

App. 1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-31244

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

GARY JEFFERSON BYRD

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana

USDC No. 6:16-CV-1372

USDC No. 6:92-CR-60025-1

(Filed Sep. 26, 2017)

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.
PER CURIAM*

In 1992 Gary Jefferson Byrd, federal prisoner # 07983-035, was convicted of receiving child pornography through the mail and sentenced to serve 10 years in prison. The district court concluded that the most recent action he filed to challenge this conviction was an unauthorized successive 28 U.S.C. § 2255 motion and dismissed it on this basis. Byrd now moves this court for a certificate of appealability (COA), arguing that this action is a writ of coram nobis and that

* Pursuant to 5th Cir. R. 47.5, this opinion is not published and is not precedent except under limited circumstances. See, 5th Cir. R. 47.5.4.

App. 2

he is entitled to relief on his claims concerning his innocence.

Because Byrd is no longer in custody for the 1992 conviction, he cannot challenge it via a § 2255 motion. *See Pack v. Yusuff*, 218 F.3d 448, 454 N. 5 (5th Cir. 2000). He can, however, bring a writ of coram nobis to challenger [sic] this conviction. *See United States v. Dyer*, 136 F.3d 417, 422 (5th Cir. 1998). Because this action is best classed as sounding in coram nobis, not § 2255, Byrd's COA motion is DENIED AS UNNECESSARY.

The writ of coram nobis may be used to correct only fundamental errors that result in a complete miscarriage of justice. *Dyer*, 136 F.3d at 430. Because Byrd's claims could have been presented sooner, he has not met this standard. *See id.*

AFFIRMED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL NO.
VERSUS	6:92-60025
GARY JEFFERSON BYRD	CIVIL NO. 6:16-1372
	JUDGE DRELL
	MAGISTRATE
	JUDGE HANNA

JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge filed previously herein, and after an independent review of the entire record and the objections filed herein, and concurring with the Magistrate Judge's findings under the applicable law,

IT IS ORDERED that the motion to vacate filed pursuant to 28 U.S.C. §2255 by Gary Jefferson Byrd [rec. doc. 216] is **DISMISSED WITHOUT PREJUDICE** because the motion constitutes a second and successive motion within the meaning of 28 U.S.C. § 2255(h) and §2244(b)(2) filed without prior authorization of the United States Fifth Circuit Court of Appeals.

App. 4

Thus done and signed this 3RD day of November,
2016 at Alexandria, Louisiana.

/s/ Dee D. Drell

DEE D. DRELL CHIEF JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL NO.
VERSUS	6:92-60025
GARY JEFFERSON BYRD	CIVIL NO. 6:16-1372
	JUDGE DRELL
	MAGISTRATE
	JUDGE HANNA

REPORT AND RECOMMENDATION

Before the court is the Motion to Correct Illegal Sentence filed by *pro se* petitioner, Gary Jefferson Byrd, pursuant to 28 U.S.C. § 2255 on September 28, 2016. [rec. doc. 216]. Petitioner attacks his 10 year sentence imposed by this Court on June 18, 1993, following his December 14, 1992 conviction for receiving through the mail visual depictions of persons under the age of eighteen engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). Petitioner has served this sentence and was discharged. He is currently serving concurrent sentences of 168 and 180 months imprisonment for possession of child pornography and receiving child pornography in violation of 18 U.S.C. §2252A(a)(5)(B) and § 2252A(a)(2)(A).

PROCEDURAL HISTORY

On December 14, 1992, a jury found petitioner guilty of receiving through the mail visual depictions of persons under the age of eighteen engaging in

App. 6

sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). [rec. doc. 131]. On June 18, 1993, Byrd was sentenced to ten years imprisonment. [rec. docs. 151 and 152]. Petitioner's conviction and sentence were affirmed on direct appeal. [rec. doc. 168, *United States v. Byrd*, 31 F.3d 1329 (5th Cir. 1994)]. On April 3, 1995, the United States Supreme Court denied certiorari. *Byrd v. United States*, 514 U.S. 1052, 115 S.Ct. 1432 (1995).

