-03-01.1(3) permitted North Dakota’s statutory rape law to be applied extraterritorially to Goodwin, even though the intended sexual conduct was fully legal under Texas law. *Goodwin I*, 712 F.3d at 1245.

Goodwin filed a petition for panel rehearing, arguing that “North Dakota simply does not have the power to criminalize the conduct of individuals taking place outside the territorial jurisdiction of North Dakota, absent some proof of offense conduct occurring in North Dakota.” Petition for Rehearing *En Banc* at 14. The brief alluded vaguely to federalism and the Privileges and Immunities Clause, *see id.* at 10, and mentioned neither the First Amendment nor the Supreme Court’s rulings in *Bigelow v. Virginia*, 421 U.S. 809 (1975), or *Strassheim v. Daily*, 221 U.S. 280 (1911).

On May 28, 2013, the Eighth Circuit granted his motion for panel rehearing, *United States v. Goodwin*, No. 12-2175, 2013 U.S. App. LEXIS 10771 (8th Cir. May 28, 2013), and issued an amended opinion affirming his conviction, *United States v. Goodwin*, 719 F.3d 857 (8th Cir. 2013) (“*Goodwin II*”). The opinion was identical to the panel’s original one, except it contained an additional footnote stating that the North Dakota Supreme Court likely would construe North Dakota’s extraterritorial jurisdiction statute, N.D. Cent. Code § 29-03-01.1(3), as allowing the State to apply its law to Goodwin’s planned acts in Texas. *Goodwin II*, 719 F.3d at 863 n.5.

Goodwin petitioned for panel rehearing or, in the alternative, rehearing *en banc*. For the first time, he argued that “[t]he panel decision below is directly contrary to the Supreme Court’s ruling in *Bigelow v. Virginia*, 421 U.S. 908 (1975).” Petition for Rehearing *En Banc*. On August 12, 2013, the Eighth Circuit denied the petition without opinion, with two judges dissenting. *United States v. Goodwin*, No. 12-2175, 2013 U.S. App. LEXIS 16726 (8th Cir. Aug. 12, 2013).

Goodwin then petitioned the U.S. Supreme Court for *certiorari*, raising the following issues:

- May a State prosecute a person in another State for soliciting its citizens to travel to that other State to engage in conduct that is legal there?
- May a State exercise extraterritorial legislative jurisdiction, to criminalize conduct that occurs in another State which is legal under the law of that other State?
- Under the Mann Act, does providing information about transportation schedules to a person and offering to provide money for a bus ticket constitute “transportation” or “attempted transportation” of that person?

On January 13, 2014, the U.S. Supreme Court denied his petition for a writ of *certiorari*. *Goodwin v. United States*, No. 13-7384, 134 S. Ct. 944 (2014).

10. Goodwin has not filed any other motions, petitions, or applications in any court concerning his final judgment of conviction.

11. As noted above, Goodwin has not filed any other motions, petitions, or applications concerning this final judgment of conviction in any court.

12. This Motion is based upon the following grounds, which are discussed at greater length below:

GROUND I N.D. Cent. Code § 29-03-01.1(3) is Facially Unconstitutional Under the First Amendment and *Bigelow v. Virginia*, 421 U.S. 809 (1975), Because It Is Impermissibly Overbroad

This issue was not raised at trial or on direct appeal as of right due to ineffective assistance of counsel. Goodwin has not engaged in previous post-conviction proceedings in which this issue could have been raised.

GROUND II N.D. Cent. Code §§ 12.1-20-05(2) and 29-03-01.1(3) are Unconstitutional As Applied to Goodwin

This issue was not raised at trial or on direct appeal as of right due to ineffective assistance of counsel. Goodwin has not engaged in previous post-conviction proceedings in which this issue could have been raised.

GROUND III Ineffective Assistance of Counsel in Violation of the Sixth Amendment

This issue was not raised at trial or on direct appeal as of right due to ineffective assistance of counsel. Goodwin has not engaged in previous post-conviction proceedings in which this issue could have been raised.

13. Goodwin did not raise any of the foregoing grounds at trial or on direct appeal as of right due to ineffective assistance of counsel. Goodwin raised his argument under *Bigelow v. Virginia* (Ground I) in his second petition for rehearing to the U.S. Court of Appeals for the Eighth Circuit and his petition for *certiorari* to the U.S. Supreme Court, but neither court agreed to consider the issue on the merits.

Goodwin may pursue Ground I in this post-conviction proceeding because: (i) it is a facial challenge to a law underlying his conviction, (ii) his argument establishes that he is actually innocent of violating both North Dakota law and the federal Mann Act, and (iii) this argument was not raised previously because Goodwin received constitutionally ineffective assistance of counsel at trial and on direct appeal.

Goodwin may pursue Ground II in this post-conviction proceeding because: (i) his argument establishes that he is actually innocent of violating both North Dakota law and the

federal Mann Act, and (ii) this argument was not raised previously because Goodwin received constitutionally ineffective assistance of counsel at trial and on direct appeal.

Goodwin may pursue Ground III in this post-conviction proceeding because this is the appropriate forum in which to litigate ineffective assistance claims.

14. Goodwin does not have any motions, petitions, or appeals currently pending in any court for the judgment he is now challenging.

15. Goodwin was represented by the following attorneys in this matter:

- a. Preliminary hearing—First Assistant Federal Public Defender William D. Schmidt, Federal Public Defender’s Office, Federal Plaza, 324 N. 3 Street, Suite 1, Bismarck, ND 58501.
- b. Arraignment and plea—same
- c. Trial—same
- d. Sentencing—same
- e. On appeal—Mr. Schmidt represented Goodwin in his direct appeal and petition for panel rehearing. Attorney Michael T. Morley, 223 Pawnee Road, Cranford, N.J. 07016, prepared his Petition for Rehearing *En Banc*, which Mr. Schmidt filed with the U.S. Court of Appeals for the Eighth Circuit. Mr. Morley prepared and filed his Petition for *Certiorari* with the U.S. Supreme Court, with Mr. Schmidt and several other attorneys from the Federal Public Defender’s Office appearing on the brief.
- f. In any post-conviction proceeding—n/a
- g. On appeal from any ruling in a post-conviction proceeding—n/a

16. Goodwin was sentenced on a single count of one indictment.

17. Goodwin does not have any future sentences to serve after completing the sentence for the judgment he is challenging.

18. Goodwin’s conviction became final on January 13, 2014, when the U.S. Supreme Court denied his petition for a writ of *certiorari*. *Goodwin v. United States*, No. 13-7384, 134 S.

Ct. 944 (2014). This Motion is timely because it falls within the one-year statute of limitations. See 28 U.S.C. § 2255(f)(1).

FACTUAL BACKGROUND

A. Goodwin and J.B.¹ Develop a “Relationship” Over the Internet

J.B. lived with her grandparents in Hebron, North Dakota. I:78-79, II:154-55, 245.² When she was 15 years old, she created an Mbuzzy account without her grandparents’ permission and in violation of MBuzzy’s terms of service. II:187-88. Mbuzzy is a social networking site that allows people to communicate via instant messaging, “chats” in chat rooms, e-mail, and posts to members’ profiles. I:41-43, 80-81. J.B. entered a false birthday that caused her to appear 18 years old. II:187-88.³

J.B. used Mbuzzy to have highly graphic, sexually explicit conversations with numerous men, II:162, 181-82, 190-91, 216, 231, ranging in age from 20 to 45, II:181-82, 184, 198, 203, 208, 210, 218, with user names such as “giantcock09” and “lovestoeatyungpussy,” II:204, 207, 215. In addition to detailed sexual conversation, she often told these men that she loved them, II:183, 213; III:366-67, as well as numerous lies about herself, II:214-15, 218, 220-221-22. In particular, she often claimed that her father beat her badly, sometimes with a belt, sending her to

¹ This Motion will follow the convention used in the U.S. Court of Appeals for the Eighth Circuit and refer to the 17-year-old involved as “J.B.”

² These citations refer to trial transcripts. The roman numeral before the colon represents the volume number, and the Arabic numeral following the colon represents the page number.

