No. 18-9255

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

SANTOSH RAM — PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

FILED
APR 22 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Santosh Ram

(Your Name)

Great Plains Correctional Facility, P.O. Box 400

(Address)

Hinton, Oklahoma, 73047

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

01. Whether there was violation of due process of law by the failure of the trial court to order the mental competency evaluation and/or conduct mental competency hearing with respect to Petitioner's competence to stand trial where counsel filed two unopposed motions to determine competency, and there was bonafide doubt that Petitioner was suffering from mental disease/defect?

02. Whether counsel was ineffective and guilty plea involuntary, unknowing, uninformed, unintelligent, and without understanding where guilty plea was induced by promise, lie, threat, misrepresentation, and under duress while Petitioner was incompetent and suffering from mental disease/defect, and counsel failed to provide adequate legal advice, failed to put any meaningful adversial process, failed to advice on the applicable laws in relation to facts, failed to advise on true nature of the plea agreement and applicability of the United States Sentencing Guidelines?

03. Whether probable cause existed to search the Petitioner's new apartment for child pornography and/or any other evidence where only information available to agents was sexual explicit chat texts which were stale and almost two-years old, no new information was discovered to link Petitioner's new apartment to any unlawful activity, Petitioner had moved to new apartment at another location, IP (Internet Protocol) address change automatically and can be easily spoofed, Facebook chat texts do not get saved on local computer, and agents already had all chat texts?

04. Whether government breached the plea agreement by demanding a sentence beyond parties' intent (guidelines sentence) where government did not stipulate to any applicable guidelines, base offense level, any enhancements, guidelines range, and calculated guidelines range was 4½ times (135-168 months) longer than the actual applicable guidelines range (30-37 months), and whether this ambiguity should have been resolved against the government?

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:

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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

[x] 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 B 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 December 18, 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: February 25, 2019, and a copy of the order denying rehearing appears at Appendix C.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including May 17, 2019 (date) on January 18, 2019 (date) in Application No. 18 A 748.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(01) Sixth Amendment of the United States Constitution. See details in Appendix [**E**] on page 1.

(02) Due Process and Fifth Amendment of the United States Constitution. See detail in Appendix[E], on page 1.

(03) Fourth Amendment of the United States Constitution. See details in Appendix[**E**] on page 1-2.

(04) 18 U.S.C. §2422(b). See details in Appendix[**E**] on page 2.

(05) 18 U.S.C. §2252(a)(2). See details in Appendix[**E**] on page 2.

(06) 18 U.S.C. §2251(a). See details in Appendix[**E**] on page 2-3.

STATEMENT OF THE CASE

Petitioner came to United States in late 2006 on H1B Visa on a project assignment, and he returned back to his home country in February, 2009 due to completion of his assignment and recession. Petitioner again got an opportunity to come to United States in late 2010. Petitioner worked in Lake Forest, CA till he found another job in Bentonville, Arkansas in the end of 2010. Petitioner had no criminal history in his home country or in United States.

Petitioner lived in shared accomodation in Bentonville, Rogers, and nearby areas to save money so that he can provide a better life to his family back home. In 2011, Petitioner was living with another white male roommate at Commons Drive Apartments in Rogers, AR. When his roommate left for U.S. Navy, another individual moved back in to share rent. After lease got expired, Petitioner lived in shared accomodation, and around January 2013, Petitioner rented an apartment at Last Spring apartment in Rogers, AR, where search warrant was executed in 2013 after almost 2-years from initial complaint filed with Iowa police in 2011. So prosecutor selectively prosecuted Petitioner because no search warrant was executed until Petitioner started to live by himself. Petitioner's roommates were Americans and he was Asian and non-citizen.

Charges against Petitioner was based on an alleged chat in 2011 on facebook.com, and from chat texts agents speculated that webcam may had been used on chat. But this speculation was wrong becuase there was no video chat functionality available on facebook.com because Facebook partnered with skype in July of 2011 to develop video chat on facebook.com which would have taken at least a year to launch video chat on facebook.com. See Appendix[D] for some history of Facebook Messenger. So clearly charges against Petitioner was fabricated.

On March 8, 2013, a criminal complaint was filed against Petitioner,

and on April 24, 2013, Petitioner was named in one-count Indictment filed in Western District of Arkansas which alleged that Petitioner attempted to violate 18 USC §2422(b) on or about September 18, 2011, and continuing through and including October 16, 2011.

Initially court appointed Mr. Jack Schisler from Public Defender Office and ordered Petitioner to pay money for legal fees so Petitioner hired Ms. Kimberly R. Weber. Since Ms. Weber was not doing anything on the case, Petitioner sent two letters to Ms. Beaumont for help but Ms. Beaumont had become a Judge. Ms. Weber provided ineffective assistance, and induced and coerced Petitioner to plea guilty for violation of 18 USC §2252(a)(2) which was neither charged on Indictment nor included therein. PSR (Presentence Investigation Report) calculated offense level based on USSG §2G2.2 which resulted in total offense level of 19 and guidelines range of 30-37 months after acceptance of responsibility. But then PSR switched to USSG §2G2.1 and changed the base offense level to 32 using cross-reference even though there was no evidence to support cross-reference, and calculated offense level of 33 and guidelines range of 135-168 months after acceptance of responsibility. Petitioner requested counsel to file objections but later counsel withdrew all objections without Petitioner's consent (Petitioner only consented to withdraw one minor objection).

