20-7076
NO.

IN THE

SUPREME COURT OF THE UNITED STATES

Michael J. Ottogalli — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Michael Javier Ottogalli #67985-380
(Your Name)

FCI Bastrop, P.O. Box 1010
(Address)

Bastrop, TX 78602
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Is due process violated due to ineffective assistance of counsel when defendant's attorney did not give defendant opportunity to review Presentence Report and government's sentencing memorandum which contained contested factual information and led to an overly enhanced sentence?

Is due process violated when a sentence is enhanced, based on erroneous factual conclusions of which defendant recieved inadequate advance notice?

LIST OF PARTIES

[V] 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:

RELATED CASES

Rompilla v. United States, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed 2d 360

Cataldo v. United States 171 F.3d, 1316, 1321-22 U.S. Court of Appeals for the 11th Circuit, 1999

Wilson v. United States, 993 F. 2d, 214, 218 U.S. Court of Appeals for the 11th Circuit, 1993

Rummel v. Estelle, 498 F. Supp. 793, U.S Court of Appeals for the 5th Circuit, 1980

Chavez v. United States, 119 F. 3d 342, U.S. court of Appeals for the 5th circuit, 1997

King v. United States, 876 F. 2d 1440, 1445 U.S. Court of Appeals for the 9th Circuit, 1998

Ruster v. United States, 712 F. 2d 409, 412 U.S. Court of Appeals for the 9th Circuit, 1983

Petty v. United States, 982 F. 2d 1365, 1369 U.S. Court of Appeals for the 9th Circuit,

Cronic v. United States, 466. U.S. 648, 80L Ed. 2d 657, 104. U.S. Supreme Court, 1984

Sasson v. United States, 561 F. 2d 1154 U.S. Court of Appeals for the 5th Circuit, 1977

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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,B to the petition and is

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[ ] is unpublished.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

The opinion of the United States district court appears at Appendix C, D, E 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 31, 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: July 30, 2020, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be... deprived of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

I, Michael Ottogalli, pleaded guilty to one count of distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2). I had no prior record. The district court sentenced me to the statutory maximum of 20 years' imprisonment.

I studied at the United States Military Academy for two years, before moving to serve in the Navy instead. I moved on to the Ohio State University to finish my degree and was commissioned in the Navy. Over the course of my career, I learned five languages, and after my honorable discharge, became a teacher. I began by teaching English in Poland, where I met and married my wife. We later moved to San Antonio, TX to be close to my elderly parents.

In San Antonio, I taught elementary school. My wife stayed home with our two boys. I became known as a devoted family man and good neighbor. At some point as the years went on, however, I started viewing adult pornography on the internet. My habit spiraled, and, regrettably, began to include child pornography.

In 2015 authorities noticed an email chat exchange between another person and me. That chat led them to obtain a search warrant for my home. The agents seized computers from the house and discovered child pornography and pictures of female students going about their school days. All the children were clothed and unaware of being recorded. They also obtained a laptop that I kept at the school where I worked.

But I had never used it while at work because it was inoperable and would constantly reboot. Additionally, none of the child pornography in any device I had depicted rape, sexual assault, nor penetration of any minors by adults.

I was charged with six counts related to the distribution, receipt, and possession of child pornography. Eleven days after my indictment, I agreed to plead guilty pursuant to a plea agreement. The factual basis in the plea agreement stated that I had engaged in email chats about child pornography in which I portrayed myself as a woman with two daughters, and that I had sent an image of a young girl in her panties during an email chat on Jan 25, 2015. The plea agreement that I signed contained a provision purporting to waive my right to appeal my sentence.

Following my guilty plea, a probation officer prepared a presentence report. The officer recommended a base offense level of 22 and numerous upward adjustments. Among the adjustments were recommendations for a five-level increase for distribution of child pornography in return for a thing of value, but not for pecuniary gain: an expectation of an image in return, U.S.S.G 2G2.2 (b)(3)(B); a four-level enhancement for 2G2.2(b)(4); a two-level upward adjustment for abusing a position of trust, my job as a school teacher, U.S.S.G. 3B1.3; and a two-level increase for computer use.