³ J.B. testified under oath that she entered an incorrect birthday because Mbuzzy required her to input her birthday in Roman numerals, and she has dyslexia and Tourette’s Syndrome. None of the records the Government obtained from Mbuzzy suggested that the website ever used Roman numerals. I:81, 152-53; II:226. It appears that the first time she claimed to have dyslexia was two weeks before trial, II:169, and that the first time she claimed to have Tourette’s Syndrome was at trial itself, II:168-69.

the Emergency Room. II:184, 196, 216, 263. She lived with her grandfather, however, and he did not beat her, and especially not with a belt. II:174, 185.

In June 2010, after J.B. had been using Mbuzzzy for approximately two years, she received an instant message from Goodwin for the first time. I:56, 81-82, 90; II:291-92. She accepted him as a “friend” on Mbuzzzy and had a “general” social conversation with him. I:82; II:162, 165; III:366. Two days after they first communicated online, J.B. called Goodwin on the phone and spoke with him for nearly three hours. II:163. They came to communicate with each other on nearly a daily basis, I:88, and their conversations became sexually explicit and disturbingly inappropriate. I:89-91; II:311-12, 319; III:368. At some point, J.B. told Goodwin that she was living in an abusive relationship with her grandfather. II:311.

Between June and October 2010, J.B. called Goodwin 181 times, and spoke with him for a total of over 60 hours. II:164, 166. Goodwin called J.B. only 65 times during that period, for a total of slightly more than 4 hours. II:164. Throughout this time, J.B. and Goodwin professed their love for each other. III:367-70, 372-77. The evidence was sufficient for a jury to conclude that, at some point during these communications, Goodwin learned J.B.’s true age. Among other things, it appears that, on J.B.’s 17th birthday, Goodwin acknowledged that she would be turning 18 the following year. I:88, 93-94; II:236, 239, 314-15, 378, 389.

J.B. testified that, at some unspecified point, Goodwin “brought . . . up” the idea of “creating a pornography.” I:107. She replied, “Oh, I can’t wait,” but it “wasn’t really something [she] was particularly interested in.” *Id.* J.B. testified it was “possibl[e]” she would have made pornography at some unspecified point, explaining, “Not right off, but eventually that probably would have happened.” II:242. Sometime in early July, Goodwin sent J.B. texts stating:

I miss you baby. And I watched a pron [sic] that drove me nuts. I am so lucky to have you. Such a slut. I know I'll see you doing things like in that video. You just LOVING cock. I miss you daughter.

What happened? They find your phone again or again baby? I LOVE YOU and MISS YOU.

I LOVE you [J.B.] So much.

III:368-69. J.B. responded, "Mmmm daddy. I don't have a phone anymore. And I can't wait 2 make my first porn." III:369.

In mid-July, J.B. lied to Goodwin and falsely told him that she had lost her virginity. I:92-93, 107-08, II:237, 243. This upset Goodwin and made him want to see her sooner, rather than when she turned 18. II:237-39; III:371-72, 382-83. Around this time, J.B.'s grandmother caught her talking on the phone with Goodwin and confiscated her phone. II:251. Her grandmother and aunt called Goodwin, told him that J.B. was a minor, and threatened to notify the police if he called her again. II:161-62, 252-54, 277-82. It became more difficult for J.B. to contact Goodwin, and he sent several texts mentioning the possibility of him coming to North Dakota to be with her.⁴

B. Goodwin and J.B. Plan for Her to Travel to Texas to Meet Him

Originally, J.B. and Goodwin planned to wait until she was 18 until they met in person. I:94; II:239. J.B. turned 17 on September 8, 2010. I:93. After her birthday, J.B. wanted to leave Hebron immediately because local gossip about her "had gotten so horrible," I:94; II:134, 161,

⁴ For example, on July 18, Goodwin made several references to "DO[ING] SOMETHING TO BE TOGETHER PERMANENTLY" with J.B., III:382-83. He further commented, "I LOVE YOU SO MUCH. I won't let these people stop us baby. I hope you'll marry me. I'm coming soon for you. They can't stop me," III:385. The next day, he sent J.B. a text asking, "Will you please tell me whats [sic] going on before I star [sic] calling your phone and drive up there." III:387. A week later, he sent another text declaring, "God damn this is so hard to handle. Baby where the hell are you? What have they done to you? Pretty soon I'm gonna come to North Dakota looking for you. PLEASE CONTACT ME!" III:389. There is no evidence that Goodwin ever decided to travel to North Dakota, made any preparation or attempt to do so, or alluded on any other occasions to that possibility.

175-76; her grandmother was emotionally and “mentally abusive” and called her names, including “whore” and “slut,” I:106, 161; II:174; and she wanted to escape a large phone bill, II:160-61. Goodwin also wished to see her sooner. I:94.

On October 16, 2010—nearly three months after the last text in which Goodwin had raised the possibility of coming to North Dakota—Goodwin and J.B. agreed over Mbuzzzy that she would travel to Texas to meet him in person. I:83-84, 86-88, 94, 98; III:394. Goodwin advised her to purchase a Green Dot card, a prepaid telephone, and a bus ticket to Dallas. I:79-80, 83-84, 98-99; II:311, 337. A Green Dot card is a debit card that a person may load with cash remotely. I:61, 75; II:337. Goodwin intended to remotely load funds onto the card to enable her to purchase the bus ticket to Texas. I:79-80, 83-84, 98-99, 105, II:134, 241-42, 311. He also told her the arrival and departure times for the buses she would have to take to travel from North Dakota to Texas. I:84, 86, 98, II:152, 301, 311. When J.B. arrived in Texas, she was going to eat with Goodwin, and then go to a hotel there to have sex with him. I:105-06, II:145-46, 160, 242, 318, 319-20.

C. J.B.’s Attempted Trip to Texas

On the morning of October 17, 2010, J.B. left a note for her grandparents, falsely claiming that she was going to Miami. I:72, 95-96, 99-100. She took her grandparents’ car without their permission, I:60, 71, 79, 83, 94-95, II:136-37, 284, as well as one of her grandmother’s credit or debit cards, which she did not have permission to use under these circumstances, I:60, 71, II:137, 142. J.B. drove to Bismarck to purchase the Green Dot card and phone, but all the stores were closed because they do not open until noon on Sundays. I:101-02, II:135. J.B. drove to a few gas stations, and Goodwin called several businesses to see if they were open and sold Green Dot cards, but they were unsuccessful. I:52, 61, 102.

Later that morning, J.B. called Goodwin collect from a truck stop. He told her, “Well, this is a bad idea. You should probably go home.” I:102-3, II:135-36, 234. J.B. did not wish to return home, however, so they agreed she would go to Fargo instead. I:102, II:136-38, 234-35. Shortly after J.B. arrived in Fargo, Walmart opened and she was able to purchase a Green Dot card and two prepaid cellular phones, I:64, 103-04, but neither of them worked, I:64, 103-04, II:141.

In the meantime, J.B.’s grandparents woke up, saw that she was gone and had taken the car, and found her note claiming that she had left for Florida. II:245-46, 275. Her grandmother called 911; their minister, Numan Zahran; and J.B.’s aunt, Jenny Wood. II:246, 274. Her grandmother then found some notes J.B. had made about her plan, II:247-49, 264, 287-88. and Wood found Goodwin’s number in the records for J.B.’s cellular phone, II:274. Zahran called Goodwin at approximate 1:51 P.M. and told him that J.B. was 17. II:267, 311, 327, 333, 340-41. He claimed he thought she was 18, and agreed to tell her to go home. II:311, 327.

Following the call from Zahran, Goodwin sent J.B. a text stating, “These people on the phone are saying that you are a MINOR? Do you have any idea how bad that is? If that’s [sic] true then you need to GO HOME! Or find a policeman and Tell them the TRUTH (for once) If your [sic] the same person that these crazed people on the phone are looking for, Then [sic] this is unbelievable. I will inform them that you are at Bismarck Walmart.” I:148-49; III:395-96.

Sometime that morning, J.B.’s “dear friend,” a 53-year-old named Sally, called her and asked her to return home. I:105; II:150. After purchasing herself a shirt at a store, J.B. borrowed a phone to call Goodwin and they agreed she would go home. I:105; II:141, 311. J.B. drove to

Sally's house in Hebron and stayed there for three days. II:140, 150-52, 229, 255-56, 284.

Goodwin deleted his Mbuzz account, and did not have further contact with J.B. I:55, 57.

