ORIGINAL



No. 19-7223

IN THE SUPREME COURT OF THE UNITED STATES

**ERIK BILAL KHAN,**

Petitioner

vs.

**UNITED STATES OF AMERICA,**

Respondent

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

# PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

Does the right of a defendant to the effective assistance of counsel at every critical stage of a criminal proceeding, including arraignment, encompass the duty of counsel to advise the defendant of his option to plead guilty at an arraignment, and if the defendant decides to plead guilty at that time, to assist the defendant in entering such a plea?

## Parties to the Proceedings Below

Petitioner, who was the Appellant for the Application for a Certificate of Appealability and direct appeal below, is Erik Bilal Khan. Respondent, who was the Appellee in the Application for a Certificate of Appealability and direct appeal below, is the United States of America.

## Citation of Prior Opinion

The United States Court of Appeals for the Tenth Circuit decided this case by unpublished opinion issued April 25, 2019, in which it denied a certificate of appealability and dismissed the appeal, thus affirming the judgment of the habeas court. The Tenth Circuit denied rehearing and rehearing en banc on August 6, 2019. A copy of the Tenth Circuit's opinion and denial from rehearing/rehearing en banc are included in the Appendix attached to this petition. The Tenth Circuit's unpublished opinion denying the Certificate of Appealability can also be found at United States v. Erik Bilal Khan, 769 Fed. Appx. 620, 2019 U.S. App. LEXIS 12644 (10th Cir. Apr. 25, 2019).

## Jurisdictional Statement

This petition seeks review of an opinion, judgment, and order denying an Application for a Certificate of Appealability following the denial of a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 where Khan attacked the validity of his convictions because his attorney, inter alia, failed to consult with him about the fundamental decision of what plea to enter and further interfered with that decision prior to, during, and following the initial arraignment. This Petition is timely in that this Court granted Khan's Application for an Extension of Time. A copy of the Order is attached to the Appendix to this Petition. This Court has jurisdiction to review the Tenth Circuit's judgment pursuant to 28 U.S.C. § 1254(1). Finally, this Court is also vested with the power to grant a Writ of Habeas Corpus at all times. 28 U.S.C. § 2241.

## Constitutional Provision Involved

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment VI

## Manner in Which the Federal Question Was Raised Below

The questions presented in the instant Petition were argued and reviewed below as Khan timely moved to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255(a), (f)(1) and the district court denied that motion. Khan renewed the arguments on appeal to the Tenth Circuit. Khan specifically argued that counsel was ineffective for his failure to consult with him about his options in pleading at the arraignment and affirmatively interfered with Khan's ability to choose his plea at the arraignment. The Tenth Circuit dismissed the appeal and declined to issue a Application for a Certificate of Appealability holding that no case has ever held an attorney to a duty to assist a defendant in pleading guilty at a specific point in time within the proceedings, and even if there was, Khan could not show that the government would have abstained from bringing hypothetical proceedings to achieve the same result. In a Petition for Rehearing and Rehearing En Banc, Khan reasserted his argument that this Court "has made abundantly clear that counsel 'must' consult with his client and honor his client's choice with regard to 'fundamental decisions' such as whether or not to plead guilty." Accordingly, the issues presented have been properly preserved and are now ripe for review by this Court.

## Statement of the Case

The facts of the case remain uncontested and incontroverted.

1. Khan is arrested by federal and local police on May 9, 2012.

2. Two weeks later, Homeland Security Agent Stephanie Legarretta charges Khan with violating three federal laws involving child pornography (possession, receipt, distribution). Khan immediately informs prosecution, by way of an ends-of-justice agreement, that he intends to plead guilty and agrees to the pre-indictment plea negotiations.

3. At the detention hearing, Assistant U.S. Attorney Sinha alleges that the government has "evidence" supporting an inference of production of child pornography.

4. Khan releases his initial attorney and hires Jason Bowles, Esq. and Robert Gorence, Esq., to represent him in federal court. He vehemently denies to counsel that he attempted or actually produced child pornography on any occasion. Khan specifically explains to Bowles and Gorence that his ultimate goal is to plead guilty and face the sentencing court.

5. November 14, 2012: Khan is alleged by indictment to have violated the same three federal laws involving child pornography.