This string of increases caused the recommended total offense level to peak at 44 minus three points for acceptance of responsibility. The final total offense level was 41 with a criminal history category of I, with no prior history.

This yielded an advisory guideline sentence range of 324-405 months' imprisonment. My attorney objected to the five-level distribution-for-a-thing of value increase under 2G2.2(b)(3). She pointed out that I had not used a file-sharing program and that the evidence did not establish that I had emailed an image with an expectation of recieving something in return of value. She also objected to the two-level abuse-of-trust adjustment, arguing that I had not used my position as a teacher to commit, conceal, or facilitate my offense.

My counsel filed a sentencing memo arguing that a sentence of seven to nine years' imprisonment was sufficient to satisfy the purposes of sentencing under 18 U.S.C. § 3553. Counsel attached to the memo letters from family and friends who knew me as a good son, a good father, a good husband, and a good neighbor.

Counsel also attached the report of Mr. James Keedy, a licensed sex-offender therapist. Mr. Keedy found me "cooperative, open, remorseful", "teachable," and possessed "insight into his past behavior." He had administered multiple tests to me to assess my risk of committing sexual offenses and my general risk of danger. The tests showed that I posed a very low risk of re-offending, that I was a good candidate for supervised probation, and that my "unusually low" scores indicated a minimal need for incarceration. Indeed, Mr. Keedy opined that a lengthy sentence would do more harm than good, both for me and for a society interested and invested in returning me to everyday life.

At sentencing, the district court summarily overruled my objections to the presentence report, which I had never read while locked up in a detention facility and only went over details of it over the phone with counsel. Defense counsel asked the court to impose a below-guideline sentence of nine years' imprisonment. The court sentenced me to 20 years' improvement to be followed by 15 years of supervised release.

I appealed. Counsel argued against the distribution-for-a-thing-of-value enhancement 2G2.2(b)(3)(B) and the abuse-of trust increase. The government argued that the appeal-waiver provision of the plea agreement barred my contention. Counsel replied that the district court had failed to address the appeal-waiver provision with him, as required by Federal Rule of Criminal Procedure 11(b)(1)(N), and thus the purported waiver was involuntary and unknowing and could not be enforced. The fifth Circuit Court of Appeals enforced the waiver and denied my appeal. Subsequently, the Supreme Court denied my petition as well.

REASONS FOR GRANTING THE PETITION

The court should grant certiorari to determine if due process is violated when the government relies on false evidence that defense counsel never objects to because defendant never had the opportunity to review own presentence report and government sentencing memorandum, which in turn leads to an unobjected to enhancement, which vastly increased the sentence.

A. Due process requires effective assistance of counsel during the entire judiciary process that includes a defendant to review one's own PSR and other documents set against the defendant.

"From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." (Strickland v. Washington, S. Ct, 1984 at 12) (see Powell v. Alabama, 287 U.S. at 68-69, 77 L Ed 158, 53 S. Ct. 55, 84 ALR 527)

In addition to not having the chance to read my PSR, counsel recieved the government's response to the sentence memorandum June 23, 2016, one day before the sentencing hearing. I never got the chance to read for possible objections, and, subsequently, counsel failed to object to any evidence that was provided to the court, nor investigate the nature of the evidence in dispute.

In the government's sentencing memo (Doc. 26. p. 11) it states, "he intentionally used his computer and file sharing software to share and traffic in such images and videos." My sentencing memo even stated that I did not use any software (nor the PSR for that matter), but they still came back with this statement.

Plus, forensics never stated nor will show that I ever sent or recieved any video. Such a statement implies that I did. On the same page it also said, "He chose to distribute files, thousands of files, depicting prepubescent children being raped and exploited." The handful of images I distributed were solo poses and absolutely depicted nothing resembling rape whatsoever. A quick look at forensics would show I did not distribute "thousands of files" and that no image depicted any actual sexual activity. Such inflammatory and false language was prejudicial toward me.

