

No. _____

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

18-8485

In The

Supreme Court of the United States

In Re:

MICHAEL DAVID HOWER

MOVANT

PETITION FOR WRIT OF MANDAMUS

OR AS APPROPRIATE

Authorized by 28 U.S.C. § 1651

Michael David Hower
Federal Correctional Institution
P.O. Box 6001
Ashland, KY 41105

ORIGINAL

QUESTION(S) PRESENTED

1. Is the petitioner entitled to immediate relief, including mandamus or prohibition from this Court, to protect his constitutional and statutory rights guaranteed in Massaro v. United States, 538 US 500, to a full and fair judicial review of cognizable claims of ineffective assistance of counsel with an evidentiary hearing to resolve material factual disputes never resolved in his 2012 28 U.S.C. §2255 petition?

2. Is the failure of the district court and the United States Court of Appeals to hold an evidentiary hearing to allow the petitioner to develop an ineffective assistance of counsel claim that he was coerced into pleading guilty to a crime he did not commit by the AUSA and his attorneys, who later refused to move for withdrawal of his guilty plea as ordered before sentencing, the type of extraordinary circumstances correctable by mandamus?

RELIEF SOUGHT

Petitioner prays for a writ of mandamus or as appropriate, directed to the United States District Court for the Western District of Michigan, and the Honorable Robert J. Jonker, directing and commanding the Honorable Jonker to grant him a full and fair judicial review of the claims of ineffective assistance of counsel that were made in his 2012 28 USC §2255, by holding an evidentiary hearing to develop his claims and to resolve material factual disputes, as announced in this courts decision in Massaro v. United States, 538 US 500 and the rules governing 28 USC §2255(b).

UNAVAILABILITY OF RELIEF IN OTHER COURTS

AND

UNSUITABILITY OF ANY OTHER FORM OF RELIEF

Due to the vast number of petitions that he has filed in the past 9 years, and very limited space he is allowed by the prison, Hower can only present a partial record of the motions he has filed requesting federal collateral relief. What he does show is his due diligence in asserting his constitutional rights to establish the record and further develop his ineffective assistance of counsel claims to prove his innocence. There has never been more than a 30 day gap between his filing of motions, once one was rejected, another was in the mail.

On December 1st, 2009 Hower was sentenced to 600 months in prison; November 9th 2011 the direct appeal was denied by the "sixth" cir. court of appeals; November 2012, filed §2255, and denied by district court in August 2013. September 2013 filed §2255 to the "sixth" cir. and denied in May 2014. In June 2014 filed for rehearing/ rehearing en banc to "sixth" cir. and was denied July 2014.

Hower has filed many other motions, five petitions for "second or successive", motions to the district court and then to the court of appeals for "motion to unseal docket #57", "motion to inforce FOIA" and a "motion under Rule 60(b)." (all denied without review)

Hower has filed motions under 28 USC §2241 to the disrtict court in Maryland.

Hower has filed a civil action against his two attorneys.

Hower has filed a motion to withdraw his guilty plea to the district court that was transfer to the court of appeals as a "second or successive" petition.

Hower has filed three motions to this US Supreme Court, two for a writ of Certiorari and one for "rehearing". All motions have been denied or transferred to the court of appeals then dismissed. All of these petitions have asserted the same basic claims, that Hower is innocent of all the charges and only plead guilty to the AUSAs' "off the record" promise because he was coerced by the AUSA and his attorney, if he did not take the promise, his wife was going to be arrested and his children were going into fostercare and he was going to get "life" in federal prison and similar state charges. see affidavit (appx b)

Hower has tried everything he can think of before getting to his current request for mandamus. Hower has motioned other courts in other jurisdictions hoping that someone will give him a full and fair review that he was denied, or as in the civil lawsuit against his attorneys for malpractice, hoping that the district court where the civil action was filed, would order his attorneys to respond to the allegations set in the civil action, almost exactly the same as the allegations of constitutional err that were made in the 2012 §2255. (denied)

No other form of relief will be sufficient to protect the rights of the petitioner and preserve the ability to seek review of the lower court decision in this court. Hower has sent letters to the Hon. Jonker, the Sixth Circuit Court of appeals and to this U.S. Supreme Court begging for help. (appx.D)

All of Howers' motions, letters and affidavit asserting his innocence and asking for help and asking for an evidentiary hearing so he can prove he was being truthful in the claims of ineffective assistance of counsel and that he was coerced into pleading guilty in the 2012 §2255 have gone ignored, by not only the district court, but also by the Sixth Circuit Court of Appeals that has left out any mention of allegations of improper conduct by AUSA Mekaru from their case summarys of Howers many motions.