On April 22, 1997, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [rec. doc. 173]. That Motion was ultimately dismissed on September 1, 1998 without prejudice for failure to prosecute. [rec. doc. 181].

On March 8, 1999, petitioner filed another a [sic] motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [rec. doc. 182, 183 and 186]. On October 25, 1999, the Motion was denied and dismissed with prejudice as time-barred by the one-year limitation period set forth in 28 U.S.C. § 2255. [rec. doc. 203]. Petitioner's request for a certificate of appealability was denied by the United States Fifth Circuit Court of Appeals on July 6, 2000. [rec. doc. 209, *United States v. Byrd*, No. 99-31425 (5th Cir. 1999) (unpublished)].

On September 28, 2016, petitioner filed the instant motion asserting that he is innocent of the crime of conviction.

LAW AND ANALYSIS

For the reasons which follow, the instant motion is “second or successive” within the meaning of 28 U.S.C. § 2255(h) and § 2244(b)(2), filed without proper authorization from the United States Fifth Circuit Court of Appeals.

As set forth above, this court’s records demonstrate that petitioner filed at least one previous motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, attacking the same conviction and sentence that is the subject of this motion. That § 2255 motion was denied and dismissed with prejudice as barred by the one year limitation period set forth in § 2255. Although a dismissal based upon the statute of limitation does not include an examination of the merits of the underlying substantive claims presented in the petition, such a dismissal is considered an adjudication of the merits for purposes of determining whether a subsequent petition is successive under the AEDPA.¹ Therefore, this is Byrd’s second, and possibly third, § 2255 motion filed in this court in which petitioner attacks the same conviction and sentence that were the subject of his previous motion.²

AEDPA uses the phrase “second or successive” as a “term of art.” *In re Lampton*, 667 F.3d 585, 587-588

¹ See *In re Flowers*, 595 F.3d 204, 205 (5th Cir. 2009) (per curiam); *Shelvin v. Cain*, 2015 WL 5838870, *2 and fn. 2 (W.D. La. 2015) (and cases cited therein); see also *Villanueva v. United States*, 346 F.3d 55, 61 (2nd Cir.2003),

² See fn. 2, *supra*.

App. 8

(5th Cir. 2012). The phrase appears in both §2244 and § 2255, and it carries the same meaning in both provisions. *Id.* at 588. However, AEDPA does not define what constitutes a “second or successive” motion. Decisions of the United States Supreme Court and Fifth Circuit Court of Appeals provide guidance in determining when a § 2255 motion should be considered second or successive for purposes of § 2255(h) and § 2244(b)(2).

The Supreme Court has found that the phrase “second or successive” does not encompass all “applications filed second or successively in time.” *Lampton*, 667 F.3d at 588 *citing Magwood v. Patterson*, 561 U.S. 320, 130 S.Ct. 2788, 2796 (2010). Rather, it “must be interpreted with respect to the judgment challenged.” *Id. citing Magwood*, 130 S.Ct. at 2797. AEDPA’s bar on second or successive petitions therefore applies to a later-in-time petition that challenges the same judgment imposing the same sentence as an earlier-in-time petition. *Id. citing Burton v. Stewart*, 549 U.S. 147, 156, 127 S.Ct. 793 (2007). The Supreme Court has further held that the phrase “second or successive” applies to an entire application, not individual claims in an application. *Magwood*, 130 S.Ct. at 2798 (“AEDPA uses the phrase ‘second or successive’ to modify ‘application.’”).

The Fifth Circuit has found that “an application filed after a previous application was fully adjudicated on the merits is a second or successive application within the meaning of 28 U.S.C. § 2244(b), even if it contains claims never before raised.” *Graham v. Johnson*, 168 F.3d 762, 774 fn. 7 (5th Cir. 1999) *citing Felker*

App. 9

v. Turpin, 518 U.S. 651, 655-58, 662-63, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). Thus, the Fifth Circuit has suggested a focus of the inquiry is whether in the prior petition, the petitioner received an adjudication on the merits of his claims.

