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SUPREME COURT, U.S.

Hinton, OK 73047  
P.O. Box 400  
Great Plains Correctional Facility  
Santosh Ram # 11361-Q10

MOTION TO LEAVE TO FILE PETITION FOR REHEARING

FOR THE EIGHTH CIRCUIT

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

Respondent.

UNITED STATES OF AMERICA,

vs

Petitioner

SANTOSH RAM

IN THE SUPREME COURT OF THE UNITED STATES

MOTION FOR LEAVE TO FILE  
PETITION FOR REHEARING  
(SUPREME COURT RULE 44.2)

RELIEF SOUGHT

Santosh Ram, Petitioner, proceeding pro se, moves for leave to file the attached petition for rehearing of this court's order dated June 17, 2019 denying the petition for writ of certiorari.

GROUND FOR RELIEF

Petitioner should be granted permission to file the attached petition for rehearing more than 25 days after this court's decision of June 17, 2019 because:

(1) The decision of the court was made on June 17, 2019, but Clerk of this Court never mailed any copy of the court's decision to Petitioner. Petitioner sent a letter dated July 26, 2019, to clerk of this court requesting a copy of the Memorandum prepared by court clerks to be submitted to Justices for review in order to decide if writ of certiorari should be granted. Clerk's Office received that letter on August 06, 2019.

(2) Mr. Michael Duggan from Clerk's Office responded to Petitioner's letter and told him that his Petition for Writ of Certiorari was denied on June 17, 2019. Petitioner received that letter from Clerk's Office on August 13, 2019.

(3) Petitioner had been requesting Government to return his passport so that he can show his innocence in the court and sent multiple motions but Government never returned Petitioner's passport. Finally district court ordered Government on August 22, 2019 to return Petitioner's passport which is a new evidence.

evidence to show Petitioner's innocence.

(4) The Petition raises crucial matters and lower courts have bypassed this court's well established precedents and constitutional protections afforded to Petitioner from United States Constitution when lower courts denied his 28 USC §2255 motion for post conviction relief.

(5) The court may extend or shorten the time for filing of Petitions for rehearing ... and sometimes the strict application of the Rules is not applied "in the interest of justice". See e.g. United States v. Ohio Power Co., 353 U.S. 98, 99 (1957) (per curiam) (untimely petition for rehearing granted).

(6) The petition and this motion were prepared with the greatest speed possible for Petitioner, and petition would be within 25 days limit from receiving the notification of denial on August 13, 2019.

#### CONCLUSION

For all of the reasons stated, Petitioner respectfully requests that court allow the filing of the proposed petition.

Respectfully Submitted,

Date: 09/04/2019

  
Santosh Ram # 11361-010

Great Plains Correctional Facility  
P.O. Box 400  
Hinton, OK 73047

No. 18-9255

SANTOSH RAM

Petitioner

vs

UNITED STATES OF AMERICA

Respondent

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

**PETITION FOR REHEARING**

Santosh Ram # 11361-010  
Great Plains Correctional Facility  
P.O. Box 400  
Hinton, OK 73047

PETITION FOR REHEARING  
(SUPREME COURT RULE 44.2)

Appellant presents its petition for a rehearing of the above-entitled cause, and, in support of it, respectfully presents following claims:

Rule 44.2 permits to raise substantial grounds based on intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously raised.

(I) Whether it was debatable that Petitioner was entitled to relief pursuant to §2255 motion where Government denied to provide Petitioner with his passport that would have been attached as evidence to support his claim of actual innocence, and whether court denying the §2255 motion without the evidence to strengthen the claim of innocence was in error, is debatable, and Certificate of Appealability should have been granted?

Petitioner had filed many motions requesting his passport along with other documents. For example Docket No. 78, filed on 01/08/2016, requesting for passport, Docket No. 102, Reconsideration for Request of Documents, filed in 2016, Docket No. 133, copy of passport, Docket No. 137, reconsideration for copy of passport. Petitioner would have attached his passport in his §2255 motion to strengthen his claim of actual innocence. The Government knew that providing Petitioner with his passport to support his claim would damage their case. The Government has no legitimate reasons of why government could not provide the passport to Petitioner to prove that he was innocent of the charges against him. To make sense and even to show this court that the government would have been in hard position if government would have provided the passport. Government even failed to provide copy of the passport when Petitioner only requested the copy of the passport not the actual passport. Now the question to this court apart from the claims alleged by Petitioner, what else could be the reason of the government refusing to provide Petitioner with his passport, if it is not the same reason stated by Petitioner.

