

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

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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ARGUMENT

The Government's opposition is based entirely on the startlingly incorrect premise that the Eighth Circuit considered and adjudicated both Petitioner's constitutional challenge to Tex. Pen. Code § 43.25(b), which that court invoked *sua sponte* for the first time after years of litigation, as well as his facial challenge to N.D. Cent. Code § 29-03-01.1(3), for which the district court had issued a certificate of appealability which was never modified or revoked. Even a cursory glance at the Eighth Circuit opinion flatly disproves both assertions.

The Government does not dispute the certworthiness of any of the questions presented. In *Day v. McDonough*, 547 U.S. 198, 210 (2005), this Court held that a court may consider an issue *sua sponte* in a habeas or § 2255 case only if the petitioner "is not significantly prejudiced." The Government does not contest that an appellate court's refusal to consider a substantial, timely raised, fully briefed constitutional challenge to a statute the court *sua sponte* invokes for the first time on appeal as its sole basis for rejecting a § 2255 motion prejudices the petitioner in violation of this principle. Nor does the Government challenge the notion that such refusal raises questions of fundamental fairness, due process, and even potential violation of the Suspension Clause. See *Harris v. Nelson*, 394 U.S. 286, 292 (1969) (discussing the "duty" of courts to "adjudicat[e]" petitions for writs of habeas corpus).

Furthermore, the Government does not dispute that a circuit split exists over whether a court is required to adjudicate all issues identified in a certificate of appealability. Compare *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999)

(holding that an appellate court “must review the merits of each claim” set forth in a certificate of appealability (citing *Nowakowski v. Maroney*, 386 U.S. 542, 542 (1967)), *with* Pet. 1a-6a (failing to adjudicate facial challenge set forth in certificate of appealability). At least two circuits have already recognized the split of authority over whether a circuit court is required to adjudicate all issues raised in a certificate of appealability. *See Phelps v. Alameda*, 366 F.3d 722, 726-27 (9th Cir. 2004); *Buie v. McAdory*, 322 F.3d 980, 981-82 (7th Cir. 2003). None has adopted the Eighth Circuit’s approach of simply refusing to consider such an issue without either amending or vacating the certificate.

Finally, earlier this week, this Court reiterated the importance of the central constitutional issue in this case: whether a state may prohibit a person from soliciting conduct that is entirely legal in the place where it is to occur. *Murphy v. NCAA*, No. 16-476 at 29-30 (May 14, 2018) (slip op.) (discussing the First Amendment limitations on a law that “would forbid the advertising of an activity that is legal under both federal and state law” (citing *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 176 (1999)); *see also Bigelow v. Virginia*, 421 U.S. 809 (1975).

Petitioner has presented substantial questions of law worthy of certiorari that affect the rights of both speakers and § 2255 movants throughout the nation. The lower court’s ruling is contrary to this Court’s precedents, and a recognized circuit split exists concerning an appellate court’s duty to adjudicate issues set forth

in certificates of appealability. The Government’s argument in opposition to certiorari is specious and contradicted by the record.¹

I. THE EIGHTH CIRCUIT DID NOT ADJUDICATE PETITIONER’S CONSTITUTIONAL CHALLENGE TO TEX. PEN. CODE § 43.25(b), WHICH THAT COURT INVOKED *SUA SPONTE* AS ITS SOLE BASIS FOR REJECTING HIS § 2255 MOTION.

The Government contends “[t]he court of appeals considered and rejected Petitioner’s First Amendment challenge to Section 43.25(b).” Opp. at 17; *see also id.* at 18-19 (“Petitioner’s contention that the court of appeals failed to address his constitutional challenge to Section 43.25(b) is therefore incorrect.”). To the contrary, the Eighth Circuit’s opinion clearly demonstrates the court failed to consider Petitioner’s substantial, timely raised, fully briefed constitutional challenge to that statute.

Petitioner’s § 2255 motion argued his conviction for violating the federal Mann Act, 18 U.S.C. § 2423(a), (e), must be vacated because it is predicated upon his purported violation of North Dakota’s statutory rape law, N.D. Cent. Code § 12.1-20-05. *See* Motion to Vacate Under 28 U.S.C. 2255, D.E. #83, at 5 (Jan. 12,

¹ The Government also misstates the record in another important respect. The Petition for Certiorari demonstrated that “the Government conceded that it would have been legal under Texas law for Goodwin and J.B. to have sexual relations in Texas.” Pet. at 9, 14. In its Opposition, the Government rejects this assertion, without explanation, as “incorrect.” Opp. at 19. To the contrary, at trial, the Government expressly agreed with the judge’s assertion “that the age of consent in Texas is 17.” Trial Trans. Vol. III, taken Feb. 9, 2012, D.E. #70, at 412 (July 10, 2012). On appeal, the Government’s brief again conceded “it would have been legal” for Petitioner and 17-year-old J.B. “to engage in sexual activity . . . in Texas.” Appellee’s Brief at 18 (June 6, 2016). And at oral argument, the Government reiterated yet again that the contemplated sexual activity between Petitioner and J.B. 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 further declared, “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).

