

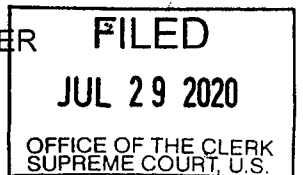
20-5496
Not

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

SANTOSH RAM — PETITIONER
(Your Name)

vs.



UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES ~~OF~~ COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Santosh Ram
(Your Name)

Great Plains Correctional Facility, P.O. Box 400
(Address)

Hinton, OK 73047
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether evidences of an actual innocence provides a legal reason to reopen 28 USC § 2255 Motion Proceedings to establish constitutional violation in light of cases such as *Schlup v. Delo*, 513 U.S. 298 (1995), *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Lower Court failed to cite any legal authority and failed to explain why evidences did not provide a legal reason? A fair justice system should always put emphasis on innocence.

2. Whether lower Court erred when it failed to engage in the comprehensive, equitable analysis required by the Federal Rule of Civil Procedure 60(b), failed to cite correct legal standard, and applied incorrect legal standard for deciding Federal Rule of Civil Procedure 60(b) motions?

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☐ is unpublished.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☐ is unpublished.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 March 24, 2020.

☐ 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: May 11, 2020, 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).

⊗ Petitioner's application for extension of time was received by office of the clerk on July 9, 2020. But clerk return the application citing Order of this Court of March 19, 2020, and clerk failed to attach copy of that order with returned mail.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- (01) Sixth Amendment of the United States Constitution.
See Appendix [H].
- (02) Due Process and Fifth Amendment. See Appendix [H].
- (03) 18 U.S.C. § 2422(b). See Appendix [H].
- (04) 18 U.S.C. § 2252(a)(2). See Appendix [H].
- (05) 18 U.S.C. § 2252(a) - See Appendix [H]

STATEMENT OF THE CASE

In 2013, Petitioner an Indian man was charged with an attempt to violate 18 USC §2422(b) (entrapment of a minor) based on alleged chat communication on www.facebook.com "on or about September 18, 2011, and continuing through and including October 16, 2011". Petitioner retained Ms. Weber to represent him. Ms. Weber was a state attorney and told Petitioner that she recently started to take federal cases since it has more money. Ms. Weber was working without any investigators and/or forensic experts. Ms. Weber was not doing anything on the case so Petitioner sent two letters to Ms. Beaumont for legal help but Ms. Beaumont had become a Judge. Ms. Weber failed to conduct any investigation despite Petitioner has directed Ms. Weber towards evidences which showed his innocence. Petitioner had been suffering from mental disease/defect. Dr. Rutherford identified that Petitioner was suffering from mental disease/defect rendering him incompetent to understand the proceedings and assist in his defense, and further evaluation was needed. Based on Dr. Rutherford's evaluation and medical history of Petitioner, Ms. Weber filed 2nd motion for competency evaluation (Doc. 26). But before even Judge ruled on that motion, Ms. Weber came to see Petitioner in County Jail and lied¹ to him that she got 5-years plea deal from Prosecutor. Since Petitioner has been asserting his innocence, he again asserted his innocence. Ms. Weber called the Prosecutor and handed her phone to Petitioner. On the phone Petitioner again asserted his innocence. But rather than answering his questions, Prosecutor threatened to file more serious charge which would carry mandatory minimum of 15-years. Ms. Weber and Prosecutor knew that Petitioner was suffering from mental disease/defect but still induced, coerced, and threatened him to plea guilty. Due to their coercion, threats, and inducement Petitioner pleaded guilty.

1. Petitioner knew later that it was a lie.

to charging information which alleged violation of 18 USC § 2252 (a) (receipt of child porn) "between on or about September of 2009 and continuing to on or about October of 2011". But petitioner was not in United States during alleged timeframe and his passport was physical evidence of this fact since stampings on passport from immigration authorities showed entry/exit into/from United States. Also facebook.com did not had any video chat available on www.facebook.com during 2009-2011. Therefore, petitioner was factually innocent of all charges against him.

