

No. 19-8696

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Frank DiTomasso — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(\$)
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Frank DiTomasso
(Your Name)

FC # Otisville P.O. Box 1000
(Address)

Otisville NY, 10963
(City, State, Zip Code)

(Phone Number)

RECEIVED

JUN 10 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. How can there be a conviction of production when nothing is ever asked for, e.g. pictures or video, and there is not even an attempt to get any pictures or videos?
2. This is an Actual Innocence Claim, can you please consider this?
3. There is a bold lie told to the grand jury in first indictment, how can that indictment stand?
4. Marcus clearly had the means and opportunity to engage in such conduct, and was the only one who could. Even after admitting to such conduct, how can this not exonerate DiTomasso?
5. With all the errors done by defense counsel, between having no defense (which there was a defense), not calling the person responsible to the stand, his opening statement, etc... how is this not completely ineffective assistance of counsel?
6. How can DiTomasso be held responsible for his attorneys mistakes? e.g. "DiTomasso made no effort to develop a record in district court that NCMC violated his Fourth Amendment Rights, and that no evidence was challenged by DiTomasso. These mistakes were made by DiTomasso's trial and appeal lawyers. It is written as if DiTomasso handled his own case and appeal. Why doesn't have his attorney's names instead? (DiTomasso did challenge evidence in letter to trial judge.)
7. How can file sharing networks that are known to have almost all illegal things being traded on them be allowed to operate?
8. How can DiTomasso be held accountable for testimony when he clearly had no prep what so ever?
9. How is 25 years and lifetime supervised release not unjust and cruel punishment? (Sentencing judge said about 25 years mandatory minimum, "murders frequently get less than 25 years," (In 2001 NYC cop driving drunk, speeding, and went through a red light killing 4 people got 25 years).

10. How can the trial be fair when the prosecution began saying things in opening statement that were completely untrue?
11. How can the trial be fair when the defense tells the jury in opening statement to, not find the defendant not guilty?
12. The judge refused to call a mistrial because she was close to retiring. How is this acceptable?

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:

Appeals Court for the Second Circuit

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A	<i>US v Roy Naim aka Bill Howard Second Circuit Lexis 65976 13-CR-660 (NGG) May 19, 2015. Decided May 20, 2015</i>
APPENDIX B	<i>David US v David Keith First Circuit 980 F. Supp 2d 33; US Lexis 158282 November 5 2013, decided.</i>
APPENDIX C	<i>US v. Walter E Ackerman, Court of Appeals for the Tenth Circuit 831 F.3d 1292; 2016 US App Lexis 14411 No. 14-3265 August 5, 2016. Filed</i>
APPENDIX D	<i>House v Bell 547 US 518, 126 S Ct 2065, 165 L Ed 2d 1, 2006 US Lexis 4675 Decided June 12, 2006. Supreme Court</i>
APPENDIX E	<i>Lloyd Schlup v Paul K. DeLo 513 US 298 130 L Ed 2d 808, 115 S Ct 851 No. 93-7901 decided January 23, 1995 Supreme Court</i>
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
U.S. v. Roy Naim	11
House v. Bell	14
Schlup v. Delo	14
U.S. v. Keith	15
U.S. v. Ackerman	15

STATUTES AND RULES

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 _____ 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 _____ 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 _____.

☐ 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

STATEMENT OF THE CASE

1. A 13 year old girl produced a video of herself and took photos of her self that were in a sexual manner. She downloaded and uploaded videos of child pornography by herself.
2. Robert Marcus had the means and opportunity to commit the crime at hand, and was the only one who could have, also he admitted it was him.
3. Child pornography was traded on a file sharing network.
4. Defense counsel failed in many ways, by not putting Marcus on the stand, not having him do an affidavit, not presenting any type of defense, not preping his client, telling the jury to not find his client not guilty in 5 minutes, socializing with the prosecutor and case agent when judge and jury were not present, also never says his client is innocent. Among other ways.
5. The National Center for Missing and Exploited Children (NCMEC) is a government actor.
6. Defense counsel did not develop a record to make NCMEC a government actor, not defendant.
7. Consent to search by A.O.L. and Omegle with a single click.
8. An Actual Innocence Claim
9. File sharing sites operating despite the government knowing most things shared are illegal and are allowed even though the government can stop them.
9. Opening statement by prosecutor had many falses
10. 25 years mandatory minimum plus lifetime supervised release is unjust and cruel punishment. At sentencing judge said "murders frequently get less than 25 years." E.g. In 2001 an NYC cop was drunk driving, speeding, and went through a red light, killing 4 people and got 25 years.
11. The judge refused to call a mis trial because she was retiring soon.

* In a letter to DiTomasso, Ginsberg said the government got a superceding indictment of attempt to produce most likely because the Xbox showed NO evidence of Dropbox or Skype.