The Fifth Circuit has also found that a later petition is successive when it: "(1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ" *In Re Cain*, 137 F.3d 234, 235 (5th Cir. 1998).

Under the above standards, the instant Motion is "second or successive." Byrd's motion seeks to challenge the same judgment of conviction imposing the same sentence that was the subject of his prior § 2255 motion. Moreover, petitioner's prior § 2255 motion was denied and dismissed on the merits.³ Finally, petitioner's claim was or could have been raised in his earlier motion.

Before this motion may be considered by this court, petitioner is required to obtain authorization to file this second or successive § 2255 motion from the Fifth Circuit in accordance with 28 U.S.C. § 2244(b)(3)(A) which provides in part, [b]efore a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C.

³ See fn. 2, *supra*.

App. 10

§§ 2244(a) and 2255(h). The record does not show that petitioner has received such authorization. Until such time as petitioner obtains said authorization, this court is without jurisdiction to proceed. *Hooker v. Sivley*, 187 F.3d 680, 682 (5th Cir. 1999); *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000); *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003).

This court is not required to transfer this second and successive § 2255 motion to the Fifth Circuit for a determination whether petitioner should be allowed to proceed. Pursuant to *In Re Epps*, 127 F.3d 364 (5th Cir. 1997), some district courts have taken this route; however, transfer is not mandatory. Rather, the opinion merely adopts a procedure to be used when a district court determines that transfer is appropriate. *See Id.*

In the instant case, transfer of this case to the Fifth Circuit is not warranted. Petitioner's conviction became final over 20 years ago in April 1995, when the United States Supreme Court denied certiorari. In this Motion, petitioner relies on no new facts which could not have been discovered with the exercise of due diligence, there has been no governmental imposed unconstitutional impediment to the filing of a § 2255 motion and petitioner's claim does not rely on any newly recognized constitutional right made retroactive to eases on collateral review by the Supreme Court. Thus, it appears that the Motion is statutorily barred by the one-year statute of limitations for the filing § 2255 motions. *See 28 U.S.C. §2255(f).*

App. 11

Moreover, it does not appear that petitioner could satisfy his burden for the Motion to be considered timely by application of equitable tolling; it does not appear that petitioner “has been pursuing his rights diligently” or “that some extraordinary circumstance stood in his way and prevented timely filing.” *See Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 1085 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005); *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002); *see also Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000) (the burden of proof concerning equitable tolling is on the petitioner).

IT IS THEREFORE RECOMMENDED that the instant second and successive motion to vacate filed pursuant to 28 U.S.C. § 2255 by Gary Jefferson Byrd be **DISMISSED WITHOUT PREJUDICE** because the instant petition constitutes a second and successive *habeas* petition within the meaning of 28 U.S.C. § 2255(h) and §2244(b)(2) filed without prior authorization of the United States Fifth Circuit Court of Appeals.

Under the provisions of 28 U.S.C. Section 636(b)(1)(C) and Rule 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party’s objections within fourteen (14) days after being served with a copy of any

App. 12

objections or response to the District Judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. See *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. **Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on whether a certificate of appealability should issue. See 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.**

App. 13

Signed at Lafayette, Louisiana this 3rd day of October, 2016.

/s/ Patrick J. Hanna

PATRICK J. HANNA
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-31244

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
GARY JEFFERSON BYRD,
Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Nov. 30, 2017)

(Opinion 09/26/2017, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

App. 15

- () The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
UNITED STATES
CIRCUIT JUDGE

§ 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, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

JURY TRIAL/DAY FOUR

(Filed May 3, 1993)

Transcript of Proceedings
before the Honorable Richard T. Haik, Sr.,
United States District Judge, and a jury.

APPEARANCES:

On Behalf of the Government:

United States Attorney's Office
BY: JOHN L. WALKER
600 Jefferson Street, Suite 1000
Lafayette, Louisiana 70501

On Behalf of the Defendant:

BY: D. RANDY WAGLEY
Attorney at Law
Post Office Box 191
Opelousas, LA 70571-0191

* * *

[99] o'clock. Does that give everybody enough time to eat? We want to crank up at one o'clock. Come right back in here.