SENTENCING

Applicable United States Sentencing Guidelines (USSC) for violation of 18 USC § 2252(a)(2) was USSC § 2G2.2. Presentence Investigation Report (PSR) applied USSC § 2G2.2 which resulted in total offense of 14 and guidelines range of 30-37 months. But then PSR unlawfully applied cross-reference USSC § 2G2.2(c)(3) and recalculated total offense level of 33 and guidelines range of 135-168 months using USSC § 2G2.1. Petitioner requested counsel without petitioner's consent. Cross-reference was applied on the ground that recovered/deleted pictures obtained using specialized software were created from screenshot of live stream on facebook.com. But facebook.com did not had any video chat available on facebook.com during 2009-2011. Therefore, recovered pictures could not had been created using live stream on facebook.com and cross-reference 2G2.2(c)(3) should not had been applied. Petitioner pointed Ms. Weber to exculpatory evidence of his passport and history of text/video chat on facebook.com which showed innocence of the petitioner but Ms. Weber had failed to do any investigation and prepare the case and petitioner for trial. Ms. Weber only told petitioner that she would need more money if case went to trial. But petitioner did not had any money to pay her additional trial fees. On February 18, 2014, petitioner was sentenced to 135-months completely based on prosecutor's facts. At the end, petitioner told Honorable judge that he did not agree to withdraw all objections

but judge told him that he was too late.

Direct Appeal

On Petitioner's request Counsel filed Notice of Appeal. Petitioner sent multiple motions for an appointment of Counsel on direct Appeal but Court of Appeals for the Eighth Circuit denied all motions and force Ms. Weber to represent Petitioner on appeal. On direct appeal Ms. Weber filed Anders Brief and Petitioner filed Pro Se brief and raised his innocence, misapplication of guidelines, and ineffective assistance of Counsel. Court of Appeals stated that innocence claim was foreclosed by guilty plea, Counsel withdrew all objections so waived appellate arguments regarding those facts, and ineffective assistance of Counsel claims was not properly raised on the direct appeal. Court of Appeals affirmed the conviction and sentence. Petition for writ of Certiorari (Case No. 15-5366) was denied on October 5, 2015.

28 USC § 2255 Motion Proceedings and Certificate of Appealability

While Petitioner was preparing his Pro Se § 2255 motion, he filed motion for documents and his passport (Doc. 78, 2016) but district court denied the motion. Petitioner filed his 2255 motion without the exculpatory evidence of his passport to support his ineffective assistance of Counsel claims, and only pointed Court to existence of evidence of his passport and history of text/video chat on Facebook.com during 2009-2011, which showed that Petitioner was not in United States during 2009-2011 and Facebook.com did not have any video chat available on Facebook.com during 2009-2011.

Since Sentencing Judge Honorable Jimm Larry Hendren retired after Petitioner's Sentencing, 2255 motion was assigned to Honorable Magistrate Judge Erin L. Setser. After a ~~big~~ long time 2255 motion was re-assigned to ~~Judge~~ Hon. Magistrate Judge James R. Marschewski who issued Report and Recommendation (R&R)

1. Judge Setser was most suitable to issue Report and Recommendation since she issued the search warrant and she was involved on the case from the beginning.

on April 16, 2018. Honorable District Judge Timothy L. Brooks overruled Petitioner's objections and denied 2255 motion without an evidentiary hearing. District Court also denied Certificate of Appealability (COA) in a single page text only order on August 20, 2018. Court of Appeals denied COA (Case No. 18-2865) on December 18, 2018 in a single page Judgment without any opinion, Memorandum, and order. Petition for rehearing and/or rehearing en banc was denied on January 22, 2019. Petition for ~~Certiorari~~ Certiorari (Case No. 18-9255) was denied on May 17, 2019. Out-of-Time Petition for Rehearing was also denied by Supreme Court.

Federal Rule of Civil Procedure Go Motion

District Court had denied Petitioner's motion for his passport. But at last Court granted the motion, and his passport arrived at the facility around September 10, 2019. Petitioner also acquired evidence of history of text/video chat on facebook.com with the help of facility staff. Once Petitioner acquired exculpatory evidence of his passport and history of text/video chat on facebook.com, he filed his federal Rule of Civil Procedure (Fed. R. Civ. P.) Go motion for relief and to reopen 2255 motion Proceeding. But district Court applied incorrect legal standard and reviewed Petitioner's Fed. R. Civ. P. Go motion in light of Federal Rule of Criminal Procedure (Fed. R. Crim. P.) Go, and denied the motion on the ground that the "passport and its contents do not provide a legal reason for vacating the Court's order on the motion to vacate".