"Due Process is violated when a sentence is based on mistaken factual conclusions of which defendant recieved no advance notice." (U.S. v. Valentine, 21 F. 3d 395, 398, 11th Cir. 1994)

In addition, the following statements were also false, unobjected to, and thus contributed to my sentence. "In addition to the years spent collecting, viewing and distributing to others." (Doc. 26, p. 12). Nothing in the record supported this statement, nor any evidence would support it. "He is addicted to watching prepubescent girls being raped." (Doc 26, p. 17). I never said this, nor did I have any material depicting rape. Not even the PSR admitted that I did. But even the sentencing court went so far to state that I "aided and abetted the rape of these children." (sentencing hearing transcript p. 18). And also the court said, "And these children are raped so Mr. Ottogalli can watch." (p. 12)

"At least they haven't been scarred like the kids in the pornography who are raped so that you can sit there and masturbate while you watch them get raped." (P.5) As this was stated, I was confused and shocked because I knew for a fact that I did not have any such material. At no time did I ever have any video depicting rape of any child or anybody. I will always stand by that assertion. "Rape" is a very specific term to use. According to the Black's Law Dictionary, "rape" is defined as "sexual intercourse with a woman against her will or with a girl below the age of consent."

An honest and truthful forensic review would reveal I never had such material. I can honestly say with certainty there was no video depicting the rape of a minor let alone any image. As a former porn collector, I knew the material I had, and none of it included that evil.

Constant use of the word "rape" created an inherent bias against me. If they already believed, or, worse, if my counsel had also believed, that I had possessed actual rape material, then Counsel should have conferred with me about it or objected to it had I known the government believed this. Not having the opportunity to review and object to such an abhorrent term and falsity was prejudicial toward me. Nowhere in the record is any material that I had described with any detail or evidence as rape. Such is not the case in other case law

where these actually is such material. They just use it in vague terms against me. The only material that was actually described in any detail was in the PSR and none of it was of rape, nor was these any adult in any file. So why did the government and court go to such lengths to say I watched such material when they would not or could not describe or attribute one file in particular with such material.?

Because my counsel was not adequately prepared, she did not object to the misinformation. Consequently, the court presumed it accurate and sentenced me accordingly. "Counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary." (Strickland, 466 U.S. at 691)

What did my counsel do to subject the prosecution to meaningful testing after I pleaded guilty? There is reasonable probability that my sentence would have been different had my counsel refuted these erroneous allegations.

B. Counsel was ineffective for failing to object to an enhancement that erroneous information contributed to and which was not seen or read prior by defendant.

There was insufficient evidence for the imposition of the sadistic/masochistic enhancement, 262.2(b)(4). In the government's sentencing memo (doc. 26, 14) it falsely stated, "They [images and videos] involve sexual penetration of prepubescent children by adults, vaginally, orally, and anally." The government tried to prove this by simply stating in its response to my initial 2255 motion (doc. 49, 13, 14), "The forensic review of Movant's devices reveal a USB flash drive which contained 3,668 image files and 65 video files depicting the sexual abuse and exploitation of prepubescent children, including the vaginal, oral, and anal penetration of prepubescent children by adults."

The truth was there was never any image or video that depicted vaginal, oral, and anal penetration by adults, bondage or anything of the sort. The court even admitted I had a "brilliant mind" (sentencing hearing doc., 16) and "intellectual ability" (at 18), therefore, I knew my collection did not contain such abhorrent material. All files were posed and acted out.

The PSR nor any other government document claimed that the images or videos portrayed conduct that inflicted physical or emotional pain. There was no mention whatsoever of any grimacing or otherwise discomfort or pain present. Furthermore, the repeated use of the idea that I had files depicting rape contributed to the pursuit of the S/M enhancement.

But with the inability to have seen any of these statements through counsel, I was prejudiced. And yet the only claim the government tried to use to justify the S/M enhancement were the descriptions of four video files in the PSR. All videos were in an acted out manner, production style, not some real life home video. There were no adult males present. It mentioned in three of the videos the girls were prepubescent, but I believe that to be disputable. For even if the girls were in the 11-13 year old range, which the youngest of the girls could have been, according to the Sixth Circuit, "no precedent indicates that an 11-13 year old is even presumptively - let alone always - considered prepubescent under the guidelines." (Cover v. U.S., 6th Cir. CA. 800 F. 3d 275, 2015)

And as detestable as the files were, the girls in the videos were only inserting a dildo or similar object into their genitalia themselves, certainly not by any adult. And only in a danced and performed way.

