No. 18-9055

IN THE

SUPREME COURT OF THE UNITED STATES

Ronald Ray Horner — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ronald Ray Horner #16352-046
(Your Name)
Federal Correctional Instutition - Englewood
9595 West Quincy Ave.
(Address)

Littleton, CO 80123
(City, State, Zip Code)

N/A
(Phone Number)

Question Presented

Does the fact that the Appellant was arrested and questioned in Canada immunize the United States Attorney from following the Constitution of the United States of America, the Bill of Rights (specifically the Fifth Amendment), and established Supreme Court precedents when applying United States statutes Extra-territorially when no express Extra-territorial component is explicitly expressed by Congress, especially since multiple circuits continue to disagree on the proper execution of the application of Extra-territorial jurisdiction and Constitutional protections when an individual is charged and tried for a crime in the United States and when all aspects of the alleged crime occured entirely within the sovereign territory of a foreign nation?

LIST OF PARTIES

[x] 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:

TABLE OF CONTENTS

INDEX TO APPENDICES

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,
[x] is unpublished.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[ ] is unpublished.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.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **10 December, 2018**

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **5 February, 2019**, and a copy of the order denying rehearing appears at Appendix **A**.

[ ] 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).

TABLE OF AUTHORITIES

SUPREME COURT

CIRCUIT COURT

STATUTES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. A defendant's right to remain silent under the Fifth Amendment to the Constitution of the United States of America.

2. Application of United States Statutes and Constituional guarantees when applied Extra-territorially.

3. Extra-territorial jurisdiction when the statute in question lacks express Congressional intent for Extra-territorial application.

Case Synopsis

On or about March 24, 2014 Appellant was arested in Couts, Alberta, Canada and charged with importing child pornography. Canada released Appellant who returned to the United States. On June 7, 2016 Appellant was arraigned for transportation of child pornography. Appellant was tried and convicted on April 7, 2017. During his trial the prosecution highlighted during testimony of a prosecution witness that the Appellant exercised his right to remain silent under both Canadian and United States law. This is an egregious violation of the Appellant's Fifth Amendment rights. From the time of his conviction to the time of his sentencing the Appellant fired his Public Defender and a new attorney was assigned through CJA. At the hearing to replace his attorney the Appellant brought up jurisdiction which was never addressed. CJA attorney filed appeal with the Ninth Circuit which held error was harmless.

Argument

When the United States Attorney violated Appelant's Fifth Amendment rights, which violation is unquestioned, with malice aforethought it should have triggered Constitutional and jurisdictional concerns. Jurisdiction can never be waived (see Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152, 53 L. Ed. 12, 29 S. Ct. 42 (1908)). During the Appellant's trial the United States Attorney made a point of explicitly bringing to the jury's attention that the Appellant elected to remain silent while being questioned by Canadian authorities in Canada. The right to remain silent is an unalienable right under both Canadian and United States law. This right is sacrosanct. Appellant exercised that right vocally during questioning. The Appellant's Fifth Amendment rights were violated (see Griffen v. California, 388 F. 3d 1060 380 U.S. 609, 611-13, 85 S.Ct. 1229, 14 L. Ed 2d 106 (1965) and see Miranda v. Arizona, 16 LED 2d 694, 384 US 436 (1966) also see Doyle v. Ohio, 49 LED 2d 91, 426 US 610 (1976)).

Neither the district court nor the Ninth Circuit Court of Appeals considered the reach and the scope of the extra-territorial application of the Fifth Amendment. Or its hook to the extraterritorial application of 18 U.S.C. §2252. This should invoke both courts duty to specifically examine extraterritorial jurisdiction. Neither the district court nor the Ninth Circuit Court of Appeals did so. When United States statutes are applied extraterritorially, fundamental Constitutional protections are also applied extraterritorially (see Hernandez v. Mesa, 137 S. Ct. 2003; 198 L. Ed 2d 625 (2017)). This was evident as the district court and then the Ninth Circuit Court of Appeals both heard

arguments regarding the Appellant's rights under the Fifth Amendment. However, not all circuits agree. The Third Circuit Court of Appeals rejects the idea that the Fifth Amendment applies extraterritorially (see Evironmental Tectonics v. W.S. Kirkpatrick, 847 F. 2d 1052; 1988 U.S. App. LEXIS 5865; 1988-1 (1987)). These two different holdings creates a circuit split regarding application of the Fifth Amendment.