Mr. Bienvenu from St. Martin Parish will have some coffee. They have Cokes available, I think, to you, and please let me know if he is mistreating y'all back there. I'll take care of him.

(JURORS ESCORTED FROM THE COURTROOM.)

THE COURT: Do you have witnesses lined up for this afternoon?

MR. WAGLEY: There should be some here after lunch, Your Honor.

Your Honor, at this time, based on the Court's ruling previous, the defense would like to make a proffer of Ms. Anika's testimony based on the fact that she would have testified that Dr. Byrd – Dr. Byrd's informing her that he had ordered the tapes would go to show his belief that there was a sting, because if he had ordered them for the purpose of consuming them, it's – he wouldn't – he wouldn't be telling people about that.

THE COURT: I will allow you to put a brief proffer on.

MR. WAGLEY: Also, Your Honor, that, as Dr. Byrd has testified, he believed he had an appointment with Mr. Schearer and Ms. Anika is also aware of that belief.

THE COURT: I'll let you put that on proffer.

[100] MR. WAGLEY: Thank you.

THE COURT: Come on up, ma'am.

(ANIKA RESUMES THE WITNESS STAND.)

THE COURT: Okay.

PROFFER EXAMINATION

BY MR. WAGLEY:

Q. Ms. Anika, prior to July 29th, 1987, were you aware of Dr. Byrd ordering pornographic tapes in the mail?

A. No.

Q. Were you aware of his attempt to set a trap for DHHR?

A. I was aware that he felt DHHR - well, that DHHR was trying to hurt him and to do bad things to him in an essential way. And, I mean, I could be more specific if you would like, but, at any rate, that he was trying to catch them so that he could prove that this was happening so people would listen to him about what was going on. They were trying to break his adoption. And, you know, I don't know if I said this earlier, But, I mean, he went everywhere trying to get help on solving that problem.

Q. Okay. The reason you spent the night at Dr. Byrd's home July 28th, 1987, what was that?

A. Because he was going on the next day to New Orleans to see the Schearer from the postal inspectors and the FBI.

Q. Okay. Were you of the impression that he had appointments at both of those places?

[101] A. Yes.

App. 20

Q. Did he believe that he had appointments in both of those places?

A. Well, yes. I mean, it was a planned trip. He had planned – arranged for me to come and stay in his home to watch the boys. He had arranged for someone to watch the boys on the next day. I mean, you know, he had – it was a trip that he had planned especially for those two things.

Q. He didn't happen to share with you why he thought he had an appointment?

A. I don't know. He may have told me that he called and made an appointment, but I just don't know.

MR. WAGLEY: That's all I have, Your Honor.

THE COURT: Any cross on the proffer?

MR. WALKER: No, Your Honor.

THE COURT: Okay. You may step down, ma'am. Thank you very much.

Can we release this lady from her subpoena?

MR. WAGLEY: Yes, Your Honor.

THE COURT: Government, you want to release her from her subpoena?

MR. WALKER: Yes, Your Honor, I ask that she be released and she can go home.

THE COURT: Thank you, ma'am.

(WITNESS EXCUSED)

* * *

[123] This is going to be a proffer?

MR. WAGLEY: Yes, Your Honor, in connection with the Court's ruling.

THE COURT: Sure.

PROFFER EXAMINATION

BY MR. WAGLEY:

Q. Ms. Rebecca, were you aware at some point in time that Dr. Byrd perceived he was having problems with DHHR?

A. Yes. That perceived me as having problems or him?

Q. That he was having.

A. Yes.

Q. Okay. And do you know some of the circumstances surrounding that?

A. Yes, sir. I – I was – I was aware of a lot of concerns that Gary had about state agencies that were trying to get him in some way or were after him in some way.

Q. Do you have –

THE COURT: I would have allowed that – those questions.