6. On November 21, 2012, Khan is brought to Court for arraignment and asks Bowles if he can plead guilty to the indictment as charged. Bowles tells Khan "no." Khan is never asked to enter his own plea and the Magistrate defers to Bowles for the entry of the plea. Bowles pleads "not guilty." Khan wants to plead guilty.

THERE IS A REASONABLE PROBABILITY THE FOLLOWING EVENTS WOULD NOT HAVE OCCURRED IF BOWLES ANSWERED KHAN'S QUESTION CORRECTLY AND ALLOWED HIM TO ENTER THE PLEA OF HIS CHOICE.

7. Just over five months later, Assistant U.S. Attorneys Lizarraga and Sinha offer Khan a plea offer for "22 years" imprisonment. Khan rejects the "offer."

8. Several months later, a superseding indictment is filed alleging the same three counts as originally charged and added a single count of attempted production of child pornography.

9. Bowles and Gorence fail to attend the arraignment on the superseding indictment charge. Khan is without his counsel of choice for the hearing and no waivers regarding counsel were made.

10. Gorence visits Khan at the jail and presents him with a plea agreement that has only a single stipulation: Khan is permitted to file an appeal as to the suppression issue only. Gorence tells Khan that the government has located a "victim" to testify in support of Count 4 of the indictment: attempted production of child pornography. Khan asks Gorence if he can try to plead to the three counts he actually committed and take the attempted production count to trial. Gorence lies to Khan and says "no."

11. The day before Thanksgiving in 2013, Khan enters a plea under the agreement that has no sentence stipulations, waives all but one appellate issue, and exposes Khan to 15-100 years imprisonment.

12. Khan hires sentencing specialist Alan Ellis, Esq. Khan is informed by Ellis' staff attorneys that his actual exposure was 15-80 years and not 15-100 years. Ellis' staff attorneys also conduct a comprehensive investigation into Count 4 of the superseding indictment and find that the government never located a "victim" for Count 4 and had no evidence other than to lump the charge with the damaging possession, receipt, and distribution counts.

13. Ellis' comprehensive investigation confirms what Khan says all along: he was communicating with an adult. Indeed, defense investigators located the adult that the government claimed was not locatable. Indeed, the government admitted at sentencing there was no proof whatsoever to support that it was in fact a minor. Tr. of Sentencing, District Court ECF No. 191 at 29:17 - 32:2.

14. Khan files a number of motions including a motion to withdraw his plea pursuant to Rule 11(d)(2)(B). He argues that his plea was unkowing and involuntary for myriad reasons that he is innocent of the attempted production count that he wants to take to trial. Declarations of Erik Khan in Support of Motion to Withdraw Plea, District Court ECF Nos. 91-1 at 5; 103-4 at 5-6.

15. AUSA Sinha is removed from the case by the hand of AUSA Lizarraga and AUSA Lizarraga offers to amend the agreement to lock in a sentence of 240-months imprisonment plus life supervises release and $12,000 in restitution. Khan demands that he still retain the right to pursue ineffective assistance claims that he has discovered.

16. At sentencing, Khan presses a number of objections to the Presentence Report. One of those objections was to an enhancement that stated Khan

produced child pornography of a minor between the ages of 15-17 years old. AUSA Lizarraga concedes that the government never located anyone, there was no undercover officer, and there was no basis to lodge the enhancement. Khan is one of the only defendants to ever have a § 2G2.1 calculation that (a) doesn't have a minor victim enhancement and (b) delivers a Guideline offense level **less** than the possession, receipt and distribution guideline.

