No. 19-5403

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



RANDY CHARRIEZ-ROLON — 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 - FIRST CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RANDY CHARRIEZ-ROLON #43821-069
(Your Name)

FCI, COLEMAN, PO. BOX. 1032
(Address)

COLEMAN, FLORIDA 33521 - 1032
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

1. Whether the First Circuit's op/order affirming Petitioner's sentence and conviction finding no plain error when the United States commented on Petitioner's silence as to specific areas which were not addressed in Petitioner's direct testimony warrants certiorari ?

2. Whether the First Circuits ruling on Petitioner's Rule 29 motion should be remanded for a new trial ?

3. Whether Appellate Counsel was ineffective for filing a direct appeal on Petitioner's behalf without reviewing the evidence. Specifically, the First Circuit pointed out "Curiously, unlike the jury and us, Charriez's Appellate Counsel **has not looked at the photos** ? See App A.

## 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,
[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 May 1, 2019.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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

### AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

On March 9, 2014, a complaint was filed by the Federal District Court of Puerto Rico charging this Petitioner with Transportation of a minor with the - intent to engage in prostitution and criminal sexual activity. 18 U.S.C. § 2423(a). That same day, he was arrested and his preliminary hearing was held there after on March 10, 2014. Ten (10) days later, the .. Petitioner was indicted by a Federal Grand Jury in a two count indictment of Sex Trafficking of Children in violation of 18 U.S.C. 1951(a) & (b)(1) and two counts of transportation of a minor with intent to engage in prostitution and criminal sexual activity, in violation of 18 U.S.C. § 2423(a). On February 18, 2014, Petitioner was charged under a superceding ... indictment of two counts of transportation with a - minor with intent to engage in any criminal sexual activity pursuant to 18 U.S.C. § 2423(a) and .. one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(b) & (b)(2). The jury trial lasted (4) days, and Petitioner was found guilty of all counts as charged. Petitioner was sentenced to 420 months imprisonment, and 20 years of supervision.

## REASONS FOR GRANTING THE PETITION

During the Government's rebuttal at closing argument the prosecutor stated to the jury, "[i]n conclusion ladies and gentlemen and most important, the defendant came before you, took the stand and did not deny the allegations. Had the opportunity to and when given the opportunity to he did not deny the charges." (T. 6/29/15, 132). Defense counsel did not object to this statement at the time of closing arguments. The court, however seemingly had issue with this statement by the prosecution and gave the following cautionary instruction sua sponte, "[r]egardless of what might have been argued by counsel for the government, I instruct you that you should examine and evaluate his testimony, that is what he said, what he testified about, and you are not to speculate or draw any adverse inference on matters that he did not testify about. The defendant's testimony is to be evaluated just as you would evaluate the testimony of any witness with an interest in the outcome of the case." (T. 6/29/15, 132).

It should be said that the defendant testified on direct to the fact that his albinism caused him to have undue sensitivity to light, which is why he had the tinted windows in his car. Additionally the defendant also testified to the fact that the victim's mother was angry at him. Objections to questions that did not touch on these areas were sustained for being outside the scope of direct examination.

The defendant argues here that the prosecutor's statements at closing were improper and violated the defendant's Fifth Amendment rights to remain silent. This is not a case where the prosecutor's statements were an invited reply in response to defense counsel's argument and the Judge's curative instruction was not enough to eliminate the harmful prejudice caused by the prosecutor's remarks. As such, the defendant is alleging that the prosecutor's statements were not harmless. One of the most bedrock principles of our judicial system is the Fifth Amendment right to remain silent and it forbids any comment by the prosecutor on the defendant's exercise of this right to remain silent. United States v. Robinson, 485 U.S. 25, 30 (1988); Griffin v. California, 380 U.S. 609, 6155 (1965). "There is no bright line marking the precipice between a legitimate assessment of defense witnesses and an

impermissible encroachment upon the accused's silence. United States v. Sepulveda, 15 3d 1161 (1st Cir. 1993). Prosecutors who choose to explore these areas must take care not to comment upon or call the jury's attention to a defendant's exercise of this right. United States v. Lavoie, 721 F.2d 407, 408 (1st Cir. 1983) cert. denied, 465 U.S. 1069 (1984).