MR. WAGLEY: I understand. There are some other instances.

THE COURT: Okay.

BY MR. WAGLEY:

Q. Prior to July 20th, 1987, were you aware of any action Dr. Byrd took in an attempt to catch DHHR in wrongdoing?

[124] A. Yes, sir. He was receiving information in the mail with things that had pornography or requests for pornography. I didn't see specific language. I have read the paper and I saw a name or something, so I want to tell you that I saw a name but I didn't specifically see a name. But, I was aware that he was being solicited to order pornography.

Q. Did you have any information as to whether or not he made orders?

A. Yes, sir. He told me he was.

Q. And for what purpose?

A. That he was – That he was doing, you know, this manipulation thing to catch them trying to catch him and he was going to use it to show that DHHR was – or some agency was after him.

Q. And was this prior to July 29th, 1987?

A. Yes, sir.

MR. WAGLEY: That's all the questions -

A. We discussed it several times.

MR. WAGLEY: That's all the questions I have.

THE COURT: Mr. Walker?

MR. WALKER: I have no questions of the witness, Your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Am I free to go?

THE COURT: Mr. Walker, do you have any objection to

* * *

[140] CROSS EXAMINATION

BY MR. WALKER:

Q. Excuse me. I'll get that. I'm Luke Walker, by the way. I am an Assistant U.S. Attorney. Hi.

A. Hi.

Q. As I understand it, you trusted Dr. Byrd to resolve the matter and then, if there was a problem, he'd get back to you; is that right?

A. Um-hum.

Q. How long have you known Dr. Byrd?

A. Since '63.

Q. Have you had a close relationship then?

A. For a number of years we were in the military and away from the Houston area and not in the area and didn't have contact, and resumed contact in the fall or before, I am not sure. My husband had placed some calls prior to that.

Q. Okay, thank you.

MR. WAGLEY: Your Honor, I have no further questions right now. We would also like to make that proffer, our Honor, at the proper time.

THE COURT: All right, we are going to remove the jury right now. Don't go anywhere. Just go right in there and don't stay long.

(JURORS ESCORTED FROM THE COURTROOM.)

THE COURT: Okay, you may have a seat.

[141] MR. WAGLEY: Your Honor, in connection with the Court's previous ruling, the defense would like to make a proffer.

THE COURT: Yes, sir.

PROFFERED EXAMINATION

BY MR. WAGLEY:

Q. Ms. Louise, you testified that you were aware that Dr. Byrd and as well as yourself, you testified, you thought he was under attack by DHHR?

A. (Witness indicates yes.)

Q. I believe you said he showed you some things he got in the mail?

A. (Witness indicates yes.)

Q. Do you know if he took any other action after that?

A. He talked about he felt like that they were trying to – they were trying to set him up, and he kept saying he was going to – he didn't know what they were going to do next and he was going to catch them trying to set him up.

Q. Did he say how?

A. And he talked about ordering the tapes.

Q. The tapes, what did you understand the tapes to be?

A. I didn't – They were child pornography tapes or child tapes with. . . .

Q. Did you find this out before July 29th, 1987?

A. Yes. And it was discussed on several occasions.

[142] Q. Does the name James Bishop McIntosh mean anything to you?

A. (Witness indicates no.)

Q. Did Dr. Byrd ever discuss with you refusing any mail at his home?

A. There was – Not with me refusing mail, but – I don't think. I – but he did discuss ordering the tapes.

Q. Okay.

MR. WAGLEY: Thank you. That's all I have.

CROSS-EXAMINATION

BY MR. WALKER:

Q. Did he discuss that with you before or after he ordered the tapes; do you know?

A. He didn't – I don't know when the tapes were ordered. I know that on several occasions he – he kept talking about it and I was getting so uncomfortable and I said, "This scares me to death. These are big agencies." And I said, "It just scares me to be doing anything like this." And I – I didn't – I don't think I knew that the tapes were ordered until I heard of his arrest.