Goodwin never loaded any money on J.B.'s Green Dot card, or otherwise sent her any money. I:63; II:134-35, 146, 228. Goodwin never left Texas, and J.B. never made it there. I:69; II:146, 228-29.

PROCEDURAL HISTORY

A. The Mann Act

Goodwin was indicted for attempting to violate the Mann Act, 18 U.S.C. § 2423(a) and (e). The Mann Act provides, in relevant part:

(a) A person who knowingly transports an individual who has not attained the age of 18 years in interstate . . . commerce . . . with intent that the individual engage in . . . any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life. . . .

(e) Whoever attempts or conspires to violate subsection (a) . . . shall be punishable in the same manner as a completed violation of that subsection.

Goodwin's indictment neither identified any particular statute that Goodwin's planned sexual activity would have violated, nor even specified which jurisdiction's laws that conduct would have violated. Indictment, Doc. #1, at 1 (Mar. 31, 2011).

B. Trial-Level Arguments Concerning North Dakota Law

1. **Preliminary Jury Instructions**—This Court's preliminary jury instruction, which it issued to the jury at the beginning of the case, specified that, to convict Goodwin, the jury must conclude that he transported J.B. with the intent of engaging in "sexual activity that could result in a person being charged with a crime." Preliminary Instructions, Doc. #37, at 2 (Feb. 10, 2012).

2. Proposed Jury Instructions—The Government’s proposed jury instructions identified only a single statute—North Dakota’s statutory rape law, N.D. Cent. Code § 12.1-20-05(2)—as the law which Goodwin’s conduct would have violated. United States’s Requested Jury Instructions, Doc. #26, at 4 (Jan. 18, 2012). The proposed jury instructions that Attorney Schmidt filed on Goodwin’s behalf neither specified any particular law, nor identified a jurisdiction whose laws, that Goodwin allegedly violated. Defendant’s Requested Jury Instructions, Doc #29, at 3 (Jan. 27, 2012).

3. Debating the Applicability of North Dakota Law—Near the close of the evidence, the Government asked the Court what it would be required to prove. Specifically, it inquired whether the Court would “instruct the jury to the laws that [Goodwin] may have . . . violated.” II:350. Attorney Schmidt argued, “[I]f, in fact, any kind of sexual activity was going to occur, it certainly wasn’t going to occur in North Dakota. It was going to occur in Texas, and so I would suggest to the Court that if a specific law is going to have to be looked at, I don’t think North Dakota is the law. I think it would be Texas.” (II:350-51).

This Court raised the possibility that Goodwin might have violated North Dakota’s law against luring minors. II:351. The Government cited North Dakota’s extraterritorial statute, N.D. Cent. Code § 29-03-01.1(3), which provides that “soliciting while outside the state, sexual contact with a person believed to be a minor who at the time of the solicitation is located in the state, is chargeable within the county where it was committed within the state.” II:352. This Court invited the Government to submit every North Dakota law it feels Goodwin may have violated, and Goodwin to submit every Texas law that he might have violated, to submit to the jury. II:353-54.

4. Motion for Judgment of Acquittal—At the close of the Government’s case, after unsuccessfully moving for a mistrial based on the Government’s introduction of the texts between Goodwin and J.B. alluding to pornography, III:397-99, Attorney Schmidt moved for a judgment of acquittal on Goodwin’s behalf. He first argued that the Government had failed to prove a Mann Act violation, because there was no evidence that Goodwin had attempted to transport J.B. for the purpose of engaging in illegal sexual activity. North Dakota law did not apply, Schmidt maintained, because “if any kind of sexual activity was going to occur, it was going to occur in Texas,” where J.B. was of legal age to consent. III:404. “[N]othing in the record,” he added, “suggests that any kind of criminal activity between Mr. Goodwin and Ms. Bainter was going to occur in North Dakota.” III:405; *see also* III:411, III:415. Attorney Schmidt did not cite any caselaw in support of his argument, including the Supreme Court’s rulings in *Bigelow v. Virginia*, 421 U.S. 809 (1975), or *Strassheim v. Daily*, 221 U.S. 280 (1911); omitted any mention the First Amendment or any other provision of the U.S. Constitution; and failed to argue that the State of North Dakota lacked constitutional authority to punish a resident of a different state for inviting a North Dakota citizen to travel to that other state to engage in conduct that was legal there.

Attorney Schmidt further claimed that the Government could not support a Mann Act conviction based on Texas or federal pornography laws, since the evidence was insufficient to allow a jury to conclude that Goodwin was transporting J.B. for the purpose of producing pornographic material with her. III:412. Schmidt stated, “There was talk about it, and I think most of the talk—virtually all of it came from [J.B.]. The comments that [Goodwin] made about having watched a video, I don’t think that suggests that they were going to be made” III:412.

Finally, Attorney Schmidt claimed that the evidence was insufficient to show attempt because Goodwin had made a “substantial step” toward violating the Mann Act. III:408. The only acts that the Government proved were that Goodwin helped J.B. plan her trip to Texas, provided bus schedule information to her, and offered to transfer funds to a Green Dot card to pay for her bus ticket. III:413.

This Court denied the motion, and reiterated that it would instruct the jury on the law of both North Dakota and Texas, as well as federal law, so that it could apply whatever law it believed applied. III:414, 427-28, 438. The Court also concluded that the jury could infer that Goodwin would travel to North Dakota to pick up J.B. if things didn’t work out. III:415, 429.

5. Final Jury Instructions—This Court’s final jury instructions permitted the jury to convict Goodwin if his conduct violated any of the following provisions:

- North Dakota law—N.D. Cent. Code § 12.1-20-05(2), prohibiting adults over 22 years old from engaging in a sexual act with a minor who is 15-18 years old;
- Texas law—Tex. Code § 43.26, prohibiting a person from knowingly or intentionally possessing pornography depicting a child younger than 18 years of age; or
- Federal Law—18 U.S.C. § 2251(a), prohibiting a person from producing pornography depicting a person under 18 engaged in sexual conduct.

Final Instructions, Doc. #38, at 4-5 (Feb. 10, 2012). Attorney Schmidt objected on Goodwin’s behalf to the inclusion of North Dakota law (without citing any supporting authorities or raising any constitutional concerns) as well as the instructions concerning the production of pornography, and the Court overruled his objection. III:440, 443, 446.

The jury’s convicted Goodwin of violating § 2423(a), III:494 and its verdict did not specify the predicate law he purportedly had transported J.B. to violate. *See* Verdict, Doc #36 (Feb. 9, 2012).

6. Motion for a New Trial—After Goodwin’s conviction, Attorney Schmidt filed a perfunctory Motion for Mistrial or in the Alternative New Trial. See Doc. #42 (Feb. 23, 2013). Remarkably, the supporting memorandum—apart from the case heading, signature block, and certificate of service—was barely two pages long, and failed to cite even a *single* supporting case or constitutional provision. See Memorandum in Support of Motion for Mistrial or in the Alternative New Trial, Doc. #43, at 1-3 (Feb. 23, 2012). The motion first argued that the court should grant a mistrial because the Government asked a question concerning whether Goodwin intended to produce pornography involving J.B., despite the absence of any evidence that he intended to do so. *Id.* at 1.

The memo then went on—in a single paragraph, without any citation to supporting legal authority of any nature—to request a new trial on the grounds that the court had erred by instructing the jury on North Dakota law. *Id.* at 2. It pointed out that the evidence demonstrated that Goodwin and J.B. intended to have sex, if at all, in Texas, where the age of consent was 17. *Id.* The memo declared that the Court’s instructions on North Dakota statutory rape law, as well as its instructions concerning Texas and federal pornography law, were inappropriate. *Id.* Rather than presenting legal arguments, the memo offered nothing more than a series of bald, unsupported conclusory assertions.

The memo did not argue that the Supreme Court’s ruling in *Bigelow v. Virginia*, 421 U.S. 809 (1975), precluded the jury from convicting Goodwin for soliciting and offering to help J.B. travel to Texas to engage in sexual conduct that was legal under Texas law. Nor did the memo argue that N.D. Cent. Code § 29-03-01.1, which purports to apply North Dakota’s statutory rape law extraterritorially to out-of-state individuals who solicit North Dakota minors for sex, is facially unconstitutional under the First Amendment due to overbreadth (because it applies to

individuals who solicit 17-year-olds to travel to other states to engage in acts that would be fully legal in those states).

