No. _____

In The

Supreme Court of the United States

GARY BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should a Certificate of Appealability (COA) be denied to a pro se litigant thus denying an appeal when the issue has been extensively researched and comprehensively briefed establishing that he has made a substantial showing of the denial of a constitutional right especially when it has been shown that jurists of reason could disagree with the District Court's summary denial?

Should the Fifth Circuit continue to summarily deny a COA to a pro se litigant when both equity and several Supreme Court admonitions would require the issuance of a COA?

PARTIES TO THE PROCEEDINGS

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OPINION BELOW

The opinion of the United States Court of Appeals for the 5th Circuit, which is unpublished, is designated as United States vs. Byrd, Case # 17-30510, July 6, 2018, Motion for Reconsideration. A copy of that ruling is in the appendix of this petition as App. 35.

JURISDICTION

The district court in the Western District of Louisiana had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. The Certificate of Appealability [COA] motion was denied by a single judge in motion hearing on June 6, 2018. App. 1. The Motion for Reconsideration was denied by three judge panel on July 6, 2018. App. 35. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Overview

This petition for a writ of certiorari seeks review of the ruling of the Fifth Federal Circuit Court of Appeals (*United States vs. Byrd*, Case # 17-30510, July 6, 2018, Motion for Reconsideration, of single judge denial of COA Case # 17-30510, June 8, 2018.

The conviction for which habeas corpus was sought via 28 U.S.C. § 2255, was rendered by United

States District Judge Elizabeth Erny Foote in the Western District of Louisiana in October of 2013, and the petitioner was sentenced on April 11, 2014 to 168 months on Count 1 [possession of child pornography 18 U.S.C. § 2252(a)(5)(B)]and 180 months on Count 2 [receipt of child pornography 18 U.S.C. § 2252(a)(2)(A)] with the sentences to run concurrently. This conviction was affirmed on appeal by the Fifth Federal Circuit court of Appeals on March 3, 2015, in *United States v. Byrd*, 595 Fed. Appx. 431; 2015 U.S. App. LEXIS 3372, No. 14-30385. The Supreme Court denied certiorari at *Byrd v. United States*, 193 L. Ed. 2d 80, 2015 U.S. LEXIS 5009 on October 5, 2015.

The habeas corpus motion filed by the petitioner was initially denied by Magistrate Judge's Report and Recommendation at *United States v. Byrd*, 2017 U.S. Dist. LEXIS 80617 (W.D. La. April 3, 2017). On May 24, the District Judge, Elizabeth Erny Foote, issued a summary adoption of the Magistrate's R&R without any comment on the content. There was a delay until September 17, 2017, where a summary denial of a COA was rendered without any explanation. This ruling was appealed to the Fifth Federal Circuit Court of appeals and their subsequent denial of the application for a COA (supra in introduction) which forms the basis for this petition for a writ of certiorari.

Both counts were based on visual depiction of nudists engaged in everyday activities and nudist models. There was no sexual activity portrayed in any of the material and none of the material exhibited individuals posing in a sexual or suggestive manner. All of the

material from Azov Naturist Film Company was accompanied by a detailed legal disclaimer signed by two law firms which explained in detail how that none of the material violated any local, state, or federal law in the United States. The other material originated from web sites which had a strict prohibition on the posting of any child pornography on their sites and thus any material found there would necessarily be legal material (not child pornography).

The investigative officers (postal inspectors) obtained the petitioner's name and address from the records of the Azov Naturist Film Company along with the addresses and names of tens of thousands of other individuals located in the United States.

The naturist material with the legal disclaimer was ordered from Azov Naturist Film Company by the Petitioner using his actual name and his correct, standard mailing address. It was paid for using a credit card with his actual name. These facts are significant because consumers of illegal child pornography routinely order material under an alias and have it delivered to a drop box or alternate address. The Petitioner was involved in bona fide research (as evidenced by the thousands of pages of written research material in his computer) and based on the legal disclaimer and total absence of any sexual content in the nudist pictures believed that he was gathering legal material and that none of it was illegal "child pornography". Likewise, the images obtained from web sites were believed by the petitioner to be fully legal and

proper since the web sites had strict written rules prohibiting the posting of any child pornography.

The petitioner was involved in research directed towards correcting a wrongful conviction he had received in 1993 [*United States v. Byrd*, 31 F. 3d 1329 (CA5 1994)]. During the trial of this case, the AUSA, John Luke Walker, presented evidence which had been altered, claimed that important exculpatory evidence had been "lost", presented witnesses who gave testimony which qualified as perjury by law and was known to be perjury by AUSA Walker.