Q. So he never told you he actually had ordered the tapes?

A. I don't think. I really don't think so.

MR. WALKER: Okay.

THE COURT: I have one question, ma'am.

Did you know the tapes, when y'all talked about those tapes, did you know that the ordering of those tapes or did he [143] indicate to you the ordering of those tapes was illegal?

THE WITNESS: I –

THE COURT: If you remember. I know it's hard.

THE WITNESS: I really don't. There was – There was a problem with the tapes, and I felt there was a problem with the tapes, but I – I really don't know. I honestly don't know.

THE COURT: And you don't recall him actually telling You that he had ordered the tapes?

THE WITNESS: No, I don't.

THE COURT: Okay. Thank you, ma'am. You may step down.

I'm going to make the same order at this time that this lady's name be stricken from the record by agreement of counsel and that her name be substituted and the name be substituted as Mom Number Two.

Can we release this young lady from her subpoena?

MR. WALKER: Yes, Your Honor. I have no objection from her being released from her subpoena.

THE COURT: Mr. Wagley?

MR. WAGLEY: No objection.

(WITNESS EXCUSED)

THE COURT: All right. Let's bring the jury back in.

(JURORS ESCORTED INTO THE COURTROOM.)

* * *

[153] THE COURT: Do we need to remove the jury?

MR. WAGLEY: Yes, sir.

THE COURT: All right. Would y'all step out for one moment, please, ladies and gentlemen?

(JURORS ESCORTED FROM THE COURTROOM.)

MR. WAGLEY: Your Honor, again -

THE COURT: Please.

MR. WAGLEY: - in connection with the Court's ruling, I would like to make a proffer.

PROFFERED EXAMINATION
BY MR. WAGLEY:

Q. Ms. Thomas, you said you saw some mail that Dr. Byrd got?

A. Yes.

Q. About the tapes?

A. Yes.

Q. Do you have any other knowledge concerning those tapes?

A. The only other knowledge I have is - is that he said that he thought he was going to order the tapes

as – By that time he had thought – believed that he was being set up by DHHR.

Q. And what was his purpose in ordering the tapes?

A. He ordered the tapes in order to acquire a postmark as to origin or anything that he could find that would bring it back to DHHR.

Q. Do you know – Are you aware of what he intended to do when the tapes arrived?

[154] A. When the tapes arrived? Yes. He wanted to bring them to the federal authorities.

Q. His trip to New Orleans that you spoke about, did that have anything to do with those tapes?

A. That has to do with, I think, more than the tapes. It has – It had to do with him believing that there was a problem in the DHHR system.

Q. But did it also have to do with the tapes that you know of?

A. I don't know.

Q. Okay. That's all I have, Your Honor.

MR. WALKER: No cross-examination, Your Honor.

THE COURT: I have a couple of questions, ma'am, and the jury is not here.

EXAMINATION BY THE COURT

Q. Why did the doctor show you those pictures of the children?

A. At the time, I was involved in the church. I was getting information on child molestations going on in the church. We had two in my hometown.

Q. But this child – the child in the picture had nothing to do with the church, huh?

A. No. But what it is, was he was doing – he was trying to do some research as he was getting some of the victims from the church, you see. So, we had something in common at that point.

[155] Q. Did you order any pornography?

A. No. I didn't order any pornography, no, sir.

Q. Did he tell you at the time he ordered the pornography or was going to order the pornography that he knew it was illegal?

A. No, he didn't – Oh, he – yes. He – He didn't express that it was illegal. His point was that he was going to be set up and he wanted to find out exactly who was setting him up and he believed it was DHHR.

Q. And that's because DHHR had sent people to investigate his home because he wanted to adopt a child?

A. He wanted to adopt a child, but his reason for the anger that came out in the beginning was that he had paid money and he told me, he said what about the

poor people who cannot afford to pay when this is a government organization? And they shouldn't – they shouldn't have to pay large sums of money to adopt a child. He was concerned about poor people.

Q. So he wasn't upset about the ones that came into his home to evaluate his home. He was upset about the fact that they have to pay for the evaluations?