This Court denied the motion for a new trial. *See* Order Denying Defendant’s Motion for Mistrial or, in the Alternative, a New Trial, Doc. #46 (Mar. 13, 2012) (hereafter, “New Trial Denial”). It held that the jury reasonably could have concluded that Goodwin intended to make pornography with J.B, *id.* at 8-9, based on her statement that it was “possible” that she “eventually” might make a pornographic video with Goodwin at some point, *see* I:107; II:242, along with Goodwin’s statement that he knew he would “see [J.B.] doing things” he had seen in a pornography video, III:368-69.

This Court further held that it had properly instructed the jury as to North Dakota’s statutory rape law.

C. Appellate Arguments

Goodwin’s arguments on appeal are discussed *supra* at p. 2-4, ¶ 9.

GROUND FOR MOTION

This Court should vacate Goodwin’s conviction and sentence. Goodwin was convicted of a single count of attempting to violate the Mann Act, 18 U.S.C. § 2423(a), (e). The Mann Act, in relevant part, makes it a federal crime to “knowingly transport[]” in interstate commerce a person under 18 years of age “with intent that the individual engage . . . in any sexual activity for which any person can be charged with a criminal offense.” 18 U.S.C. § 2423(a). To convict a defendant under § 2423(a) or (e), the Government must demonstrate that the defendant transported or attempted to transport the victim in order to engage in conduct for which he could have been prosecuted under some other law. *Cf. United States v. Langley*, 549 F.3d 726, 730 (8th Cir. 2008) (holding, under identical language in a complementary provision of the Mann Act, 18 U.S.C. § 2422(b), that “[w]e look to state law to provide the underlying criminal offense.”). Thus, a defendant cannot be convicted under the Mann Act unless his actions also violate some other predicate statute.

At Goodwin’s trial, this Court concluded that Goodwin could be convicted under the Mann Act based on any of three predicate offenses: (i) North Dakota’s statutory rape law, N.D. Cent. Code § 12.1-20-05(2), which purportedly applied extraterritorially due to N.D. Cent. Code § 29-03-01.1(3); (ii) Texas’ pornography law, Tex. Code § 43.26; and (iii) federal pornography law, 18 U.S.C. § 2251(a). The Eighth Circuit held that the evidence was insufficient to instruct the jury about, or allow Goodwin to be convicted based on, the Texas and federal pornography statutes. *Goodwin I*, 712 F.3d at 1244. Consequently, the validity of Goodwin’s conviction hinges solely on one possible predicate offense, under North Dakota’s extraterritorial jurisdiction and statutory rape laws, N.D. Cent. Code §§ 12.1-20-05(2), 29-03-01.1(3).

It is undisputed that Goodwin solicited and agreed to help 17-year-old J.B. travel to Texas, and that any sexual relations they planned were going to happen there, where the age of consent is 17. Tex. Penal Code Ann. § 22.011(c). North Dakota's age of consent, in contrast, is 18 years old. N.D. Cent. Code § 14-10-01 (defining "minor"). Goodwin therefore stands convicted under the Mann Act on the grounds that his solicitation of, and offer to assist, J.B. travel to Texas to have sex with him there violated North Dakota's statutory rape law, which serves as a predicate offense for, and essential element of, his federal conviction.

Goodwin's conviction and incarceration are unconstitutional for three reasons. First, North Dakota's extraterritorial jurisdiction statute, N.D. Cent. Code § 29-03-01.1(3), upon which Goodwin's conviction rests, is facially unconstitutional, because it purports to subject citizens of other states to criminal liability for a broad range of constitutionally protected conduct. Second, North Dakota's extraterritorial jurisdiction and statutory rape laws, N.D. Cent. Code §§ 12.1-20-05(2), 29-03-01.1(3), are unconstitutional as applied to Goodwin because they allowed him to be convicted solely for inviting and assisting a North Dakota citizen to travel to Texas to engage in conduct that is legal under Texas law, in direct violation of the Supreme Court's ruling in *Bigelow v. Virginia*, 421 U.S. 809 (1975). Third, Goodwin received ineffective assistance of counsel because, although his attorney contested the application of North Dakota law to Goodwin's planned sexual activities in Texas, he negligently failed to raise any constitutional objections based on binding Supreme Court caselaw, despite the complete absence of any conceivable strategic justification for the omission.

GROUND I

**N.D. Cent. Code § 29-03-01.1(3) is Facially Unconstitutional Under
the First Amendment and *Bigelow v. Virginia*, 421 U.S. 809 (1975),
Because It Is Impermissibly Overbroad**

This Court should vacate Goodwin’s conviction and sentence because North Dakota’s extraterritorial jurisdiction statute, N.D. Cent. Code § 29-03-01.1(3)—upon which both this Court and the Eighth Circuit recognize Goodwin’s conviction rests, *see Goodwin II*, 719 F.3d at 863 n.5—is facially unconstitutional under the First Amendment.

“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). A law is unconstitutionally overbroad under the First Amendment if “it prohibits a substantial amount of protected expression.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). A statute must be invalidated if a “substantial number” of its applications are unconstitutional, “judged in relation to [its] plainly legitimate sweep.” *New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *see, e.g., United States v. Stevens*, 559 U.S. 460, 473, 481-82 (2010) (invalidating federal statute banning depictions of animal cruelty because its language was sufficiently broad to apply “to common depictions of ordinary and lawful activities”).

“Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations.” *Broadrick*, 413 U.S. at 612. A statute is subject to an overbreadth challenge on First Amendment grounds even if “where conduct and not merely speech is involved,” particularly where the conduct occurs “in the shadow of the First Amendment,” *id.* at 614-15 (citing *United States v. Harriss*, 347 U.S. 612 (1954)).

North Carolina’s extraterritorial jurisdiction statute, N.D. Cent. Code § 29-03-01.3(3), provides, “Any person who commits one or more of the following acts is liable to prosecution under the laws of [North Dakota] . . . Soliciting, while outside this state, sexual contact with a person believed to be a minor who at the time of the solicitation is located in this state.” Because this law is triggered only by solicitations to minors for sexual contact, its primary—if not sole—effect is to allow North Dakota’s statutory rape law, N.D. Cent. Code § 12.1-20-05(2), which sets the age of consent at 18, *id.* § 14-10-01, to be applied to defendants located in other states who sexually solicit North Dakota residents under 18. Section 29-03-01.3(3) is facially overbroad because it renders a person “liable to prosecution” for a wide range of conduct that the State of North Dakota lacks the constitutional power to prohibit under the First Amendment.

In *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975), the Supreme Court held that a State may not impose criminal sanctions on a person who solicits or offers to help that State’s citizens travel to a different State to engage in conduct that is legal in that other State. An abortion provider from New York, where abortion was legal, ran an advertisement in a Virginia newspaper stating, “UNWANTED PREGNANCY LET US HELP YOU FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST We will make all arrangements for you and help with information and counseling.” *Id.* at 812. The Commonwealth of Virginia prosecuted the newspaper publisher under a state law that prohibited any person from “encourag[ing] or prompt[ing] the procuring of abortion.” *Id.* at 812-13 (citing Va. Code § 18.1-63).

The Court held that the law violated the First Amendment, as well as inherent constitutional limits on the scope of States’ legislative authority. It began by noting that “The Virginia Legislature could not have regulated the advertiser’s activity in New York, and

obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, prosecute them for going there.” *Id.* at 824 (citations omitted).

The Court went on to declare:

A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. . . . [I]t may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.

Id. at 824-25. The Court ultimately invalidated the statute under the First Amendment.⁵

In this case, Goodwin solicited J.B. to travel to Texas to engage in sexual activity that was legal there, *see* Tex. Pen. Code § 22.011(c), just like the advertiser in *Bigelow* solicited Virginia residents to travel to New York to obtain abortions that were legal there. Similarly, Goodwin provided information to J.B. and offered to facilitate her travels to Texas, just as the advertiser in *Bigelow*, 421 U.S. at 824-25, offered to provide information and assistance to Virginia residents in traveling to New York.

⁵ *Bigelow* establishes a special First Amendment prohibition that trumps the general restriction on extraterritorial application of state laws. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.”); *Nielsen v. Oregon*, 212 U.S. 315, 321 (1909) (“[O]ne state cannot enforce its opinion against that of the other . . . as to an act done within the limits of that other state.”); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.”); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”); *FTC v. Travelers Health Ass’n*, 362 U.S. 293, 301 (1960) (noting “the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska’s power to regulate any given aspect of extraterritorial activity”).