The courts have long said that defense attorneys have a mutual responsibility to exercise reasonable vigilance and direct the trial court's attention to an objectionable issue. United States v. Griffin, 818 F.2d 97, 100 (1st Cir. 1987) cert denied, 484 U.S. 844 (1987). A criminal defendant who believes that a prosecutor's closing argument goes too far usually must object to the offending statements contemporaneously so the judge can administer a curative instruction, thereby limiting any damage. Arrieta-Agressot v. United States, 3 F.3d 525, 528 (1st Cir. 1993).

In the case at hand, however, it was the judge who gave the instruction sua sponte, the next day during the jury charge and called it a curative instruction and directed her comments toward the government. Trial counsel never objected, nor did he ever ask for a curative instruction, nor did he object to the "curative" instruction as given by the trial judge. The Defendant maintains that the instruction was insufficient

because essentially, it only cautioned the jury not to speculate as to what it is that the defendant did not say. The Government overstepped the bounds of propriety and fairness under the Due Process Clause of the United States Constitution, "which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record." Berger v. United States, 295 U.S. 78, 84-85 (1935). In the case at hand, the trial judge never instructed the jury as mandated in Berger v. United States and failed to give the stern rebuke and repressive measures the court called for in Berger. Id.

The Berger court reminds us that the prosecutor is the "representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id.

While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Id. In the case at hand, we do not have "a case where the misconduct of the prosecuting attorney was slight", the statement constituted a mistake that goes to the heart of our constitutional democracy, the Fifth Amendment right of a defendant to remain silent. Id.

When no contemporaneous objection appears on the record, appellate review is for plain error. Arrieta-Agressot, 3F.3d at 528. These are not like the facts in Sepulveda where the court wants to give the arguer the benefit of every plausible interpretation because of the counsel's failure to object suggests that the arguer's statement is not ambiguous. This statement was a clear statement commenting on the defendant's failure to deny his culpability of this crime from the stand when he deliberately limited the areas subject to cross-examination to matters other than guilt or innocence. Although it is clear that ineffective assistance of counsel claims need to be brought in habeas corpus proceeding, trial counsel hardly objected to anything throughout this entire trial, refuting the possibility that defense counsel did not object because prosecutor's statement was an unclear pronouncement and comment of defendant's failure to deny the charges.

Since, defense counsel did not object contemporaneously, the standard of review becomes one of plain error. Thus leaving the previewing court to review a ruling of the court, that was not objected to, if the defendant shows that "(1) an error occurred, which was clear or obvious and (2) not only affected the defendant's

substantial rights but also (3) seriously impaired the fairness integrity or public reputation of judicial proceedings." United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001).

In the case at hand reviewing the facts, it appears that the definition of plain error clearly applies. The error in this case was clear and obvious and affected the defendant's substantial rights. This error, which unquestionably was noticed by the trial judge, albeit not by defense counsel, was an error that involved the defendant's right to remain silent. As stated above, this right is considered to be a "bedrock" under the Fifth Amendment to the United States Constitution. The prosecutor chose to state the fact that the defendant never denied his culpability in the case at hand and in so doing so impaired the public reputation of judicial proceedings. As stated above, the trial judge felt strongly enough to mention this to the jury the next day even though defense counsel never mentioned it himself. It was clear from her comments that the trial judge felt this comment could constitute a problem for the prosecutor and the case itself and felt compelled to attempt to correct this sua sponte.

