No. 18-7578 ORIGINAL



In the
SUPREME COURT OF THE UNITED STATES

JEFFREY TODD HOWARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

Jeffrey Todd Howard
Reg. No. 27865-379
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

## QUESTIONS PRESENTED

(1) Whether the Fifth Circuit Court of Appeals misapplied the law applicable in COA proceedings such as would represent deviation from the directives of the Supreme Court and the holdings of other Circuit Courts of Appeals?

(2) Whether the Fifth Circuit Court of Appeals should, under Clisby, Slack, and Miller-El, have granted a COA upon the facts of this case?

(3) Whether the case below represented a correctable injustice based on the identified jurisdictional and constitutional issues?

(4) Whether the case below presented a manifest miscarriage of justice in light of the actual innocence of Petitioner as charged?

(5) Whether in any event this Court must act as the judgment below is actually and manifestly void due to improper venue?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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

## OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition, and is unpublished.

The opinions of the United States District Court appear at Appendix B and Appendix C hereto, and are reported at U.S. v. Howard, 2016 U.S. Dist. LEXIS 163217 (S.D.Tex. 11/22/2016) and U.S. v. Howard, 2016 U.S. Dist. LEXIS 141639 (S.D.Tex. 10/12/2016).

## JURISDICTION

The date on which the United States Court of Appeals decided my case was 1/18/2018. No petition for rehearing was timely filed in my case.

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

Petitioner appealed from both final judgments of the District Court below, i.e., the denial of his 2255 Motion and the denial of his Rule 59(e) Motion thereafter. See Appendix B and Appendix C.

## STATEMENT OF THE CASE

Petitioner Jeffrey Todd Howard was, in early 2012, unemployed and living with his girlfriend in California; as a result of a basketball injury to his back, Petitioner was, in fact, bedridden. U.S. v. Howard, 766 F.3d 414, 416 (5th Cir. 2014).

What began as small talk on a social-networking website escalated to flirtation and "taboo" subjects. When Petitioner asked his correspondent, a civilian, "can you get me a quince?" she took a screen shot of the conversation and went to the police. Id. The responding officer was a detective with the Corpus Christi P.D.'s Internet Crimes Against Children (ICAC) Task Force. Id.

The detective created a fictitious persona, complete with an email address, instant-message account, and Facebook profile. The civilian introduced Petitioner to the detective as a friend with access to children, who followed up with Petitioner about his "taboo" inquiry by phone. Id at 417.

On the call, the detective asked Petitioner: "What are you looking for? [The civilian] told me ... that you wanted her to get you a 15-year-old. I said, I don't know if I can help because my daughter is 14 ... and I have an 11-year-old daughter." Petitioner confirmed his interest in having sex with the putative 14-year-old girl. Id.

Over time, Petitioner asked for photographs of the fictitious minor and offered to (and eventually did) send a picture of his penis to the detective -- though not to any minor, nor in conjunction with any inducement for an intermediary to convey it to one. The detective testified at trial that she thought that Petitioner

had sent the picture "[t]o confirm that he was not a cop, as well as to convince [the detective] to send a picture ... to make sure that [the daughters] were real and [she] was who [she] was saying [she] was." Id.

While some of the conversations between Petitioner and the detective contained explicit sexual talk including details of sex acts involving minors, the furthest that Petitioner went toward promoting the actual engagement of a putative minor was to direct the detective to put the fictitious minor on the phone, Id. at 418.

Petitioner never instructed the detective to bring a minor to a meeting for sex with him, to display a minor in a sexually-explicit manner, or involve a minor in a sexual exchange per se. When the detective pressed Petitioner to take a substantial step such as booking a flight from California to Texas, where she represented that the fictitious children lived, Petitioner refused, said "I'll leave it," and never contacted her again. Three months later, the police arrested Petitioner in Northridge, California. Id.

Petitioner was indicted on 10/10/2012 in the U.S. District Court for the Southern District of Texas at Corpus Christi. A bench trial was conducted over two days in April 2013, after which the District Judge found Petitioner guilty of having violated 18 U.S.C. §2422(b) during the course of the three-week sting operation conducted by a task-force officer in Texas. He was sentenced to the 10-year mandatory minimum.