Although *Bigelow* involved an advertisement for abortion, the opinion did not turn on that fact, and subsequent rulings have confirmed that its reasoning applies equally to solicitations for other products or activities that are legal in the places they are to be sold or performed. See *Va. State Bd. of Pharm. v. Va. Citizens Cons. Council*, 425 U.S. 748, 760-61 (1976). In any event, the right to engage in non-commercial, consensual activity with a person of legal age (in the jurisdiction where the act is to be consummated) is entitled to the same constitutional protection as the right to seek an abortion. *Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003).

North Dakota's extraterritorial jurisdiction law, § 29-03-01.1(3), is unconstitutionally overbroad under *Bigelow* because a substantial amount of the conduct to which it applies is protected by the First Amendment and may not be prohibited by States. The law applies to individuals who solicit minors in North Dakota to engage in sexual activity, **regardless** of whether the solicited sexual acts would violate the law of the State in which they are to occur. *Bigelow*, however, held that a State may not impose criminal sanctions on a person who solicits or offers to help that State's citizens travel to a different State to engage in conduct that is legal in that other State. Section 29-03-01.1(3), on its own, purports to render a defendant "liable to prosecution," and purports to render illegal conduct that otherwise would be legal under the law of the State in which it is to occur.

By its very terms, § 29-03-01.1(3) applies exclusively to out-of-state defendants. North Dakota is among only about a dozen states that set 18 as of the age of consent for sexual relations.⁶ The overwhelming majority of states—approximately 3/4, enough to amend the U.S.

⁶ Others include Arizona, Ariz. Rev. Stat. §§ 13-1405, 13-1407; California, Cal. Penal Code § 261.5; Colorado, Colo. Rev. Stat. §§ 18-3-1402, 1404; Delaware, Del. Code tit. 11, § 770; Idaho, Idaho Code §§ 18-6101, 6107, 6108, 1508A; New Mexico, N.M. Stat. Ann § 30-9-11; Oregon, Or. Rev. Stat. §§ 163.315, 163.345; Tennessee, Tenn. Code Ann. § 39-13-506; Utah, Utah Code Ann. §§ 76-5-401, 76-5-401.2; Virginia, Va. Code §§ 18.2-63, 18.2-371, and Wisconsin, Wis. Code §§ 948.01, 948.09.

Constitution—set the age of consent at 16 or 17. A “substantial number” of interstate solicitations from out-of-state defendants covered by § 29-03-01.1(3) therefore will be for sexual acts that would be legal in the places where they are to occur. *Ashcroft*, 535 U.S. at 244; *Ferber*, 458 U.S. at 769-71. The State of North Dakota’s only basis for applying its law to such activities under § 29-03-01.1(3) is a solicitation from a defendant in one of those States to a person living in North Dakota to travel to that other State to engage in conduct that is legal there. *Bigelow* flatly forecloses that rationale. *See also New England Accessories Trade Ass’n, Inc. v. City of Nashua*, 679 F.2d 1, 4 (1st Cir. 1982) (“If New York, or some other state, decided to legalize the sale and use of marijuana, New Hampshire would have greater difficulty under *Bigelow* prohibiting an advertisement suggesting that the Big Apple was the place to get high on marijuana.”); *Coyote Publ., Inc. v. Miller*, 598 F.3d 592, 597-98 (9th Cir. 2010) (“It is consistent with fundamental precepts of our federal system that the law of the jurisdiction where the transaction is proposed should govern the legality of those transactions, as citizens of one state ordinarily are free to travel to another state and have their behavior governed by the law of that second state.”).

The overbreadth of § 29-03-01.1(3) is similar to that of the provision invalidated in *Houston v. Hill*, 482 U.S. 451, 461 (1987). In *Hill*, a local ordinance made it “unlawful for any person” to “oppose, molest, abuse or interrupt any policeman in the execution of his duty.” *Id.* at 461 (quotation marks omitted). The Supreme Court recognized that, although the ordinance covered some activity that “might constitutionally be punished under a properly tailored statute,” *id.* at 462 n.11, it also impermissibly abridged “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest,” *id.* at 462-63. The Court concluded that the ordinance was impermissibly overbroad under the First Amendment, because it “is not

narrowly tailored to prohibit only disorderly conduct or fighting words.” *Id.* at 465. It explained that the ordinance “criminalizes a substantial amount of constitutionally protected speech” and “is susceptible of regular application to protected expression.” *Id.* at 466-67.

Similarly, in this case, § 29-03-01.1(3) arguably might be valid as applied to defendants who solicit North Dakota residents to engage in sexual activity that would be illegal under the law of the place where it is to occur. The statute nevertheless is “susceptible of regular application” to individuals such as Goodwin, who never entered North Dakota, and solicited and offered to help a North Dakota resident to travel to a different state to engage in conduct that was fully legal there. Thus, the law is impermissibly overbroad.

Section 29-03-01.1(3)’s invalidity is further confirmed by comparison to the law the Eighth Circuit upheld in *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012). In *Neely*, an Arkansas law prohibited a person older than 18 from soliciting children under the age of 15 to engage in sexual conduct. *Id.* at 349 (citing Ark. Code § 5-14-110(a)). A resident of New Mexico violated this statute by calling a 14-year-old in Arkansas on the telephone and offering to perform oral sex on him. *Id.* at 348-49. The Eighth Circuit easily rejected the defendant’s facial overbreadth challenge to the law. *Id.* at 351.

The *Neely* Court held that the Arkansas law was valid because it “targets primarily, if not exclusively, illicit activity within the State’s power to regulate.” *Id.* at 351. To the extent the law covered protected speech, such as “television advertising, films or popular music with sexual themes,” such cases “constitute a tiny fraction of affected speech.” *Id.* (quotation marks omitted). In the instant case, in contrast, a substantial amount—if not the overwhelming majority—of the solicitations covered by § 29-03-01.3(3) concern conduct that would be fully legal under the law of the States in which it is to occur; the solicitations therefore are

constitutionally protected under *Bigelow*. Thus, unlike the law upheld in *Neely*, 677 F.3d at 351, § 29-03-01.3(3) applies to “a substantial amount of protected speech.”

Because Goodwin’s conviction unavoidably rests on § 29-03-01.1(3), *see Goodwin II*, 719 F.3d at 863 n.5, and that statute is unconstitutionally overbroad under *Bigelow*, 421 U.S. at 824-25, this Court should vacate his conviction and sentence. Goodwin’s attorney did not raise this issue either at trial or on direct appeal. The *Bigelow* issue was raised only in Goodwin’s second petition for rehearing before the Eighth Circuit and his Supreme Court Petition for Certiorari; no court ever considered its merits. This Court may consider this issue in the context of this § 2255 proceeding for three reasons. **First**, a § 2255 movant may raise a facial challenge to a statute despite procedurally defaulting on the issue. *See United States v. Morgan*, 230 F.3d 1067, 1071 (8th Cir. 2000) (“[T]he majority opinion explicitly recognizes a facial constitutional challenge exception to the procedural default doctrine.”) (Bye, J., specially concurring); *see also Country v. Parratt*, 684 F.2d 588, 589 n.1 (8th Cir. 1982) (allowing a habeas petition to bring a facial constitutional challenge to a statute, despite pleading “no contest” and failing to litigate the issue in his original criminal proceedings).

Second, Goodwin may pursue these claims under *Bousley v. United States*, 523 U.S. 614, 623-24 (1998), because he is actually innocent of violating the Mann Act. *Bousley* held that a defendant may pursue a constitutional claim in a collateral proceeding, despite a procedural default, if “in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Id.* at 623 (quotation marks omitted). And the Eighth Circuit has applied the *Bousley* “actual innocence” standard even where a defendant was convicted, rather than pled guilty, also without requiring the defendant to produce new evidence. *See, e.g., United States v. Apker*, 174 F.3d 934, 938-39 (8th Cir. 1999).