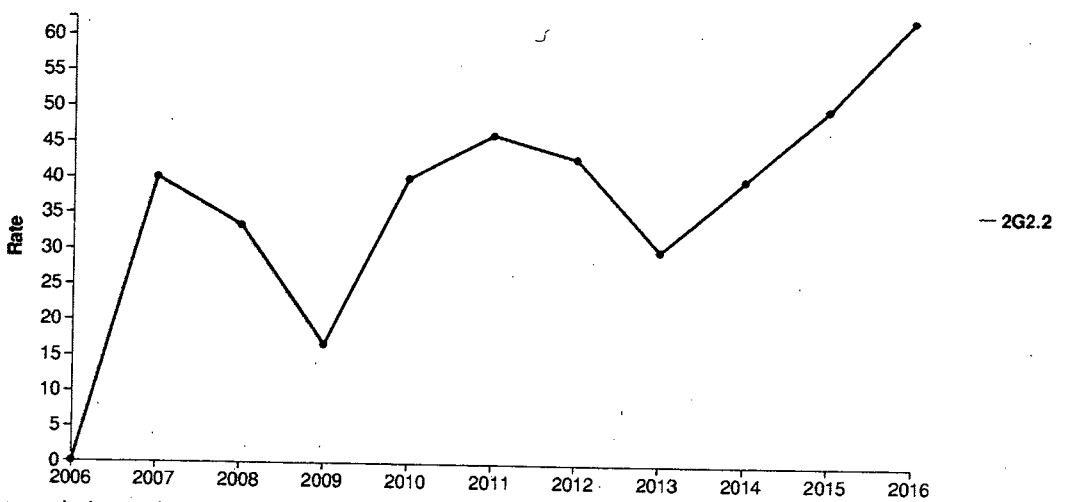
17. On June 27, Khan is sentenced under the amended plea agreement and immediately pays all of his fines. Out of the $12,000 in restitution that was ordered paid, not one dollar was for a victim of the alleged "attempted production" as there was **no victim**.

18. Data reviewed from the Sentencing Commission shows that, in the Tenth Circuit, there are only three other people that were sentenced with a 15-year manditory minimum under USSG § 2G2.2 between 2006 and 2016. Khan was **the only one** that was **not** a repeat offender. His sentence is a statistical outlier and thus substantively unreasonable.

19. According to the Sentencing Commission, the national rate of "Judge-Initiated" downward variances is well above 55% (with an average of -104 months) for USSG § 2G2.2 offenses when the final offense level is 38. That means that there is a greater than 50% probability that but for counsel's errors here, Khan would have received substantially less time in prison were he able to plead at the arraignment like he wanted to do.

## Rate of Judge-Initiated Downward Variances, National

FILTERS: Nationwide, Lead Guideline=2G2.2 - Child Pornography-Poss. or Dist., Final Offense Level=38, Crim. Hist. Category=1




The trend chart above reflects the rate of judge-initiated below Guidelines sentences imposed from fiscal years 2006 through and including 2016 for offenders sentenced under the indicated Guideline(s). The data are limited by the filters indicated, and are derived from the U.S. Sentencing Commission's published datafiles.

## Reasons for Granting the Writ

A. Introduction

This Court has long held that a criminal defendant retains the "ultimate authority" to make "certain fundamental decisions" regarding the course of events the case is to take, including but not limited to, what plea to enter to the charges alleged in the indictment or information. While the attorney is there to make tactical decisions that the client cannot generally complain about, the attorney may not interfere with the defendant's decisions with regard to: what plea to enter, whether or not to appeal, whether or not to testify on his own behalf, or whether or not to waive a jury and proceed before a judge for trial. Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983). Those decisions "cannot be made for the defendant by a surrogate" and "an attorney must consult with the defendant" when one of these fundamental decisions is to be made. Florida v. Nixon, 543 U.S. 175, 187, 160 L. Ed. 2d 565, 125 S. Ct. 551 (2004)(emphasis added).

The very first opportunity for a federal criminal defendant to voice a plea of any kind is typically at an arraignment. F.R.Cr.P. 10. Indeed, it is the criminal defendant's first real opportunity to speak, or to refrain from doing so, in court regarding the case at all. Despite being considered an indispensable step in federal criminal procedure, it has become a knee-jerk proceeding where the defendant has no choice in its outcome at all.

In Hamilton v. Alabama, 368 U.S. 53, 55 n.4 (1961), Justice Douglas noted the importance of the arraignment in federal criminal procedure:

> Under federal law an arraignment is a sine qua non to the trial itself - the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried.

(emphasis added).

Thus, this Court as established that a criminal defendant has the right to the effective assistance of counsel at the arraignment proceedings. That being the case, it seems illogical to conclude that the right to the effective assistance of counsel would not require counsel to (i) inform the client of his option to plead guilty at that proceeding and (ii) assist the client in entering the plea of his choice. "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy ... [C]ertain decisions regarding the exercise and waiver of basic trial rights are of such moment that they cannot be made for a defendant by a surrogate." Nixon, 543 U.S. at 187 (citation omitted).