On direct appeal, the Fifth Circuit cited U.S. v. Gladish, 536 F.3d 646, 649 (7th Cir. 2008) ("Treating speech (even obscene speech) as the 'substantial step' would abolish any requirement

of a substantial step [which requirement] serves to distinguish people who pose real threats from those who are all hot air," Id. at 650) and U.S. v. Lee, 603 F.3d 904 (11th Cir. 2010) (see Id. at 919, Martin, C.J., dissenting: "In order for a person to be convicted of attempting to commit a crime, he must not only intend to commit the crime, he must also take a substantial step towards committing it"); and, affirming, pointedly noted:

> In light of the government's conduct, finding criminal attempt in this case is a close call, and we hope that this is the outer bounds of a case the government chooses to prosecute under §2422(b). There is no single action by the defendant in this case that clearly signifies that the defendant would follow through on his sexual talk .... Were we the triers of fact, we might reach a conclusion different from the district court in this case.

Howard, supra, at 427-28.

Petitioner's direct application for a writ of certiorari was denied on 1/12/2015. He filed a motion under 28 U.S.C. §2255 in the District Court on 12/8/2015. The Government, in response, moved for summary judgment, which the District Court granted on 10/12/2016, denying the §2255 motion.

Petitioner moved on 10/31/2016 under F.R.Civ.P. Rule 59(e) for reconsideration, which the District Court denied on 11/22/2016. He then applied for a Certificate of Appealability from the Fifth Circuit, which was denied on 1/18/2018. This petition timely follows.

Petitioner's grounds for relief below centered upon the fundamental unfairness of the prosecution of a California resident who literally could not have left his bed for a crime allegedly to be committed in Texas. He alleged prosecutorial misconduct

by law enforcement agents in Corpus Christi because, inter alia, the original charges did not state an offense; that the indictment in the criminal case likewise failed to charge an offense because venue in Texas was improper; that the conviction followed from violations of his constitutional rights; and that counsel was ineffective at trial and on appeal for failing to: challenge the indictment pre-trial, re-urge a motion for acquittal post-verdict, move to suppress evidence, object to extraneous evidence, object to lay opinion testimony, challenge the sufficiency of the indictment post-trial and on appeal, and challenge venue in the Southern District of Texas. He generally argued that the prosecution amounted to inequitable conduct by the Government and that he is in fact innocent of the charged crime and of specific intent.

The District Court denied some of his claims and found that others were procedurally barred. It found that Petitioner's claim as to venue failed, citing U.S. v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999) (venue is based on the nature of the offense and the location of the commission of the criminal acts); U.S. v. Clenney, 434 F.3d 780, 781 (5th Cir. 2005) (venue derives from the statute of conviction); and U.S. v. Rounds, 749 F.3d 326, 335 (5th Cir. 2014) (§2422(b), continuing offense, and communication with minor in district supports venue) -- stating that counsel's failure to challenge venue "falls squarely within trial strategy" and that "counsel is not required to file futile motions." It further found that Petitioner's claim as to factual innocence failed where "the Fifth Circuit's rejection of impossibility as a defense" meant that he could not establish prejudice under Strickland v. Washington,

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The District Court denied a COA and the Fifth Circuit did likewise in an order addressing Petitioner's arguments that the District Court erred in dismissing his prosecutorial misconduct and invalid indictment claims as procedurally barred, that the venue of his underlying criminal proceedings was improper, and that counsel rendered ineffective assistance in failing to object to improper venue and failing to raise a factual-impossibility claim on direct appeal.

## REASONS FOR GRANTING THE PETITION

The Fifth Circuit should have granted a COA because "the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2), and has demonstrated that "reasonable jurists could debate" the resolution of the §2255 action "or that the issues presented were 'adequate to deserve encouragement to proceed further'," Slack v. McDaniel, 529 U.S. 473, 484 (2000), particularly because a reviewing court must "only conduct a threshold inquiry into the merits of the claims," Reed v. Stephens, 739 F.3d 753, 764 (5th Cir. 2014) (citing Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate," Id. at 342.