Importantly, the Eighth Circuit has granted collateral relief under *Bousley* where the defendant's conduct could not have violated the statute under which he was convicted. *See, e.g., United States v. Ryan*, 227 F.3d 1058, 1064 (8th Cir. 2000) (reversing lower court's denial of § 2255 relief, "because [the defendant] stands convicted for conduct not prohibited by [18 U.S.C. §] 844(i)"); *see also Moore v. United States*, 173 F.3d 1131, 1136 (8th Cir. 1999) (reversing lower court's denial of § 2255 relief because the defendant's conduct was not prohibited by 18 U.S.C. § 924(c)). In this case, *Bigelow* and the First Amendment prohibit North Dakota punishing Goodwin for soliciting and offering to assist a North Dakota resident to travel to a different state to engage in conduct that is legal in that other state. Thus, North Dakota law could not have served as a predicate offense for Goodwin's Mann Act conviction. Because none of the other predicate offenses of which the Government accused Goodwin survived appellate review, there are no constitutionally permissible grounds upon which a jury could convict Goodwin under the Mann Act, and he is entitled to § 2255 relief. *Ryan*, 227 F.3d at 1064.

Third, Goodwin may overcome the procedural default because his attorney, William Schmidt, was ineffective in failing to raise the issue at trial and on direct appeal. *See Becht v. United States*, 403 F.3d 541, 545 (8th Cir. 2005); *see also King v. United States*, 595 F.3d 844, 853 (8th Cir. 2010) (holding that defendant "is entitled to relief . . . [because] his appellate attorney's performance cost him the opportunity to present his meritorious argument on direct appeal").

The Eighth Circuit has recognized that a defendant's Sixth Amendment rights are violated when counsel fails to raise a meritorious constitutional issue without a sound tactical reason. In *Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001), for example, the court held that the defendant's attorney failed to provide effective assistance of counsel because "[n]o sound

trial strategy could include failing to make a constitutional objection to a prosecutor's improper comment concerning [the defendant's] rights to a jury trial and to confront witnesses.” *See also Manning*, 310 F.3d at 577 (holding that counsel was ineffective for failing to raise a contemporaneous Sixth Amendment objection to testimony of a Government witness, without any strategic rationale); *cf. Reagan v. Norris*, 365 F.3d 616, 621 (8th Cir. 2004) (recognizing that counsel was ineffective for failing to object to a first-degree murder instruction that lacked an “essential element of the crime” without attempting to further “any particular trial strategy”); *King*, 595 F.3d at 853 (holding that counsel's failure to “offer the obvious and meritorious argument . . . deprived [the defendant] of the effective assistance of counsel”).

Here, one of the main focal points of the defense was the contention that Goodwin could not be convicted, because his intended sexual activity under Texas law was legal. There was no tactical basis for failing to either raise the First Amendment argument or cite the Supreme Court's binding *Bigelow* precedent, in support of that goal. Failing to raise a meritorious constitutional issue, or to cite a binding, on-point precedent, either at trial or on appeal, violates the minimum standard that reasonable could be expected of competent counsel. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also* Declaration of First Assistant Federal Public Defender William D. Schmidt, ¶ 10 (“No strategic or constitutionally permissible basis exists for defense counsel to decline to raise an issue or argument under binding U.S. Supreme Court authority that a defendant's conduct is constitutionally protected, or that a law cannot apply to a defendant's conduct.”).

Moreover, Goodwin's attorney at trial and on appeal, First Assistant Federal Public Defender William Schmidt, himself acknowledges that he did not refrain from raising these issues based on trial strategy, but because he failed to recognize the First Amendment argument

and was unfamiliar with the Supreme Court’s ruling in *Bigelow*. Schmidt Decl. ¶¶ 7, 8(a). He acknowledges that a reasonable attorney would have recognized the *Bigelow* argument and asserted it in a timely manner. *Id.* ¶ 9. An attorney’s failure to raise a meritorious argument—particularly an argument in favor of a conclusion he already is advocating (*i.e.*, applicability of Texas, rather than North Dakota law)—cannot be deemed a reasonable strategic decision when the attorney is unaware of the argument in the first place. *Cf. Henderson v. Sargent*, 926 F.2d 706, 712 (8th Cir. 1991) (holding that counsel was ineffective because he “admittedly did not know enough about this evidence to make a reasonable decision not to use it”). As Schmidt explains, “Mr. Goodwin’s case was not bolstered or advanced in any way by [Schmidt’s] failure to raise arguments under the First Amendment or *Bigelow*” at trial or on direct appeal. Schmidt Decl., ¶ 8(c).

Thus, this Court should grant Goodwin’s motion to vacate his conviction.

GROUND II
N.D. Cent. Code §§ 12.1-20-05(2) and 29-03-01.1(3)
are Unconstitutional As Applied to Goodwin

In the alternative, this Court should vacate Goodwin’s conviction because North Dakota’s statutory rape and extraterritorial jurisdiction laws, N.D. Cent. Code §§ 12.1-20-05(2), and 29-03-01.1(3) are unconstitutional as applied to Goodwin, because the sexual activity in which he intended to engage was fully legal under the law of the State in which it was to occur.

The Supreme Court has held that defendants may obtain collateral relief if the laws under which they are convicted are unconstitutional as applied to them. *Smith v. Goguen*, 415 U.S. 566 (declining to consider statute’s facial constitutionality, and instead granting habeas because the law under which the defendant was convicted was unconstitutional “as applied to [him]”); *see also Cline v. Rockingham Cnty. Super. Ct.*, 502 F.2d 789, 790 (1st Cir. 1974) (affirming the

“granting of the writ of habeas corpus” on the ground that “the statute was unconstitutionally applied to petitioner[’s] . . . activity in the instant case”); *Monroe v. State Court of Fulton Cnty.*, 739 F.2d 568, 570 (11th Cir. 1984) (“Because we hold that the Georgia statute is unconstitutional as applied, we reverse the denial of appellant’s petition for writ of habeas corpus.”); *Coble v. Quarterman*, 496 F.3d 430, 448 (5th Cir. 2007) (reversing “the district court’s denial of habeas relief on [the petitioner’s] claim that the Texas special issues were unconstitutional as applied to him”).

Under *Bigelow*, 421 U.S. at 824-25, the State of North Dakota lacked constitutional authority to render Goodwin “liable to prosecution” for “solicit[ing]” J.B. to travel to Texas, N.D. Cent. Code § 20-03-01.1(3), to engage in activity that is legal under Texas law. *Cf. State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 421. Because North Dakota’s statutory rape and extraterritorial jurisdiction laws cannot be constitutionally applied to prohibit such conduct, Goodwin’s Mann Act conviction must be vacated.

This Court may reach the merits of this claim because it demonstrates that Goodwin is actually innocent of violating the Mann Act, *Bousley*, 523 U.S. at 623-24; *Ryan*, 227 F.3d at 1064; *Moore*, 173 F.3d at 1136, as well as because his counsel at trial and on direct appeal was ineffective for failing to raise it, *King*, 595 F.3d at 853; *Burns*, 260 F.3d at 897.

GROUND III Ineffective Assistance of Counsel in Violation of the Sixth Amendment

Finally, this Court should vacate Goodwin’s conviction and sentence because he received constitutionally ineffective assistance of counsel in violation of the Sixth Amendment, both at trial and on direct appeal. To demonstrate ineffective assistance, a defendant must show that

counsel's fell "outside the wide range of professionally competent assistance" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 690, 694; *accord Deltoro-Aguilera v. United States*, 625 F.3d 434, 437 (8th Cir. 2010).

Goodwin's attorney, William Schmidt, argued at trial and on direct appeal that North Dakota law should not govern the legality of Goodwin's intended conduct in Texas. Raising constitutional arguments—particularly a First Amendment argument predicated on *Bigelow*, 421 U.S. at 824-25—would have been fully consistent with, and immeasurably bolstered, this contention. There is no strategic justification for failing to raise a meritorious constitutional argument and cite binding precedent to establish one of Goodwin's key contentions. *See Burns*, 260 F.3d at 897 ("Defense counsel's performance was deficient because counsel's inaction allowed, and in fact, invited the jury to punish [the defendant] for exercising his constitutional rights. There was no reasonable tactical basis for failing to make a constitutional objection to this argument."); *Manning*, 310 F.3d at 576-77 ("[T]here can be no doubt that the performance of [the defendant's] counsel was deficient" because "[t]he lack of a contemporaneous objection at trial allowed the government to proffer [its witness'] testimony unfettered, despite being constitutionally inadmissible."); *Reagan*, 365 F.3d at 621 (granting habeas relief because trial counsel's "failure to object to a first-degree murder instruction without an essential element of the crime fell below an objective standard of reasonableness" and did not further "any particular trial strategy"); *King*, 595 F.3d at 853 (vacating sentence under § 2255 because defendant's "appellate attorney's performance cost him the opportunity to present his meritorious argument on direct appeal" without strategic justification). Schmidt himself acknowledges that a

reasonable attorney would have recognized and pursued these arguments, Schmidt Decl. ¶¶ 9-10, and that no valid strategic or other reason existed for his failure to do so, *id.* ¶¶ 8(a), 8(c), 10.