On February 18, 2014, Petitioner was sentenced to 135 months completely based on prosecutor's facts. At the end, Petitioner told Judge that he did not agree to withdraw all objections but Judge told him, Petitioner was too late.

On Petitioner's request counsel filed notice of appeal on March 4, 2014. Petitioner sent multiple motion for appointment of counsel on direct appeal but Court of Appeals denied motions and forced Ms. Weber to represent Petitioner on appeal. On direct appeal counsel filed Ander's Brief and Petitioner filed pro se layman's supplimental brief, and raised his innocence, misapplication of guidelines, ineffective assistance of counsel. Court of Appeals stated that innocence

claim was foreclosed by guilty plea, counsel withdrew all objections so waived appellate arguments regarding those facts, and ineffective assistance of claim was not properly raised on the direct appeal. Petitioner filed a layman version of Petition for Writ of Certiorari (Case No. 15-5366) which was denied on October 5, 2015.

28 USC §2255 Proceedings and Certificate of Appealability:

Petitioner filed amended §2255 motion on June 22, 2016. In his §2255 motion, Petitioner raised actaul innocence, involuntary guilty plea, breach of plea agreement, and claims based on ineffective assistance of counsel (which included Due Process violation and Fourt Amendment violations). United States filed response on August 26, 2016. In its response government failed to respond to many claims on the ground that claims were barred by guilty plea even though all claims were raised based on ineffective assistance of counsel. Petitioner filed reply on October 31, 2016.

Since Honorable Judge Jimm Larry Hendren retired after Petitioner's sentencing, §2255 motion was assigned to Hon. Magistrate Judge Erin L. Setser[1]. After a long time §2255 motion was reassigned on April 10, 2018 to Hon. Magistrate Judge James R. Marschewski who did not had any prior knowledge of the case, and within a few days Judge Marschewski issued the Report and Recommendation (R&R) on April 16, 2018. Petitioner filed objections to R&R on May 29, 2018 after an extension of time.

Honorable Timothy L. Brooks overruled Petitioner's objections and denied §2255 motion on August 13, 2018. Judge Brooks ruled that guilty plea was voluntary and Petitioner was competent based on plea hearing records. On inadequate legal advice claim court ruled that Petitioner had "failed to prove he was prejudiced by any of these allegations; and on "adversarial effort" claim court ruled that "allegations in this category are precluded by his guilty plea". On " breach of plea agreement" court ruled that "[Petitioner] was informed of statut-

1. Continued on next page.

ory minimum and maximum" and that "court was not bound by terms of that agreement". On Fourth Amendment violation claims court ruled that chat texts and Petitioner's connection to IP was sufficient to establish probable cause.

Since district court neither denied nor granted COA, Petitioner filed Notice of Appeal and motion for COA on August 20, 2018. District court denied COA in a single page Text only order on August 22, 2018. Appeals Court for the Eighth Circuit(8th Cir.) treated Notice of Appeal as an Application for COA (Case No. 18-2865). Petitioner filed a supplimental brief in support of application for COA. Appeals Court denied Application for COA on December 18, 2018 in a singe page Judgment without any opinion, memorandum, and order. Petitioner filed Petition for panel rehearing and/or rehearing en banc on January 22, 2019, and raised that court's ruling was contrary to well established Supreme Court case laws on COA. Appeals Court denied rehearing by panel and rehearing en banc on Fabruary 25, 2019.

Jurisdiction

(1) District Court has jurisdiction persuant to 28 USC §2255.

(2) Court Of Appeals for the Eighth Circuit has jurisdiction pursuant to 28 USC §2253 (a).

(3) 28 USC §1254 gives the United States Supreme Court jurisdiction to review cases in the Court of Appeals.

Magistrate Judge Erin L. Setser was most suitable to issue report and recommendation since she issued the search warrant and she was involved on case from the beginning.

REASONS FOR SEEKING CERTIORARI

Issues presented in the petition are really important to entire landscape of the criminal proceedings in light of constitutional protections being diluted because of guilty plea process and advance in computer and internet technology. Petitioner's new apartment was searched without any probable cause merely based on his connection with IP[1] address and existence of technology to recover deleted files (i.e. non-existing information) from the computer. Petitioner was never provided any mental competency evaluation and competency hearing despite multiple unopposed request and existence of bonafide doubt to his competence to stand trial. Counsel provided ineffective legal assistance, and deceived, induced, and coerced an incompetent Petitioner into signing plea agreement. Plea agreement was designed to induce the guilty plea, and Government later breached the plea agreement.

Lower court's decision conflicts with relevant decisions of this court, and conflicts with decisions of other United States Court of Appeals. And allowing lower court's opinion to stand would permit an innocent Petitioner's conviction to stand in violation of protections gauranteed by United States Constitution, and it would start erasing the faith of the people from the United States justice system. Also issues presented involves a factual configuration that this court have not addressed and therefore requires clarifications.

1. IP is internet protocol.

01. Petitioner's due process rights were violated when trial court failed to order mental competency evaluation and/or conduct competency hearing with respect to his competence to stand trial where counsel filed multiple unopposed motions to determine competency, and there was bonafide doubt that Petitioner was suffering from mental disease/defect. Counsel was ineffective for failure to raise due process claim on appeal and for allowing an incompetent defendant to plea guilty. Court of Appeals should have granted Certificate of Appealability.