In September of 2012, prosecution was instituted against the petitioner by the same AUSA, John Luke Walker, and the basis for the receiving count was the material purchased above board from Azov Naturist Film Company as had been done by tens of thousands of other United States based consumers. Azov was regarded as a legitimate company in a detailed write up in Wikipedia. No other prosecutions in the Fifth Federal Circuit of similarly situated Azov customers was located and only two others were located nationwide and they were not similar in that they had different circumstances. The action against the petitioner was selective prosecution on its face (one prosecution in tens of thousands of similarly situated individuals). It is to be noted that the Government had the names and addresses of the tens of thousands of similarly situated individuals.

In the trial the Government argued that the visual examples represented "lascivious exhibition of the

genitals" while conceding that there was not a single example of sexual activity in any of the images. The definition of "lascivious exhibition of the genitals" is quite vague and the decision regarding each example is quite subjective. The same image will very often be declared 'lascivious' by some observers but not so by others equally qualified to render an opinion. In the trial, the jury was shown multiple examples and subsequently guided in the jury instructions that if they found *one* of the examples fit the characterization as "lascivious" then that would suffice for a guilty plea. The instructions did not instruct and the jury voting did not identify which *one* (if any) met that criteria.

The petitioner strongly wanted to testify but his trial counsel nixed that, preventing the petitioner from testifying, buttressed by his explanation that should the petitioner testify and clearly explain to the jury the extent and details of his research (he is a trained forensic psychiatrist who has performed research and has published in the medical literature) then the prosecutor in the trial (AUSA John Luke Walker) would surely do just as he had done in the 1992 trial and that would include introduction of false and altered evidence and suborn perjury. When the petitioner questioned the trial attorney about that described behavior for the AUSA, his trial counsel laughed it off saying that AUSA Walker often does those things and if we presented a strong case through petitioner's testimony he would almost certainly resort to those tactics again since *winning* was his primary, if not only, concern and that "justice" in the classic sense is of minimal to no

concern to him. Thus, the petitioner was prevented from testifying by his attorney.

To review, the jury was given unclear instructions and a vague standard to assess the images and information provided to them. By contrast had the petitioner been allowed to testify he could have provided a clear understanding which was more comprehensive.

Some of the relevant facts and information was mentioned by government witnesses but when it was mentioned, it was done so minimizing its significance or even ridiculing the information. The petitioner's profile as verified by the Government was classic for one who did *not* believe he was dealing with illegal pornography. In fact, the so called indicators of intent used by the government were diametrically opposite to those identified in the petitioner. In the established and accepted profile of the pornographer there will be found on his computer a record of his involvement in chat rooms where such material is discussed and traded, and he will have sent and received such material to and from others known to be interested in that material. The petitioner had never been involved with that type of activity and the examination of his computer by the Government verified that fact. The files in the computer of a typical pornographer will have file names consistent with the lascivious content. There were no such files in the petitioner's computer. The petitioner's method of acquisition of the material by the petitioner was dramatically different: The pornographer will use aliases in the ordering and in the delivery of the material and use methods of payment

which obscure his actual identity. The petitioner used his actual name and standard mailing address for all materials and he paid for them with a credit card in his name. The materials obtained from Azov Naturist Film Company had detailed legal disclaimers to the effect that the material violated no state or federal statutes. The company's profile in Wikipedia was that it was a legitimate and legal business. Had the Petitioner been permitted to testify, these points could have been emphasized, and he could have clarified and explained his research. Since either the material was *not* child pornography (as an objective finding) or if subjectively it had been so cast by a misinformed jury, it remained the fact that the petitioner did not perceive it as illegal and thus the mens rea is absent and this is consistent with and indicative of "actual innocence". The petitioner pointed this out to his trial counsel along with the appearance of selective prosecution but the trial counsel failed to file related motions. The jury was shown multiple images but the jury instructions did not require them to identify which specific image(s) met the criteria to be illegal child pornography. The petitioner emphasized to the trial attorney how that a generalized instruction would permit a finding of guilt when there was no single image on which all jurors agreed met the required criteria. The attorney failed to file a motion regarding the jury instructions. Absent the filing of these motions and absent the testimony of the petitioner the jury delivered a guilty verdict on two counts. This verdict was appealed to the Fifth Federal Circuit Court of appeals which upheld the verdict. Subsequently a Habeas corpus under 28 U. S.C. § 2255 was

filed in the District Court. It was denied as was a COA. A COA was sought from the Fifth Circuit. Initially a single judge denied the application for a COA and then on a Motion for Reconsideration, a three judge panel denied the application for a COA. Each of these actions are identified specifically in the beginning of this section. It is the last action, the denial of the Motion for Reconsideration which forms the basis of this petition for a writ of certiorari.

In the following section "Reasons For Granting the Petition", void for vagueness, selective prosecution, lack of specific unanimity, absence of age testimony, mens rea, actual innocence, and cumulative errors will be addressed as the grounds included in the habeas corpus, 28 U.S.C. § 2255, which justify the issuance of a Certificate of Appealability.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for the following reasons:

(I) The application for a COA was based on five separate and distinct grounds. Each of the grounds had been extensively developed, comprehensively briefed, and logically presented. Each of the five grounds was either debatable by reasoned jurists or justified further development and discussion.

