

No. 19-7845

Supreme Court, U.S.
FILED

FEB 18 2020

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Omar Weise — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Omar Weise I.D. # 98813-004
(Your Name)

FCC-Petersburg, P.O. Box 1000
(Address)

Petersburg, Virginia 23804
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Did the Circuit apply an improper, too demanding, and unduly burdensome COA standard? Should a COA be granted in this Case?

LIST OF PARTIES

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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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.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 is unpublished.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 is unpublished.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 is unpublished.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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 08, 2019.

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: 12/19/2019, and a copy of the order denying rehearing appears at Appendix C.

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

18 U.S.C. § 1591(a)(1)

U.S. Const. I, IV, V, VI

STATEMENT OF THE CASE

Mr. Weise went to trial on an indictment alleging two counts of sex trafficking of a minor by force, fraud, or coercion, in violation of 18 U.S.C. § 1591(a)(1), (b)(1). The counts corresponded to two minors, S.L. and A.R.E., who worked as dancers and prostitutes for Mr. Weise. S.L., A.R.E., and other sex workers affiliated with Mr. Weise testified at trial that Mr. Weise could be violent at times, but each witness insisted that the violence was limited to personal disagreements unrelated to dancing or prostitution. The most graphic account of Mr. Weise's violence involved S.L.: the jury heard about an occasion on which Mr. Weise punched her hard enough to break her jaw and send her to the hospital. The jury ultimately convicted Mr. Weise of the count relating to S.L. based on its findings that Mr. Weise knew or recklessly disregarded her age and that he knew or recklessly disregarded that she was coerced into engaging in commercial sex acts. As a result of the jury's finding with regard to coercion, Mr. Weise was subject to an enhanced mandatory minimum penalty pursuant to subsection (b)(1) of the statute.

The jury found Mr. Weise not guilty of the second count relating to A.R.E. At sentencing, however, the district court found that the government had proven the conduct involving A.R.E. by a preponderance of the evidence. Accordingly, the court took that conduct into consideration in calculating his guideline range, classifying it as a separate offense group pursuant to § 2G1.3(d) and Part D of Chapter Three of the Sentencing

REASONS FOR GRANTING THE PETITION

Guidelines. On the basis of the two groups of offenses, the district court calculated a guideline range of 360 months' to life imprisonment and imposed a sentence of 360 months' imprisonment.

REASONS FOR GRANTING THE PETITION

The 11th Circuit Court of Appeals denied Mr. Weise a certificate of Appealability, when there is a lot that a reasonable juror could debate. For example, Mr. Weise argued in the district court about amending his § 2255 (Doc. 19), but the magistrate held it was procedurally defaulted (Doc. 24 at 20), and the district judge adopted the report and denied a certificate of appealability (Doc. 34). Whether the argument relates back and if equitable tolling applies a reasonable juror can debate, and a COA should issue.

Mr. Weise's § 2255 dealt with (1) if the evidence at trial was insufficient to sustain his conviction; (2) did the government improperly assert facts not in evidence when it impeached its own witness, Alexandra Snapp, and this amount to prosecutorial misconduct that deprived Weise of a fair trial; (3) and did the Court miscalculate his guideline range by considering conduct that related to minor A.R.E., for which he had been acquitted. See United States v. Weise, Case no. 1:16-cv-24453 (Doc. 24); United States v. Weise, 606 Fed. Appx. 981 (11th Cir. 2015). Also see Petition for Cert. pending before this Court. Asorio, pending February 21, 2020. Also see Nelson v. Colorado, 137 S. Ct. 1249 (2017).

A. Movant's Ineffective Assistance of Counsel Claims

First, Movant claims that trial counsel was ineffective when he failed to file any dispositive pretrial motions (DE

1 at 17). Movant references counsel's failure to file: (1) a motion to dismiss based on preindictment delay; (2) a motion to dismiss or request for a new trial based on the discovery at trial of the Government's Brady and Giglio violations (based on A.R.E.'s testimony); (3) a motion to suppress Movant's custodial statement obtained in 2009; (4) motion to exclude trial testimony regarding S.L.'s broken jaw; and (5) motion to exclude photos of that injury (DE 1 at 17-18).

Second, Movant claims that trial counsel was ineffective when he failed to conduct an adequate pretrial investigation in the federal case and failed to interview the following witnesses after Movant was indicted: (1) Samantha Snyder; (2) victim A.R.E.; (3) victim S.L.; (4) medical personnel familiar with S.L.'s injury; (5) S.L.'s family and friends; (6) the detectives who oversaw the state investigation pertaining to S.L.'s injury and who obtained a custodial statement from Movant; and (7) various persons in positions of management at various strip clubs (DE 1 at 22-23).

Third, Movant claims that trial counsel was ineffective because he failed to call any defense witnesses, including: (1) Shateka Simmons and Tamiah Powers, who could have testified about Movant's lack of violent history, character for peacefulness, and lack of involvement in sex trafficking; and (2) Samantha Snyder, the eyewitness to the battery involving S.L. (DE 1 at 24).