The Tenth Circuit's handling of Khan's case has reduced the arraignment proceeding to a mere ministerial task in federal criminal procedure so that the defendant has zero influence as to what occurs and is no longer a vital step in the resolution of criminal cases that seeks the defendant's answer to the charges. The Tenth Circuit's opinion is in stark contrast to the holdings of this Court regarding the duties of counsel and the reason arraignments occur in the federal procedure at all. See e.g. Nixon, supra; see also Hamilton, supra.

It remains undisputed that Khan would have entered a plea at the arraignment held several months following his arrest. Khan, Slip Op. at 4. In fact, the Magistrate, District Court, Tenth Circuit and the government have never questioned the veracity of that point. But, at each stage of the proceedings below, Khan was given one overarching reason why he could not get relief: he is unable to show prejudice. Id. at 5-6. According to the Tenth Circuit, it was not enough for Khan to show a lower sentence or lesser charges because the government could simply bring a new case to achieve the same final result.

Interestingly, the government never raised the argument that the government

could have brought further charges in another case. That was invented by the district court alone.

According to the lower courts, Khan was required to show that the government would never have brought enhanced charges had Khan pled guilty at the initial arraignment. Id. at 7, n.1. In affirming, the Tenth Circuit found Khan's claim that the government would have abstained from bringing further charges was mere conjecture and thus not even remotely debatable. Id. The Tenth Circuit's holding was in the face of statistics, compiled using data from the U.S. Sentencing Commission, showing that it is exceedingly rare for the government to bring further charges and also an email from the prosecution expressing a desire to cease the case in return for a plea. Id. The district court and the Tenth Circuit thus erred in denying Khan a Certificate of Appealability and a Writ of Habeas Corpus.

This Court has recognized that the arraignment is a vital step in federal criminal procedure. Hamilton v. Alabama, 368 U.S. 52, 55 n.4 (1961). The importance of the arraignment has been long memorialized by the Federal Rules of Criminal Procedure which provides that a defendant "must be informed of the charges" and "asks the defendant to answer the charges against him". F.R.Cr.P. 10(a)(2)-(3) (emphasis added). But, despite all of this, it has become apparent, in the cavalier procedure employed in virtually every arraignment in the federal court system, that the arraignment has evaporated into thin air. In Khan's case, he wasn't even asked "to answer the charges against him." Instead, he was told that he could not plead guilty and then the attorney entered the plea of the attorney's choice - not Khan's.

This case seeks to set the record straight and is of clear national importance in the ever-increasing world of federal prosecutions. Is the defendant's opportunity to plead at the arraignment a situation in which counsel

must inform his client of his options and stand aside if he disagrees with the client's choice or not? As of today, that is the only "fundamental decision" that this Court has not expressly evaluated in the context of ineffective assistance claims and that is causing attorneys, and even the lower judiciary, to believe that arraignments are mere ministerial tasks that hold no specific importance to the defendant in federal criminal practice. The decision of the Tenth Circuit obliterated the right for a defendant to decide what plea to enter in this case and, as such, Khan respectfully requests that this Court issue a Writ of Certiorari to the Tenth Circuit Court of Appeals, consider this question of national importance, and issue a Writ of Habeas Corpus.

**B. Counsel has a clear and unequivocal duty to inform their criminal defendant clients about their options in pleading at the arraignment and, if they fail in that regard, to remedy the error as fast as possible.**

This Court has expressly held that counsel has a specific duty to both "consult with" and "obtain" consent to the recommended course of action" when a decision involving the "exercise or waiver" of the most basic rights, like pleading, must be made. Nixon, 543 U.S. at 187. While no case has ever discussed this duty within the rubric of the arraignment per se, the Court's holding in Nixon makes clear that said duty is a continuing obligation that begins at the point in which the right to counsel attaches and only ends upon the conclusion of that representation. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991); Hamilton, supra. Thus, this Court has already implicitly held that counsel must explain what options the defendant has, provide him any needed guidance, ask him for his choice, and help him enter that choice on to the record. The Federal Rules of Criminal Procedure provide that the defendant himself may plead "not guilty, "guilty," "nolo contendere" with the court's consent, or may "remain silent." F.R.Cr.P. 11(a)(1), (4). There is no discussion in the rule about the defendant's attorney. cf. F.R.Cr.P. 16.1(a)(directing "defendant's attorney"

specifically).