(II) The Fifth Circuit has consistently failed to respond to the direction and guidance of Supreme Court rulings.

(III) The Petitioner's basic claim has as its foundation actual innocence and equity and fairness justify the granting of the petition in order to provide an example for pro se litigants pursuing post conviction relief.

The Petitioner will first address his application for a COA as a whole and then will address the individual grounds with specificity.

The Petitioner filed a habeas corpus 28 U.S.C. § 2255 in district court, and the Magistrate Judge issued a report and recommendation. The Petitioner filed extensive and comprehensive objections to this R & R because it had both the appearance and effect of having been taken directly from the Government's brief without having even read the Petitioner's objections. This observation was further strengthened by the fact that the R&R omitted two grounds exactly in the manner which the government had omitted the same two grounds. Additionally, the Petitioner's objection to the R&R had been detailed and explicit with each claim or argument by the Magistrate Judge being rebutted and refuted with specificity and citations. The District Judge accepted the R&R without commenting on any of the detailed objections. The Opening Brief and Application for a COA addressed to the Fifth Circuit pointed out these obvious errors and emphasized also that the Petitioner was pro se. Unfortunately the

Fifth Circuit panel summarily denied the application for a COA without addressing any of the identified errors from below. In summary, no reviewer from the Magistrate Judge, District Judge and Fifth Circuit Panel has addressed any of the detailed argumentation and well documented positions of the pro se litigant. A COA is warranted to enable a careful presentation and proper review of the several issues.

The Fifth Circuit has a history of improperly denying a COA ostensibly based on a premature review of the habeas petitioner's claims. *Jordan v. Fisher*, 192 L. Ed. 2d 948, (Supreme Court) June 29, 2015 (dissent by Sotomayor joined by Ginsberg/Kagan) citing *Tabler v. Stephens*, 588 Fed. Appx. 297 (2014); *Reed v. Stephens*, 739 F. 3d 753 (2014); *Foster v. Quarterman,* 466 F. 3d 359 (2006); *Ruiz v. Quarterman*, 460 *F. 3d* 638 (2006); *Cardenas v. Dretke*, 405 F. 3d 244 (2005). The Fifth Circuit has denied a COA over a dissenting opinion see *Tabler* supra and *Jackson v. Dretke*, 450 F. 3d 614 (2006). " --- the pattern they and others like them form is troubling." "Because reviewing court inverted statutory order of operations by deciding merits of appeal and then denying Certificate of Appealability (COA) based on adjudication of actual merits, it placed too heavy burden on prisoner at COA stage" *Buck v. Davis*, 197 L. Ed 2d 1, (Supreme Court 2017). Also in *Miller-El v. Cockrell*, 154 L Ed 2d 931 (Supreme Court 2003), held that Fifth Circuit wrongfully denied a COA to the petitioner. When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his

claims. *E.g. Slack vs. McDaniel*, 529 U.S. at 481, 146 L Ed 2d 542, 120 S Ct 1595. This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." § 2253(c)(2) (one) need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, ibid.

The U.S. Supreme Court may review the denial of a certificate of appealability (COA) by lower courts. When lower courts deny a COA and the Court concludes that their reason for doing so was flawed, the Court may reverse and remand so that the correct legal standard may be applied. *Ayestas v. Davis*, 200 L. Ed. 2d 376, 2018 U.S. LEXIS 1913, (Supreme Court March 21, 2018). " --- review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review" – *Tharpe v. Sellers*, 199 L. Ed. 2d 424, 2018 U.S. LEXIS 616, (Supreme Court January 8, 2018). The COA inquiry is not coextensive with a merits analysis. At the COA stage the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This threshold question should be decided without full consideration of the factual or legal bases adduced in

support of the claims. When a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. – *Buck v. Davis*, 197 L. Ed. 2d 1, 2017 U.S. LEXIS 1429, (Supreme Court February 22, 2017).

The reviewing Circuit Judge responded to appellant's Combined Opening Brief and Application For A Certificate of Appealability by denying that the appellant made "a substantial showing of the denial of a constitutional right" by his brief which would have needed to reach the standard such that it "satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further".

The appellant pro se respectfully suggests that the reviewing Circuit Judge may have misconstrued critical portions of his extensively researched Combined Opening Brief and Application For A Certificate of Appealability and may have overlooked other portions which should establish the predicate for a different outcome that being the granting of a COA for one or more of the several grounds.

To begin, the appellant pro se will review the significance of his pro se status. Expressed simply one who is not formally trained in law may well have the correct factual basis and the correct legal basis for a

valid argument but may express himself in such a manner that the legally trained and educated eye misperceives or overlooks those valid factual points and valid legal bases. In *Canady v. Davis*, 2017 U.S. App. LEXIS 7204, April 24, 2017 (CA 5) "As we begin our review, we are mindful that 'we liberally construe briefs of pro se litigants and apply less stringent standards to parties proceeding pro se than parties represented by counsel". *Haase v. Countrywide Home Loans, Inc.*, 748 F. 3d 624, 629 (5th Cir. 2014) (quoting *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995). All of these are consistent with L. Ed. Digest: Pleading § 130 3. A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers (Per curiam opinion of Roberts, Ch. J. and Stevens, Kennedy, Souter, Ginsburg, Breyer, and Alito, JJ.) This theme was addressed in *Haines v. Kerner*, 30 L.Ed. 2d 652 (Supreme Court 1972).

In the present case of the appellant pro se there have been an accumulation of judicial errors at the district court level which could also have contributed to confusion when reviewed by the Circuit Judge. Reviewing the activity in the District Court: The Appellant pro se filed his initial 2255 on September 28, 2016, (Docket # 113). The government filed a brief in opposition on November 29, 2016 (Docket # 12). The Appellant pro se filed his response brief on January 3, 2017 (Docket # 123). The Magistrate Judge filed his Report and Recommendation on April 3, 2017 (Docket # 124), and this may have been the origin of the obfuscation and error.

It was and is the clear and reasoned impression of the Appellant pro se that the Magistrate Judge (or R&R) appears to have been written directly from the government's brief even to the extent of omitting two of the grounds which had been argued and briefed by the Appellant pro se. The Appellant pro se filed a detailed Objection to the R&R including a Supplement which addressed every case cited by the Magistrate Judge pointing out how that many did not apply to the facts of his case. This Objection and Supplement were filed on May 1, 2017 (Docket # 127). The District Judge summarily approved the R&R with total absence of comment or reasoning in response to the Appellant pro se's detailed arguments, substantial citations of law, and provision of supporting facts. This summary approval was filed on May 24, 2017 (Docket # 128) and Judgment adopting the R&R on the same day (Docket # 129). After a delay of four months denial of a COA was rendered again without any substantive comment. It follows that the arguments of the Appellant pro se were not fairly and clearly available to the Circuit Judge for his assessment of the COAs. Not only did the District Court improperly fail to address his brief, the Court failed to have a hearing. The Appellant pro se filed an extensive and detailed affidavit on January 3, 2017 (Docket #123). Numerous cases have held that the government's answer or counter affidavits are not dispositive against the Appellant pro se so if there are disputed issues of fact, then a hearing must be held. This right to a hearing is established in *Machibroda v. United States*, 7 L Ed 2d 473 (Supreme Court 1962). The right to a hearing in a Section 2255 motion was

reaffirmed in *Romero v. United States*, 327 F. 2d 711, 1964 U.S. App. LEXIS 6447 (CA5 1964).

Pro Se litigants may additionally face the reluctance of judges to correct other judges. In *Hicks v. United States*, 198 L.Ed.2d 718, U.S. LEXIS 4265 (Supreme Court, June 26, 2017) Justice Gorsuch in a concurrence wrote: "For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?" *United States v. Sabillon–Umana*, 772 F. 3d 1328, 1333, (CA 10 2014).

A major component in the case is actual innocence. As stated in *Elonis v. United States*, 135 S. Ct. 2001; 192 L. Ed.2d 1; 2015 U.S. LEXIS 3719; (Supreme Court June 1, 2015) "the general rule is that a guilty mind is a necessary element in the indictment and proof of every crime. The specific facts involved in the case of the Appellant pro se may present a situation of first impression there would not be a clear precedent for same. We can look to the comments of United States District Judge Jack B. Weinstein for guidance. In *Duhs v. Capra,* 180 F. Supp. 3d 205; 2016 U.S. Dist. LEXIS 51604; April 18, 2016 (E.D.N.Y.):

> Nevertheless a "court faced with a record that raises serious issues as to the guilt of the defendant and the means by which his conviction was procured, yet unable to grant relief (absence of a precedent for example), is not Obligated to become a silent accomplice to what may be an injustice." *Friedman v. Rehal*,

> 618 F. 3d 142, 161 (CA 2 2010). – Courage in public life means that not only the fortitude to withstand criticism and even outrage, but the strength as well to examine one's conscience and soul and to speak from the truth and conviction that we know lies deep within our hearts. – Reservation in the opinion promotes the growth of the law in the court where it most counts. For if the criticism of the precedent (or lack thereof) be just, the appellate court will set matters straight, and any trial judge worthy of his salt will feel complimented in being reversed on a ground he himself suggested.

Considering the extensive affidavits which were not refuted, the extensive legal citations, and the detailed argumentation, the District Judge erred by not granting a COA. The District Court offered no discussion and no explanation for denying a COA. The Appellant pro se submitted a 21 page "Combined Opening Brief and Application For A certificate of Appealability". The Circuit Judge denied a COA without discussing any of the grounds and without making a substantive comment on the body of the extensive brief. His stated reasons were reproduced in the opening of this Motion for Reconsideration. They will be addressed.

The Supreme Court in *Buck vs.* Davis, 197 L Ed 2d 1, 2017 US LEXIS 1429, Decided February 22, 2017. reversed the Fifth Circuit Court of Appeals ruling denying the Appellant's motion for a COA. The Supreme Court held that the Circuit's adjudication of the

merits prior to review of the COA was improper. In the initial 5th Circuit case, *Buck versus Stephens*, 630 Fed. Appx. 251; 2015 U.S. App. LEXIS 19643 (November 6, 2015) Judge Dennis in the dissent pointed out that in *Miller-El v. Cockrell,* 154 L. Ed. 2d 931 (2003) had held that the threshold inquiry required by 28 U.S.C. § 2253(c) does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.

In the present case it is difficult to ascertain exactly what process was used to deny the COAs but in any case such a summary denial is contrary to the spirit of the Supreme Court's admonition to the Fifth Circuit.

In his Combined Opening Brief and Application for a Certificate of Appealability the Appellant pro se demonstrated that he meets the tests expressed in *Strickland v. Washington*, 80 L. Ed. 2d 674 (Supreme Court 1984) and *Pape v. Thaler*, 645 F. 3d 281, 288 (CA 5 2011) by showing that counsel's performance was ineffective. Counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to him by the Sixth Amendment and that this deficient performance prejudiced the defense of the case. There is no question that jurists of reason could disagree with the District Court's denial that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. Counsel's nixing of Appellant pro se's expressed strong desire to testify prevented him from

providing the truthful and accurate characterization of the images and his knowledge and intent.

Ground Two presentation established, using government testimony, that the government had obtained the business records of Azov film company which contained the names and addresses of multiple thousands of individuals residing all over the United States who had purchased nudist films just as had the Appellant pro se. Government briefing conceded that they could locate no more than two other prosecutions and the defendants were not similarly situated. No cases in the Fifth Circuit were identified by the Government. Thus, out of thousands of similarly situated individuals the Appellant pro se was the only one prosecuted. Furthermore, the AUSA who headed this selective prosecution was the same AUSA who headed the 1992 trial. The Appellant pro se had personally observed (and had corroborated) that the AUSA in that trial had put forth perjured testimony of which he was aware, altered evidence, claimed to have "lost" exculpatory evidence and other unacceptable actions. The Appellant pro se was actively developing this information when this very same AUSA initiated the present prosecution (2013) primarily based on the appellant pro se choosing to exercise protected statutory and constitutional rights while others similarly situated were not prosecuted. Trial counsel's failure to raise and argue this issue (notwithstanding the urging of same by the Appellant pro se) was a deficient performance by Counsel which resulted in a fundamentally unfair outcome for the Appellant pro se. It is to be noted that the prosecution was

factually a selective prosecution as was further verified after the trial. Jurists of reason could certainly conclude that this issue is adequate to deserve encouragement to proceed further. Additionally, it is clearly a constitutional violation to prosecute an individual for pursuing his constitutional rights, and jurists of reason could disagree with the district court's resolution of this constitutional claim. This satisfies the basis for issuance of a COA for this ground.

In Docket # 113, page 8, ground three is detailed and is summarized as follows: During the trial, the jury was shown multiple images but in the jury charge and in the verdict there was no indication of which images were being voted upon nor of the voting outcome for the specific images. This is especially important since *none* of the images contained *any* sexual activity. None of the images portrayed minor who appeared willing to undergo sexual activity. All of the images were of simple nudity. Any given image found to be unlawful was so found based on the subjective response of the viewer and it is a fact that a given image could well be assessed differently by two different viewers. For images which exhibit sexual activity the degree of agreement could well be so high that this does not present a problem. However, for simple nudity alone (with no sexual activity) where assessment of "Dost factors" are utilized there is a predictable level of disagreement and nonconcurrence. The Graph on page 8 demonstrates what could take place hypothetically if twelve jurors were shown twelve images and Juror #1 found that only image #1 was illegal but none of the other

eleven images were illegal. Likewise, Juror #2 found that image #2 was illegal but none of the other eleven images were illegal. If this hypothetical jury were given the charge asking the question "Did you find at least one image to be illegal, then they would respond in the affirmative. All twelve jurors would have found "at least one" image to be illegal and would have voted "Guilty" for "at least one" image. The chart emphasizes how in that example the defendant could be convicted when eleven out of twelve jurors found each of his images to be legal and had voted "not guilty" on each of the twelve submitted images. Clearly and unequivocally this would be an unjust and unconstitutional result. The appellant pro se demonstrated this clear problem to counsel and counsel failed to file a motion for a specific unanimity jury charge. Admitting that a general unanimity charge was not appropriate for the facts of the case of the Appellant pro se, trial counsel failed to file a motion for specific unanimity using the 5th circuit pattern jury instruction as an excuse while conceding that the pattern instructions were

TABLE OF JURY VERDICT/VOTES

Image	#1	#2	#3	#4	#5	#6	#7	#8	#9	#10	#11	#12
JUROR #1	Guilty	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG
JUROR #2	NG	Guilty	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG
JUROR #3	NG	NG	Guilty	NG	NG	NG	NG	NG	NG	NG	NG	NG
JUROR #4	NG	NG	NG	Guilty	NG	NG	NG	NG	NG	NG	NG	NG
JUROR #5	NG	NG	NG	NG	Guilty	NG	NG	NG	NG	NG	NG	NG
JUROR #6	NG	NG	NG	NG	NG	Guilty	NG	NG	NG	NG	NG	NG
JUROR #7	NG	NG	NG	NG	NG	NG	Guilty	NG	NG	NG	NG	NG
JUROR #8	NG	NG	NG	NG	NG	NG	NG	Guilty	NG	NG	NG	NG
JUROR #9	NG	NG	NG	NG	NG	NG	NG	NG	Guilty	NG	NG	NG
JUROR #10	NG	NG	NG	NG	NG	NG	NG	NG	NG	Guilty	NG	NG
JUROR #11	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG	Guilty	NG
JUROR #12	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG	Guilty

wrong for the facts of this case. Since this was a "novel claim", – citing *Reed v. Ross*, 82 L Ed 2d 1 (1984), in *Fraser v. U.S.*, 2005 U.S. Dist. LEXIS 12408, (ED PA) (June 21, 2005) – "The Supreme Court has held that a claim that is so novel that the legal basis is not reasonably available to counsel may constitute cause." The failure of trial counsel to file a motion for specific unanimity either as a novel claim or in response to the Appellant pro se urging him to do so is a denial of a constitutional right and a substantial showing has been so made. Clearly jurists of reason could disagree with the district court's refusal to address this claim or provide relief. Furthermore, jurists of reason could conclude that this issue deserves encouragement to proceed further. For any of these reasons and certainly for all of them a COA should be granted.

The argument for ground four closely tracks the above argument for ground three. No specific image and no specific part of any video was identified as having minor actors. In fact no evidence as to age was provided by the government. In the same manner as before without a specific unanimity charge it is possible that a less than unanimous verdict was misconstrued as a unanimous verdict. The chart on page 21 demonstrates this error also. The district court's refusal to grant relief on this issue can certainly be a matter for disagreement among jurists of reason. A COA should issue for this constitutional error.

The Appellant pro se pled a detailed argument for actual innocence based on the well evidenced and documented fact that he was not aware that the images of simple nudity (totally absent any sexual activity or innuendo) were or could be considered illegal. As was stated in his Combined Opening Brief and Application for COA, an absence of mens rea defines actual innocence. This basic concept has been addressed in *United States v. Lacy*, 119 F. 3d 742; 1997 U.S. App. LEXIS 17067 (CA 9 1997); *Morissette vs. United States*, 95 L Ed 288 (Supreme Court January 7, 1952); *Rozzelle v. Secretary*, 672 F. 3d 1000, 2012 U.S. App. LEXIS 4114 (CA 11 February 29, 2002) quoting "In *Finley v. Johnson* the Fifth Circuit concluded that a sufficient showing of actual innocence to allow a petitioner to proceed with a procedurally defaulted constitutional claim." "and then quoting directly from Finley, "a showing of facts which are highly probative of an affirmative defense which if accepted by a jury *would result in the defendant's acquittal* constitutes a sufficient showing of 'actual innocence' – " In 1998 the Supreme Court in *Bousley v. United States*, 140 L Ed 2d 828, (Supreme Court 1998) noted that it is appropriate to permit the accused to attempt to make a showing of actual innocence to receive a procedural default. The Fifth Circuit in *Haley v Cockrell*, 306 F. 3d 257; 2002 U.S. App. LEXIS 20507, (CA 5 2003) – "notwithstanding the procedural bar – Haley's procedural default *was* excused. Haley had shown that he was 'actually innocent'" –

Most recently, the Supreme court in *McQuiggen v. Perkins*, 185 L. Ed. 2d 1019 (Supreme Court 2013) – "a showing of *actual innocence* may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the existence of a procedural bar to relief". The Magistrate Judge in the trial court conceded seven separate facts or areas of information which support "actual innocence". When those seven and additional facts are considered it becomes undeniable that such are consistent *only* with an absence of mens rea and as such defines actual innocence. Clearly, had trial counsel not nixed Appellant pro se's strongly expressed wish to testify, the appellant pro se could have delivered all of the listed areas strongly and convincingly. He could have delivered the material affirmatively to the jury and not in a spirit of ridicule (as did the government witness) and such would very likely have resulted in an acquittal. Consequently, there exists a combination of actual innocence and ineffective assistance of counsel. Jurists of reason could clearly disagree with the district court's failure to resolve this in the proper manner. Additionally, the issues presented are adequate to deserve encouragement to proceed further. Therefore, a COA should issue for these errors.

The Appellant pro se raised the "void for vagueness" argument because assessing "lasciviousness" in simple nudity inherently is subjective and the guidelines are vague. As detailed in his Opening Brief, recent cases: *Johnson v. United States*, 192 L. Ed. 569 (Supreme Court 2015); *Welch v. United States*, 194 L.Ed. 387 (Supreme Court 2016); *United States v.*

Pawlak, 2016 U.S. App. LEXIS 8798 (CA 6 2016); *United States v. Jason Lee*, 821 F. 3d 1124, 2016 U.S. App. LEXIS 8402 (CA 9 2016) a void for vagueness argument for 18 U.S.C. § 2252 may be addressed in a motion under 28 U.S.C. § 2255; *Evans v. Snyder–Norris*, 2016 U.S. Dist. LEXIS 73541 (Northern Division ED KY). It is to be noted that this void for vagueness argument was not rebutted by the government, was not addressed by the Magistrate Judge in the R&R, and not commented on by the District Judge. It would follow that jurists of reason could disagree with the district court's resolution of this constitutional claim and considering the developing areas of application of vagueness arguments, the issue presented is adequate to deserve encouragement to proceed further. Therefore a COA should be granted for this issue.

Aggregating the previous grounds, the Appellant pro se presented the argument for cumulative error.

The Government did not offer any disagreement, refutation attempts or argument. The Magistrate Judge did not address it in the R&R and the District Judge did not comment on it. Considering the extensive facts, detailed briefing, and related argumentation, it would follow that jurists of reason could disagree with the district court's resolution of these constitutional claims. Consequently, a COA should issue for the cumulative argument issue.

In Summary, the Appellant pro se began his Motion for Reconsideration of Denial of COA by respectfully suggesting that the Circuit Judge may have

misconstrued significant portions of his extensively researched Combined Opening Brief and Application For A Certificate of Appealability. Possible factors which may have contributed to the misunderstanding include the lay status of the Appellant pro se with his use of language not being the same as may be the case with trained attorneys. It is suggested that another contributing factor could be an accumulation of judicial errors at the district court. The detailed 21 page Combined Opening Brief and Application for a Certificate of Appealability addressed each of these issues and it serves as the basis for the review and emphasis within this Motion for Reconsideration. Each of the grounds: claims related to the right to testify; actual innocence; selective prosecution; jury unanimity; ineffective assistance of counsel; and cumulative error was individually reviewed with emphasis on the facts and law which support that jurists of reason could disagree with the district court's resolution of the constitutional claims of the Appellant pro se or that jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further. Therefore, it follows that COAs should issue for some or all of the presented grounds.

The petitioner would suggest that the Court consider that the initial review by a single Judge of the Fifth Federal Circuit Court of Appeals was flawed based upon the misconstruing or misunderstanding of essential aspects of the facts, law and argumentation as presented to the district court. The petitioner respectfully suggests that the three judge panel was

misled by the same flawed report and recommendation of the Magistrate Judge and by reversing the proper order of consideration by focusing on the Magistrate Judge's flawed analysis of the merits of three grounds and failing to address two other grounds.

The petitioner suggests that after a thorough and careful review of these errors from below, the Court will grant the writ and issue a COA to the petitioner.

SUMMARY

The Supreme Court has repeatedly vacated rulings by the Fifth Federal Circuit Court of Appeals in which the Circuit Court denied a Certificate of Appealability (COA) to the appellant. In doing so, several specific and recurrent errors by the Circuit Court have been identified and discussed. Among the errors are the following: (1) inversion of the statutory order of operations by assessing merits as reason for the denial of the COA; (2) placing too heavy of a burden on the pro se litigant at the COA stage; (3) failing to consider all of the claims; (4) fully considering pro se litigants. Review of the denial of a COA by the Supreme Court is not limited to the grounds expressly addressed by the court whose decision is under review.

It is well established that less stringent standards should be applied to pro se litigants by the reviewing courts. One who is not formally trained in law may well have identified the correct factual bases and the correct legal basis for a valid argument but may express

himself in such a manner that the legally trained and formally educated eye may misperceive or overlook those valid conclusions.

The Magistrate Judge's Report and Recommendation at the District Court appeared to have been written with scant if any attention to the detailed brief filed by the pro se petitioner. In fact it appeared to have been written directly from the government's brief to the point of actually omitting responses to two of the grounds. The petitioner filed a detailed Objection to this R&R addressing line by line areas of disagreement. He reviewed every case cited in the R&R and rebutted or refuted the contrary claims of the Magistrate Judge. Notwithstanding this detailed and documented and comprehensive Objection the District Judge summarily adopted the R&R without comment. After a several month delay the District Judge denied a COA, again summarily and without analysis or comment.

Consistent with the Court's precedent and the statutory text, the petitioner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

The District Judge not only failed to address the merits of the petitioner's petition and his objections to the R&R, she also failed to conduct a hearing notwithstanding the filing of a comprehensive affidavit by the petitioner. These affidavits were not refuted and they

were extensive. After summarily adopting the Magistrate's R&R, without addressing the extensive objections, she denied a COA without any clarification or explanation. In a similar manner the Fifth Federal Circuit Court of appeals summarily denied a COA even though a 21 page "Combined Opening Brief and Application For a Certificate of Appealability" was filed in support of granting a COA.

In this brief the petitioner established that his counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to him by the Sixth Amendment and that this deficient performance prejudiced the defense of the case There is no question that jurists of reason could disagree with the District Court's denial that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. Trial counsel's nixing of the petitioner's expressed strong desire to testify prevented him from providing the truthful and accurate characterization of the images and of his knowledge and intent.

The presentation and discussion of ground two established that the government had obtained the names and addresses of tens of thousands of United States based individuals who had ordered films from Azov Naturist Film Company and were similarly situated as was the petitioner. The government briefs conceded that they could locate no more than two other prosecutions but these were not similarly situated and no cases in the Fifth Circuit were identified by the government. Of particular significance is the fact that the

AUSA who headed this selective prosecution was the same one who had unacceptable behavior in the 1992 trial of the petitioner. In the 1992 trial this AUSA had presented witnesses who perjured and this was known by the AUSA. Additionally he presented altered evidence and claimed to have "lost" important exculpatory evidence. The petitioner was actively developing the investigation of these areas, thus choosing to exercise protected statutory and constitutional rights, when the AUSA triggered the current prosecution while virtually no other person similarly situated in the United States was prosecuted. The failure of the trial counsel to raise and argue this issue notwithstanding the urging of the petitioner was a deficient performance by the trial counsel which resulted in an unfair outcome for the petitioner. Jurists of reason could certainly conclude that this issue is adequate to deserve encouragement to proceed further.

Ground three encompasses the failure of counsel to argue for a specific unanimity charge to the jury. The jury was viewing multiple images and multiple sections of a video. Since none of this material had any sexual activity or content the question posed was the very subjective one of lascivious exhibition of the genitals. It is not at all clear that the jury voted unanimously that any single, specific image met the criteria for being illegal. The general charge permitted the possibility that each juror found that some of the images met those criteria but not necessarily the same images that other jurors found similarly. A chart was provided to emphasize how necessary it was that a specific

unanimity charge should have been given to the jury. The petitioner explained this in detail to trial counsel who failed to raise the issue. The conviction of one where no image was found to be illegal by all of the jurors would be unjust and unconstitutional.

The district court's failure to grant relief on this issue can certainly be a matter of disagreement among jurists of reason both for the unjust conviction if no image was found to be illegal by a unanimous vote and the issue deserves encouragement to proceed further because it is a novel claim.

The petitioner presented a strong and comprehensive argument that there was an absence of the required mens rea and as such he was actually innocent. The Magistrate Judge, in his R&R conceded seven separate facts or areas of information which support or corroborate the claim of actual innocence. Clearly, had the trial counsel not prevented the petitioner from testifying he could have addressed each of these areas strongly and convincingly. Consequently, there exists a combination of actual innocence and ineffective assistance of counsel. Jurists of reason could clearly disagree with the district court's failure to resolve this in the proper manner. Additionally, the issues presented are adequate to deserve encouragement to proceed further.

The petitioner raised the "void for vagueness" argument because assessing "lasciviousness" in simple nudity is inherently subjective and the guidelines are vague or non-existent. The Supreme Court and Courts

of Appeal have widened the application of the vagueness argument since the initial *Johnson* ruling with reference to ACCA.

Aggregating these multiple grounds there is a valid argument for cumulative error. The government did not offer any counter argument to cumulative error, the Magistrate Judge did not address it, the District Judge did not comment on it, and the Circuit panel also failed to address it.

Each of the grounds: claims related to the right to testify; actual innocence; selective prosecution; jury unanimity; ineffective assistance of counsel; and cumulative error were shown to have been resolved incorrectly by the District Judge. Certainly, jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further.

Therefore it follows that Certificates of Appealability should issue for some or all of the presented grounds.

CONCLUSION

For the reasons given above, the petition fora writ of certiorari should be granted, vacating the denial of the Certificate of Appealability by the Fifth Federal Circuit Court of Appeals and granting the COA or remanding the case to the circuit with instructions to grant the COA.

Respectfully submitted,

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