Petitioner timely filed Notice of Appeal on October 11, 2019 and he also filed Notice of Intent to file COA because preparation of application for COA was going to take longer time, and he wanted to let Court know that he was working on his COA application. But district Court construed Notice of Intent to file COA as motion for COA and denied

the COA. District Court prevented pro se petitioner from filing an adequately prepared application for COA in violation of due process. District Court denied COA on the ground that "The Court finds that neither Mr. Ram's Rule 60(b) motion nor his motion to vacate made a significant showing of the denial of a Constitutional right ... that reasonable jurists would have no reason to disagree or debate about how the Court resolved either motion, or otherwise find that further proceedings were justified." But Court's this conclusion was not based on newly discovered evidence since Court incorrectly determined that evidences were legally insufficient to reopen the \$2255 proceedings.

Court of Appeals for the Eighth (Case No. 19-3457) relied on district Court's ruling and denied COA as well in a single page order without reviewing Petitioner's Memorandum of law due to confusion of the label of the memorandum. Petitioner filed Application of COA and Brief in Support of COA. But Court clerk stated "no briefing schedule has been scheduled". This Brief was actually a Memorandum of law in support of COA application. Later Petitioner tried to rename the Brief as Memorandum of law but Court denied that motion when it denied COA.

REASONS FOR GRANTING THE PETITION

An application for a certificate of appealability involves a threshold analysis. Petitioner presented evidence(s) of his innocence which included his passport and history of text/video chat on facebook.com. Evidence(s) showed that he was not in United States during 2009-2011 and facebook.com did not had any video chat on facebook.com. So there way no way he could have received/produced any child porn. But Counsel had failed to investigate these evidences and failed to present it to the Court. Government had possession and control of his passport and district Court denied motions to return the passport. Therefore, Court/Government prevented Petitioner from presenting evidence during §2255 motion proceeding in violation of due process. A lay person would have little trouble concluding that Petitioner should be permitted to present his evidences of innocence in some forum. The emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable. Evidence(s) of passport and history of text/video chat on facebook.com contradicted the fabricated factual basis in guilty plea agreement and showed factual innocence of Petitioner and supported his ineffective assistance of counsel claims. In light of recent protests against racial discrimination and disproportionate number of colored people in prisons, this Honorable Court should put emphasis on innocence and permit to raise claims of innocence despite guilty pleas.

A prisoner seeking a certificate of appealability (COA) need only demonstrate "a substantial showing" that district Court erred in denying relief. *Miller-El*, 537 U.S. at 327 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and 28 USC § 2253 (c)(2)). This threshold inquiry is satisfied so

long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327, 336. A COA is not contingent upon proof "that some jurists would grant the petition for habeas corpus. In sum, the touchstone is "the debatability of the underlying constitutional [or procedural] issue, not the resolution of that debate," *Id.* at 342. The Supreme Court has determined that the standard for deciding whether an ineffective assistance of counsel claim is "substantial" is whether the claim has "some merit," in the context of the standards for issuance of a COA. *Martinez*, 132 S. Ct. 1309, 1318-19 (citation omitted).

(I). Reasonable jurists could debate that newly discovered evidences provided adequate legal basis to reopen 28 USC § 2255 motion proceedings to establish constitutional violation where newly discovered evidences contradicted the fabricated factual basis to the guilty plea and showed factual innocence of the petitioner.

(a). A valid claim of actual innocence [only] requires that a petitioner set forth "new reliable evidence" that demonstrates "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence". *Schlup v. Delo*, 513 U.S. 298, 324, 327-28 (1995). Petitioner's passport¹ showed that he was not in United States during alleged timeframe (2009-2011) and history² of video chat on facebook.com showed that there was no video chat available on facebook.com during 2009-2011. These two evidence combined together showed factual innocence of all charges against petitioner. Therefore, evidences presented by petitioner provided adequate legal basis to ~~re~~ reopen 2255 motion proceedings to establish his constitutional claims of ineffective assistance of counsel

1,2: See Appendix D & E.

under Schlup. Also see *McQuiggin v. Perkins*, 569 U.S. 383 (2013) (claim of actual innocence allowed to pursue habeas petition as it had been filed on time). In light of reasoning in Schlup and *McQuiggin*, evidence of actual innocence would be sufficient to reopen a §2255 motion proceedings. Evidence of passport and history of text/video chat on facebook.com contradicted the fabricated factual basis in the guilty plea agreement and showed factual innocence of petitioner and supported his ineffective assistance of counsel claims. The emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable.