To be competent to stand trial for the purpose of the due process clause, the defendant must have the "capacity to understand the nature and object of the proceeding against him, to consult with counsel, and to assist in preparing his defense". Drope v. Missouri, 420 U.S. 162, 171. Petitioner had not been given any competency hearing and/or mental evaluation, and Dr. Rutherford was hired by counsel to only determine if further evaluation was needed. Dr. Rutherford identified that Petitioner was suffering from mental disease or defect rendering Petitioner incompetent to understand the proceedings and assist in his defense. Petitioner has suffered from post traumatic stress disorder (PTSD) and he was still suffering from PTSD. Petitioner was suicidal and he was on "suicide watch" for a period of time. Petitioner was suffering from extreme chronic depression and anxiety attacks causing chest pain and symptoms of heart attack. Due to extreme depression and anxiety attacks which was compunded because of PTSD, Petitioner was taken to hospital for medical emergency, and he was taking psychiatric medications. Petitioner has outburst in the court and he was delusional. Reaction to stress is another factor that affects mental competence. Petitioner's reaction to stress was too severe which caused chest pain, and decomposition under stress was symptomatic of mental illness rendering him incompetent to understand trial. An excessive anxiety affects the ability to grasp what is transpiring and to logically analyze what is heard. Above facts along with believes of the counsel that "defendant cannot participate in the preparation of his defense nor does he understand the consequences of a plea , trial and/or sentencing" created a bonafide doubt on Petitioner's mental competency to stand trial or to plea guilty. "Whenever information sufficient to raise a reasonable doubt about

the defendant's competence arises in any form from any source, the court has an obligation to inquire". See Demos v. Johnson, 835 F.2d 840, 843 (11th Cir. 1988) (the information which warrants further inquiry into defendant's competence "need not be presented to the judge in the form of admissible evidence" as long as facts known to the court are sufficient to raise a reason to doubt the defendant-'s competence). Petitioner was protected under 18 USC §4241(a).

In Drope v. Missouri, counsel submitted a psychological evaluation in support of a motion for continuance, which stated that Drope suffered from chronic anxiety reaction, had difficulty relating, and spoke irrelevantly, but was otherwise oriented. Counsel stated to the court that the defendant was not of sound mind and should have further psychiatric examination before proceeding to trial. The motion for further examination was denied. This Court held that "when considered together .. the information created a sufficient doubt of his competence to stand trial to require further inquiry on the question (Id. at 180) as a matter of due process of law. So based on Drope, due process rights were violated.

Lower court relied only on demeanor and Petitioner's response in the court to assume him competent, but court was required to consider all facts available including opinion of the counsel. Once the doubt on mental competency is raised, the court cannot dispell it simply by relying on contrary evidence. Most irrational individual may appear normal to an untrained observer. Judge is not a doctor and cannot make medical determination. Defendant's counsel's opinion on competency should receive "significant weight since 'counsel, perhaps more than any other party or court, is in a position to evaluate a defendant's ability to understand proceeding'". United States v. Zavesky, 839 F.3d 688(8th Cir. 2016)(quotation omitted). Court failed to give proper weight to the information suggesting incompetence. Virtually any condition which causes the defendant to be unable to understand the proceedings or to effectively assist counsel in the defense renders the defendant incompetent and thus unavailable for prosecution as a

matter of due process of law.

COA should have been granted on this claim:

Petitioner's claim presented adequate undisputed factual basis whis showed that mental incompetence of the Petitioner was debatable among jurist of reasonable mind. "A defendant was entitled to a hearing on his post-conviction motion to set aside his sentence based on his alleged incompetence at the time of his guilty plea, when there had never been a previous federal hearing on the issue". Rose v. United States, 513 F.2d 1251, 1256 (8th Cir. 1975). Under 18 USC §4241 Petitioner was protected from prosecution since he was mentally incompetent but Judge failed to rule on motion for compentency determination (Doc.26). So if Judge is allowed to proceed without ruling on competency motion then §4241 would be meaningless. Please see copy of (Doc.26) in Appendix[F].

02. Counsel was ineffective and guilty plea involuntary, unknowing, uninformed, unintelligent, and without understanding where guilty plea was induced by promise, lie, threat, mispresentation, and under duress while Petitioner was incompetent and suffering from mental disease/defect, and counsel failed to provide adequate legal advice, failed to put any meaningful adversarial test, failed to advise on the applicable laws in relation to facts, failed to advise on true nature of the plea agreement and applicability of the United States Sentencing Guidelines. Court of Appeals should have granted COA on this issue.

Sixth Amendment guarantees the accused a lawyer "for his defense" against a "criminal prosecutio[n]", and it gurantee legal advice directly related to defense against prosecution of the charged offense. Padilla v. Kentucky, 559 U.S. 356 (2010). This court has recognized that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970). A [guilty] plea "cannot be truely voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466 (1969). An incompetent advice distorts the defendant's decision making process and seems to call the fairness and integrity of the criminal proceeding itself into question. See Strickland, 466 U.S., at 686, 104 S. Ct. 2052.

(a) Counsel failed to provide adequate legal advice.

(a)(i) Indictment had charged Petitioner for an attempt to violate 18 USC §2422 (b) and underlying Arkansas State offense was 5-14-103(Statutory Rape). When Petitioner asked counsel what was statutory rape, counsel replied that "a sex without contact" which was completely incorrect. Statutory rape is prosecuted under Arkansas's rape and sexual assault law. Statutory rape includes sexual intercourse or penetration (however slight). In United States v. Gomez-Mendez, 486 F.3d 599(9th Cir. 2007), 9th Circuit (Cir.) defined statutory rape as "ordinarily, comtemporarily, and commonly understood to mean the unlawful sexual intercourse with a minor under the age of consent specified by State statue". Id. at 603. So clearly counsel's advice was inadequate, and due to this Petitioner was unable to make an informed decision to go to trial or plea guilty. Counsel failed to advise that statutory rape cannot be commited without any physical contact and that there was no violation of underlying Arkansas Statue 5-14-103.