Counsel's unreasonable failure to raise *Bigelow* or assert First Amendment challenges to Goodwin's conviction also prejudiced Goodwin. If counsel had pressed these claims—particularly on appeal, where the Eighth Circuit invalidated the other predicate offenses this Court submitted to the jury, *Goodwin I*, 712 F.3d at 1244—the only remaining grounds underlying Goodwin's Mann Act conviction would have been removed. Thus, Goodwin is entitled to have his conviction and sentence vacated under § 2255 due to ineffective assistance of counsel.

CONCLUSION

For these reasons, Goodwin asks that the Court vacate his conviction and sentence, or grant such other relief as may be just and proper. Goodwin further requests a hearing and oral argument on his claims. In the alternative, Goodwin requests a certificate of appealability for any issues on which this Court declines to grant full relief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on January 12, 2015

VOGEL LAW FIRM

/s/ James M. Cailao

BY: James M. Cailao(#07086)

US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899
Email: jcailao@vogellaw.com

Michael T. Morley*
Coolidge Reagan Foundation
1629 K Street, N.W. Suite 300
Washington, D.C. 20006
(P) 860-778-3883
Michael@coolidgereagan.org
*Admitted pro hac vice

Attorneys for Rodney Goodwin

APPENDIX E

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

UNITED STATES,	)	
	)	Docket No. 1:11-CR-038
	)	
v.	)	
	)	
RODNEY GOODWIN.	)	
	)	

**DECLARATION OF FIRST ASSISTANT FEDERAL PUBLIC DEFENDER
WILLIAM D. SCHMIDT IN SUPPORT OF DEFENDANT RODNEY GOODWIN'S
MOTION TO VACATE CONVICTION AND SENTENCE UNDER 28 U.S.C § 2255**

I, WILLIAM D. SCHMIDT, hereby declare as follows:

1. All of the statements contained in this declaration are based on my personal knowledge, except where stated otherwise.
2. I am at least 18 years old, of sound mind, and am competent to testify to the matters contained in this declaration.
3. I am First Assistant Federal Public Defender for the District of North Dakota.
4. I represented Rodney Goodwin at trial and in his direct appeal in the above-captioned case.
5. I did not argue, either at trial, in Mr. Goodwin's motion for a new trial, or in Mr. Goodwin's initial appeal, that:
 - a. the State of North Dakota lacked power under the U.S. Constitution to prohibit a person located in another state from soliciting North Dakota citizens from traveling to that other state to engage in conduct that is legal there;
 - b. the First Amendment guarantees the right of citizens of one state to solicit and offer to assist residents of other states to travel there to engage in conduct that is legal there;

c. the U.S. Supreme Court's ruling in *Bigelow v. Virginia*, 421 U.S. 809 (1975), precludes the Government from convicting Goodwin based on the solicitations and offer it established at trial; or

d. N.D. Cent. Code § 29-03-01.1(3) is unconstitutional, either facially or as applied to Mr. Goodwin, under the First Amendment and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

6. The first time in these proceedings that I briefly alluded to a potential constitutional concern about the application of North Dakota law to Mr. Goodwin's contemplated conduct in Texas (which would have been legal under Texas law) was in Mr. Goodwin's first post-appeal motion for reconsideration to the U.S. Court of Appeals for the Eighth Circuit. Even in that motion, I did not argue that:

a. the First Amendment guarantees the right of citizens of one state to solicit and offer to assist residents of other states to travel there to engage in conduct that is legal there;

b. the U.S. Supreme Court's ruling in *Bigelow v. Virginia*, 421 U.S. 809 (1975), precludes the Government from convicting Goodwin based on the solicitations and offer it established at trial; or

c. N.D. Cent. Code § 29-03-01.1(3) is unconstitutional, either facially or as applied to Mr. Goodwin, under the First Amendment and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

7. I did not recognize, discover, or learn of Mr. Goodwin's potential arguments under *Bigelow v. Virginia*, 421 U.S. 809 (1975), and the First Amendment until preparing his second motion for reconsideration of his initial appeal to the U.S. Court of Appeals for the Eighth Circuit, in coordination with undersigned counsel Michael T. Morley. By this time, it

was too late to have these arguments considered on the merits in the course of Mr. Goodwin's direct appeal, and no court ruled on their merits.

8. I attempted to argue, at trial, during post-trial motions, and on direct appeal, that Texas law, rather than North Dakota law, applied to Mr. Goodwin's intended conduct in Texas.

a. I did not omit arguments to that extent based on the First Amendment or *Bigelow v. Virginia*, 421 U.S. 809 (1975), for any strategic purpose, because I did not know about or consider them.

b. Raising arguments under the First Amendment and *Bigelow* would have bolstered my overall strategy of having the court instruct the jury exclusively as to Texas law, rather than North Dakota law.

c. Mr. Goodwin's case was not bolstered or advanced in any way by my failure to raise arguments under the First Amendment or *Bigelow*.

9. Based on my knowledge and experience as First Assistant Federal Public Defender for the District of North Dakota, a reasonable attorney would have recognized that the solicitations and offer for which Mr. Goodwin was convicted (insofar as that conviction was affirmed by the U.S. Court of Appeals for the Eighth Circuit) were protected by the First Amendment, as interpreted in cases such as *Bigelow*, and that the U.S. Constitution bars the State of North Dakota from attempting to apply its laws to such solicitations and offer, and asserted those arguments.

10. No strategic or constitutionally permissible basis exists for defense counsel to decline to raise an issue or argument under binding U.S. Supreme Court authority that a defendant's conduct is constitutionally protected, or that a law cannot apply to a defendant's conduct.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Dated January 12, 2015

/s/ William D. Schmidt, Esq.
William D. Schmidt, Esq.
First Assistant Federal Public
Defender for the District of North
Dakota

APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-1669

Rodney Goodwin

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:15-cv-00004-DLH)

ORDER

Having considered the briefs and oral arguments, the court requests supplemental briefing on the effect of Texas Penal Code § 43.25(b) on this case. The appellant's brief is due May 8, 2017, and the appellee's brief is due May 22, 2017. The appellant may file a reply brief by May 30, 2017. The opening briefs may not exceed 5,200 words, and the reply brief may not exceed 2,600 words.

April 20, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G

No. 16-1669

United States Court of Appeals
for the Eighth Circuit

Rodney Goodwin,

Appellant,

v.

United States of America,

Appellee.

**DECLARATION OF FORMER TEXAS
STATE REPRESENTATIVE SUE SCHECHTER**

I, Sue Schechter, hereby declare as follows:

1. I am at least 18 years old and of sound mind.
2. The statements contained in this declaration are true and correct to the best of my personal knowledge. These statements are based on my personal knowledge, except where otherwise indicated. If called upon to testify in this matter, I would attest to the facts contained within this declaration.
3. I am submitting this declaration at the request of Michael T. Morley, counsel for Appellant Rodney Goodwin, who first contacted me over the Internet several weeks ago via LinkedIn.
4. I do not have any prior personal or professional relationship with either Rodney Goodwin or any of the attorneys in this case. I have not been compensated for providing this declaration.

5. I received my BBA degree in Marketing from the University of North Texas, and my JD from the South Texas College of Law in 1981.

6. I am a licensed inactive member in good standing of the Texas State Bar.

7. I worked as an associate at the law firm Martin & Sperry from 1982 to 1984. I then worked as in-house counsel at CIGNA Insurance Co. from 1984 to 1989.

8. I served as a Representative in the Texas State Legislature from January 1991 through January 1995. I represented District 134, which included parts of the City of Houston.