At sentencing, the court referenced two of them, "Two nude girls kissing, performing oral sex on each other and inserting a dildo into the vagina of one of the young girls. A nude prepubescent girl simulating oral sex on a penis using a black foreign object, spreads her legs apart, displaying her genitalia." (Doc. 39, 7,8)

Yes these were despicable and utterly immoral files I had, and they were clearly in the realm of child pornography. But they were acted out for the camera, and a forensic review could identify that these actors were in other acted out videos as well. It should be pointed out that these girls were Russian, where, unfortunately, it is all too common for girls to become involved in pornography at an early age. These were not home videos depicting an actual rape or sexual assault by an adult male, unlike the vast majority of cases with this enhancement.

A thorough search of Fifth Circuit cases reveals the S/M enhancement was applied only when there was violence or penetration of a minor by an adult male and inflicting emotional and physical pain that was contemporaneous with the creation of the image.

In Lyckman v. U.S., the Fifth Circuit stated, "It is difficult to imagine that the sexual penetration of a prepubescent female by an adult male would not qualify as violence."

In Comeaux v. U.S., he "videotaped himself performing oral sex on the child" (5th Cir)

In Bivens v. U.S. (5th Cir.) there were two videos showing adult males anally penetrating young children. Jenkins v. U.S. (5th Cir.) showed "an erect, adult male penis penetrating the vagina of a child." In Cameron v. U.S. (1st. Cir. C.A.), there was a "naked minor bound to a table." Similar conduct appeared in Morris v. U.S (5th. Cir, 2009), Beckham vs. U.S. (5th Cir.), Hoey v. U.S. (1st. C.A.), Cowan v. U.S. (5th C.A.) and Charniak v. U.S. (11th C.A. 2015). All of them involved actual penetration by an adult and bondage. These were specific actions described in those files.

Interestingly, there were no descriptions of actual penetration in any file in my case. Only the vague phrase "sexual penetration of prepubescent children by adults, vaginally, orally, and anally." was used. They failed to point to a specific file that would have purportedly have such material. However, in the PSR, they described in detail the four videos that depicted solo girls acting out, but did not describe any scenes of pain, physical or emotional; nor was pain of any kind implied or insinuated.

This is something I would have objected to, or at least would have wanted my counsel to look into. But I never had the chance. Is there precedence that acted out videos, absent any adult males, absent the description of any pain, deserve the S/M enhancement?

In Charniak (11th CA. 2015), the court said, "While the age of the child is part of the analysis articulated in judicial precedent as to whether 262.2(b)(4) applies, the image must also portray vaginal or anal penetration by an adult male. The fact that the child is prepubescent is only one part of the analysis of whether the image necessarily depicts violence"

Thus, the 262.2(b)(4) enhancement is not warranted in my case because these was no evidence that specific files depicted any adult penetration and caused any girls physical or emotional pain. And counsel never gave me the opportunity to review the information that led to this enhancement and ultimately object to it. Thus I was prejudiced.

Thus, my counsel's representation fell below an objective standard of reasonableness because I was given no notice to review these allegations against me, nor did she request or present any testing or analysis. And I was prejudiced because there is a reasonable probability the result of the proceeding would have been different but for counsel's errors. See U.S. v. Kayote, Lexis 24338, 5th Cir. 2014

Undoubtedly, possessing child pornography is terrible and harmful to its victims. It is a shameful and utterly regrettable act that I will live with for the rest of my life. And I take full responsibility for the crime I have committed. But the images and videos I had did not portray sadism nor violence, and was not deserving of the S/M enhancement. And regrettably, I had no chance to review the language being used against me, which, I believe, is a due process error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael J. Ottogalli

Date: October 27, 2020 (resubmitted January 28, 2021)