(a)(ii) Counsel failed to advise that "substantial step" was required for an attempt charge.

Counsel never provided any advice on defending against the charge on the indictment. Because Petitioner was charged with an attempted violation of 18 USC §2422(b), the government had to prove that Petitioner not only intended to commit a crime, but that he took a "substantial step" towards its commission. See Braxton v. United States, 500 U.S. 344, 349(1991). Substantial step is described as " a true commitment towards completing the crime" and that "the crime will take place unless interrupted by independant circumstances." United States v. Hofus, 598 F.3d 1171, 1174(9th Cir. 2010). Defendant's action must go beyond mere preparation, and must corroborate strongly the firmness of the defendant's criminal intent". United States v. Nelson, 66 F.3d 1036, 1042(9th Cir. 1995).

Petitioner's case only involved sexual chat texts. There was no compensation or gift offered, no setting up of any meeting place, no travel plans made, and no other act that would constitute a substantial step. Petitioner's case had

familiarity with United States v. Nitschke, 843 F. Supp. 2d 4(D.D.C. 2011), United States v. Taylor, 640 F.3d 255, 256-57(7th Cir. 2011), United States v. Gladish, 536 F.3d 646(7th Cir. 2008), and United States v. Palato, 2011 U.S. Dist. LEXIS 77081(9th Cir. 2011). Charges against above defendants were either dismissed or defendants were acquitted on trial becuase there was no substantial step involved. These cases involved more allegations and acts compared to Petitioner's case. In Petitioner's case, alleged chat happened in 2011 and search warrant was executed in 2013. So there was clearly no true commitment towards completing the crime and no criminal activity had taken place even after 2-years without interruption by independant circumstances. So there was no substantial step involved in Petitioner's case. Also 7th Cir. has cautioned against "[t]reating speech (even obscene speech) as the "substantial step" because it "would abolish any requirement of a substantial step." Gladish, 536 F.3d at 650.

If counsel would have advised Petitioner that there was "substantial step" required for an attempt charge and there was no substantial step involve in his case, Petitioner would not have pleaded guilty to Information but insisted and elected to go to trial to prove his innocence[1]. Since counsel failed to provide Petitioner "with an understanding of the law in relation to the facts, he could not make an informed and conscious choice" between pleading guilty and going to trial. "Substantial step" was element of the attempt charge and counsel has duty to advise on the laws on the elements of the offense. Therefore, Petitioner's guilty plea was involuntary and didnot represent an informed choice. In absence of inadequate legal advice, there would neither had been a charging information nor a guilty plea.

1. These arguments could be extended to an attempt to violate 18 USC §2251, the offense prosecutor threatened to file.

(a)(iii) Counsel failed to adequately advise about true nature and scope of the plea agreement and impact of factual basis on the calculation of the guidelines sentence.

Petitioner alleged that counsel presented him with one version of the plea agreement for signature and switched the document during submission in the court. Counsel didnot dispute this fact. Petitioner clearly stated what paragraphs were added/modified later in his §2255 motion.

Counsel never advised Petitioner on impact of the stipulated factual basis on the guidelines range. United States Sentencing Guideline(USSG) §1B1.2(a) provides in relevant part "..However, in case of a plea agreement (written or made orally on record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chaptor Two applicable to the stipulated offense". Petitioner was not aware of this guideline and counsel never explained it to him. Rather, counsel told Petitioner that she got 5-years deal, government will not oppose 5-years sentence, and Judge will give 5-years sentence to Petitioner. Plea agreement didnot had any stipulation on base offense level, applicable USSG, enhancements, and guidelines range.

Plea agreement(Doc. 31, ¶15) stated "..discussion have taken place concerning the possible guideline range which might be applicable to this case." This was complete fabrication in light of the fact that no guideline and guideline sentence was stipulated in the plea agreement, and counsel never discussed or advised Petitioner about applicable guidelines and guidelines range. If counsel would have explained USSG §1B1.2(a) and explained that stipulated factual basis would establish more serious offense and would result in application of USSG § 2G2.1, and guidelines range would be 135-168 months, and counsel would have explained or even showed plea agreement (¶15), Petitioner would not have pleaded guilty and insisted on going to trial. Counsel deceived Petitioner into accepting the plea agreement in order to avoid going to trial since Petitioner didnot had

money to pay the counsel's legal fees for trial. Petitioner's guilty plea didnot represent an informed choice.

(a)(iv) Other inadequate legal advices.

Counsel failed to advise that recovered deleted files via forensic could not form basis of any charge. See United States v. Flyer, 633 F.3d 911(9th Cir. 2011)(Court held that insufficient evidence existed to support the defendant's conviction for possession of child pornography, where the images were all located in space on the hard drive that contained only deleted data that could not be seen or accessed by the user without the use of forensic software).

Counsel failed to advise that Petitioner could not be convicted on [false] confession alone unless it is corroborated. See United States v. Reynolds, 367 F. 3d 294(5th Cir. 2004). Since prosecutor threatened to use false confession, this kind of advice was essential to make an informed decision.

Counsel failed to advise that Petitioner could withdraw his guilty plea. Due to lack of knowledge and inadequate legal advice, Petitioner could not withdraw his guilty plea before sentencing.