A. Right.

Q. Is that it?

A. Well, that they had to pay for evaluations, they had to put so much money forward to adopt these children. This was in the beginning part when he was going to adopt Shaun.

Q. Did he show you any other pictures of children?

[156] A. No. I haven't seen any.

Q. Just that one set?

A. Just – Yes.

MR. WALKER: Can I ask just a couple of questions based on what you asked?

CROSS-EXAMINATION

BY MR. WALKER:

Q. What kind of investigation were you doing against the church?

A. I wasn't doing an investigation. What happened was, I was having some problems with Bishop Frey, and I decided that I was going to fight him because of what I believed in. And in doing so, I was friends with a Monsignor, who had a lot of power in the church, and it just so happened that I found out about these molestations. Well, he was correct, because one of the priests that he did tell me about was picked up in another state.

Q. What kind of problems were you having with the church?

A. He was angry at my pastor for, really, silly little reasons and he decided he was going to move him to a smaller parish.

THE COURT: Let me ask you something, ma'am. Did he – I better not get into that. But Dr. Byrd was your psychiatrist?

THE WITNESS: Right, for two years, and then – I [157] lost two children, and my husband was in an accident that almost killed him.

THE COURT: Okay.

THE WITNESS: So that's how I came to be his patient.

MR. WALKER: That's all I have.

MR. WAGLEY: I have nothing else, Your Honor.

THE COURT: Can we release this lady?

MR. WALKER: Sure. Absolutely.

THE COURT: Thank you, ma'am.

(WITNESS EXCUSED)

MR. WAGLEY: Your Honor, if we could have a break at this time, the witnesses went a lot faster. I think there are some here, but I haven't seen them. I am sure they are. Somebody notified me there were.

There are a couple here, Your Honor.

THE COURT: Let's call one.

Let's call the jury back in.

(JURORS RETURN TO THE COURTROOM.)

THE COURT: Government waive the polling?

MR. WALKER: Yes, Your Honor.

THE COURT: Defense waive the polling?

MR. WAGLEY: Yes, Your Honor.

THE COURT: Next witness?

MR. WAGLEY: Ross, Your Honor.

* * *

[196] (DISCUSSION OFF THE RECORD)

MR. WALKER: No further questions.

MR. WAGLEY: Your Honor, I have no further questions of this witness other than we would like to make a proffer.

THE COURT: Yes.

Y'all go take a three-minute break. Don't get too comfortable, though. In fact, y'all can probably walk in and stay in line and be ready to walk back out in a little bit.

(JURORS ESCORTED FROM THE COURTROOM.)

THE COURT: Okay, we are going to go on the record for the proffer.

MR. WAGLEY: Your Honor, again, in connection with the Court's previous ruling, the defendant would offer a proffer.

PROFFERED EXAMINATION
BY MR. WAGLEY:

Q. Mr. Carriere, in response to Dr. Byrd's belief that he was under attack from DHHR, do you know what, if anything, he did to try to catch them?

A. He did several things. There was correspondence that I saw that he had initiated to the FBI; he had initiated correspondence to – I think it was the postal inspector, somebody in the post office department; I don't remember the exact name of the person, both in New Orleans and in Washington D.C.

[197] Q. Did he ever –

THE COURT: Did he tell you he was going to order some videotapes because he thought they were DHHR trying to set him up?

THE WITNESS: I remember him talking about videotapes, Judge.

THE COURT: Did he tell you that he was going to order [sic] some videotapes and he thought that DHHR was trying to set him up and he was going to turn those in to the authorities?

THE WITNESS: (No response)

THE COURT: And if you don't remember, that's okay. That's the crux of the proffer.

THE WITNESS: I understand that. It's been five years, so my memory is not as great as what it ought to be.

THE COURT: I can appreciate that.

