

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Larry Allison — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Circuit Court Of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Larry Allison #26662-045
(Your Name)

F.C.I. P.O. Box 9000
(Address)

Forrest City, AR. 72336-9000
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Can one be sentenced for a crime to which no plea of guilty has been entered and no trial resulting in a conviction has been held?

2. Will this Court under the First Amendment and Fifth Amendment for Due Process "make an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis v. Ohio*, 378 U.S. 184 (1964) when a defendant accused of violating 18 U.S.C.S. § 2251 (a) and (e) during a Fed. R. Crim. P. 11 plea proceeding admits for a factual basis only "that there was a picture of full body unclothed" and the district judge considers the admission to constitute a lascivious exhibition of the genitals or pubic area? When during the plea proceeding the government never elaborated on what made the "picture of full body unclothed" lascivious. There is no indication the district judge ever viewed the depiction, nor is any picture described, characterized or even mentioned in the indictment.

3. Is defense counsel ineffective when he leads a defendant accused of 18 U.S.C.S. § 2251 (a) and (e) into a plea proceeding under the premise that sexually explicit conduct "would be the purpose of sexual gratification" instead of its actual meaning under

the statute "lascivious exhibition of the genitals or pubic area", and recites the erroneous definition in open court at the plea? Is he ineffective for not objecting to the shortcomings and errors during the plea proceeding?, and was he ineffective on direct appeal as to these issues?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was July 17, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 17, 2018, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment - Guarantie of free expression & redress

Fifth Amendment - Due Process

Sixth Amendment - Right of effective assistance of
counsel

STATEMENT OF THE CASE

This is a petition for a writ of Certiorari from the Eighth Circuits refusal of Larry Allison's application for a Certificate of Appealability from the district courts denial of his 28 U.S.C. § 2255 petition for relief.

On February 26, 2014 an indictment was filed where as in the Western District of Missouri alleging Larry Allison of violation of 18 U.S.C. § 2251 (a) and (e). Employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct with the visual depiction being produced using materials that had been mailed, shipped, or transported in interstate commerce. (see appendix D, transcript of plea proceeding. Pg 6).

Under Fed Crim. P. Rule 11 Allison entered into a plea proceeding on October 20, 2014.

The 8th Circuit has so far departed from the accepted and usual course of judicial proceedings that the conviction cannot stand.

A simple review of the plea transcript (Appendix D) confirms the defendant/petitioner Allison never affirmatively waived his trial rights by tendering a voluntary and knowing plea of guilty and in fact did not enter a guilty plea at all, or state he was guilty of the charge.

Page 13 of the plea transcript, the only place in the record where the court attempts to elicit a guilty plea shows that the court erroneously perceived that Allison's reply to the court's statement qualified as a knowing, voluntary plea of guilty. Under the Federal Constitution it did not.

The court states on page 13 "If you don't want to plead guilty just say 'I'm not going to plead guilty' and we'll go to trial."

Allison's reply to the court's statement cannot conclusively determine that he pled guilty here.

"No, Sir. There were pictures. There were two pictures I believe were found," is equivocal and vague as to a plea, and a mere admission of two pictures. A guilty plea "is more than a confession which admits that the accused did various acts."

Boykin v. Alabama, 395 U.S. 238 (1969) "A guilty plea is more than an admission of past conduct; it is the defendant's consent that judgment may be entered without a trial" *Brady v. United States* 397

U.S. 742 (1970) Due Process requires a "guilty plea".
"A guilty plea is a grave and solemn act to be accepted only with care and discernment." Brady Id. "By entering a plea of guilty, the accused is not simply stating he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." United States v. Broce, 488 U.S. 563 (1989)

It is axiomatic that Due Process does not permit a person to be sentenced for a crime in which he has not pled guilty or been given a trial. Moreover, "Courts indulge every reasonable presumption against waiver of fundamental rights, and do not presume acquiescence in their loss." Johnson v. Zerbst, 304 U.S. 458 (1938) Here Allison did not make an intentional relinquishment of his trial rights and it should appear to a reasonable person that the trial judge did not consider the reply by Allison referenced above to be adequate as a waiver when in the next breath the judge says "I think we're going to do this again..."

Was counsel ineffective in his advice?

Strickland v. Washington, 466 U.S. 668 (1984)

Even if this Court could find that Allison gave a plea of guilty, by examining the transcript further, it is readily apparent that the plea could not have been knowingly due to ineffective assistance of counsel.

"Sexually explicit conduct" as defined under 18 U.S.C. § 2256 is a "lascivious exhibition of the genitals or public area."

As one delves further into the plea transcript it is readily apparent that defense counsel is constitutionally ineffective and prejudiced Allison in his ability to voluntarily and knowingly plead guilty.

It wasn't until nearly the end of the plea proceeding that Allison learned that he had entered into the plea under the erroneous advice of counsel. Allison was told - that "sexually explicit conduct would be the purpose of sexual gratification" and entered into the plea under this assumption.

Again it wasn't until the proceeding had nearly concluded when defense counsel demonstrated his lack of comprehension of the statute and the elements needed to be convicted of 18 U.S.C. § 2251

2 On page 15 of the transcript defense counsel states his deficiency. After Allison denies there was a picture of the vagina counsel states his failure to understand the law. "Your Honor, I think one of the questions, I think the definition of sexually explicit would be the purpose of sexual gratification, am I correct?"

Now the first issue here is that if it can be found that Allison gave a valid guilty plea earlier (page 13 plea transcript) then was it voluntary and knowing?

2 Nowhere is the purpose of sexual gratification mentioned in 18 U.S.C. § 2251 or § 2256

During the earlier exchange on page 13 Allison only admitted, "I believe there's two pictures but they were nude" and then after the court's statement, "If you don't want to plead guilty just say 'I'm not going to plead guilty' and we'll go to trial." Allison only admits "There were pictures. There were two pictures I believe were found."

At that point in the proceeding, pg. 13, Allison believed due to his counsel's advice that sexually explicit was the purpose of sexual gratification. (Emphasis added)

A nude picture can be sexually gratifying without being a lascivious exhibition of the genitals and mere nudity is not illegal under the statute.

So, did Allison tender a guilty plea on pg. 13 or anywhere else in the transcript? If he did was it knowing and voluntary when it was given?

Going beyond what has been said here already, the indictment stated that Allison was accused of -

Employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct.

Defense counsel's advice precluded Allison here from a true understanding of the charge. He did not know that sexually explicit conduct was a lascivious exhibition of the genitals and denied throughout the plea there was a picture of the vagina. It follows

that he could not have entered an informed plea to the formal charge.

It seems glaringly apparent that Allison was led into the plea proceeding and participated in convicting himself without an understanding of the law, or in other words, what would have to be proven beyond a reasonable doubt at trial.

"Because a guilty plea is an admission of all the elements of a formal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts" *McCarthy v. United States*, 394 U.S. 459 (1969). Allison never had "an understanding of the law in relation to the facts," and the deficiency was never cured throughout the proceeding. Even defense counsel did not know his own understanding of "sexually explicit conduct" was erroneous during the colloquy.

In the district court's denial of the §2255 petition (Appendix B, pg 3) the court states "As for the performance of plea counsel, having reviewed the transcript of the plea hearing, during which the Movant testified that he was satisfied with counsel's assistance, the Court finds no deficiency under the Strickland/Hill standard."

2. In his §2255 petition Allison stated (pg 10) that "Although he stated he was satisfied with his attorney early in

the plea colloquy, it wasn't until nearly the end of the proceeding that he learned, unfortunately, that he had labored for months under incompetent advice that counsel had given him in regard to an essential element of the offense in which he relied in his decision to enter into the plea"

"The federal courts may not adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea is accepted were so much the product of misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment." Blackledge v. Allison, 431 U.S. 63 (1977)

The "subsequent presentation made here as well as in the § 2255 petition before the district court of ineffective assistance are not "conclusory allegations unsupported by specifics" nor are they "contentions that in the face of the record are wholly incredible." Blackledge Id at 74. It was an abuse of discretion to deny Allison's ineffective assistance of plea counsel claim.

Although the government, after defense counsel gave his erroneous understanding of sexually explicit conduct, explained the true meaning of the term, (pg 15 plea transcript) this still did not cure the

deficiency in the proceeding. That is, the necessity of Allison's understanding of the term lascivious exhibition of the genitals or pubic area, a term not in the indictment or recited in the factual basis by the government

Although Allison agreed that a picture of "full body unclothed met the definition of a lascivious exhibition, he did so only after his counsel interceded and agreed to the question by the judge. (Pg. 15) The Court; **Does** the defendant agree it meets that definition? Mr. Lewis (defense counsel); Yes, Your Honor, we do.

Mr. Lewis agreed it met the definition directly after he gave his erroneous version of sexually explicit just seconds before.

The statute 18 USC § 2256 (2)(A) does not define "lascivious exhibition of the genitals or pubic area." Because lascivious means tending to excite lust; lewd; indecent; obscene (Black's law dictionary 10th edition), so more than mere nudity is required to make an image lascivious.

Counsel here continued with his representation that fell below an objective standard of reasonableness by not giving Allison a true understanding of what makes a picture "a lascivious exhibition" before he compelled Allison to agree.

The district court found (pg 16) that the "admission" by the defendant is sufficient for me to find there's a factual basis to support a change of plea."

Here the court's finding is erroneous that a factual basis existed that Allison employed, used... a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct with the visual depiction being produced using materials that had been mailed, shipped, or transported in interstate commerce, when he only admitted without proper assistance of counsel that a picture of "full body unclothed" was lascivious.

Again, "Because a guilty plea is an admission of all the elements of a formal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459 (1969)

Fed R. Crim. P. 11(b)(3) mandates that the court must determine that there is a factual basis for the plea.

In this case the court determined that the admission by the defendant that a picture of "full body unclothed" was sufficient to satisfy this requirement.

This is a constitutional issue under the First Amendment.

Allison asks this Court to make an independent judgment on the facts of this case as to whether the material involved is constitutionally protected.

Allison here also alleges that Rule 11 of the **Federal** Rules of Criminal Procedure was violated in that the district court could not have been satisfied there was a factual basis for a plea.

There is no evidence the court ever viewed the "full body unclothed" picture. The government never elaborated on what made the picture a lascivious exhibition of the genitals or pubic area," and the indictment made no mention of any pictures at all. The district judge made no attempt to ascertain if the facts - the contents of the picture - fell within the ambit of criminal activity

Jacobellis v. Ohio, 378 U.S. 184 (1964) states "In obscenity cases, as in all others involving rights derived from the First Amendment guaranties of free expression, the Supreme Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected."

Allison asks this court to make this independent constitutional judgment under the principles of the First Amendment, as adopted by the Due Process Clause of the Fifth Amendment.

Rule 11(b)(3) of Fed R. Crim. P., under which a Federal District Court may not enter a judgment upon an accused's guilty plea without making an inquiry which satisfies the court that there is a factual basis for the plea, is intended to insure that an accused's plea is knowing and voluntary and along with that the Sixth Amendment's guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome. This plea proceeding had neither.

There can be no affirmative showing that the accused's plea is knowing and voluntary because without knowing whether the material involved is constitutionally protected one cannot justify reliance on the outcome.

But it must be noted, whether or not the material is found to constitute "a lascivious exhibition of the genitals or pubic area" (sexually explicit conduct) that due to counsel's erroneous advice to enter into the plea Allison could not have had the requisite knowledge to understand the formal charge, that he employed, used, . . . to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct (Emphasis added), therefore he could not have voluntarily and knowingly pled guilty.

Claim 4 in the §2255 petition was; The finding by the court that a picture was lascivious is speculation and erroneous.

Claim 6 was; Ineffective assistance before plea, at plea, at sentencing, and on appeal for not questioning the Rule 11 hearing and the lasciviousness of the picture... (Appendix B, denial of §2255)

The court in its denial said the issue should have been brought on direct appeal and must demonstrate cause and prejudice for not doing so or that he is actually innocent. The court went on to say that the Movant has failed to show cause and prejudice or that he is actually innocent. The court said that the issue of counsel not asking the court to view the picture in court or arguing the issue on appeal was meritless.

First counsel should have objected during the plea and preserved the issue for appeal, and was ineffective for not asking the court to view the picture, but as Allison has shown in this petition counsel did not even understand the law, that is, what is sexually explicit conduct. Allison here has shown cause and prejudice for not raising the issue on appeal. The error is not harmless and could show "actual innocence" if the picture is examined. The

argument is not meritless.

Since the petition comes from a denial for a certificate of appealability from the district court and the Eighth Circuit Court of Appeals, Allison believes that the courts **here have wrongly concluded** that Allison has not shown a "substantial showing of the denial of a constitutional right" See 28 U.S.C. §2253(c)(2) "A petitioner satisfies this standard by demonstrating jurists or reason could disagree with the district courts resolution of his constitutional claims or that jurists **could** conclude the issues presented are adequate to deserve encouragement to proceed further," Miller El v. Cockrell, 537 U.S. 322 (2003)

Allison asks that his sentence be vacated or set aside or that he be allowed to replead or whatever this Court deems necessary to ensure that complete justice is done.

REASONS FOR GRANTING THE PETITION

The court has so far departed from the accepted and usual course of judicial proceedings.

This case, due to ineffective assistance of counsel and errors by the court resulted in more than "a formal violation of Rule 11 of the Federal Rules of Criminal Procedure" United States v. Timmreck 441 U.S. 780 (1979) The errors were "constitutional or jurisdictional" or error that is a fundamental defect and inherently results in a "miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lorry Allison

Date: 12/14/2018