Some in the legal profession might claim that the district courts abuse of discretion when denying Hower an evidentiary hearing is no big deal or "harmless error". Under the circumstances of this case it is a very big deal; the allegations of criminal and constitutional violations against AUSA Mekaru and Howers' attorneys Nunzio and Graham, an evidentiary hearing is not discretionary but mandatory, at a time when the facts of the case were fresh on their minds. Hower believes he was denied a hearing so the courts can cover for AUSA Mekaru.

AUSA Mekaru has a history of violating the constitutional rights of defendants. In United States v. Ranger Electronic, 22 F. Supp. 2d 667; 1998 U.S. Dist LEXIS 14673 (appx.E) In Ranger, the AUSA used his influence as a federal prosecutor over another federal agency (the FCC) to withhold exculptory evidence in a criminal case. The judge in that case issued an order " shall require the Assistant United States Attorney to show cause why a formal investigation before the Office of Professional Responsibility of the Department of Justice should not be commenced." Ranger The record does not establish if AUSA Mekaru was referred to the O.P.R., but Hower does have a pending FOIA request to try to find out.

It appears that Howers' requests have gone ignored to hide something sinister. It would have taken very little for the district court to order Howers' attorneys and AUSA Mekaru to file affidavits. The district courts wilful disobedience of the procedural rules laid down by this court has caused Hower irreparable harm, over

the past 12 years, he has lost very important time with his family, both of his grandparents have passed and his four children have grown into young adults, but because of the nature of the charges he was forced into pleading guilty to, he is denied communications with them.

Mandamus will lie appropriate to cases to correct a courts wilful disobedience to the procedural rules laid down by the Supreme Court and there existence of exceptional facts that require mandamus as a corrective measure and the only way for Hower to recieve any justice is for this court to grant mandamus, to find out what is really going on and to put district court back into conformity with the law.

Because Hower is a layman when it comes to matters of the law, please try to look past forms, typing or spelling errors of if he has supplied way too much or too little information, and to please dig into this case and try to determine what is really going on. On page 8 of the Ranger case summary (appx.E) there are two quotes, one from Henery Hyde Chairman of the House Judiciary Committee, sponsor of the Hyde Amendment and one from Justice Sutherland in his famous opinion in Berger v. United States, 295 U.S. 78 88, 79 L.Ed 1314 55 S.Ct 629 (1935), that after reading causes one to stop and think of how important it is for the United States Attorney to be fair and impartial, to have a strong moral compass and to be ruled by truth and justice, not personal feeling.

LIST OF PARTIES IN COURT BELOW

- 1. MICHAEL DAVID HOWER - Petitioner**
- 2. UNITED STATES OF AMERICA - Respondent**
- 3. HONORABLE ROBERT J. JONKER - Respondent**

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3, 4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	10

INDEX TO APPENDICES

APPENDIX A Decision from Sixth Circuit Court of Appeals

APPENDIX B Sworn Affidavit

APPENDIX C Massaro v. United States, 538 US 500

APPENDIX D Letter to Honorable Robert J. Jonker,
Sixth Circuit Court of Appeals and
U.S. Supreme Court

APPENDIX E United States v. Ranger Electronic, 22 F. Supp. 2d 667
Dist. LEXIS 14673 (6th cir. 1998)

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Johnson v. Williams</u> , 185 LED2d 105 568 U.S. 289	<u>8</u>
<u>Massaro v. United States</u> , 538 U.S. 500 (2003)	<u>6</u>
<u>Sanders v. United States</u> , 10 LED2d 148 373 U.S.1	<u>7</u>
<u>Strickland v. Washington</u> , 466 U.S. 668 687 104 s.ct 2052 2052 80 LED2d 674	<u>8</u>
 STATUTES AND RULES	
28 U.S.C. §2244(b)	<u>8</u>
28 U.S.C. §2255(b)	<u>6,8,9</u>
28 U.S.C. §2255(h)	<u>7,8</u>
Fed. R. Crim. P. 11(d)(2)(b)	<u>9</u>
 OTHER	
Blacks Law Dictionary, 1199 (9th ed. 2009)	<u>8</u>

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 _____ 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.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of to issue the requested writ under
28 U.S.C. § 1651(a) and Supreme Court Rule 20.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The rules governing 28 U.S.C. § 2255 (b) states:

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant to prompt hearing there on, determine the issue and make finding of fact and conclusion of law with respect there to".

