

No. 18-5381

Original Case 3:15-CR-00016-1

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN MICHAEL BURTON, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT(S)

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether a downward departure from a statutory minimum sentence is warranted when the abusive tactics of the Government acting in concert with a Confidential Informant exercises psychological, emotional and physical dominion and control over a susceptible defendant ("Petitioner") in violation of principles of due process in violation of the U.S. Constitution's 5th Amendment.
2. Whether the District Court denied Defendant's motion for a downward departure where Defendant's agreement to facts admitted in the plea agreement do not constitute the elements of a violation of [18 U.S.C. § 2422(b)] a crime in violation of the U.S. Constitution's 5th Amendment.
3. Whether the District Court erred, after considering Defendant's § 3553(2) factors "sympathized" but stated its hands were tied.

Parties To The Proceeding

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

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The opinion of the United States Court of Appeals appears at Appendix A to the Petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the Petition and is unpublished.

Jurisdiction

For cases from ~~federal courts~~:

The date on which the United States Court of Appeals decided Petitioner's case was September 20, 2018.

Constitutional and Statutory

Provisions Involved

18 U.S.C. § 2422(b).....	1,7,9,11,12
18 U.S.C. § 3553(2).....	1,8,14
21 U.S.C. §§ 841, 844, 846.....	12
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STATEMENT OF THE CASE

Burton pled guilty to one count of "Enticement of a Minor for Sexual Purposes" [18 U.S.C. § 2422(b)] on August 3, 2015. At no time did Burton actually speak to or communicate with an underage minor.

Burton communicated online via the internet with an undercover Law Enforcement Officer (the "Officer") who was posing as an adult acquaintance of Burton. The adult acquaintance was actually an alleged friend of Burton who was cooperating with the Officer as a Confidential Informant ("CI") to set a trap for Burton.

The Officer, posing as the "CI" was able to control or at least bend the will of Burton as the CI himself had a committed relationship at one time with Burton. The Officer, posing as the "CI", advised Burton online that he could arrange for the two of them to engage in sexual acts with a [fictitious] 12 year old male in a hotel room.

After several denials by Burton, the Officer, posing as the CI, friend of Burton, and a third party, posing as the fictitious 12 year old male communicated online to arrange to meet in a hotel room on February 10, 2015. When Burton arrived at the hotel room, he was arrested.

At no time was there ever a 12 year old male, either at a hotel room or online.

Burton had advised the Court of several childhood experiences he endured. Aside from these past occurrences, Burton, without asserting entrapment or ineffective assistance of counsel, but in full acceptance and responsibility of his acts had accepted responsibility for his guilt and is questioning the extent to which he was sentenced giving full cognizance of the surrounding facts.

On March 15, 2016, the Honorable Thomas Varlan, United States District Judge (the "Court") sentenced Burton to 120 months incarceration (10 years) and 120 months of supervised release.

During the Sentencing Colloquy the Court specifically indicated "[I]ts hands were tied by the statute and [it] had to impose a minimum sentence of 120 months." Even after Burton explained several childhood experiences, which taking 18 U.S.C. § 3553 factors into consideration would have permitted the Court to justify a sentence departure below 120 months. However, the Court again stated "[It] was sorry, but it could not deviate from the 120 month sentence."

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD HOLD THAT THE FIFTH AMENDMENT RULE OF SUBSTANTIVE DUE PROCESS PERMITS A DISTRICT COURT TO CONSIDER ALL OF THE FACTS AND CIRCUMSTANCES WHEN CRAFTING A DECISION BELOW A MANDATORY MINIMUM.

1. The facts of the case nor do the plea agreement support a violation of law.

The facts of this case do not support the elements of the crime (18 U.S.C. § 2422(b)) to which Petitioner was cajoled into pleading guilty.

The crime of Coercion and Enticement (18 U.S.C. § 2422(b)) requires the elements of:

(a) Knowingly **PERSUADES, INDUCES, ENTICES, OR COERCES**. At no time do the facts alluded to in the plea agreement or presented by any evidence indicate that the Petitioner persuaded, induced, enticed, or coerced either a minor or a C.I. posing as a minor.

- * Petitioner was contacted and persuaded by an undercover agent to meet a minor.
- * Petitioner was induced and enticed by an undercover agent posing as a friend to meet a minor.
- * Petitioner was coerced by the hypothetical friend, of whose emotional control he was under, to meet a minor.

(b) or **ATTEMPTS TO DO SO**.

- * Petitioner never made any attempts. Petitioner was in fact lured to meet his hypothetical friend, who was not a minor, at a hotel, where he was told by his hypothetical friend that there would be a minor

there.