REASONS FOR GRANTING THE PETITION

1. There is no evidence of Production. Dropbox is never mentioned in any Skype chats. Furthermore at no time was any pictures or any videos ever asked for. The evidence proves this. Sarah Jones was irrelevant.
2. Sarah was never instructed to use any foreign objects and was not instructed to produce and upload to her Dropbox account any sexually explicit images or videos of herself. Her interview was obviously coerced.
3. March 2014, in the grand jury indictment, the very first question they asked was if DiTomasso lived alone. (Case agent lied and said yes but then admitted Robert Marcus also lived there). He said 2 weeks, but in second indictment admitted it was over 3 1/2 months.
4. The frankieinnyc1@aol.com was a former email then used by Robert Marcus. DiTomasso's email was Frankie DiTomasso@yahoo.com.
5. Marcus used a video of DiTomasso to video chat similar in the case of U.S. v. Roy Naim aka Bill Howard, Second Circuit, 13-CR-660, Lexis 65976, May 19, 2015 Decided. (United States v. Roy Naim).
6. Anyone can make a profile and put attributes, even if they are not true, eg weight, height, ect...
7. Marcus moved in Nov. 2013, but had Keys to the apartment which was in his name, would come and go as he pleased, would often spend nights, and had a laptop that was the only device capable of committing any of these actions. It was only there when Marcus was in the apartment and it was password protected with Marcus being the only one who knew the password and there for the only one who could use it. Marcus frequently stayed in the apartment from 2010, and throughout.
8. Marcus stating in affidavit, "I was the one who engaged in the conduct and not Frank" and "I told DiTomasso's trial counsel that I was the one responsible for the crimes not Frank" does not constitute a confession. But by admitting these things it is specifically just that, a confession.
9. Marcus did not know what DiTomasso was doing every single minute of every single hour of every single day is a complete over sight. That is not enough to gain a conviction, so it cannot be enough to sustain a conviction.

10. Marcus' laptop was password protected and was the only device capable of committing any offenses. DiTomasso was never allowed to use the laptop, also did not know the password making it impossible for DiTomasso to have committed any offenses.

11. Ginsberg (Trial Counsel) refused to put Marcus on the stand or have him do an affidavit despite being asked to by DiTomasso for both. In a phone call in April 2016 Ginsberg told DiTomasso he could put the call in writing which stated the fact that Ginsberg had told DiTomasso, "The worst thing Robert (Marcus) could do is say he is going to come forward then doesn't, then that this won't change anything, then he doesn't know if Robert would be willing to do jail time, then back to it won't change anything." Then a few days before trial started, Ginsberg said "if Robert is going to come forward now is the time." But Ginsberg refused to act on it.

12. Ginsberg kept socializing with the prosecutors and case agent when the judge and jury weren't there. When DiTomasso complained Ginsberg claimed they were professionals, however when DiTomasso told Ginsberg if he did it again he would tell the judge, Ginsberg ceased doing it.

13. For counsel not to call a witness that can offer exculpatory evidence is not viewed as a lapse in representation and for trial counsel not to call Marcus as a witness after Marcus told Ginsberg he was the guilty party and DiTomasso was entirely innocent does not establish ineffective assistance. However, there is not a better way to show ineffectiveness than just what counsel did, not call a witness who will prove their client is innocent.

14. When it was discussed if there was a defense case, DiTomasso did not mention Marcus confessed. (Because Ginsberg would not call him, that is why it was not mentioned.) But Ginsberg did ask DiTomasso on the stand if Marcus confessed and it was objected.

15. Ginsberg attacked but there was no evidence of production, judge said it was a defense strategy but inadvertently admitted Ginsberg didn't defend 100%. Also defense counsel thought distribution was done by showing child pornography over video chat websites (Omegle) but was actually done through file sharing which there is no evidence DiTomasso himself ever file shared. (Marcus had the opportunity through his password protected laptop).

16. DiTomasso gave questions to ask witnesses about evidence, but Ginsberg refused to.

17. Ginsberg gave no prep to DiTomasso and it is quite obvious by DiTomasso's testimony. On the stand counsel even had to tell DiTomasso not to say "uncle" but "Robert Marcus." Ginsberg met with DiTomasso for only 1 hour (if MCC Manhattan has records it will prove this) and during that hour only tried to convince DiTomasso not to take the stand and even said to DiTomasso to circumvent the system and have his cellmate (who was also a client of Ginsberg) send him an email if DiTomasso changed his mind and was not going to testify. And the only "prep" Ginsberg gave was by telling DiTomasso to write some questions he wanted to be asked while on the stand (which is counsel's job not defendant). Prosecutors witnesses were practically reading off of cue cards.

18. After Ginsberg was no longer DiTomasso's counsel, DiTomasso saw in the visiting room, a little while after. DiTomasso was back in his unit, another large inmate came up to him and told him Ginsberg for no reason went up to him and started talking about DiTomasso's case saying he was told "it was a crazy case" and "he got a DiTomasso a 10 year deal" (which Ginsberg admitted the prosecutors office called with the deal, Ginsberg never made any attempt to get a deal) and the case dealt with a 13 year old girl but DiTomasso was "looking for younger." The only way for the inmate to know this was to get it from Ginsberg and he had to remove himself from him, he told all this to DiTomasso and

said "who knows what else he would have told me." Ginsberg obviously was trying to put DiTomasso in danger. (The inmate is Darnel Harris)

19. In opening statement defense told jury to "not just oh that was horrible and terrible. Let's just get out of here in '5 minutes, and say Mr. DiTomasso is not guilty." (Defense told jury to "not find DiTomasso "not guilty" (Transcript page 16). Defense counsel never once says to the jury his client is innocent.