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Government's response (Doc.94, p.16) on "Inadequate Legal Advice" claim was that "Grounds occurred before entering his guilty plea..with respect to all these claims, .. a plea of guilty waives .. right to request relief under 28 USC §2255". But a guilty plea does not bar claims that Petitioner received ineffective assistance of counsel in deciding whether to plead guilty or go to trial. See Lee, 137 S. Ct. at 1965.

Honorable District Judge on "Inadequate Legal Advice" claim stated that "The court finds that [Petitioner] has failed to prove he was prejudiced by any of these allegations. no evidence exists to suggest that [Petitioner] would have fared better by going to trial". (Doc. 118, p.6). But application of this stand-

ard by the court was contrary to well established Supreme Court case laws. See Lee v. United States, 582 U.S. ____, 137 S. Ct. 1958(2017)("Likelihood of success at trial not factor"). In Lee, this court ruled that when a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, the court will not consider the likelihood of conviction or acquital. Stickland standard only required that Petitioner would not have pleaded guilty rather insisted on going to trial, it does not require that Petitioner would have fared better on trial. See Hill v. Lockhart, 474 U.S. 52 (1985)(there is reasonable probability that, but for counsel's error, the defendant would have proceeded to trial instead of pleading guilty).

Petitioner asserted his innocence to counsel in his letters but counsel ignored it. He never asked for any guilty plea. There was defense to charge i.e. "substantial step" defense, there was no substantial step involved to violate either 18 USC §2422(b) or 18 USC §2251, and there was no violation or attempt to violate any underlying Arkansas State Code. Petitioner was deceived and coerced to plea guilty to violation of §2252 but violation of §2252 was not charged on original indictment nor it was included into that charge. There was no sender of any child pornography and Petitioner was in his home country in 2009-10 (information charged offense from 2009 to 2011). Innocence of Petitioner, availability of defense to the charge, severity of sentence[1] after guilty plea and after trial would have been in similar range, and any sentence beyond mandatory minimum (60 months) was not acceptable to Petitioner, were sufficient to establish reasonable probability that Petitioner would have elected to go to trial if he would have received adequate legal advise, or at least plausibly motivated a reasonable person in his position not to pled guilty but exercise his right to public jury trial. The justice of Petitioner's conviction and sentence was rendered unreliable by breakdown in the adversary process caused by deficiencies in counsel's

1. If Petitioner would have been gone to trial on §2251(a) offense, the applicable guidelines and range would have been same since USSG §2G2.1 was applied after

performance.

(b) Counsel failed to put any meaningful adversarial testing.

(b)(i) Counsel failed to file motion to dismiss indictment and information on the ground that it failed to state an offense and/or failed to state all elements of the offense. Court on this claim stated that "The entry of a guilty plea bars any allegation that a defense attorney failed to file certain motions or make other challenges prior to the entry of that plea" (Doc. 118, p.6). Since claims were based on ineffective assistance of counsel, court was required to evaluate the merits of these claims. Therefore, court's conclusion was contrary to the Supreme Court case laws. Also automatic waiver after guilty plea does not include "a waiver of the previleges which exist beyond the confines of the trial." See Mitchell v. United States, 526 U.S. 314, 324(1999).

The indictment or information must be plain, concise, and definite written statement of the essential facts constituting the offense charge, and must convey the "who", "what", "when", "where", and "how" as to each offense charged. Indictment used Arkansas Code Annotated Section 5-14-103(statutory rape) as a underlying offense for violation of 18 USC §2422(b), and statutory rape is prosecuted under Arkansas's rape and assault law. This offense includes sexual intercourse or penetration. Since there was no sexual intercourse, penetration, or any physical contact, or attempt to contact, there was no violation of Section 5-14-103 or attempt to violate this section. Therefore, indictment failed to state an offense. Indictment failed to state any facts constituting the offense charged, and didnot convey what, where, and how of the offense. Specific facts where required to prepare a defense. Since indictment charged for an attempt, it was required to state an overt act but it failed to do so i.e. it failed to state the elements of the charge offense.

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guilty plea, and if trial would have been on attempt to violate §2422(b) the applicable USSG was §2G1.3 resulting in lower guideline range (121-151 months).

Information failed to provide date of the offense which was the element of the offense. "Indictment[Information] must contain all elements of the crime charged". United States v. Rosendiz-Ponce, 549 U.S. 120 (2007). Information used time frame from 2009 to 2011 but Petitioner was in his home country in 2009-10. See attached Affidavit in Appendix[F]. Information failed to indentify the means of interstate and/or foreign commerce i.e. failed to specify the interstate nexus required under 18 USC §2252(a)(2). Also a criminal statue punishing the transmission or receipt of the relevant material "in interstate or foreign commerce" require the material itself to cross state lines. Information did not identify who, how, or from where visual depiction was sent. Information failed to provide adequate notice of the charge because it failed to provide any factual details. Also sexually explicit chat is not criminally proscribed, and it do not amount to be a sexual activity.

(b)(ii) Counsel failed to file motion to supress evidence when there was no probable cause to search Petitioner's new apartment for child pornography or any other evidence. See Section[03] for complete details.

(b)(iii) Counsel failed to file motion to supress false confession because it was involuntary and result of mental breakdown. Petitioner challenged voluntariness of his false confession based on Lynumn v. Illinois, 372 U.S. 528, 534 (1963), but court never reviewed claim in light of this case. Petitioner denied creating or using facebook profile at issue (PSR¶26) so he didnot confess to any criminal activity. Petitioner had mental/nervous breakdown during search and interrogation. "[R]ecantation testimony is properly viewed with great suspicion". Dobbert v. Wainright, 468 U.S. 1231, 1233-34 (1984).