28 U.S.C. § 2255 (h):

- 1) The claim contains newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or
- 2) The claim contains a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court that was previously unavailable.

28 U.S.C. § 2244 (b)

The court will not consider claims that were presented in a prior 28 U.S.C. 2255 motion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Crim. P. 11(d) (2) (b)

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

Statement of the case

On December 1st 2009, the United States District court in Grand Rapids, Michigan sentenced Hower to 420 months in prison on one count of sexual exploitation of a minor and one count of receiving child pornography. The defendant had been coerced into pleading guilty to a crime he did not commit under a written plea agreement to both counts on February 9th 2009. Hower was told by his attorney Nunzio, if he did not plead guilty, his wife was going to be arrested, his children were going into state foster care, and he would get the maximum possible sentence and face similar state charges. Or he could take the AUSA "off the record" promise of 15 years. Even after Hower told his attorney that there was another middle aged male living at the residence at the time the alleged offense occurred and most likely committed the crime.

Because the AUSA did not want to appear soft on this type of charge; Nunzio told him he would have to lie to the court and showed him the charging documents on February 8th and 9th 2009 to study so he could answer the judge's questions at the plea hearing.

A couple of months later after receiving the preliminary PSR with a guideline calculation of 30 years, the defendant ordered Nunzio to withdraw his plea, instead Nunzio had a meeting with the AUSA and probation agent in a failed attempt to reduce the guideline calculation, and only succeeded in raising it.

Again Nunzio was ordered to move for withdrawal and when he refused Hower requested and received new counsel. After consulting with new counsel, the defendant did again seek to withdraw his plea and move forward to trial. New counsel had two meetings with the AUSA and probation agent to reduce the guideline calculation from 34 years but only succeeded in raising the calculation to life.

On November 23rd 2009 walking into the court room Hower again ordered his attorney Graham to withdraw the plea, but he refused stating "We don't have a good enough reason".

REASON(S) TO GRANT THE PETITION

In this petition for An Extraordinary Writ authorized by 28 USC §1651, the petitioner is appealing to this Honorable United States Supreme Court from the Sixth Circuit Court of Appeals decision to affirm the district courts order denying him well defined constitutional rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution, and statutory rights under 28 USC §2255, and this courts rule of constitutional law in Massaro v. United States, 538 U.S. 500 (2003)

The action taken by the lower inferior courts in this case are contrary to U.S. federal law, U.S. Supreme Court case law authority and the rights guaranteed to all criminal defendants under the United States Constitution, these rights are clear and indisputable. Granting of the writ will be in aid of this courts appellate jurisdiction, that exceptional circumstances warrant the exercise of this Courts discretionary powers and that adequate relief cannot be obtained in any other form or from any other court.

Hower is requesting that this most Honorable Supreme Court order or otherwise require the United States District Court for the Western District of Michigan follow the statutes enacted by the congress in 28 USC §2255(b) and this courts case law authority in Massaro, to hold an evidentiary hearing to expand the record so he can develop his claims of ineffective assistance of counsel asserted in his 2012 §2255 petition that have never been resolved "on the merits".

The facts on which this motion is based are established in Howers' affidavit in appx. B. In his original 2012 §2255, he swore under penalty of perjury that he was coerced into pleading guilty to a crime he did not commit. He was told by his attorney Nunzio, that if he did not plead guilty to the AUSAs' "off the record"

promise of 15 years, his wife was going to be arrested and his children were going into state foster care and he would get the maximum of life in federal prison and be charged in state court with similar charges. But he could not tell the judge, he was told by his attorney Nunzio, to lie to the judge. Nunzio made him study the charging documents so he knew how to answer the judges questions at the plea hearing. His attorney gave him the answers to the "test" given by the judge. He swore that he ordered his attorneys to move for withdrawl of his guilty plea on three separate occasions before sentencing. These attorney- client conversations occured outside the courtroom, a few were held at the federal holdover, 50 miles away from the courthouse, a few in the attorney- client room at the courthouse, and one walking into the courtroom and one at the Kent County Jail.

The lower courts assert that they are not required to hold a hearing into the ineffective assistance of counsel claims made in the 2012 §2255 petition because "they were meritless based on Howers testimony at the plea hearing" and their assertion that the district court "did a full review of the record but could not find any evidence to support Howers claims" is not only an attempt to invalidate the legislative power held by congress and this Court, but causes one to pause and question what are the true motives of the lower courts if not to ensure that the law is followed equally for all, justice be done and to guarantee that an innocent man is not sitting in prison because his attorney was acting more as an agent for the government and not as one guaranteed by the Sixth Amendment of the United States Constitution.