It is indisputable that Khan expressed a desire to plead guilty "as fast as possible" when he retained his attorneys and also made that same desire known to his attorney at the arraignment itself. This fact has never been disputed in any way. It is also indisputable that Khan was not permitted to plead the way he wanted to at the arraignment and was not provided **any other opportunity to plead** until well after the government brought a superseding indictment. Khan has asserted, at all stages of the underlying § 2255 proceeding below, that his counsel's failure to allow him to plead at the arraignment was prejudicial to him because he would (i) not have been charged with attempted production, (ii) his mandatory minimum would have been substantially lower, (iii) he would have received a lower sentence, and (iv) his Guidelines range calculation would have been lower.

**C. Whether or not the government could have, or ever would have, pursued further charges in separate proceedings is irrelevant to the analysis of whether or not counsel was ineffective in the proceedings at bar.**

The district court and the Tenth Circuit both have asserted that Khan must show prejudice from counsel's unprofessional errors beyond the proceedings under attack. The Tenth Circuit's holding that a habeas petitioner must show that the government would not have instituted new (uncontemplated) proceedings to achieve the same result has turned Strickland on its head and is setting the bar much higher than this Court ever intended a criminal habeas petitioner to have to clear.

Khan wanted to plead guilty at the arraignment. When Khan's lawyer ineffectively misinformed him as to his options and then interfered with the entry of the plea, the case naturally progressed forward. There was discovery turned over by the prosecution in due course, the case was set for trial, and Khan pursued a Motion to Suppress. Throughout the pretrial litigation, the government offered Khan an agreement that if he pled to the indictment as it

stood, the government would agree to a 22-year sentence. The government also asserted that if Khan did not plead guilty they would pursue further charges, including the addition of a count of attempted production of child pornography. Khan rejected the agreement as unduly harsh and substantively unreasonable.

Years later, Khan found out that he could have walked into the district court at any time and pled to the indictment before a superseding indictment issued, or was even contemplated, within the proceedings under attack. But, the district court went on to hold that there was no indication showing the government would not have instituted a new set of proceedings to achieve the same result; thus, Khan could not establish prejudice. The Tenth Circuit seized on the district court's erroneous interpretation of Strickland jurisprudence and held that Khan's claim that the government would have abstained from bringing further charges was mere conjecture.

In Strickland, this Court held that a habeas petitioner must make two showings in order to establish ineffective assistance. First, the petitioner must show that his attorney made unprofessional errors in handling the case. Second, the petitioner must establish prejudice. Strickland, 466 U.S. 668, 687-88, 692 (1984). Prejudice is shown by demonstrating a "reasonable probability" that "but for counsel's unprofessional errors" the outcome "of the proceedings" would have ended more favorably for the petitioner. Id., 466 U.S. at 694. Prejudice is thus established if there is a reasonable probability that the petitioner would have: (i) received less time in prison or (ii) been convicted of lesser charges. Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012). The lower courts did not contend that Khan couldn't make these critical showings with regard to the case under attack. Instead, the lower courts held that Khan was obligated to show and prove that the government would never have charged him with any further crimes in new, separate, proceedings.

Khan stressed to the lower courts that the holdings of this Court only required him to establish prejudice within the case under attack and not hypothetical proceedings that have never come to fruition. Sadly, it appears that the lower courts simply presumed that Khan was in fact guilty of attempted production and that the alleged crime had a verified victim. Neither of these contentions is accurate since Khan flatly asserted in a declaration supporting a motion to withdraw the plea that he was tricked into pleading guilty despite being innocent of the charge. Doc 91 at District Court ECF No. 91-1 at 5; District Court ECF No. 103-4 at 5-6.