The colloquy at sentencing confirms that:

- (a) That Petitioner was abused as a minor.
- (b) That Petitioner did not initiate, nor coerce, nor entice a minor into a sexual relationship.
- (c) That Petitioner was duped by a "trusted friend," (the C.I.) who exercised emotional control over him.
- (d) That Petitioner was lured by an undercover agent posing as his "trusted friend" and another undercover agent posing as a minor to meet them at a hotel.
- (e) The undercover agents abused their authority and exceeded all honest bounds of investigation, even as undercover agents, to "play upon the easy manipulative character of Petitioner" (as reported in the appendix herein.)
- (f) At no time did Petitioner initiate an e-mail or suggest to a minor or a C.I. posing as a minor to meet.

2. The decision of the Court is inconsistent with the abuse of conduct and law by the government.

The Officer, posing as the "CI" (the CI being the friend) was able to control or at least bend the will of Petitioner as the CI (friend) himself had a committed relationship at one time with Petitioner. The Officer, posing as the CI, advised Petitioner online that he could arrange for the two of them to engage in sexual acts with a [fictitious] 12-year-old male in a hotel room.

The Officer, posing as the CI, friend of Petitioner and a third party, posing

as the fictitious 12 year old male initiated a communication online to arrange to meet in a hotel room on February 10, 2015. When Petitioner arrived at the hotel room, he was arrested.

At no time was there ever a 12 year old male, either at a hotel room, or online, or coerced by Petitioner.

3. The Court abused its discretion in denying a downward departure.

In the District Court's denial of Petitioner's Request for Sentence Reduction, the District Court states [Doc. 45]:

The Court sentenced Petitioner to a term of 120 months imprisonment, followed by ten years supervised release [Doc. 39]. This represented the mandatory minimum sentence to which the Court could have sentenced Petitioner.

A. The facts of Petitioner's acts do not support a conviction

Under 18 U.S.C. 2422(b).

1. Petitioner herein restates the facts stated above as if fully provided herein.

B. The Law of 18 U.S.C. § 2422(b) as applied to Petitioner is

Unconstitutional.

1. Government referrals for prosecution of Coercion and Enticement (§2422(b)) have outstripped actual convictions at a 2:1 ratio. ^{FN1} The aggressive nature of prosecution and threats of long term imprisonment used to frighten an already susceptible Petitioner, coercing him to plead guilty to elements of a crime he did not commit, and which were inconsistent in the plea agreement.

Judge Patti B. Saris, Chairwoman, Introductory Comments at U.S. Sentencing Commission Hearing on Child Pornography Offenses (Feb. 15, 2012), available at <http://www.ussc.gov/Legislative and Public Affairs/Public Hearings and Meetings/20120215/Hearing Transcript 20120215.pdf>., states:

"The law and practice regarding child pornography offenses likewise has evolved considerably, especially since United States v. Booker. At its core, the history of the Child Pornography Guidelines continues a trend that first arose during the evolution of the Drug Guidelines, namely a critical assessment of the judiciary of the empirical support and rationality of the particular guideline. As with the Drug Guidelines, the critique from the bench has grown to critical mass such that the Child Pornography Guideline now, too, in all likelihood, will be revised downward by Commission amendment if not Congressional directive."

(emphasis added)

The District Court has the authority to depart from mandatory minimums in special cases. (The drug cases cited by Judge Saris).

(a) Limitation on applicability of statutory minimums in certain cases.

Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substance Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances

FN1 Source: Transactional Records Clearinghouse, Syracuse University. Data searched performed June 2012. Search was limited to referrals, prosecutions, and convictions were violations of 18 U.S.C. § 2422 was recorded as the lead offense. Referrals are limited only to those referrals that were disposed of, meaning acted upon.

Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of Title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation that:

- (1) the defendant does not have more than one criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and is not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substance Act [21 U.S.C.S. § 848); and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Petitioner herein meets all of the conditions of a downward departure had he in fact been a drug dealer causing much greater harm and damage to individuals than to a fictitious "setup".

4. Case law supports a downward departure.

It is of no small consequence that despite more egregious violations of law which federal judges provide variances from statutory minimums based on facts and circumstances as well as factors of the accused (§ 3553) that in the genre of sex offense crimes where federal judges have mandated the convicted to see a therapist, the resulting sentences for crimes of (a) public exposure; (b) molesting a stepdaughter; (c) sexual assault of a neighbor; (d) statutory rape; and (e) even an accused who spent decades masturbating next to women in movie theaters. ^{FN2}

The history of "Matt" which more egregiously parallels Petitioner's case in chief, the consequences for "Matt" were swift, he went to prison for eleven (11) months despite a mandatory minimum of 20. ^{FN3}

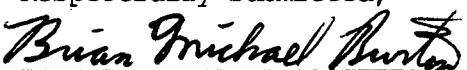
^{FN2} Report on Page 40 of Time, May 21, 2018

^{FN3} Pages 41 and 42 of Time, May 21, 2018.

Conclusion

For reasons given above, this Petition for a Writ of Certiorari should be granted.

date of December 7, 2018

Respectfully Submitted,

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