- (b). Petitioner had due process rights to meaningful opportunity to be heard, fully litigate his claims supported by evidences, and have adequate redress. But Court/Government denied Petitioner a compulsory process to present exculpatory evidence in violation of due process when Court/Government failed to return his passport in a timely manner during §2255 motion proceedings. This right to compulsory process is rooted in the Sixth Amendment. See *Taylor v. Illinois*, 484 U.S. 400, 409 (1988), to state a contention that the [Court/Government] denied him compulsory process, a criminal defendant must show: (1) he was deprived of the opportunity to present evidence in his favor; (2) the [evidence] would have been material and favorable to his [claims]; and (3) the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purposes. *United States v. Cruz-Jiminez*, 977 F.2d 95, 100 (3d Cir. 1992). Petitioner was denied of the opportunity to present evidence during §2255 motion proceedings since Court denied hearing, evidence of passport and history of video chat on facebook.com were material since they showed factual innocence of the petitioner, denying passport and evidentiary hearing was disproportionate to any legitimate purposes. During evidentiary hearing Petitioner would have been able to acquire those evidences. Therefore, Petitioner has shown violation of due process rights. The government's "interest in a criminal prosecution is not that it shall win

"a case, but that justice shall be done," *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

The scale of justice are rendered askew by the withholding of evidence which supports the innocence of the accused. No one should be deprived of the precious gift of liberty under such circumstances. *Landano v. Raftery*, 126 F.R.D. (D.N.J. 1989). The due process clause requires that criminal prosecution comport with prevailing notions of fundamental fairness. This standard of fairness has been consistently interpreted by the Supreme Court "to require that criminal defendant be afforded a meaningful opportunity to present complete defense [claims]." *California v. Trombetta*, 467 U.S. 479, 485 (1984).

(c). In light of New evidences, reasonable jurists would debate the Court's denial of an evidentiary hearing.

A lay person would have little ~~trouble~~ trouble concluding that Petitioner should be permitted to present his evidences of innocence in some forum. Petitioner in his 42255 motion pointed to existence of facts and evidences which would have established his innocence and ineffective assistance of counsel claims. But Court failed to conduct an evidentiary hearing. If Court would have conducted an evidentiary hearing, Petitioner would have been able to timely acquire evidence of his passport and admissible evidence (certified business records from Facebook) of text/video chat on Facebook.com with the help of attorney appointed to him during hearing to establish his ineffective assistance of counsel claims. Due to Court's failure to conduct evidentiary hearing, Petitioner was denied "a full and fair opportunity to be heard, litigate his claims supported by actual evidences, and to was prevented from receiving adequate redress pursuant to the due process clause of the Fifth Amendment.

"Section 2255 requires a hearing to resolve disputed issue(s) of facts." See *Fontaine v. United States*, 411 U.S. 213, 215 (1973).

"Evidentiary hearing must be held to resolve bona fide factual issues that are possibly relevant to the issues set forth in Petitioner's motion." *Dugan v. United States*, 512 F.2d 231 (5th Cir. 1975). Stampings from Immigration authorities on the Passport shows entry/Exit into/from United States.

(II). Court erred when it failed to engage in the comprehensive, equitable analysis required by the Fed. R. Civ. P. 60(b) and applied an incorrect legal standard.

District Court denied Petitioner's Fed. R. Civ. P. 60(b) motion after reviewing in light of Fed. R. Crim. P. 60. See (Doc 148), Appendix [B]. Therefore, Court applied incorrect legal standard. Petitioner's Fed. R. Civ. P. 60(b) motion had no relation with Fed. R. Crim. P. 60 which deals with victims Rights. An application of an incorrect legal standard would be a "manifest legal error".

Federal Rule of Civil Procedure 60(b) set forth six reasons that permits relief from a prior judgment or order. Fed. R. Civ. P. 60(b) states in relevant part: Ground for relief from a final judgment, order, or Proceeding: On a motion and just term, the Court may relieve a Party or its legal representative from a final judgment, order, or Proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time;
- (3) fraud (---), misrepresentation or mis conduct by an opposing Party;
- (4) the judgment is void;
- (5) the judgment has been satisfied --;
- (6) any other reason that justify relief.