This Court has never gone so far as to hold that a defendant asserting ineffective assistance of counsel must demonstrate a reasonable probability that the government would not have instituted new proceedings in order to purge any prejudice that the defendant could point to. Indeed, if that were the case, virtually every ineffective assistance of counsel case would fail. Instead this Court has only said that the defendant must show prejudice within the proceedings under attack. Frye, supra. The Tenth Circuit has thus expanded the elements of ineffective assistance of counsel claims and nullified decades of Sixth Amendment jurisprudence.

**D. Khan showed a reasonable probability that the proceedings under attack would have ended more favorably but for counsel's unprofessional errors in misadvising and interfering with Khan's choice of plea at the arraignment.**

The Tenth Circuit held that Khan did not, and could never, show prejudice related to the lawyer's error in removing his right to decide his plea. To get there, the Tenth Circuit centered on the fact that Khan **could have been** charged in a separate proceeding for the attempted production count. The Panel's claim is a non-sequitir. "Khan admitted that the attempted production count - unlike

other counts he had been charged with - involved communication with and solicitation of an individual victim and thus it is likely the government would have still pressed the charge." United States v. Khan, 2019 U.S. App. LEXIS 12644, at *8; but see: Tr. of Sentencing, District Court ECF No. 191 at 29:17 - 32:21 (conceding there was no identifiable "victim" for the attempted production charge); Declarations of Erik Khan in Support of Motion to Withdraw Plea, District Court ECF Nos. 91-1 at 5, 103-4 at 5-6 (asserting that he is innocent of the charge and he was misled by counsel as to the strength of the government's case with regard to the attempted production charge). Notwithstanding the Tenth Circuit's clearly erroneous statement of the facts in this case, it is irrelevant that Khan eventually made any admissions later in the case when evaluating counsel's ineffective assistance.

Nixon is instructive. There, this Court was faced with a captial case where counsel, without the defendant's consent, decided to proceed with a "strategy" of cocession. In finding that counsel, an experienced capital attorney, ineffective, this Court discussed the importance of the defendant's participation in the case. While recognizing that counsel does not need to "obtain the defendant's consent to 'every tactical decision'," Nixon, 543 U.S. at 187, counsel must recognize when a decision is more than merely tactical. Thus, the Court reaffirmed the priciple that "[a] defendant ... has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal" and counsel "must both **consult with the defendant and obtain consent to the recommended course of action**." Id. Under Nixon, counsel had a duty to "consult with" Khan about his options and required Khan's "consent" to enter the "not guilty" plea. The Tenth Circuit, when admonishing that Khan's claim that the government would have abstanined from filing a new case as "mere conjecture," Khan, 2019 U.S. App. LEXIS 12644 at * 8,

ignores the fact that **there has never been any case that found prejudice cured because of the government's charging discretion**. The only inquiry worthy of evaluation, if any is permitted beyond the facts of the case at bar, is how Khan would have responded to the charge brought in a new case if that were to occur. The record clearly demonstrates that he would have demanded a trial and fully contested the attempted production charge. Motion to Withdraw Guilty Plea Pursuant to Rule 11(d)(2)(B), District Court ECF No. 91 (demonstrating, inter alia, that Khan would have contested the attempted production charge had he been properly advised); Declarations of Erik Khan, 91-1 at 5; District Court ECF No. 103-4 at 5-6.

In evaluating the actual prejudice that Khan suffered, it is clear **in the collateral case at issue** (as opposed to the hypothetical proceedings discussed by the lower courts) that Khan would have: (a) been convicted of lesser crimes, (b) received less prison time, and (c) had a lower Guidelines calculation. Khan clearly established Strickland prejudice.

Lesser Crimes:

There is no doubt that if Khan pled guilty at the arraignment, the government would have been prohibited from bringing the case within the collateral case at issue. A guilty plea to the indictment, indeed, ends the controversy - a fact that the District Court conceded. But, the Tenth Circuit and the District Court believed that Khan was required to prove prejudice, not in the case at bar but throughout all time. **No case has ever held any criminal defendant to such a standard until now**. Extensive research reveals that every case that has ever discussed prejudice since Strickland, has recognized that the defendant must show that but for counsel's unprofessional error(s), there is a reasonable probability that **the outcome of the proceedings under attack** would have ended more favorably for the defendant. Missouri v. Frye, 132 S.Ct. 1399,

1409 (2012). One way to do that is to show that "the proceedings" would have resolved with lesser charges. Attempted production of child pornography, a Class B offense, is more serious than Possession, Receipt, or Distribution of child pornography (all class C offenses). 18 U.S.C. § 3551 (classification of offenses). Accordingly, Khan has shown the "**outcome of the proceedings**" would have been more favorable had Khan not been prevented from entering the guilty plea that he wanted to enter at the arraignment in that he would not have been found guilty of the far more serious attempted production crime.