9. After my time in the state legislature, I served as the Executive Director of the Harris County Democratic Party from June 1996 through May 1998. I then served as Chair of the Harris County Democratic Party from May 1998 through January 2003. In 2007-08, I was campaign manager for the Rick Noriega for U.S. Senate campaign.

10. While serving in the Texas State Legislature, I introduced a bill, H.B. 549, to amend Tex. Pen. Code § 43.251, to increase the age for engaging in topless or nude dancing in commercial establishments from 17 to 21. At the time, Houston suffered a major problem from bars hiring young girls to dance topless. I, and many of my constituents, thought it was improper to allow girls to dance topless or naked in establishments in which they were too young to serve alcohol under state law. My bill did not become law. Copy of bill as passed by the House attached.

11. In 1993, while I was still serving in the Texas State Legislature, the Texas House considered S.B. 1067, a bill to make major changes throughout the Texas Penal Code.

12. As introduced in the House, the bill did not make any changes to the age-related provisions of Tex. Pen. Code § 43.25(b). The bill presented an ideal opportunity, however, to incorporate a variation of my previous legislation to increase the age for topless dancing.

13. While S.B. 1067 was pending on the floor of the House, I drafted, sponsored, and introduced Amendment No. 35. I was the amendment's sole sponsor and movant.

14. I drafted and intended Amendment No. 35, and understood it was my previous bill to increase the legal age for topless dancing. I drafted and intended the Amendment, and it was understood, exclusively to increase from 17 to 18 the legal age for engaging in sexual-related performances, exhibitions, recordings, and pornography, as related to topless dancing.

15. When I introduced Amendment No. 35, I emphasized that it was intended to incorporate into S.B. 1067 the topless dancing bill I had previously introduced.

16. Tex. Pen. Code § 43.25(b) is entitled "Sexual Performance by a Child." I drafted and intended the provisions of Amendment No. 35 relating to Tex. Pen. Code § 43.25(b) to relate solely to the age of consent for engaging in a "sexual performance."

17. Throughout all discussions of my amendment with my colleagues, I explained that its sole function was to increase the legal age for engaging in topless dancing, sexual performances, and pornography. I never stated that the amendment either increased the age of consent for sexual relations, or increased the age of people who could be legally induced to engage in private, voluntary, non-commercial sexual relations.

18. Amendment No. 35 had absolutely nothing to do with private, voluntary, non-commercial sexual relations.

a. It did not change the age of consent for private, voluntary, non-commercial sexual relations under Texas law.

b. It did not change the age of persons who could be legally induced to engage in sexual conduct under Texas law.

c. It did not make it illegal to engage in private, voluntary, non-commercial sexual conduct with a 17-year-old.

d. It did not make it illegal for a person to induce a 17-year-old to engage in private, voluntary, non-commercial sexual conduct.

e. It did not make it illegal for a person to induce or solicit sexual conduct that is legal under Texas' laws concerning statutory rape and sexual assault, Tex. Pen. Code § 22.011; aggravated sexual assault, Tex. Pen. Code § 22.021; or indecency with a child, Tex. Pen. Code § 22.11.

The law was not drafted, intended, or understood by me as having any of these effects. So far as I am aware, as the sole sponsor of Amendment. No. 35 who interacted with many colleagues about this amendment, no legislator ever recognized, claimed, stated, warned, desired, intended, or understood that the amendment would have any of these effects.

19. I would not have proposed and, in my professional opinion based on my experience as a legislator at the time, the legislature would never have enacted, an amendment to make it illegal to solicit or induce a 17-year-old to engage in private, voluntary, non-commercial, consensual sexual conduct that is permissible under Texas' laws concerning statutory rape and sexual assault, Tex. Pen. Code § 22.011; aggravated sexual assault, Tex. Pen. Code § 22.021; or indecency with a child, Tex. Pen. Code § 22.11.

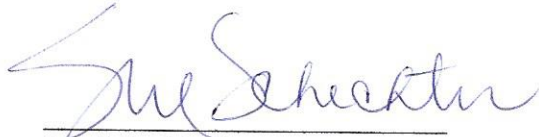
20. Mr. Morley has brought to my attention the opinion of the Texas Court of Appeals in *Dornbusch v. State*, 156 S.W.3d 859 (Tex. App. 2005), along with its discussions of the purported purpose and legislative history of my 1993 amendment to Tex. Pen. Code § 43.25(b). I was previously unaware of that litigation and ruling. The *Dornbusch* Court's

explanation of both the legislative intent and purpose of my 1993 amendment, as well as § 43.25(b)'s relationship with the remainder of the Texas Penal Code, is unequivocally incorrect.

21. To the extent Amendment No. 35 to S.B. 1067 has caused Tex. Pen. Code § 43.25(b) to make it illegal for a person to induce a 17-year-old to engage in sexual conduct outside the context of a sexual performance, any such amendment was a wholly inadvertent, unintended, and unrecognized ^{Texas Legislative Council's} scrivener's error that should not be given legal effect. Properly ^{SS} drafted and understood, Amendment No. 35 related solely to the provisions of § 43.25(b) governing sexual performances, not sexual conduct. But for ^{Texas Legislative Council's} ~~my~~ inadvertent scrivener's error in ^{SS} drafting the Amendment on the floor of the House, its scope would have been more clearly limited. Had such an error been brought to my attention during my time as a legislator, I would have introduced an amendment to correct the mistake.

Further affiant sayeth naught.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 2017.


Sue Schechter

A BILL TO BE ENTITLED

AN ACT

relating to the offense of employment harmful to a person younger than 21 years of age.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 43.251, Penal Code, is amended to read as follows:

Sec. 43.251. EMPLOYMENT HARMFUL TO PERSONS YOUNGER THAN 21
[Minors]. (a) In this section:

(1) [~~"Child"~~] ~~means a person younger than 17 years of age.~~

(2) "Massage" has the meaning assigned to the term "massage therapy" by
Section 1, Chapter 752, Acts of the 69th Legislature, Regular Session, 1985 (Article 4512k,
Vernon's Texas Civil Statutes) [~~means the rubbing, kneading, tapping, compression, vibration,~~
~~application of friction, or percussion of the human body or parts of it by hand or with an~~
~~instrument or apparatus].~~

(2) [(3)] "Massage establishment" has the meaning assigned by Section 1,
Chapter 752, Acts of the 69th Legislature, Regular Session, 1985 (Article 4512k, Vernon's Texas
Civil Statutes) [~~means a commercial activity the primary business of which is the rendering of~~
~~massage. The term does not include the businesses of licensed physical therapists, licensed~~
~~athletic trainers, licensed cosmetologists, or licensed barbers engaged in performing functions~~
~~authorized by the license held].~~

(3) [(4)] "Nude" means a person [~~child~~] who is:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than
fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the
person [~~child~~] is female, or any portion of the genitals or buttocks.

(4) [(5)] "Sexually oriented commercial activity" means a massage establishment,
nude studio, modeling studio, love parlor, or other similar commercial enterprise the primary

business of which is the offering of a service that is intended to provide sexual stimulation or sexual gratification to the customer.

(5) [(6)] "Topless" means a female person [~~child~~] clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of her breasts below the top of the areola.

(b) A person commits an offense if the person employs, authorizes, or induces a person younger than 21 years of age [~~child~~] to work:

(1) in a sexually oriented commercial activity; or

(2) in any place of business permitting, requesting, or requiring a person [~~child~~] to work nude or topless.

(c) A person commits an offense if the person:

(1) as an owner of the activity or place of business, authorizes or employs another to work in a sexually oriented commercial activity or in any place of business permitting, requesting, or requiring a person to work nude or topless; and

(2) does not have physically present at the premises while the other person is working a valid Texas driver's license or an identification card issued by the Department of Public Safety that contains a physical description consistent with the appearance of the person who is working and that establishes that the person who is working is legally able to be employed by the establishment as described by this section.

(d) An offense under Subsection (b) is a Class A misdemeanor.

(e) An offense under Subsection (c) is a Class C misdemeanor.

~~[(e) An offense under this section is a Class A misdemeanor.]~~

SECTION 2. (a) The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense is committed before the effective date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense is committed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 1993.

SECTION 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

APPENDIX H

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-1669

Rodney Goodwin

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:15-cv-00004-DLH)

ORDER

The motion to supplement the record is denied.

June 19, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans