No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

DEREK HUTTER,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

**On Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals**

# PETITION FOR WRIT OF CERTIORARI

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## A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim(s) that his counsel rendered ineffective assistance of counsel by (1) failing to advise the Petitioner regarding available defenses in this case and/or (2) failing to object to the sentencing court's consideration of an impermissible factor during the sentencing hearing.

## B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

## C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

### 1. TABLE OF CONTENTS

## 2. TABLE OF CITED AUTHORITIES

### a. Cases

**b. Statutes**



**c. Other Authority**

The Petitioner, DEREK HUTTER, requests the Court to issue a writ of certiorari to review the judgment/order of the Fifth Circuit Court of Appeals entered in this case on March 20, 2020. (A-4).[1]

## D. CITATION TO ORDER BELOW

The order below was not reported.

## E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Fifth Circuit Court of Appeals.

## F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

## G. STATEMENT OF THE CASE

The Petitioner was convicted – following a guilty plea – of enticement of a minor pursuant to 18 U.S.C. § 2422(b). The district court sentenced the Petitioner to 264 months' imprisonment. On direct appeal, the Fifth Circuit Court of Appeals affirmed the conviction and sentence. *See United States v. Hutter*, 668 Fed. Appx 143 (5th Cir. 2016).

The Petitioner subsequently filed a motion pursuant to 28 U.S.C. § 2255. The Petitioner raised three claims in the motion – two of which are the

subject of the instant petition: (1) defense counsel rendered ineffective assistance of counsel by failing to advise the Petitioner regarding available defenses in this case and (2) defense counsel rendered ineffective assistance of counsel by failing to object to the sentencing court's consideration of an impermissible factor during the sentencing hearing. On December 26, 2018, the magistrate judge issued a report and recommendation recommending that the claims raised in the Petitioner's § 2255 motion be denied. (A-13). On February 8, 2019, the district court entered an order adopting the report and recommendation (and a judgment was entered on that same day). (A-9 & A-7).

The Petitioner thereafter filed an application for a certificate of appealability in the Fifth Circuit Court of Appeals. On March 20, 2020, a single circuit judge denied a certificate of appealability on the Petitioner's

§ 2255 claims. (A-4). The circuit judge's order contains no analysis and merely concludes – in summary fashion – that the Petitioner "has not made the required showing" to obtain a certificate of appealability. (A-5).

## H. REASON FOR GRANTING THE WRIT

**The question presented is important.**

The Petitioner contends that the Fifth Circuit erred by denying him a certificate of appealability on his ineffective assistance of counsel claims. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

In his § 2255 motion, the Petitioner raised two ineffective assistance of counsel claims. Both of these claims are addressed in turn below.

**1. Defense counsel rendered ineffective assistance of counsel by failing to advise the Petitioner regarding available defenses in this case.**

In his § 2255 motion, the Petitioner alleged that defense counsel rendered ineffective assistance of counsel by failing to advise him regarding available defenses in this case. The charge in this case concerns an alleged sexual relationship between the Petitioner and a minor.[2] At the time that the charge was brought, the Petitioner was the youth minister at a church and the alleged victim was one of the females in the church youth group. The Petitioner denies engaging in an improper sexual relationship with the alleged victim.

After the Petitioner was charged, he retained defense counsel. The Petitioner informed defense

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[2] The Government asserted that the alleged victim was between thirteen and fourteen years old at the time of the purported charge.

counsel that he was innocent and that he did not engage in a sexual relationship with the alleged victim. In response, defense counsel said to the Petitioner that "we can't beat this" and "if you don't enter a guilty plea, you will get the maximum sentence and never see your wife and daughter again." Defense counsel further told the Petitioner that if he did enter a guilty plea, his sentence would likely be between five and ten years of imprisonment. In light of defense counsel's advice, the Petitioner had no choice but to enter a guilty plea in this case because his attorney told him that he had no defense to the charge in this case.

Contrary to defense counsel's advice, the Petitioner did have viable defenses in this case. At the time of the charge, the alleged victim was dealing with several matters and she used the charge in this case to deflect and avoid getting in trouble. Specifically, the

alleged victim was engaged in a physical relationship with a boyfriend, but her parents were unaware of the boyfriend – and at the time of the charge in this case, the relationship with the boyfriend was about to be exposed. In order to avoid the exposure and punishment, the alleged victim falsely informed her parents that she was involved in a relationship with the Petitioner.

Additionally, the alleged victim had an addiction to pornography websites (and a review of her electronic media and databases confirmed this problem). Moreover, the alleged victim had a reputation in the community for being untruthful. Finally, weeks before the charge in this case, the alleged victim had been caught at a church retreat with another male. With all of these matters bubbling up around the alleged victim, the alleged victim used the charge in this case

to deflect from her own problems and avoid exposure and punishment. To substantiate these assertions, the Petitioner submitted his own affidavit/declaration affirming the facts set forth above (A-36) and affidavits from people associated with the Petitioner, the Petitioner's church, and the alleged victim. (A-38, A-43 & A-47).

After the Petitioner was charged, he discussed these matters with defense counsel. Defense counsel, however, told the Petitioner that none of these matters were relevant. Defense counsel failed to inform the Petitioner that if he proceeded to trial, he would have been entitled to introduce this information to demonstrate that the alleged victim was fabricating the charge in this case.[3]

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[3] The Petitioner also notes that he has unique anatomical features – features that the alleged victim has not mentioned in any statements, but features that she would be aware of had she

Defense counsel also discussed with the Petitioner the electronic communications that purportedly took place between the Petitioner and the alleged victim. Defense counsel told the Petitioner that in light of some of the communications, the Petitioner could not "beat the charge in this case." However, the Petitioner informed defense counsel that his cellphone and computer were accessible by everyone in the church and his passwords to these devices were in plain view to anyone who entered his office. Despite being aware of this, defense counsel stood by his position that the Petitioner had no defense to the charge in this case. The Petitioner also notes that the communications referenced by defense counsel do not constitute proof that the Petitioner and the alleged victim were engaged in a sexual relationship.

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actually been involved in a sexual relationship with the Petitioner.

After the Petitioner was convicted, he conducted his own research and consulted with different counsel and he learned, for the first time, that he did, in fact, have viable defenses in this case (as set forth above). Had defense counsel properly told the Petitioner about his viable defenses in this case, the Petitioner would not have entered a guilty plea and instead would have proceeded to trial and presented these defenses.

The Fifth Amendment to the Constitution requires that a criminal defendant's decision to waive the right to a jury trial and enter a guilty plea must be "knowing, intelligent, and voluntary." *See Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969) (recognizing that a defendant's decision to plead guilty involves the simultaneous waiver of several constitutional rights and, hence, waiver must be knowingly and voluntarily made by defendant).

The Sixth Amendment to the Constitution guarantees a criminal defendant the right to counsel, and this right to counsel implicitly includes the right to effective assistance of counsel. *See McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970). The familiar test utilized by courts in analyzing ineffective assistance of counsel claims is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

*Strickland v. Washington,* 466 U.S. 668, 687 (1984).

The two-part *Strickland* test applies to challenges of guilty pleas based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Pursuant to *Hill*, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

"An attorney has a duty to make reasonable investigations in his or her cases." *Brown v. State*, 892 So. 2d 1119, 1119 (Fla. 2d DCA 2004). "At the heart of effective representation is the independent duty to investigate and prepare [the client's case.]" *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). "Permissible trial strategy can never include the failure to conduct a reasonably substantial

investigation." *Douglas v. Wainwright*, 714 F.2d 1532, 1556 (11th Cir. 1983). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Putman v. Head,* 268 F.3d 1223, 1244 (11th Cir. 2001) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)). A guilty plea is not entered knowingly, intelligently, and voluntarily if the defendant does not have knowledge of viable defenses to the crime.

Accordingly, applying the *Strickland*/*Hill* standard to this case, defense counsel was ineffective for failing to advise the Petitioner regarding available defenses in this case. Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different (i.e., the Petitioner would not have entered a guilty plea) and/or

counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

In the report and recommendation, the magistrate judge cited an unpublished opinion (*United States v. Merrill*, 340 Fed. Appx. 976, 978 (5th Cir. 2009)) and stated that "movant's 'own affidavit, containing self-serving conclusional allegations, is insufficient' to warrant habeas relief." (A-12). The Petitioner respectfully submits that several courts – including this Court – have held that a movant's specific assertions in his or her own affidavit are sufficient to require an evidentiary hearing in a § 2255 proceeding. *See Machibroda v. United States*, 368 U.S. 487, 495 (1962) (holding that the petitioner in that case was entitled to an evidentiary hearing because his "motion and affidavit contain[ed] charges which [we]re

detailed and specific"); *United States v. Cardenas*, 302 Fed. Appx 14, 17 (2d. Cir. 2008) ("Cardenas made sufficiently specific allegations under oath to raise issues of material fact as to the existence of the alleged oral agreement, and the record was insufficient to deny the motion without further inquiry."); *Raines v. United States*, 423 F.2d 526, 532 (4th Cir. 1970) ("Without holding a hearing, and solely on the basis of affidavits, the district judge resolved the facts against *Machibroda.* The Supreme Court held this procedure to be error, because the case was not one where 'the motion and the files and records . . . conclusively show that the prisoner is entitled to no relief.' Although Machibroda's assertions were 'improbable,' they were not 'incredible,' and therefore a hearing was required."); *Rouse v. Brown*, 2010 WL 569749 (W.D. Kent. Feb. 11, 2010) (granting a § 2255 hearing based

on the allegations set forth in the petitioner's motion and his own affidavit). *See also Bryan v. United States*, 492 F. 2d 775, 783 (5th Cir. 1974) ("More important, *Machibroda* seems clearly to allow a hearing on the strength of the petitioner's own affidavit without supporting papers.") (Goldberg, J., concurring in part and dissenting in part).

In the report and recommendation, the magistrate judge further stated that "Movant, however, was aware of the[] facts [alleged in his § 2255 motion] prior to entering his guilty plea . . . and chose to plead guilty." (A-24-25). As explained above, the Petitioner pled guilty because defense counsel erroneously informed him that he had no viable defense in this case. A guilty plea is not entered knowingly, intelligently, and voluntarily if the defendant does not have knowledge of viable defenses

to the crime. *See Ivy v. Caspari*, 173 F.3d 1136, 1143 (8th Cir. 1999) ("In addition to the failure of the trial court and counsel to explain fully the elements of the offense to which Ivy pleaded guilty, other circumstances cast doubt on the voluntariness of Ivy's plea. . . . Counsel's failure to advise Ivy of the possible defense of mental illness and his failure to bring the report to the trial court's attention are additional indicia of his ineffective assistance and provide additional grounds for the district court's finding that Ivy's plea was not knowingly and voluntarily entered."); *McGraw v. United States*, 106 F.3d 391, 1997 WL 34431 at *1 (4th Cir. 1997) (unpublished) ("'Because a guilty plea is valid only if it represents a knowing and voluntary choice among alternatives,' defense counsel has a duty to investigate possible defenses and to advise the defendant so that he can

make an informed decision.") (quoting *Savino v. Murray*, 82 F.3d 593, 599 (4th Cir. 1996)). As explained above and in the § 2255 motion, after the Petitioner was convicted, he conducted his own research and consulted with different counsel and he learned, for the first time, that he did, in fact, have viable defenses in this case. Had defense counsel properly told the Petitioner about his viable defenses in this case, the Petitioner would *not* have entered a guilty plea and instead would have proceeded to trial and presented these defenses.

For all of these reasons, the Petitioner submits that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Petitioner's claim is a matter debatable among jurists of reason. Therefore, the Fifth Circuit should have granted a certificate of appealability for this claim.

To be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Fifth Circuit for the consideration it deserves.

**2. Defense counsel rendered ineffective assistance of counsel by failing to object to the sentencing court's consideration of an impermissible factor during the sentencing hearing.**

In his § 2255 motion, the Petitioner alleged that

defense counsel rendered ineffective assistance of counsel by failing to object to the sentencing court's consideration of an impermissible factor during the sentencing hearing. The Petitioner entered a guilty plea to count one of the superseding indictment – enticement of a minor (pursuant to 18 U.S.C. § 2422(b)). § 2422(b) states:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

The "Factual Resume" that was filed by the parties in this case states the following:

> To establish the offense alleged in

> Count One of the Superseding Information, the government must prove the following elements beyond a reasonable doubt:
>
> > First: That the defendant knowingly used a facility or means of interstate commerce, that is, the telephone or the Internet, to persuade, induce, entice, or coerce, an individual under the age of eighteen (18) to engage in sexual activity, or attempted to do so;
> > Second: That the defendant believed that such individual was less than eighteen (18) years of age; and
> > Third: That the defendant could have been charged with a criminal offense for engaging in the specified sexual activity.

(A-52-53). During the sentencing hearing, the sentencing judge stated the following:

> For all intents and purposes, although the crime is charged differently in federal court, you raped a child. You didn't do it once. You didn't do it twice. You did it twenty times. You did it in your own home with your own child there. And it is a monstrous act for

> which you and you alone bear responsibility. And you did it in the context of a position of ultimate trust, a minister, a youth minister, an accountability youth minister. I can't think of a structure in which a person should be expected to exercise more exemplary behavior than that.

(A-59). The sentencing judge also stated:

> You are a person who raped a child. And let's not call it something else, because that's what you did. And I want to hear from you – I wanted to hear from you and didn't – genuine remorse, not as it affects you, but as it affects "Jane" and your family, but particularly "Jane," because although your – your child and your wife and your parents and your in-laws and your many friends who are here in the courtroom are having to deal with very severe consequences of your behavior, the number one person to deal with the consequences of your behavior is "Jane." And I never heard you express genuine remorse and regret about that. It's as if there is some abstraction to this. And it's not abstract.

(A-62-63). Finally, the sentencing judge stated:

> . . . And you have not arrived at what I

> believe is the point of genuine remorse and recovery from what you did. . . .
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> . . . .
>
> . . . And that your wife and friends have forgiven you for that is a wonderful gift to you, but I don't. I'm not your Lord and maker. And you will have to see your Lord and maker at the end of your life to see if you have made up for what you did. But for me, this is not about forgiveness. I do not forgive you. It's not my role to do that.

(A-64-65).

As explained above, in this case, the Petitioner entered a guilty plea to one charge – enticement of a minor pursuant to 18 U.S.C. § 2422(b). The Petitioner did not enter a guilty plea to the charge of "rape." As acknowledged by the sentencing judge, "the crime is charged differently in federal court." (A-59). In fact, the third element of the federal charge is that the Petitioner "*could have been charged* with a criminal offense for engaging in the specified sexual activity."

(emphasis added). Notably, the Petitioner *was charged* in state court with sexual battery. The appropriate sentence for that charge will be decided by the state court judge. But it was a violation of the Petitioner's constitutional due process rights[4] for the sentencing judge in this case to consider a separate pending charge when imposing the sentence. *See, e.g., Yisrael v. State*, 65 So. 3d 1177, 1178 (Fla. 1st DCA 2011) (holding that "[c]onsideration of pending . . . charges during sentencing results in a denial of the defendant's due process rights").[5]

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[4] *See* U.S. Const. amend. V.

[5] *See also Gray v. State*, 964 So. 2d 884 (Fla. 2d DCA 2007) (holding that the trial court improperly considered pending charges during sentencing); *Seays v. State*, 789 So. 2d 1209, 1210 (Fla. 4th DCA 2001) (holding that the trial court improperly considered pending attempted murder charge). *Cf. State v. Potts*, 526 So. 2d 63, 63 (Fla. 1988) ("The state through its criminal process may not penalize someone merely for the status of being under indictment or otherwise accused of a crime, as it has attempted to do here.").

Moreover, the Petitioner was not on notice that he would be sentenced for a "rape" – as he was not charged with such a crime in the instant case – and therefore sentencing the Petitioner for a crime for which he was not given notice further violated the Petitioner's constitutional due process rights.[6] The Petitioner is aware that under the current state of the law, a sentencing judge is permitted to consider "relevant conduct." But as explained by the Honorable Gilbert Stroud Merritt in *United States v. Silverman*, 976 F.2d 1502, 1527 (6th Cir. 1992), "[t]he due process violation occurs in the instant case because, at the time the plea must be entered, the defendant receives no notice of the additional crimes for which the court will

[6] The Due Process Clause carries fundamental rights of notice to the defendant. First among these is the right to know the potential sanctions for criminal conduct. *See Calder v. Bull*, 3 Dall. 390 (1797). The requirement that defendants receive fair notice as a matter of due process under the Fifth Amendment is fundamental. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

enhance the defendant's sentence." (Merritt, C.J., dissenting).

In the instant case, defense counsel failed to object during the sentencing hearing when the sentencing judge relied upon the Petitioner's pending state court rape charge when imposing the sentence in this case. The Petitioner therefore satisfies the *Strickland* standard.

Accordingly, the Petitioner has made "a substantial showing of the denial of a constitutional right" (i.e., his constitutional right to effective assistance of counsel). The district court's resolution of this claim is "debatable amongst jurists of reason." Hence, the Petitioner meets the standard for obtaining a certificate of appealability – this issue is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336. The Petitioner therefore

asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Fifth Circuit for the consideration it deserves.

## I. CONCLUSION

The Petitioner requests that the Court grant the petition for writ of certiorari.

Respectfully Submitted,

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