Petitioner explicitly detailed how each individual section of Fed. R. Civ. P. 60(b) (1), (b)(2), (b)(3), (b)(4), and (b)(6) provided him relief. Upon the filing of a Fed. R. Civ. P. 60(b) motion following a denial of a 2255 Petition, the Court "conducts a brief initial inquiry to determine whether the allegations in the Fed. R. Civ. P. 60(b) motion in fact amount to a second or successive collateral attack under 2255. *Boyd v. United States*, 304 F.3d 813 (8th Cir. 2002). In such circumstances, a Fed. R. Civ. P. 60(b) motion is proper, and may be considered on the merits only where the motion "attacks, not the substance of the federal Court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas Proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). District Court failed to apply above legal

standards to analyze Petitioner's Fed. R. Civ. P. 60(b) motion, and Court failed to cite any legal authority to support its conclusion.

Fed. R. Civ. P. 60(b) is grounded in equity and it "is to be given a liberal construction so as to do substantial justice and prevent the judgment from becoming a vehicle of injustice." (Citation omitted). Federal Courts enjoy numerous inherent powers. See *Chambers v. NASCO Inc.*, 509 U.S. 32, 43-45 (1993) (discussing various inherent powers). See also *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1934 (2013) (evaluating the court's authority to prevent a miscarriage of justice). Court is empowered to vacate a judgment if it was obtained through fraud. See *Hazel-Atlas v. Hartford Empire Co.*, 322 U.S. 238, 244-46. A Court addressing Fed. R. Civ. P. 60(b) motion must consider the equities, and "the incessant command of the court's conscience that justice be done in light of all the facts." (Citation omitted).

Court's order stated, "After carefully reviewing Defendant's motion in light of Federal Rule of Criminal Procedure 60, the Court finds that his passport and its contents do not provide a legal reason for vacating the Court's order on the motion to vacate." See Appendix [B]. But Fed. R. Civ. P. 60(b)(2) specifically provides for relief based on newly discovered evidence. Petitioner's passport and history of text/video chat on facebook.com were newly discovered evidences within the meaning of Fed. R. Civ. P. 60(b).

Fed. R. Civ. P. 60(b)(1) provides for relief based on mistake, inadvertence, surprise, or excusable neglect, and Court's decision to deny motion for passport (exculpatory evidence) would amount to mistake or excusable neglect, thereby making Petitioner eligible for relief under Fed. R. Civ. P. 60(b)(1). A fraud on the Court may be found to have been committed when an officer of the Court misleads the Court either intentionally or with callous disregard for the

truth, where such misrepresentation disrupts the Court's ability to fairly render a decision. Government had possession and control of the Petitioner's passport but government failed to return the passport, failed to produce passport in the Court during 2255 motion proceedings, and failed to tell the truth to the Court that Petitioner's passport supported his innocence claim and ineffective assistance of counsel claims. Government's this conduct amount to be fraud on the Court during 2255 motion proceeding by an opposing party, thereby, making Petitioner eligible for relief under Fed. R. Civ. P. 60(b)(3). In absence of the passport, Petitioner was unable to fully and fairly present his claims and Court failed to fairly render the decision. Court's order denying 2255 motion was void since it was entered in violation of due process of law because Court and/or Government prevented Petitioner from fully and fairly presenting his ineffective assistance of counsel claims, thereby, making Petitioner eligible for relief under Fed. R. Civ. P. 60(b)(4).

In *Landano v. Raftery*, 126 F.R.D. 627 (D.N.J. 1989), Landano claimed that his constitutional right to the disclosure of exculpatory evidence was violated by failure of the prosecution to turn over certain items in its possession and control. The Court stated that this is not merely a matter of reopening a money judgment in a civil action - the petitioner's liberty [was] at stake. The Court concluded that "something more" than what is required under the provision of [Fed. R. Civ. P. 60] (b)(1) through (b)(5) has been demonstrated by Landano and thus his request to reopen the prior ruling of [the] Court is properly considered under the provision of [Fed. R. Civ. P. 60] (b)(6). Petitioner's case has familiarity with Landano, therefore, district Court 2255 motion. Just like Landano, Court/Government denied access to the exculpatory evidence to Petitioner in violation of due process, *Brady v. Maryland*, 373 U.S. 83 (1963).