(b)(iv) Counsel failed to withdraw the guilty plea after government breached the plea agreement.

(c) **Petitioner's guilty plea was involuntary, uninformed, unintelligent, without understanding, and result of ineffective assistance of counsel.**

Counsel filed multiple unopposed motions for mental competency evaluation of the Petitioner. Counsel knew that Petitioner was suffering from mental disease/defect, See Section (01), and this was confirmed by Dr, Rutherford. But still counsel allowed an incompetent Petitioner to plea guilty. Therefore, Petitioner's guilty plea was involuntary and without understanding. Counsel's actions were below professional norms and deprived Petitioner to due process and right to public jury trial.

"To be valid, a guilty plea must represent 'a voluntary and intelligent choice among the alternative courses of action open to the defendant', and the defendant must 'possess[] an understanding of the law in relation to facts.'". Wilkins v. Bowersox, 145 F.3d 1006, 1015 (8th Cir. 1998) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970) and McCarthy v. United States, 394 U.S. 394 U.S. 459, 466 (1969)). Petitioner clearly showed to court that counsel failed to provide adequate legal advice and failed to adequately advise on plea agreement. See Section (02). So Petitioner had insufficient information for his plea to be a "deliberate" choice between "available alternatives", and he had insufficient information to make an informed decision. Therefore, guilty plea was involuntary, uninformed, unknowingly, and without understanding.

Petitioner had been asserting his innocence to the counsel. When counsel came to visit Petitioner on August 27, 2013, counsel told Petitioner that she got 5-year deal from government. But Petitioner asserted his innocence, then counsel told Petitioner that Judge will give him 5-years sentence and government will not oppose 5-years sentence, and if Judge will not give 5-years sentence, counsel will go to Court of Appeals and Supreme Court. Still Petitioner was asserting his innocence, and then counsel called prosecutor on her cellphone, and handed her phone to Petitioner. Petitioner asserted his innocence on phone

to prosecutor Mr. Roberts but Mr. Roberts threatened Petitioner that if Petitioner do not plea guilty and insist on going to trial he [Mr. Roberts] will file more serious charge of attempted to produce child pornography (i.e. vindictive prosecution, "A defendant cannot be punished for exercising a protected statutory or constitutional right." United States v. Goodwin, 547 U.S. 368, 372 (1982)) which will carry mandatory minimum sentence of 15-years, and because of [false] confession, he would prove the charge. Counsel told Petitioner if he donot plea guilty, tommorrow he will have to go to trial. Petitioner was suffering from mental disease, he lacked adequate legal advice and options to defend, prosecutor threatened to file more serious charge, he didnot had money to pay for fee for trial, and due to lack of adequate time, Petitioner had no option but to do what he was told to do and sign the plea agreement. Signed plea agreement was later changed before submitting it in the court. Counsel deceived and coerced Petitioner into pleading guilty in order to avoid going to trial. Counsel told Petitioner "donot make judge mad otherwise he will give you [Petitioner] harsh sentence" and told Petitioner to "answer in affirmative", so whatever Petitioner told in the court were not his voluntary statements.

Counsel promised and lied that she got 5-years deal from prosecutor, she lied that government will not oppose the 5-years sentence, she misrepresented and lied that she will go to Court of Appeals and Supreme Court. In Court of Appeals counsel filed Anders Brief, and did not file petition for writ of certiorari in Supreme Court despite written request from Petitioner. If counsel would have been truthful and told Petitioner that she do not have any plea deal and Supreme Court review is discretionary and Supreme Court review less than 1% of filed cases (Petitioner has more faith in Supreme Court), and provided adequate legal advice, Petitioner would not have pleaded guilty but insisted on going to trial.

Counsel and prosecutor conspired to induce guilty plea by lie, deception, threat, and deliberately did not stipulate applicable guidelines, base offense

level, enhancements, and guidelines range merely to induce guilty plea. If counsel would have told Petitioner that stipulated factual basis would cause application of more severe USSG §2G2.1 and explained or even showed plea agreement (¶15), Petitioner would not have pleaded guilty because Petitioner was innocent and any sentence in excess of mandatory minimum was not acceptable to him, and also guidelines range after being found guilty in trial would have been in similar range. Petitioner has the right to make a reasonably informed decision whether to accept [or deny] a plea offer. See Turner v. Calderen, 281 F.3d 851, 880 (9th Cir. 2002) (citing Lockhart, 474 U.S. at 55-57(holding that voluntariness of guilty plea depends on the adequacy of counsel's legal advice)).

Court stated that "claim that his attorney used deception, lies, and misrepresentation to coerce him into signing the plea agreement is rendered meritless upon the finding that his guilty plea was voluntary." (Doc.118, p.9). But this is contrary to well established Supreme Court case laws. See Machibroda v. United States, 368 U.S. 487 (1962)(guilty plea if induced by promise or threat, which deprived it of the character of voluntary act, is void).

Therefore, based on laws of Supreme Court and facts of the case, Petitioner's guilty plea was involuntary, uninformed, unintelligent, without understanding, and induced by promise, threats, coersion, and under duress while Petitioner was incompetent and suffering from mental disease and defect.