**Less Prison Time**:

A § 2255 Movant can also establish prejudice in the context of ineffective assistance by showing a reasonable probability that he would have been sentenced to less time in prison. Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012). It is absolutely ridiculous to believe that a producer of child pornography would receive **less** prison time than a trafficker. That alone establishes the

**Case Report:** Erik Khan
2G2.2 - Child Pornography-Poss. or Dist. in New Mexico, By Agreement, Open Plea, Nolo Contendere

Case Summary

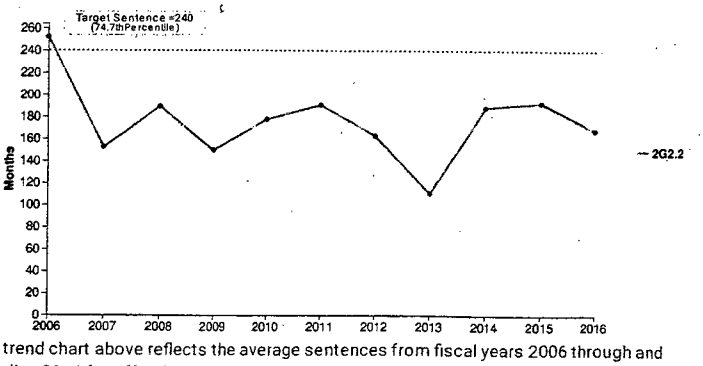
| Offense Level: | Criminal History: | Percentiles | Target Sentence: | Supervised Release: | Restitution Amount: | Fine Amount: |
|---|---|---|---|---|---|---|
| 38 | 1 | | 74.7% (240 months) | N/A | N/A | N/A |

Guideline Sentencing Range: 235 - 293

| | Case count | Avg Sentence | Med Sentence | Min Sentence | Max Sentence | % Below FSG | AVG Fine |
|---|---|---|---|---|---|---|---|
| National | 92 | 174 | 180 | 36 | 413 | 53.3% | $1,257 |
| 10th Circuit | 3 | 157 | 170 | 36 | 265 | 67% | $0 |
| New Mexico | 0 | 0 | 0 | 0 | 0 | 0% | $0 |

Average Sentences, National

FILTERS: Nationwide, Lead Guideline=2G2.2 - Child Pornography-Poss. or Dist., Final Offense Level=38, Crim. Hist. Category=1




he trend chart above reflects the average sentences from fiscal years 2006 through and ıcluding 2016 for offenders sentenced under the indicated Guideline(s). The data are limited y the filters indicated, and are derived from the U.S. Sentencing Commission's published datafiles

likelihood of a lesser sentence. Statistics supports Khan. The statistical summary of average sentences provided above, shows that there is a greater than 50% probability that a district court would render a **below**-Guidelines sentence in a 2G2.2 child pornography case - even in the Tenth Circuit. This is compelling evidence that brings Khan's assertion from "mere speculation" to a

substantial probability. Accordingly, he showed a reasonable probability that he would have received less time in prison but for counsel's error at the arraignment.

**Guidelines Offense Level:** In Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), this Court held that a single offense level difference in the Guidelines calculation is more than sufficient to establish prejudice under the virtually identical plain error standard. Khan established Molina-Martinez prejudice because he showed that the attempted production charge, because it was **not grouped** with the other charges, **increased** Khan's Guidelines Offense level. Thus, in the proceedings at issue, Khan's offense level would have been **lower** had he been permitted to make the fundamental decision regarding his plea like he wanted to.