2015). That law only applied to Goodwin as a result of North Dakota's extraterritorial jurisdiction statute, N.D. Cent. Code § 29-03-01.1(3), which Goodwin argued violated the First Amendment, both facially and as applied to him. He argued that, under *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1976), and its progeny, a state such as North Dakota cannot punish him for inviting and offering to help one of its residents travel to Texas to engage in conduct that would have been fully legal under Texas law.

The U.S. Court of Appeals for the Eighth Circuit rejected Goodwin's as-applied argument. It held the First Amendment did not protect Goodwin's solicitations because Tex. Pen. Code § 43.25(b) "applies to Goodwin," and his "conduct" was "within § 43.25(b)." Pet. App. A at 6a. Thus, the court concluded its terse analysis with the simple assertion that Goodwin's solicitation violated § 43.25(b), without even mentioning, much less considering, his constitutional objections to that statute.

Tex. Pen. Code § 43.25(b) does not prohibit sexual conduct with people under 18. To the contrary, as the Government itself admits, it prohibits a person only from "employ[ing], authoriz[ing], or induc[ing] a child younger than 18 years old to engage in sexual conduct or a sexual performance." Tex. Pen. Code § 43.25(b). *See* Opp. at 13 (reiterating that § 43.25(b) "prohibits *inducing* a minor to engage in 'sexual contact, actual or simulated sexual intercourse'"). The Government explains that *Dornbusch v. State*, 156 S.W.3d 859, 866 (Tex. Ct. App. 2005), which emphasized § 43.25(b)'s focus on "inducement," defined the term to include verbal persuasion or influence. Opp. at 13.

While § 43.25(b) prohibits a person from attempting to *persuade* (or hire) anyone under 18 years old to have sex, numerous other provisions of Texas law set the age of consent for actually *engaging* in sexual relations at 17. *See* Tex. Pen. Code § 21.11(a)(1) (“A person commits an offense if, with a child *younger than 17* years of age . . . the person[] engages in sexual conduct with the child” (emphasis added)); *id.* § 22.011(a)(2), (c)(1) (“A person commits an offense if[] . . . the person intentionally or knowingly[] . . . causes the penetration of the mouth of a child by the sexual organ of the actor ‘Child’ means a person *younger than 17* years of age.” (emphasis added)); *id.* § 22.021(a)(1)(B)(ii), (a)(2)(A)(i), (b)(1) (“A person commits an offense[] if the person[] . . . intentionally or knowingly . . . causes the penetration of the mouth of a child by the sexual organ of the actor [and] causes serious bodily injury. . . . ‘Child’ has the meaning assigned by Section 22.011(c).”).

Texas courts have repeatedly reiterated that 17 is the age of consent for actually engaging in sexual relations under Texas law. *E.g.*, *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.” (emphasis added)). The Texas Court of Appeals itself has recognized, “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 . . . 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.” *Fujisaka*, 472 S.W.3d at 799.

Goodwin argued that § 43.25(b) suffers from the same constitutional infirmity as applied to him as N.D. Cent. Code § 29-03-01.1(3): it subjected a person to criminal liability for using pure speech to solicit or induce conduct—sexual relations in Texas with a 17-year-old—that would have been legal under Texas law. The Eighth Circuit’s repeated insistence that Goodwin’s speech violated § 43.25(b) does nothing to address the constitutional defect with that law which Goodwin raised in both his court-ordered Supplemental Brief (pp. 10-14), and Petition for Panel Rehearing (pp. 5-9). The Court’s refusal to consider Goodwin’s constitutional challenge to § 43.25(b) is particularly improper since the court itself *sua sponte* invoked § 43.25(b) for the first time on appeal, *cf. Day*, 547 U.S. at 210; *Granberry v. Greer*, 481 U.S. 129, 135 (1987) (allowing *sua sponte* consideration of issues in a habeas or § 2255 case only when “the interest of justice is better served” by doing so), after the Government repeatedly conceded for years that Goodwin’s contemplated conduct would have been fully legal under Texas law. *See supra* p. 3 n.1.

The Government also contends that “[t]he First Amendment does not forbid Texas to seek [sic] to prevent adults from pressuring minors to engage in sexual activity by making inducement a crime merely because it chose not to criminalize consensual activity itself.” Opp. at 20. This argument is directly contrary to *Carey*

v. Population Services International, 431 U.S. 678, 700 (1977), in which this Court held a state may not prohibit solicitations “about entirely lawful activity” in order to prevent young people from engaging in sexual relations.