The Charging Information ("Information") stated that

"Between or or about September of 2009 and continuing to on or about October of 2011, in the Western District of Arkansas, ... did knowingly received ....". See Information in Exhibit [A].

But the troubling issue here is that how could Petitioner "receive" when he was not in Arkansas or in United States. The beginning of the alleged crime in the Information really cleared Petitioner because in September of 2009, Petitioner was in India. Petitioner went back to India in February 2009 and came back to USA in July 2010 in Lake Forest, CA, and his passport is proof of these facts, and this is proof of showing that the Petitioner could not have committed the crime and/or he could not have been in two different continents at the same time. Petitioner during July 2010 - November, 2010, was living in Lake Forest, California, he moved to Arkansas late November/December of 2010. This even raised the question of whether the conviction rested upon any evidence at all. If government believed that alleged crime was committed from September 2009, then government needed to do more investigation and evidence may had point to someone else; because during the alleged timeframe Petitioner was not even near Arkansas.

As here in present case, the date on passport shows that Petitioner was in India, and government's "Information" charge accusing Petitioner of committing the crime while in Western District of Arkansas. So denying Petitioner his passport that was beneficial to him in making a strong claim that is to deprive Petitioner, justice. And, justice demands Petitioner be given full and fair opportunity to present his claim. In Napue v. Illinois, 360 U.S. 264 (1959), the controlling principle was said to be that the United States Supreme Court has a duty to make its own independent examination of the full record when federal constitution deprivations are alleged. So as here, instead of Petitioner insisting of evidentiary hearing, Petitioner now stating that since the

court has now ordered the government to return the passport to Petitioner, see Court Order in Exhibit [B], evidentiary hearing is unnecessary for the following reasons, the facts necessary for this court to apply the law to and issue a ruling vacating the sentence and conviction are fully before the court in the record presented. Therefore, Petitioner respectfully suggests there is no need for further delay. And, the unnecessary and wasteful expenditure of judicial resources and attorney time ~~involved~~ in holding an evidentiary hearing would yield nothing of substance that is not already in the record and has been argued time and again in the lower court.

Since this court has duty to act independently and examine the record under Napue v. Illinois, it would be miscarriage of justice to allow further delay in this case. The COA should have been granted on the basis that, whether Petitioner stated a claim of ineffective assistance of counsel based on his allegations that counsel failure to advise him factual basis of the crime include the statute and only advised him to agree to a non advantageous plea agreement stipulating that he had committed the crime from September 2009, where the facts and evidence of the case does not support it. The emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Schlup v. Delo, 115 S. Ct. 851, 867 (1995). To establish actual innocence, Petitioner must demonstrate that, "in light of all the evidence, it is more likely than not no reasonable juror would have convicted him". Id. at 867. As here, the date in the passport puts Petitioner in different continent/country India, and this should have been enough to overturn his conviction. All the evidence was not before district court, but this passport and information as a evidence do shed light on Petitioner's innocence. Passport do qualify as new evidence because it was not available to Petitioner at the time he pleaded guilty and during §2255 motion proceedings.

Trial Counsel's performance with respect to the only "Reasonable and Available Defense Strategy" was unreasonably deficient:

This case falls within the perimeters of the decision of this court in *Hinton v. Alabama*, 571 U.S. 263 (2014). While there are typically many ways reasonably effective counsel might decide to defend a case, this case belongs to a separate category of criminal cases where the government evidence of guilt relies entirely on scientific evidences. *Harrington v. RITCHER*, 131 S. Ct. 770, 788 (2011) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidences whether pretrial, at trial, or both"). There is no dispute in this case that the only "reasonable and available defense strategy" required the assistance of competent Internet expert.

From February 2009 to July 2010, it makes 17 months, Petitioner being in India. Any competent attorney would have listen to his client when his client directed her to pursue this line of defense. Counsel was in position to request the passport from the government, whereby 17 months to any competent attorney would have alerted her, and raised the question of how did her cleint "committ the crime when the passport shows he was in India". Since this crime was involving Internet, any competent attorney should have hired an Internet expert. Petitioner on his own basic research he has come across an Application "APP" that people out there are using to connect their internet IP addresses and use someone else IP address.

How it works? A person downloads the APP on his computer, once downloaded, he just turns it on, and it will give thousands of IP address, some around USA in different States and some around the world. In just by a click he will choose the IP address, the one that he want to use, and it will hide his IP address and will be using selected IP address without knowledge or permission of the actual user of the IP address as long as actual owner is

online, and other user can store and access files directly on hacked IP as well. One of such application is called "Hide My Ass".