The question we have in the case at hand, is was the judge's instruction strong enough. It is said by this court that

jurors are presumed to follow the instructions of the judge, as the judge seemingly had issue with the statement by the prosecution, she gave the following cautionary instruction, that regardless of what might have been argued by counsel that the jury should examine and evaluate the defendant's testimony, and not to speculate or draw any adverse inference on matters that he did not testify about and evaluate his testimony just as they would evaluate the testimony of any witness with an interest in the outcome of the case. However, this is not the type of instruction mandated in Berger v. United States, which is to give a stern rebuke and repressive measures. This instruction, essentially was to tell the jury that this witness was to be treated like any other witness that they were to consider when they undertook their jury deliberations. The jury on the other hand, had it in their minds that this witness is like any other witness but they already heard the fact that he did not deny the charges. Even under the plain error rule, this argument warrants a new trial.

**The trial judge erred in denying defendant's Rule 29 motion for directed verdict made both after the government rested and renewed after the defendant's case.**

Defense counsel argued orally a Rule 29 Motion for Acquittal after the Government's case concluded, but did not file a written motion. (T. 6/29/15, 73) Defense counsel

argued that there was no evidence to conclude if the people in the images were in fact minors. (T. 6/29/15, 74). Defense Counsel argued that they don't have to be a pediatrician, or anything like that, but that a reasonable jury cannot, beyond a reasonable doubt, understand that first he downloaded those images and that those are minors. (T. 6/29/15, 74). The Government argued that, that was a question for the jury and that such an issue is premature and should be left for the jury. (T. 6/29/15, 74). The Government further argued that by the defendant's admissions because he was sexually abused he sort of acquired a curiosity as long as 20 years ago of anal sex and that curiosity lead him to do searches on the internet where he would search, download it, view it and then delete the image. (T. 6/29/15, 74). He would do so using the same Pantech cellphone. (T. 6/29/15, 74). The court determined as to count 1 that the Defendants knowledge was corroborated by the fact that he told agents he had seen child pornography specifically from around more or less eight times, which tends to prove that it was absolutely child pornography known to him. (T. 6/29/15, 76). The court ruled that there was sufficient evidence for the jury to make their determination as to whether the government has met the burden of establishing counts 1 and 2. (T. 6/29/15,

77). The court denied the Rule 29 motion. (T. 6/29/15, 77). At the conclusion of the case Defense counsel again orally raised the Rule 29 motion based on the same arguments. (T. 6/29/15, 103). The court again denied the motion. (T. 6/29/15, 103).

The ages of victims and the fact that they were minors came from one witness and one witness only, and that was Agent Gonzalez, who said that he was a computer expert and that in his mind the seven images that were highlighted in his report apparently had child pornography in them. (T. 6/26/15, 121). Mr. Gonzalez testified that the first image was selected because it had sexual content and apparently they were minors. (T. 6/26/15, 129). Mr. Gonzalez testified that the second image was selected because it appeared to be a minor because the body looks small and also the organ looks small. (T. 6/26/15, 129,130). Mr. Gonzalez testified that the third image was selected because there was a minor and an adult, based on the body. (T. 6/26/15, 130). Mr. Gonzalez testified that the fourth image was selected because you can see that it is a minor and they are in sexual kind of positions. (T. 6/26/15, 30). Mr. Gonzalez testified that image number five was selected because you can see two men having sexual relations, one with an instrument penetrating the anal of the other one, and one

of them apparently looks like a minor. (T. 6/26/15, 131). Mr. Gonzalez testified that image number six was selected because you can see two minors, what appears to be two minors sustaining sexual relation, one is penetration the other anally with an instrument. (T. 6/26/15, 131). He further testified that image number seven was selected because you can see a minor sitting on the toilet with an electronic equipment in his hand, and in this case I don't think a picture like that is normal. (T. 6/26/15, 131). Mr. Gonzalez testified that the content found on the phone was child pornography. (T. 6/26/15, 132). Mr. Gonzalez testified that he did not have any medical training. (T. 6/26/15, 134). He also testified that he did not know with absolute certainty the ages of the people in the images. (T. 6/26/15, 134).

In reviewing a district court's denial of a motion for a judgment of acquittal under Fed. R. Crim. P. 29(a), this court reviews the sufficiently of the evidence de novo, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict and proven by the government beyond a reasonable doubt. United States v. Gabriele, 63 F.3d 62, 67 (1st Cir.1995).