II. THE EIGHTH CIRCUIT DID NOT ADJUDICATE PETITIONER’S FACIAL CHALLENGE TO N.D. CENT CODE § 29-03-01.1(3), EVEN THOUGH THE ISSUE WAS INCLUDED IN HIS CERTIFICATE OF APPEALABILITY

The Government also contends that “the court of appeals directly addressed the substance of petitioner’s facial challenge” to N.D. Cent. Code § 29-03-01.1(3), North Dakota’s extraterritorial jurisdiction law. Opp. at 24. Again, the record flatly belies this assertion. The court of appeals’ entire analysis focused on whether Goodwin’s particular solicitation was protected by the First Amendment, and whether the conduct he specifically solicited would have been legal under Texas law. Pet. App. A at 5a-6a. A facial challenge, however, “does not depend on whether [a speaker’s] own activity is shown to be constitutionally privileged.” *Bigelow*, 421 U.S. at 815-16. Rather, it is based on the fact that a law will have a “substantial number” of unconstitutional applications.

The Eighth Circuit never considered § 29-03-01.1(3)’s applicability to speakers in the approximately three-quarters of states in which the age of consent is 16 or 17. See Pet. at 27-28 & n.6. Nor did it consider the statute’s constitutionally permissible sweep in connection with its overall breadth. In short, despite the fact that the district court had issued a certificate of appealability on the question of § 29-03-01.1(3)’s facial validity, the Eighth Circuit simply refused to

adjudicate the issue—even when Petitioner pointed out the court’s omission in his motion for panel rehearing.

The Government contends that Petitioner’s facial challenge lacks merit because “the First Amendment permits a State to impose criminal penalties on adults who induce or solicit minors to engage in sexual conduct—even if that sexual conduct itself, when consensual, is legal in the State where it occurs.” Opp. at 25. As an initial matter, this sentence is internally inconsistent; if a person is old enough to consent to sexual conduct in a particular jurisdiction, then for purposes of sexual relations, that person is not deemed a minor. Moreover, the Government makes no effort to square this proposition with *Bigelow* and its progeny, which hold that the First Amendment protects a person’s right to solicit conduct that is legal in the jurisdiction where it is to occur. See *Bigelow*, 421 U.S. at 824-25; *Carey*, 431 U.S. at 700; *Greater New Orleans Broad. Ass’n*, 527 U.S. at 194-95; see also *Murphy*, No. 16-476, at 29-30. This principle applies even when the solicitations are targeted to other states’ residents, *Bigelow*, 421 U.S. at 824-25; might legitimate sexual activity among young people, *Carey*, 431 U.S. at 700; and do not involve constitutionally protected activity, *Greater New Orleans Broad. Ass’n*, 527 U.S. at 194-95.² Thus, the Eighth Circuit failed to address one of the main issues raised in Petitioner’s certificate of appealability.

² Under *Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003), however, a person old enough to consent to sexual activity may have a fundamental constitutional right to engage in voluntary, non-commercial intercourse.

The Eight Circuit’s refusal to consider Petitioner’s facial challenge exacerbates a circuit split over whether 28 U.S.C. § 2253(c) requires courts of appeals to adjudicate issues set forth in certificates of appealability in § 2255 appeals. The Tenth Circuit has repeatedly held that it is obligated to do so. *See LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999); *see also Rowe v. Lemaster*, 225 F.3d 1173, 1174 n.2 (10th Cir. 2000). That court rested its conclusion on this Court’s holdings in *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967), and *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), concerning certificates of probable cause, the predecessors to certificates of appealability. *See LaFevers*, 182 F.3d at 711.

Other circuits, in contrast, have rejected this notion, ruling that an appellate court may amend or vacate a certificate of appealability in order to avoid adjudicating certain issues raised in it. *See, e.g., Phelps v. Alameda*, 366 F.3d 722, 728 (9th Cir. 2004). The Eighth Circuit’s approach in this case deepens the split even further by offering yet a third alternative: simply refusing to adjudicate a substantial constitutional issue contained within a certificate of appealability without amending or vacating the certificate. Several courts have recognized the circuit split on this issue. *See Phelps*, 366 F.3d at 726-27; *Buie v. McAdory*, 322 F.3d 980, 981-82 (7th Cir. 2003). Because this case deals with the appellate rights of § 2255 petitioners throughout the nation and implicates their ability to seek habeas-type relief, this Court should grant certiorari to resolve the split.

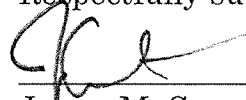
CONCLUSION

By refusing to adjudicate Petitioner’s substantial, timely raised, fully briefed constitutional challenges—including his challenge to Tex. Pen. Code § 43.25(b),

which the Eighth Circuit invoked *sua sponte*, as well as his facial challenge to N.D. Cent. Code § 29-03-01.1(3), the Eighth Circuit denied him his day in court, and effectively prevented him from obtaining habeas-type relief, raising serious questions under the Suspension Clause. U.S. Const. art. I, § 9, cl. 2.

This Court should grant the 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 Petitioner'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).

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