If United States statutes were not applied extraterritorially it would be unnecessary to consider extraterritorial application of the Fifth Amendment. The Appellant does not question Congress's power to pass laws with extraterritorial effect. What the Appellant does question is whether the statutory construction of 18 U.S.C. §2252 presents an unmistakable, unambiguous, clear expression of Congressional intent to apply extraterritorially. Several statutes under Title 18 of the United States Code expressly state that they apply extraterritorilly (see the following statutes under Title 18: §351, §832, §1039, §1512, §1513, §1751, §2285, §2332B, §2339B, and §2339D). These several statutes contain verbage clearly showing Congressional intent (most of the above statutes contain the phrase "There is extraterritorial Federal jurisdiction over an offense under this section"). There is no misunderstanding of Congressional intent as it relates to these statutes. 18 U.S.C. §2252 does not contain that express statement. 18 U.S.C. §2252 lacks a statement of affirmative intent. Concerning extraterritorial application, 18 U.S.C. §2252 is vague and ambiguous. The only portion of 18 U.S.C. §2252 that might give any extraterritorial application is the portion that says "... using any means of interstate or foreign commerce including computer or mails..." One must ask which country's interstate commerce? Canada, Japan, the U.S.?

Using that phrase to give extraterritorial effect to 18 U.S.C. §2252 is too liberal an interpretation of the phrase bordering on semantic gymnastics. In Validus Reinsurance, LTD. v. United States, (786 F. 3d 1039; 415 U.S. App. D.C. 254; 2015 U.S. App. LEXIS 8602; 2015-1 U.S. Tax Case (CCH) P70, 335; 115 A.F.T. 2d (RIA) 2015-1915(2015)) the D.C. Circuit held:

> "Yet Congress's use of the words "each" and "any" is not a clear expression of its intent to assert extraterritorial jurisdiction. In Kiobel, the Supreme Court rejected an extraterritorial application of the Alien Tort Statute based on such language... it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriallity... although the government's interpretation is plausable, plausibility does not rebut the presumption against extraterritoriallity See Aramco, 499 U.S. at 250-51; see also Morrison, 561 U.S. at 264."

For alleged crimes said to have been committed wholly within the jurisdiction of a foreign sovereign nation, and with no connection to commerce within the United States, United States statutes and Constitutional protections simply cannot apply. In United States v. Martinelli, (62 M.J. 52; 2005 CAAF LEXIS 1095 No. 02-0623 (2005)) the United States Court of Appeals for the Armed Forces held:

> "We hold that the CPPA does not have extraterritoial application and therefore does not extend to Martinelli's conduct in Germany."
>
> They continue:
>
> "The extraterritorial application of Federal statutes does not involve any question as to Congress' authority to enforce its criminal laws beyond the territorial boundries of the United States -- Congress clearly has that authority. United States v. Bowman, 260 U.S. 260 U.S. 94, 98-103, 67 L. Ed 194, S. Ct. 39 (1922). Rather, the question is whether Congress has in fact exercised that authority, which is a matter of statutory construction. Equal Employment Opportunity Commission v. Arabian American Oil CO (Aramco), 499 U.S. 244, 248 113 L Ed 2d 274, 111 S. Ct. 1227 (1991)."
>
> They further hold:

"The principles articulated by the Supreme Court in Aramco and Bowman can be harmonized to provide the following analytical framework for assessing whether the CPPA was intended to have extraterritorial effect: Unless the CPPA can be viewed as falling within the second catagory described in Bowman ("criminal statutes which are as a class,...enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated," 260 U.S. at 98), the statute is subject to the presumption against extra-territoriallity recognized in both Bowman and Aramco."

Additionally:

"We do not believe that the CPPA can be viewed as a "secondary catagory" offense under Bowman and thus exempt from application of the presumption against extraterritoriallity."

Yet more:

"The use of the term "foreign commerce" in addition to "interstate commerce" does not alter that conclusion, as the Supreme Court "has repeatedly held" that even statutes that expressly refer to "foreign commerce" do not apply abroad. Id. at 251."