Petitioner here never visited Texas: He was in California and bedridden, so he could not have intended to do so. Moreover, his communications with an undercover agent in Texas who did not represent herself to be a minor fell short of the facts establishing venue in Rounds, supra.

The judgment of conviction in this criminal case was not supported by Petitioner's "sending a sexually explicit photograph of himself and asking that it be shown to the girls," Howard, supra, at 425. Instead, this "close call," Id. at 427 -- especially given the "debatability" standard at issue in the COA context -- was based on the totality of the circumstances, hinging on "when he instructed the undercover police officer to perform sex acts on and procure birth control for the girls to get them ready for him ... against the backdrop of [Petitioner's] conversations," Id. at 426-27.

Given the complex questions presented on direct appeal, Petitioner asserts that the questions relevant to the issues he presented for collateral review must be "debatable": To the extent that his post-conviction claims can be simplified as arguments that, "but for" certain errors and omissions, the outcome of the criminal proceedings would have been different, a COA must issue. A COA is a certificate of appealability, not a resolution of the merits of claims raised by the would-be appellant.

The District Court never addressed Petitioner's claim that improper venue, in the context of the Government's standing to bring the case before the Court, rendered the judgment void as the District Court was without jurisdiction to hear the case under Article III Section 2 of the Constitution (see 28 U.S.C. §547(1)). Accordingly, Petitioner was also entitled to a COA under the reasoning of the Eleventh Circuit in Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992): The "resolution" of that claim is per se debatable because any answer would have been different from the District Court's silence.

Because the trial evidence did not incontrovertibly establish that the act comprising a violation of §2422(b) would have occurred in Corpus Christi (i.e., within the jurisdiction of the Southern District of Texas) were Petitioner to have moved to cause the relevant "affectation of the mental state of a minor," U.S. v. Dwinells, 508 F.3d 63, 71 (1st Cir. 2007), it cannot be beyond debate that a properly-lodged objection or motion by defense counsel would have changed the calculus either as to the District Court proceedings themselves or on direct appeal. The District Court's rejection of Petitioner's claim by ensconcing the status quo in "strategy" was inappropriate where no evidence existed in the collateral record to refute Petitioner's claim that counsel had failed to effectively evaluate and present relevant issues. Under these circumstances, the District Court should not have granted summary judgment for the Government, but held an evidentiary hearing (or at least allowed for expansion of the record, e.g., by deposing counsel) as required by §2255(b).

Similarly, the District Court's disposal of Petitioner's claim that the outcome of the criminal proceedings would have been different if counsel had properly raised his factual-impossibility defense was inappropriate where the collateral record was underdeveloped as to counsel's investigation and decisionmaking processes in rebuttal of Petitioner's claims. "Ineffective assistance claims generally require an evidentiary hearing if the record contains insufficient facts to explain counsel's actions as tactical," Osagiede v. U.S., 543 F.3d 399, 412 (7th Cir. 2008).

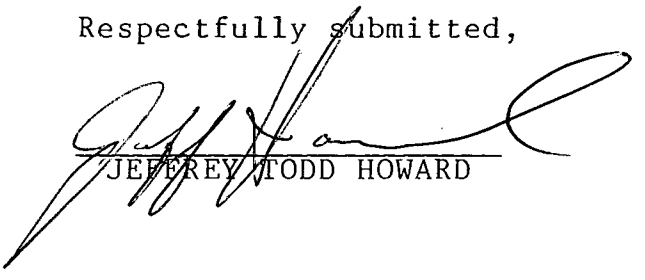
For these reasons, and in particular where courts are obliged to evaluate the presence of jurisdiction to consider a case, a COA should have issued below. That one did not is a result of the Fifth Circuit's deviation from this Court's holdings as to the applicable standard of review and from the adherent renderings of sister circuits in such cases.

Because the identified issues, including errors of jurisdictional and constitutional magnitude, represent an injustice subject to correction by way of due process of law, and where the matter as it stands represents a manifest miscarriage of justice in light of Petitioner's actual innocence where he preserved his legal rights at trial and, but for the complained-of errors and omissions, would have been entitled to relief at the District Court or Appellate Court level under the close conditions herein and below presented, this Court must act to promote proper consideration of his case as required under §2 255 and to restore justice.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



JEFFREY TODD HOWARD