The Rule 29(a) motion was essentially argued as to Count Three of the superseding indictment only and not as to Counts One and Two. Count Three charges a violation of 18 U.S.C. Section 2252A (5)(B), which is possession of child pornography. The essential basis of the defendant's argument is that the government did not meet their burden to show that the pornographic images included proof that these images included sexually explicit conduct that was produced by using an actual person under the age of 18 and that these images showed these minors engaging in sexually explicit conduct. Id.

In United States v. Katz, the court concluded that "[t]he threshold question--whether the age of a model in a child pornography prosecution can be determined by a lay jury without the assistance of expert testimony--must be determined on a case by case basis." United States v. Katz, 178 F.3d 368, 373 (5th Cir. 1999). The Defendant would argue that in this case a lay person would not have been able to make this determination in the case at hand. Even Agent Gonzalez, the Government's only witness, who they used to identify the ages of the persons depicted in the photographs, indicated that he could not be absolutely sure that they were minors in the photos. Therefore the

government, in this case, did not prove that the photographs contained minors.

In determining whether images are "lascivious," this court and the trial court referred to the criteria listed in United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) cited by the court in United States v. Johnson, 639 F.3d 433, 439, 440 (2011) suggested that the factors considered are: "(1) whether the focal point of the picture is on the minor's genitals or public area; (2) whether the setting of the picture is sexually suggestive; (3) whether the minor is depicted in unnatural poses or inappropriate attire considering the minor's age; (4) whether the minor is fully or partially clothed or is nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the image is intended to elicit a sexual response in the viewer. However, while this court considers these criteria, they are "neither definitive nor exhaustive." United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999) The trial court in this case instructed to the Dost factors and told the jury that they were to decide the weight or lack of weight to be given to any of the factors and that they could consider them in

determining the defendant's intent. United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)

In Kemmerling, the court stated that "[a] picture is 'lascivious' only if it is sexual in nature. Thus, the statute is violated, for instance, when a picture shows a child nude or partially clothed, when the focus of the image is the child's genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer." United States v. Kemmerling, 285 F.3d 644, 646 (8th Cir. 2002). Again in this case the only evidence presented by the government related to the pictures, came from one witness Agent Gonzalez, a computer expert. Mr. Gonzalez testified that he selected the images, which he believed contained child pornography. He testified that he picked one of the images because it had sexual content and apparently minors. Agent Gonzalez testified that he selected another image simply because it appeared to be a minor because the body looked small and also the organ looked small. Agent Gonzalez testified an additional image was selected because there was a minor and an adult, based on the body. Agent Gonzalez testified that he selected a fourth image because it was a minor and they were in sexual kind of positions. Agent Gonzalez testified that he selected a fifth image because you can see two men having

sexual relations, one with an instrument penetrating the anal of the other one, and one of them apparently looks like a minor. Agent Gonzalez testified that a sixth image was selected because you can see what appears to be two minors sustaining sexual relation, one is penetration the other anally with an instrument. Lastly, Agent Gonzalez testified that he selected image number seven because you can see a minor sitting on the toilet with an electronic equipment in his hand, and in this case he didn't think a picture like that was normal. This testimony by Agent Gonzalez does not even come close to meeting any of the requirements in Dost which are necessary to prove that the images possessed by the defendant were in fact child pornography. Again Agent Gonzalez testified that even he was not absolutely certain of the ages of the people in any of the images. Thus, Mr. Gonzalez was merely guessing the ages of those depicted in the images and selected one of the images merely because he did not think it was "normal". Therefore the testimony offered by the government through Agent Gonzalez failed also to meet the standard in Kemmerling as there is no indication anywhere that the images were focused on the genitals or pubic area or that the images were intended to elicit a sexual response in the viewer. Id.

Petitioner argues viewing the evidence in light most favorable to the jury verdict, no reasonable .. jury could have found he possessed child pornography materials in violation of the Federal Statute. This Honorable Court is moved to issue the writ of ..... certiorari in the interest of justice.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Randy C. Bolón

Date: 7-16-2019