And finally:

"To reach the conclusion urged by the Government, that Congress intended the CPPA to criminalize conduct inside the boundries of sovereign foreign countries, we would have to disregard the Bowman and Aramco presumption and the absence of these indicia. The rules of statutory construction laid down by the Supreme Court simply do not support that conclusion." United States v. Martinelli, 62 M.J. 52; 2005 CAAF LEXIS 1095 No. 02-0623 (2005)

Just to be clear, there exists between the United States and Canada an international boundry. Further, there is no international agreement under which the sovereign nations of Planet Earth have surrendered their sovereign duty to adjudicate crimes alleged to have been committed within their territorial jurisdictions to "TEAM AMERICA -- WORLD POLICE". However, the Circuit Courts are split regarding the extraterritorial application of 18 U.S.C. §2252. The United States Court of Appeals for the Third Circuit in United States v. Harvey, (2 F. 3d 1318; 1993 U.S. App. LEXIS 21204

No. 92-3273 (1993)) decided:

> "'Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.'" Id. (quoting United States v. Bowman, 260 U.S. 94, 98, 67 L. Ed. 149, 43 S. Ct. 39 (1922)); see also Smith, 113 S. Ct. at 1183 (presumption applies "unless a contrary intent appears")."

But then the Court of Appeals for the Seventh Circuit in United States v. Dawn (129 F. 3d 878 (March 31, 1997)) finds:

> "Generally speaking, Congress has the authority to apply its laws, including criminal statutes, beyond the territorial boundaries of the United States, to the extent that Extraterritorial application is consistent with the principles of international law. See EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 111 S. Ct. 1227, 1230, 113 L. Ed. 2d (1991); United States v. Bowman, 260 U.S. 94, 97-98, 43 S. Ct. 39, 41, 67 L. Ed. 149 (1922)

They go on:

> "Bowman recognizes an exception to the presumption against extraterritorial intent for "criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents." 260 U.S. at 98, 43 S. Ct. at 41."

The Appellant asks, just as the Court of Appeals for the Armed Forces has, how does applying 18 U.S.C. §2252 "defend" the United States from "obstruction" or "fraud"?

In the United States v. Frank (599 F. 3d 1221 March 15, 2010) the Court of Appeals for the Eleventh Circuit decided:

> "We have interpreted Bowman to hold that extraterritorial application "may be inferred from the nature of the offense and Congress' other legislative efforts to eliminate the type of crime involved." Baker, 609 F. 2d at 136; see also MacAllister, 160 F. 3d at 1307-08."

The Court of Appeals for the Ninth Circuit holds in both United States v. Clark (435 F. 3d 110 June 6, 2005) and in United States v. Thomas (893 F. 2d 1066, 1989) that 18 U.S.C. §§2241-2257 all apply extraterritorially. The Ninth Circuit justifies these holdings

saying that Congress has the power, under the commerce clause, to regulate commerce with foreign nations but the plain purpose of 18 U.S.C. §2252 is not to regulate commerce but to proscibe and regulate criminal activity. Using the Ninth Circuit's rationale Congress could regulate any activity anywhere (because generally any activity could be considered "commercial") even on the dark side of the Moon. Virtually every Circuit Court has weighed in on whether United States statutes can be or should be applied extraterritorially and virtually every Circuit has cited Bowman, Kiobel, and Morrison as supporting their holdings but the Circuits remain split; there is no consensus as to how to interpret the above cases and some Circuits are diametrically opposed in their holdings. The Appellant has provided an appendix showing the holdings of all the courts of appeals regarding extraterritorial application of United States statutes and Constitutional protections.