COA should have been granted on this claim:

In light of facts that Petitioner was suffering from mental disease/defect, and counsel provided inadequate legal advice and induced and coerced guilty plea, COA should have been granted on this claim because jurist of reason would debate that the guilty plea was involuntary, uninformed, and without understanding.

03. There was no probable cause to search the Petitioner's new apartment. Court of Appeals should have granted COA on this issue.

The warrant clause of the Fourth Amendment provides "no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be sized." Illinois v. Gates, 462 U.S. 213 (1983), sets the standard of review of a magistrate [Judge's] probable cause determination. [Court] must ensure that the magistrate had a "substantial basis" for finding probable cause.

Petitioner's new apartment was searched and his privacy rights were violated without any probable cause merely based on his connection with IP address. In light of facts that (1) chat text were almost 2-years old i.e. almost 2-years had elapsed since initial complaint was made with Iowa police in 2011 and search of new apartment in 2013, (2) Petitioner was living with roommate at that time, (3) Petitioner had moved to new apartment at new location, (4) no new information was discovered in nearly 2-years to link Petitioner and his new apartment to any unlawful activity, (5) IP address change automatically,[1] (6) Facebook chat text do not get saved on local computer rather it get saved on Facebook servers, and agents already had entire chat text, and (7) there was no information that Petitioner was collector of child pornography. Petitioner was not into child pornography and/or any unlawful activity, (8) there was no explanation of delay, there was no probable cause to search Petitioner's new apartment. The warrant affidavit contained material omission because above facts were omitted from the affidavit. If Magistrate Judge would have been made aware of these facts, Judge would not have issued the search warrant. Agents intentionally excluded these information to deceive and induce Judge to issue the search warrant. These material omission negated any showing of probable cause if there was any. The reasoning in Frank v. Delaware, 438 U.S. 154 91978), applies to information omitted from a warrant affidavit.

1 And IP address can be easily spoofed. See Appendix[F] for more detail.

Four corners of the affidavit "did not support that the Magistrate Judge had a substantial basis to conclude probable cause existed to search for evidence of child pornography under the totality of the circumstances. No independant factual evidence contained in four corner of the affidavit supported probable cause that evidence of child pornography" was likely to be found in Petitioner's new apartment. Agent's exposition of probable cause in the affidavit did not establish, allege, or even suggested any basis for a finding of probable cause to believe that Petitioner had been involved in child pornography in any manner. There was no evidence suggesting that the Petitioner collected or hoarded child pornography. He did not subscribed to any illicit internet publications or e-groups. He did not had a prepaid membership. There was no evidence indicating that he had "collected" or downloaded any illicit images. Complainant's neice denied using webcam or sending any images. Totality of the circumstances did not support probable cause to issue the warrant. Some logical inferences, without more, can not support a finding of probable cause as a matter of law. See Ybarra v. Illinois, 444 U.S. 85, 91 (1979)(rejecting the inference that probable cause to search a person could be based on the individual's "mere propinquity" to another person or location suspected of criminal activity). Also even showing that a defendant is sexually interested in a minor girl is insufficient to establish probable cause to believe that the defendant collects, or is in possession of, child pornography at his residence or on his computer. See Virgin Island v. John, 654 F.3d 412, 418-19 (3rd Cir. 2011); United States v. Doyle, 650 F.3d 460, 472 (4th Cir. 2011); United States v. Hodson, 543 F.3d 286, 293 (6th Cir. 2008); United States v. Zimmerman, 277 F.3d 426,433 (3rd Cir. 2002). In light of these cases, there was no probable cause to search for child pornography at Petitioner's new apartment.

A generalized statement of an expert and the ability to recover deleted files does not, without more, support probable cause to search a residence. "More

than mere suspicion is required to establish probable cause". United States v. Watson, 423 U.S. 411 (1976). The search warrant suffered from overbreadth because it allowed agents to seize items containing child pornography when probable cause had not been established to seize evidence of such criminality, and it also allowed seizure of property which has no connection with child pornography such as credit cards information, records related to occupancy or ownership, computer related documentations etc.

Chat texts from 2011 used in affidavit was stale information, and no new information was discovered upto application of the search warrant in 2013. An affidavit supporting a search warrant must contain "fact so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932). Also see United States v. Steeves, 525 F.2d 33, 37 (8th Cir. 1975)(Under the Fourth Amendment the probable cause upon which a valid warrant must be based exist at the time at which the warrant was issued, not at some earlier time). Also there is no support for the contention that once probable cause exists to search for child pornography, it remains valid ad infinitum. United States v. Doyle, 650 F.3d 460 (4th Cir. 2011).

Since agents already had complete chat texts, and chat texts did not get stored on local computer, rather, it get stored on Facebook Servers, there was no probable cause to search the Petitioner's new apartment for these chat logs. search warrant application did not set forth any "evidentiary support" that anything illegal would be found at Petitioner's new apartment. Also good faith exception would not apply to the warrant (Agent Faulkner was the same agent who applied for the search warrant and executed the search warrant with swat team) which authorized the search of the Petitioner's new apartment for child pornogrphy without the requisite indicia of probable cause. 277 F.3d at 436-38.

COA should have been granted on this claim:

Petitioner had clearly established that there was no probable cause to search Petitioner's new apartment. Therefore, COA should have been granted on this claim because jurists of reason would debate that there was no probable cause to search Petitioner's new apartment after almost 2-years from initial complaint.