The timeframe is one-year, five months i.e. 17 months, Petitioner is not in United States. This 17 months that Petitioner is not in United States is enough to overturn this case, and Petitioner is praying to this court to act and do the right thing. There is no dispute that Petitioner could not have been convicted for receiving child pornography , but for the deficient performance of the attorney who failed to investigate the case, and pursue the line of defense that he was directed by his client. If counsel would have adequately advised Petitioner on defense to the charge and hired expert to examine and analyzed Internet IP address to show that it was hacked, Petitioner would not have pleaded guilty, instead, he would have insisted on going to trial, whereby, the 17 months that puts Petitioner in India while the crime had already occurred, this would have been enough to create reasonable doubts in grand jury's mind.

(II) Whether guilty plea to the Information was null and void where Indictment was cause of the Information but Indictment failed to state an offense, and whether counsel was ineffective for failure to litigate this claim?

Indictment charged Petitioner for an attempt to violate 18 USC §2422(b) and used Arkansas Code Annotated Section 5-14-103 (Statutory Rape) as underlying offence. See Indictment in Exhibit [A]. Statutory rape is prosecuted under Arkansas's rape and sexual assault law. Statutory rape includes sexual intercourse or penetration (however slight). Since there was no sexual intercourse, penetration, or any sort of physical contact with the alleged victim, there was no violation of underlying Arkansas State Code Annotated Section 5-14-103 (Statutory Rape). Since there was no violation of Section 5-14-103, Indictment failed to state an offense.

Counsel should have moved to dismiss Indictment but counsel failed to do so, and induced and coerce Petitioner to plead guilty to the Information which charged Petitioner for violation of 18 USC §2252(a) (Receipt of child pornography) but this charge was neither charged on the Indictment nor included therein. See Information in Exhibit [A]

Also Information itself failed to invoke court's jurisdiction and failed to state an offense and/or failed to state all elements of the offense, and it also failed to identify who, how, or from where visual depiction was sent, or when, how, and where Petitioner received the visual depiction. Information failed to provide any factual details.

Therefore, based on reasons stated above, Petitioner's guilty plea is null and void, and counsel was ineffective to litigate this claim.

(III) Whether a constructive amendment to Indictment and/or Information claim cognizable after plea of guilty, and whether counsel was ineffective for failure to litigate this claim?

Information charged Petitioner for violation of 18 USC §2252(a) which do not have "purpose of producing" as an element. United States Sentencing Guidelines ("USSG") §2G2.1 is applicable for violation of 18 USC §2251 which have "purpose of producing" as an element. Application of USSG §2G2.2 resulted in guideline range of 30-37 months. But Petitioner's guideline sentence was calculated using USSG §2G2.1 which resulted in guideline range of 135-168 months but USSG §2G2.2 is applicable for violation of §2252(a). Therefore, Charging Information was "constructively amended" via the presentence investigation report with application of the §2G2.1 via cross-reference. Application of cross-reference changed the legal effect of the Information and changed the elements of the offense charged on Information. See United States v. McDill, 871 F.3d 628 (8th Cir. 2017)(a constructive amendment arises when the "essential elements of the offense "described in the charging instrument" are altered, either actually or in effect, by the prosecutor or the court" so that a "substantial likelihood" exists that the defendant was convicted of an uncharged offense" (quoting United States v. Emery, 186 F.3d 921 (8th Cir. 1999))).

On this issue courts are divided. See Gregory v. United States, 2000 U.S. App. LEXIS 22354 (8th Cir. 2000)(considering for constructive amendment after guilty plea); United States v. Iacoboni, 363 F.3d 1, 7 (1st Cir. 2004)(evaluating a constructive amendment claim in context of a guilty plea); United States v. Bastian, 770 F.3d 212 (2d Cir. 2014)(A constructive amendment claim challenges the validity of his guilty plea). United States v. Leggitton, 2012 U.S. Dist. LEXIS 149105 (8th Cir. 2012)(discussing constructive amendment to an indictment after guilty plea). Other circuits have deviated on the issue.

CONCLUSION

For the reasons just stated, Petitioner urges that this Petition for a Rehearing be granted, and that on further consideration, the judgment of lower court be reversed/remanded or as appropriate.

Respectfully Submitted,

Date: 09/04/2019

Santosh Ram  
Santosh Ram # 11361-010  
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Hinton, OK 73047

CERTIFICATE OF GOOD FAITH BY PETITIONER

I, SANTOSH RAM, Petitioner, certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2 of the Rules of this court.

Date: 03/04/2019

/s/ Santosh Ram

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**Additional material  
from this filing is  
available in the  
Clerk's Office.**