The Appellant contends that the extraterritorial application of United States statutes was inappropriate in this case. However, if the extraterritorial application of United States statutes was appropriate, then application of United States Constitutional protections must logically also apply and clearly the United States Attorney violated the Constitutional protections provided by the the Fifth Amendment to the United States Constitution. This egregious and heinous violation prejudiced the jury against the Appellant and short of polling each juror there is no way to tell how deeply the Appellant was prejudiced and the Ninth Circuit's holding that the error was harmless is wrong. Violation of such a fundamental right as the right to "remain silent" can only be regarded as a total denial and a complete negation of the Appellant's right to "due process" and a fair trial. The Bill of Rights were a promise

made to the people of the fundamental rights the new government would not ever violate. Had the Bill of Rights not been adopted it is unlikely that the Constitution of the United States of America would ever have been adopted. The people then, and now have an expectation that the fundamental promises of the Bill of Rights be upheld. It is the duty of the courts to uphold these fundamental rights (see Federalist #78). The district court and the Ninth Circuit both believed that the Fifth Amendment was operative and that Constitutional protections applied otherwise there would have been no controversy for them to consider.

This ignores, however, whether the statute even applies. In Kiobel v. Royal Dutch Petrolium Co., 588 U.S. 108, 114, 124-125, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013) this court held "all relevant conduct took place outside of the United States." Id. At 124, 113 S. Ct. 1659 185 L. Ed 2d 671. Just as in Kiobel, and in Martinelli, all alleged criminal conduct took place outside of the United States, therefore, just as in Kiobel, and in Martinelli, dissmissal is required based on the presumption against extra-territorial application of statutes. A statutes plain meaning must be enforced but the Appellant contends that "boiler plate" language like "in foreign commerce" does not mean the same thing as "There is extraterritorial Federal jurisdiction over an offense under this section (see Asplundh Tree Expert Company v. National Labor Relations Board, 365 F. 3d 168; 2004 U.S. App. LEXIS 7944; 174 L.R.R.M. 2929; Lab. Cas. (CCH) P10,337 Nos. 02-1151/1543, No. 02-1151, No. 02-1543 November 8, 2002 Argued, Aprill 22, 2004 filed). Note that the holding in Asplundh, from the Court of Appeals for the Third Cicuit directly contradicts their holding in Harvey.

In U.S. Bank of Ore v. INS Agents, Justice Souter writing for a unanimous Supreme Court wrote: "A statutes plain meaning must be enforced..." U.S. Bank of Ore v. INS Agents, 124 L Ed 402, 508 U.S. 439 (1993). As clearly stated in 18 U.S.C. statutes 351, 832, 1039, 1512, 1513, 1751, 2285, 2332B, 2339B, and 2339D when Congress intends a statute to have an extraterritorial application, that intention is clear, plain, and evident. Lacking a clear expression of extraterritorial application 18 U.S.C. §2252 cannot be applied extraterritorially and application of the Appellant's Fifth Amendment rights becomes moot. Neither United States statutes nor Constitutional protections apply in the case presented before this court.

Relief Requested

If 18 U.S.C. §2252 applies extraterritorially Appellant requests that this court reverse and remand for a new trial free from prosecutorial misconduct and violation of fundamental Constitutional rights. If however, this court finds that 18 U.S.C. §2252 does not apply extraterritorially the Appellant request that this court reverse and remand to vacate the conviction.

REASONS FOR GRANTING THE PETITION

1. Many ciruits are split concerning the Extra-territorial application of United States Statutes.
2. Many circuits are confused about Extra-territorial application of the Bill of Rights, specifically the Fourth and Fifth Amendments as those amendments pertain to United States Nationals in foreign countries and foreign Nationals in their own contries. One circuit even holds that the Fifth Amendment applies to a band in Northern Mexico because of its proximity to the United States.
3. Routinely circuits abandon the two step framework related in Kiobel and other Supreme Court holdings and extend United States statutes Extra-territorially simply because they decide to.
4. One circuit attempts to graft interstate commerce catagories to foreign commerce and even states in their holding that at times it is like "jamming a square peg into a round hole."
5. Many circuits have adopted the five general principles that permit Extra-territorial criminal jurisdiction which are: territorial, national, protective, universal, and passive personality under international law because these principles are far easier to impliment than jurisdiction under Federal law normally. Using these "international" concepts any person could be charged at any time for conduct anywhere in the world. This jurisdictional interpretation is too broad to be allowed to stand. Allowing this interpretation to stand would give United States Court jurisdiction on the dark side of the moon.

CONCLUSION

Due to the reasons stated in this short brief,
The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronald Ray Horner

Date: MARCH 8, 2019