THE WITNESS: I remember many discussions about him talking about a reverse sting operation where he was trying to pull something, a sting-type situation on DHHR. I remember many conversations where he spoke of high-ranking people and DHHR being involved with pedophile-type activities, and I remembered discussions about videotapes. Whether the videotape, itself, was involved in the reverse sting that he was trying to pull off, I cannot tell you with 100 percent certainty whether this was discussed or not. But all of the [198] different things were definitely discussed.

BY MR. WAGLEY:

Q. Was the ordering of tapes discussed?

A. Yes.

Q. Was -

THE COURT: Give a time frame, if you can?

A. It would definitely be between - when I represented him between April and August 7th to the 12th. You can check the suit records to see when I withdrew as counsel of record. It would be right after he was arrested is when I got out of the situation.

BY MR. WAGLEY:

Q. Would it have been prior to him being arrested?

A. Yes. And. . . .

Q. Do you recall if the tapes would have been child pornography?

A. I'm fairly certain he mentioned child pornography tapes.

MR. WAGLEY: Thank you.

BY MR. WALKER:

Q. So if he ordered them on March 2nd and you didn't start representing him until April, so he's telling you all of this stuff after he's already ordered the child pornography; is that [199] right?

A. If those dates are accurate, yes.

Q. Okay. Did you – You are an attorney, right?

A. Yes.

Q. Okay. You know it's illegal to order child pornography through the mail, right; you can't do that?

A. Outside the context of this particular lawsuit, no, I don't have an independent knowledge of that.

Q. You didn't know it was illegal to order child pornography through the mail?

A. Not in 1987.

Q. Wow.

MR. WALKER: No further questions.

EXAMINATION BY THE COURT

Q. Mr. Carriere, did you tell him that if – if whatever he was going to do in reverse sting may be illegal, he may have to report that to some type of authority; that is, policemen of some type?

A. We had discussions along those lines and he was talking with the FBI. So, I'm assuming that if that's responsive, Judge, yes.

Q. I guess you presumed that if he was going to do anything that may be illegal in a reverse sting operation, you would have presumed that he would have informed the FBI or the postal inspector or somebody; is that a fair statement?

[200] A. Yes, sir. And he was talking – According to what he was telling me and the documents that I saw, the man had correspondence to and from the FBI, I think the postal inspector, somebody in the post office department and, as well, he had numerous visits – two, three, four times. I remember one in particular because he came back and he was just agitated and wired and hitting the ceiling and he went for two hours in my office laying out this huge diagram of what the conspiracy was and what the scheme was that he had laid out.

Q. Okay.

A. I didn't understand – I mean, I stopped him many times and said, "Start over, try to lay this out for me again."

Q. All right.

A. But I know he was talking – I know he was talking with the FBI. I was assuming that in these discussions – and, again, five years ago –

Q. Well, you know he was telling you he was talking to the FBI?

A. Yes.

Q. And you know that he had some correspondence – you saw letters that purported to have gone to the FBI?

A. Yes, sir.

Q. You weren't there when he talked to the FBI?

A. No, sir

Q. And you weren't -

[201] A. But he would tell me before, "I'm going to meet with the FBI at two o'clock in the afternoon in New Orleans," and at 4:30 or 5:30 in the afternoon he would either be back in my office or he would be giving me a telephone call saying, "I met with the FBI," you know. You would have to get me in line with what we were talking about to recall the particulars.

Q. No problem.

THE COURT: Okay. Thank you very much. You may step down.

THE WITNESS: Yes, sir.

THE COURT: Bring the jury in, please.

THE WITNESS: Am I released, sir?

THE COURT: Release him? Release him, gentlemen?

MR. WAGLEY: Yes, sir.

MR. WALKER: Yes, sir.

THE COURT: All right. Thank you, sir.

(WITNESS EXCUSED)

(JURORS ESCORTED INTO THE COURTROOM.)

THE COURT: Government waive the polling of the jury?

App. 40

MR. WALKER: Yes, Your Honor.

THE COURT: Defense waive the polling?

MR. WAGLEY: Yes, Your Honor.

THE COURT: Next witness?

MR. WAGLEY: Charles Busby, Your Honor.

THE COURT: Come on up, Mr. Busby.

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