Counsel in criminal cases are charged with the responsibility of conducting appropriate investigations, both factual and legal to determine if matter of defense can be developed. Strickland v. Washington, 466 U.S. 668, 691 (1983). Petitioner directed Counsel to existence of exculpatory evidence of his passport which showed he was not in United States during alleged timeframe (2009-2011), and history of text/video chat on the facebook.com which showed there was no video chat on the facebook.com during 2009-2011. But Counsel had failed to investigate, acquire, and develop these exculpatory evidences. Since Petitioner was accused to have received webcam livestream on facebook.com during 2009-2011, the investigation and development of these evidences were mandatory, which showed factual innocence of the Petitioner but Counsel failed to do so. Defense Counsel's duty includes "a duty to investigate the defendant's most important defense, and a duty to adequately investigate and introduce into evidence records that demonstrate factual innocence". Any competent Counsel in possession of these exculpatory evidences, and knowing the fact that Petitioner was suffering from mental disease/defect (Doc. 26, Counsel's own motion), would not have advised, coerced, and induced to sign guilty plea agreement while Petitioner was asserting his innocence. Petitioner's passport and history of text/video chat on facebook.com were crucial exculpatory evidence along with the statement of the alleged minor who denied sending any picture/livestream, which would have proved his innocence to all charges against him. A failure to investigate a meritorious defense may constitute ineffective assistance of Counsel. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Cost of these investigation would have been very negligible since one basic motion in the court and a subpoena to facebook would have provided both evidences to the Counsel. Counsel also had jurisdictional defense since Indictment/Information had failed to state an offense and substantial step defense was available to an attempt charge. A continued incarceration of Petitioner for alleged offense

that he did not commit and that was impossible for him to commit, was a substantial showing of the denial of his Constitutional right to due Process and effective assistance of Counsel.

District Court denied Petitioner's 2255 motion without any evidentiary hearing on the ground that "no evidence exists to suggest that [Petitioner] would have fared better by going to trial -- fails to proffer any reason sufficient to convince the Court that he would have pursued a trial." (Doc. 118, P. 6), Appendix [F]. But Court applied Hill standard incorrectly by evaluating the probable outcome at trial. Hill standard "requires only that a defendant could have reasonably gone to trial." See Hill v. Lockhart, 474 U.S. 52, 59 (1985) ("a defendant must show... a reasonable probability that, for counsel's error, he would not have pleaded guilty and would have insisted on going to trial"). See Lee v. United States, 582 U.S. ___, 137 S. Ct. 1952 ("Likelihood of success at trial not factor"). "[J]udges and prosecutor should hesitate to speculate on what a defendant would have done in a changed circumstances". DeBartolo v. United States, 790 F.3d 775 (7th Cir 2015). Defendant's Personal choices to roll the dice is enough to satisfy the "reasonable probability standard". DeBartolo v. United States.

In light of newly discovered evidence of Petitioner's Passport combined with the evidence of unavailability of video chat on facebook.com during relevant ~~period~~ time period alleged for the offense, reasonable jurists could debate that a rational individual would have elected to go to trial if adequately advised of his options.

Also reasonable jurists could find Petitioner's guilty plea involuntary and null and void because factual basis to the guilty plea is contradicted by newly discovered evidence of Petitioner's passport which showed he was not in the United States during timeframe alleged on the Information (2009-2011) and evidence of history of text/video chat on facebook.com showed that there was no video chat available on facebook.com during 2009-2011.

Timeframe alleged on Information did not match with timeframe in the plea agreement, and fabricated factual basis was contradicted by newly discovered evidences, and newly discovered evidences showed factual innocence of the Petitioner. Therefore, Petitioner's guilty Plea was involuntary, and null and void. Charging Information alleged timeframe from "Between, on or about September of 2009 and continuing to on or about October of 2011". See (Doc. 29). But factual basis in plea agreement did not correspond to timeframe alleged on Information. Therefore, there was no factual basis to the offense charged on the Information to which Petitioner was coerced, induced, and threatened to plead guilty.

stampings on the passport from immigration authorities shows the Entry/Exit into/from United States which establishes the fact that Petitioner was not in United States during alleged timeframe (2009-2011). Copy of the passport is attached as Appendix D. History of text/video ^{chat} on facebook attached as Appendix E, shows that there was no video chat on facebook.com during 2009-2011.

CONCLUSION

Sixth Amendment guaranteed right to effective assistance of counsel to defend against the charge. A remand is this Court's traditional practice where a lower court applies the incorrect legal ^{Standard} ~~Standard~~ *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. —, 137 S.Ct. 778 (2017).

For the reasons stated in the petition, this petition for a writ of certiorari should, therefore, be granted.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

San Ram

Date: 07/28/2020

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SANTOSH RAM — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, SANTOSH RAM, do swear or declare that on this date, July 28, 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:

Salicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001

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

Executed on July 28, 2020

Sant Ram
(Signature)