*KHAN GUIDELINES CALCULATIONS*

| | ATTEMPTED PRODUCTION GROUP | | | DISTRIBUTION GROUP | |
|---|---|---|---|---|---|
| *Guidelines* | *Description* | *Adjustment* | *Guidelines* | *Description* | *Adjustment* |
| 2G2.1(a) | Base Offense Level | 32 | 2G2.2(a)(2) | Base Offense Level | 22 |
| ~~2G2.1(b)(1)(B)~~ | ~~Minor between 12-16~~ | | 2G2.2(b)(2) | Prepubescent minor | 2 |
| 2G2.1(b)(3) | Distribution | 2 | 2G2.2(b)(3)(B) | Distribution for thing of value | 5 |
| | | | 2G2.2(b)(4) | Sado-masochisim | 4 |
| | | | ~~2G2.2(b)(5)~~ | ~~Pattern of Activity~~ | |
| 2G2.1(b)(6)(B) | Use of a computer to solicit | 2 | 2G2.2(b)(6) | Use of computer | 2 |
| | | | 2G2.2(b)(7) | Number of images +600 | 5 |
| 2X1.1 | Attempt | -3 | | | |
| ~~3C1.1~~ | ~~Obstruction~~ | | | | |
| | | | | | |
| TOTAL | | 33 | | | 40 |
| 3D1.4(a) | Grouping | | | | 1 |
| 3E1.1 | Acceptance | | | | -3 |
| TOTAL OFFENSE LEVEL | | | | | 38 (235-293 months) |

The Tenth Circuit's holding that the government can simply bring charges in a separate case, absent a non-prosecution agreement, guts the entire principle of the Strickland analysis. For instance, based on the Tenth Circuit's reading of things, if a defendant is not informed of a plea offer for 120-months, that was not memorialized in a formal agreement, blindly went to trial and was sentenced to life, he would not be able to claim ineffective assistance because the government **could have** hypothetically written the agreement without a promise to cease prosecution and **could have** simply brought more charges in another case to achieve the same result of life in prison. It makes Strickland's standard impossible to prove and thus nullifies the right to counsel protected by the

Sixth Amendment. The Tenth Circuit's decision needs to be reviewed by this Court to bring uniformity to the prejudice analysis in all cases of ineffective assistance of counsel. This Court is asked to clarify that the prejudice analysis is limited to the proceedings under attack and not hypothetical proceedings that have yet, if ever, to come.

E. Since Khan was able to show that his attorney committed an unprofessional error and that error clearly prejudiced Khan, this case is a prime vehicle for this Court to evaluate the importance of properly explaining a defendant's options at the arraignment, the importance of an arraignment, and the overarching requirement that an arraignment seek the defendant's answer to the charges.

The issue raised here is one that has never been squarely addressed by this Court. It has been said that arraignments in federal procedure are indispensible and a "critical stage" in federal procedure. See F. Because arraignment is a critical stage in the proceedings, this Court has also held that a defendant has the right to the effective assistance of counsel during those proceedings. But, apparently that isn't enough for the circuit courts to understand the importance of a defendant's participation in the arraignment. This case is a prime vehicle for the Court to intervene and hold that where the defendant's attorney fails to (i) inform the defendant of his options in pleading at the arraignment and (ii) help the defendant enter the plea of his choice - regardless of the attorney's personal preferences - the defendant has demonstrated ineffective assistance of counsel.

The Rules Committee even noted that the last thing they wanted to occur is to have the arraignment erode to a ministerial proceeding. That is precisely why the Rules Committee made it clear that a defendant's presence is mandatory lest there be some substantial reason for his absence and the defendant must also personally waive that presence. See e.g. Valenzuela-Gonzalez v. United States, 915 F.2d 1276, 1280 (9th Cir. 1990)(Mandamus granted and ordered district court to have defendant produced physically to arraignment).

In sum, the defendant alone has the "ultimate authority" to decide if he will "exercise or waive" his trial rights. Nixon, 543 U.S. at 187. The "exercise" of that right would be to plead "not guilty." If the defendant wants to "waive" that right, then he has a right to plead "guilty" to the indictment as it stands. Failure to consult with a defendant and inform him of his options and gain his consent to a specific course of action at the arraginment is thus ineffective assistance of counsel. Accordingly, this case presents a prime vehicle for this Court to weigh in and hold that the defendant alone must make the decision regarding what plea to enter at the arraignment and that failure to do so necessarily is Constitutionally ineffective.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Dated: January 2, 2020
Joint Base MDL, New Jersey

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