20. In opening statement prosecutor told jury about evidence that was simply untrue. ~~How~~ How can they have the power to say whatever they want to whether it is true or false? In opening statements lawyers are given leeway, but in the prosecutors opening statement there are several times when there are things said that are blatant lies most of all that the girl was persuaded to produce videos of herself. At no time was she ever asked to produce a video. Also there was no evidence in my apartment that I had anything to do with this. This was done solely by Robert Marcus on his laptop.

21. This is also an Actual Innocence Claim under House v. Bell 547 U.S. 518, 126 S.Ct. 2065, 165 L. Ed. 2d 1, 2006 U.S. Lexis 4675. Decided June 12, 2006 Supreme Court "It is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt" (quoting Schlup Standard, Elyod Schlup vs. Paul K Delo 513 U.S. 298 130 L. Ed. 2d 808 115 S.Ct. 851 No. 93-7901 decided January 23, 1995. "Actual innocence tolling enunciated" in Schlup Supreme Court.

22. 25 years mandatory minimum is unjust and cruel ~~punishment~~ punishment. Judge said at sentencing "murders frequently get less than 25 years". In 2001 an NYC police officer was driving drunk, speeding, went through a red light and killed 4 people and got 25 years. Also there is lifetime supervised release on DiTomasso which is also unjust and cruel

23. Reports by National Center for Missing and Exploited Children, (NCMEC) should be suppressed as NCMEC is a government actor. United States v. David Keith First Circuit 980 F. Supp 2d 33; 2013 Lexis 158282 November 5, 2013 decided. Also United States v. Walter E. Ackerman, United States court of Appeals for the Tenth Circuit 831 F. 3d 1292; 2016 U.S. App Lexis 14411 No. 14-3265 August 5, 2016 Filed.

24. Several NCMEC reports were made but only 1 had a name, it was Robert Marcus. He was being investigated in the Bronx for sending child pornography.

25. DiTomaso made no effort to develop a record in District court that NCMEC violated his Fourth Amendment Rights. This is the fault of trial counsel, not DiTomaso.

26. The Appeals court said evidence was not challenged by DiTomaso but it was challenged right after trial with a letter to the judge. DiTomaso's appeal lawyer refused to challenge any evidence despite being asked to by DiTomaso several times. This is the fault of the attorney, not DiTomaso.

27. Consented to search by A.O.L. and Omegle. A single click on Terms of Service should not negate a persons Fourth Amendment Rights. Consented a search by Omegle, government obviously coerced owner of site.

28. In the previous conviction for attempted possession (~~attempted~~ misdemeanor) the State acknowledged any pictures were not DiTomaso's, but he knew about them. Thus being registered doesn't prove any guilt of involvement.

29. To monitor file sharing sites and allow them to operate over and over is text book entrapment. File sharing sites are not supposed to be monitored but should be shut down. Mostly all content is illegal. Lime Wire was a file sharing site shut down by the F.B.I.

30. Superciding Indictment filed Jan 2016 for attempt to produce. Again No evidence of any type of production.

31. There were no dates on the federal monitoring system when it was claimed the I.P. address was on the Xbox and sharing child pornography at the same time, only the case agents recollection, despite having other dates not at the same time charted. Also you cannot tell what kind of device is being used just by the I.P. e.g. computer, game system, etc...

32. DiTomasso got ill during the trial and the prosecutor tried to as the judge put it, "do a cover up" so the jury wouldn't know about it.

33. Ginsberg claimed there was a 5 year deal then claimed several times he never said it and then after arguing with Ginsberg several times he admitted he said it but he was wrong, and there never was a 5 year deal. (He even had Dr. Kurcharski during a psych visit try to get DiTomasso to take the deal which never existed.)

34. Ginsberg even went as far as to talk 2 people out of signing for bail, lying to another by saying she couldn't just sign but had to put her house up, and not even calling another back.

35. This case dealt with a 13 year old girl that the government said was a child who was uploading and downloading child pornography by herself. But in her state, Florida, 13 year olds are looked at as adults and are given 'life without parole' sentences.

36. There was also a violation of DiTomasso's Quick and Speedy Trial Right.

37. The judge refused to call a mistrial because she was close to retiring.

38. Any phone calls from DiTomasso to Marcus was advised by DiTomasso's attorney, and there for privileged.

39. There was no child pornography found at DiTomasso's apartment, nor anything illegal what so ever.

40. Photos of DiTomasso with one looking menacing were shown to the jury, however they were professional headshots used for auditions in acting and Ginsberg failed to inform the jury of this.

41. Marcus was at the apartment upstairs very often where DiTomasso was arrested and eventually forced to plea to the misdemeanor of attempted possession.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Frank DiDomasso

Date: February 18, 2020