04. Government breached the plea agreement. Court of Appeals should have granted COA on this issue.

This court have clearly established that plea agreements are to be interpreted according to contract principle of contract law. Santobello v. New York, 404 U.S. 257 (1971). Any ambiguities in the agreement are construed against the government. See United States v. Sisco, 576 F.3d 791 (8th Cir. 2009). Also see Mastrobuono v. Shearson Letiman Hutton, Inc., 514 U.S. 52, 62 (1995)(a common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it).

Petitioner signed a plea agreement for violation of 18 USC §2252, plea agreement did not stipulate to applicable USSG, base offense level, enhancements, and applicable guidelines range. Applicable USSG for §2252 violation was USSG § 2G2.2 which resulted in guidelines range of around 30-37 months, and since mandatory minimum sentence was 60 months and counsel told Petitioner that she got 5-years (60 months) deal from prosecutor, Petitioner believed that he signed plea agreement for 60 months, and he believed that the plea agreement prevented Government from seeking any higher sentence and/or apply any change of base offense level and enhancements. This believe was reasonable under the circumstances. "Whether the Government violated the agreement is judged according to the defendant's reasonable understanding at the time he entered his plea". United States v. Boatner, 966 F.2d 1575, 1578 (11th Cir. 1992).

PSR used USSG §2G2.2 to calculate guidelines range which resulted in 30-37 months, and then switched to USSG §2G2.1 which resulted in guidelines range of 135-168 months. At sentencing defense counsel requested 60 months sentence but government demanded 135 months sentence. Therefore, government breached the plea agreement: (1) by not opposing the change of base offense level and application of enhancements since it were not stipulated, and (2) by demanding the guidelines sentence of 135 months which was not based on default applicable guidelines. See Conczy, 357 F.3d at 53 (1st Cir. 2004)("A plea agreement is a binding promise by the government and is an inducement for the guilty plea; a failure to support that promise is a breach of the plea agreement, whether done deliberately or not." (Citing Santobello v. New York, 404 U.S. 257, 262(1971). Plea agreement(¶15) stated that "..possible guideline range which might be applicable to this case.", and default applicable USSG was §2G2.2 and guidelines range 30-37 months but since mandatory minimum was 60 months guidelines range would become 60 months. In constitutional context, due process require government to honor a defendant's right to advance a reasonable interpretation of an ambiguous plea agreement. A plea agreement is to be interpreted in a constitutional context. Petitioner's interpretation of the agreement was "reasonable", and supported by the plain language of the agreement, "[logic], and common sense". Plea agreements must be construed in light of the rights and obligation created by constitution.

Petitioner had been asserting his innocence, and plea agreement was designed to induce the guilty plea. "When a plea agreement rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). Plea agreement did not include a guidelines calculation, change of base offense level, and any application of enhancements. By not including change of base offense level and ehnacements, the

parties agreed that it was not an applicable guideline and that it should not be included in the guideline calculation i.e. Government implicitely promised not to argue for change of base offense and enhancements that were, not part of the plea agreement. By demanding guidelines sentence of 135 months which was based on change of base offense and enhancements that were not part of the plea agreement constituted a breach. See United States v. Taylor, 77 F.3d 368, 371 (11th Cir. 1996)(The Government breached the plea agreement when it supported the presentence report position that recommended a longer incarceration); United States v. Robinson, 634 Fed. Appx. 47 (2nd Cir. 2016)(Government breached plea agreement by advocating role enhancement in violation of the plea agreement where role enhancement was not stipulated in plea agreement).

Petitioner had clearly established breach of the plea agreement and lower court's decision is clearly contrary to well established Supreme Court case laws and case laws from other circuits.

COA should have been granted on this claim:

Petitioner had established breach of the plea agreement, and based on above facts and case laws cited, jurits of reason would debate that there was breach of the plea agreement. Therefore, COA should have been granted on this claim.

05. **The Court of Appeals erred in denying COA:**

In order to obtain COA, Petitioner was only required to show that "the issues are debatable among reasonable jurists, that a court would resolve the issues differently, or that the issues deserve further proceedings". See Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir. 1994). See Slack v. McDaniel, 529 U.S. 473, 484 (2000). In order to obtain certificate, it does not require showing that appeal will succeed, and federal court of appeals should not decline

application merely because it believes application will not demonstrate entitlement to relief. See Welch v. United States, 136 S. Ct. 1257, 194 L.Ed. 2d 387 (2016). Also Petitioner need not prove that some jurists would grant the petition for habeas corpus. See Miller-El v. Cockrel, 537 U.S. 322, 337-38 (2003)(..the grant of COA has no bearing on the ultimate success of an application after full consideration.

The facts and arguments presented before this court and court of appeals have clearly established standard required for grant of COA. Therefore, based on above stated COA standard, Court of Appeals for the Eighth Circuit, clearly erred and applied incorrect legal standard in evaluating Petitioner's application for COA.

CONCLUSION

Petitioner is proceeding pro se, and he is unskilled in science and tactics of law. He kindly request this Court to construe his petition liberally.

The judgment below is departure from decision of this court that require that conviction obtained while Petitioner was mentally incompetent be set aside at any time after conviction. Fourth Amendment protected him from unreasonable search and seizure, Sixth Amendment guranteed right to iffective assistance of counsel to defend against the charge, guilty plea was involuntary and void since it was result of ineffective assistance and obtained by inducement and coercion while Petitioner was suffering from mental disease/defect, and government breached the plea agreement.

For the reasons stated in the petition, this petition for a writ of certiorari should, therefore, be gtanted.

Respectfully Submitted,

Date: 04/22/2019

Santosh Ram

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