Howe has presented the plea withdrawl and the coerced guilty plea claim in all of his motions for federal collateral relief. All were misconstrued as "second or successive" petitions and dismissed without review, even though the lower courts continue to characterize these motions as such, they can never be within the meaning of 28 USC §2255(h), applying "Sanders v. United States", 10 LED 2d 148 373 US1, which states "no matter how many prior applications for federal

collateral relief have been made, if the same ground was earlier presented but not adjudicated on the merits, 28 USC 2255(h) does not apply." Until the AUSA and his attorneys respond to the claims of constitutional error made in the 2012 §2255, this case can never be adjudicated "on the merits" and can never be a "second or successive" within the meaning of 28 USC §2255(h) or 28 USC §2244(b).

In Johnson v. Williams, 185 LED 2d 105 568 U.S. 289, this court explains what "on the merits" review is: "a judgment is said to have been rendered on the merits only if it was delivered after the court.... heard and evaluated the evidence and the parties substantive arguments." Used in this context, the word "merits" is defined as the right and wrong of a matter, as a law case unobsecured by procedural details, technicalities, personal feelings, ect. Blacks Law Dictionary, 1199 (9th ed. 2009)

The district court was required to hold an evidentiary hearing as required by 28 USC §2255(b) and this courts rule of constitutional law in Massaro, which EXPRESSLY instructs the district court to grant a prompt hearing to resolve any questions not conclusively resolved by the record. Ineffective assistance of counsel claims by their very nature require development of the record to support a defendants claims because the evidence introduced at trial will be devoted to guilt or innocence and the penalty, and the resulting record does not disclose the facts necessary to decide either prong of the Strickland v. Washington, 466 US 668 687 104 S.ct 2052 80 LED 674 analysis. Howers' sworn notorized affidavit is the only record of multiple attorney- client conversations and must be accepted as true unless proven otherwise. The lower courts have never made any discussion about this affidavit, or have ever acknowledge its existence. At no time in the past six years and countless opportunities has either of his attorneys or anyone in the United States Attorneys Office ever offered any contradicting evidence or statements to refute any of Howers' requests for federal collateral relief or to the factual record established in the sworn affidavit. Instead, the United States

Attorneys Office defends AUSA Mekaru by relying on an incomplete record by claiming "there is no evidence on the record to support Howers claims." But the factual narrative put forward by him relates primarily to purported occurrences outside the courtroom and upon the undeveloped record could therefore cast no real light.

Hower was allowed under Fed. R. Crim. P. 11(d)(2)(b) to move for withdrawal of his guilty plea anytime before sentencing and his attorneys failure to move for withdrawal when requested violates the Sixth Amendment without regard to the probability of success. The attorneys failure to file the motion to withdraw at the behest of Hower is particularly problematic because it does not merely deprive him of effective assistance of counsel, it deprives him of the assistance of counsel altogether. If his attorneys had actually followed his orders he would have been able to inform the court of his innocence, the threats made against his family and the "off the record" promise.

The lower courts decision not to allow Hower to develop his ineffective assistance of counsel claim by holding a hearing or otherwise inquire into them, when they were presented with a factual narrative of the events that is neither contradicted by the record nor inherently incredible, is outside the norms and has shown a fundamental defect in the proceedings that has inherently resulted in a complete miscarriage of justice, an error so egregious that it has amounted to a violation of his Due Process Rights under the Fifth Amendment of the United States Constitution, that requires this court with ultimate authority over all other courts to fix.

The lower courts are hiding behind AEDPSs' strict "second or successive" petition requirements. The district court was required by 28 USC §2255(b) to hold an evidentiary hearing to expand the record to include the details of attorney-client conversations that happened outside the courtroom and are not on the record,

to aid the court in determining the truth of Howers' claims. without the details of the conversations, no court can properly resolve Howers' 2012 §2255 petition. The district court knows that due to the nature of his charges and his pro se status, he is very unlikely to gain any meaningful review of his claims.

CONCLUSION

All Hower is asking for is an evidentiary hearing as required by law, and to have the record established to include the details of the conversations between him and his attorneys and then for the court to answer the claims made in the 2012 §2255, was he coerced into pleading guilty and did he order his attorneys to move for withdrawl of his guilty plea before sentencing?

The Petition for a Writ of Mandamus should be granted.

March 4th 2019 Respectfully Submitted, *Michael D. Hower*

I declare under penalty of perjury that the foregoing is true and correct.

March 4th 2019 *Michael D. Hower*