Fourth, Movant claims that trial counsel was ineffective because he failed to lodge objections at critical points during

trial, including during the prosecutor's misstatement of facts during closing argument and improper redirect examination of Alexandrea Snapp (DE 1 at 26-28).

Finally, Movant claims that trial counsel was ineffective at sentencing by failing to file a memorandum, introduce witnesses, and provide mitigation evidence (DE 1 at 29).

B. Movant's Constitutional Claims

First, Movant claims that the Government violated his due process rights by delaying the filing of an indictment for almost four years where all the evidence was known regarding victim S.L. and the state had already settled charges filed against Movant stemming from the "same nucleus of events" (DE 1 at 29-37).

Second, Movant claims that he was sentenced in violation of the Fifth and Sixth Amendments because the district court considered and sentenced him based on acquitted conduct involving victim A.R.E. (DE 1 at 37-41).

Third, Movant claims that the statute he was convicted of, 18 U.S.C. § 1591, is unconstitutionally vague as applied to his conduct (DE 1 at 41-47).

Fourth, Movant claims that his sentence of 30 years imprisonment violates his Eighth Amendment right against cruel and unusual punishment (DE 1 at 47-49).

Fifth, Movant claims that the Government's failure to furnish defense counsel with Giglio material concerning a promise of immunity afforded to A.R.E. amounted to a due process

violation entitling him to a mistrial (DE 1 at 49-53).

Finally, Movant claims that the failure to call Snyder as a witness at trial is fairly attributable to the Government, and that such failure prejudiced the outcome of the trial (DE 1 at 53-55).

The court constructively amended the indictment because it materially modified an essential element by transforming the offense with which the indictment charged Petitioner from one requiring a specific mens rea into a strict liability offense. The indictment contained no allegation that Weise violated § 1591(c) by having reasonable opportunity to observe S.L., yet in the juror instructions, the court explained that "if the government proves beyond a reasonable doubt that Weise had a reasonable opportunity to observe then the government need not prove age." See United States v. Roberts, Court of Appeals, 11th Circuit, 2019 U.S. App. LEXIS 12976, no. 17-5002, April 30, 2019; see United States v. Lockhart, 844 F.3d 501, 515-16 (5th Cir. 2016).

The seminal case on this constructive amendment issue is Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 42 L. Ed. 2d 252 (1960); also see Apprendi v. New Jersey, 530 U.S. 466 (2000); and Alleyne v. United States, 133 S. Ct. 2151 (2013).

C. National Importance

These arguments amount to national importance because as presented in another petition before this Court, Tomlin v.

Patterson, case no. 19-7127 (Dec. 27, 2019), it questions due process and access to courts if petitioners in one circuit are 69% more likely to get a COA issued than a similar movant in another circuit.

For example, the Ninth Circuit holds the standard for granting a COA "is relatively low." See Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002)(citing Slack v. McDaniel, 529 U.S. 473, 483 (2000)), however, in the 11th Circuit, particularly, reflects a systemic breakdown in the COA review process. "A lot of petitioners are pro se, and they're not really getting reviewed anymore," Professor Bernard Harcourt told the National Law Journal last week. "It's almost as if the [statutory] mechanism requiring a COA has closed the gate on federal circuit review of their habeas denials."

Mr. Weise similarly argues that the 11th Circuit applies "an improper, too demanding, and unduly burdensome" COA standard. Also see Tomlin, supra. Although Tomlin was denied a COA by Circuit Judge Charles R. Wilson who only grants a mere 2.7% of COAs he reviews (according to a December 2019 Columbia University Law School study) and Mr. Weise was denied by Circuit Judge William H. Pryor Jr., this study shows a significant disparity in the 11th Circuit grant rates between capital prisoners (58%) and noncapital prisoners (8%). Of more concern, the study suggests that any COA filer is already doomed. These disparities affect the nation as a whole because the Ninth Circuit is the only Circuit to hold that the COA standard is a "low threshold" where the 11th Circuit's grants range from a

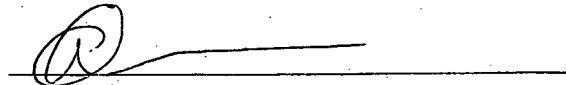
low of 2.3% to a high 25.8% depending on which judge you get. It's not a matter of the law or the Constitution, instead it's about rolling the dice. The 11th Circuit is also about half that of the First Circuit's grant rate, which is about 14.3%.

For these reasons, Mr. Weise asks for the appointment of counsel and for this Court to grant his petition, and order any further relief this Court deems just and appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature, appearing to be the letter 'R', is written over a horizontal line.

Date: February 18, 2020

No. 19-1020

IN THE
SUPREME COURT OF THE UNITED STATES

— PETITIONER
(Your Name)

VS.

— RESPONDENT(S)

PROOF OF SERVICE

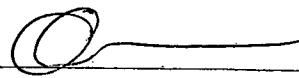
I, Omar Weise, do swear or declare that on this date, February 18, 2020, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General 950 Pennsylvania Avenue NW 5621 D.C. 20001
U.S. Attorney 919 E. Main St. Ste. 1900, Richmond VA. 23219

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 18, 2020


(Signature)