ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

No. 21-5115

In re Lisa A. Biron,
Petitioner

PETITION FOR WRIT OF MANDAMUS

Lisa A. Biron
Reg. # 12775-049
Federal Correctional Institution
P.O. Box 1731
Waseca, MN 56093

PETITION FOR WRIT OF MANDAMUS

Questions Presented

I. Whether, after the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, promulgated law and court rules require a § 2255-Certificate of Appealability ("COA")-applicant to file a notice of appeal ("NOA") in order for the circuit court to obtain jurisdiction to consider her application for a COA.

II. Whether the circuit court may lawfully refuse to exercise its jurisdictional duty to consider an application for a COA, which is a threshold, gatekeeping, function and not an appeal, by invoking law and rules that by their plain language apply only to the time for filing a NOA in an appeal permitted by law as of right.

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Relief Sought

Petitioner respectfully requests this Honorable Court to issue a writ of mandamus directing the First Circuit Court of Appeals to exercise its jurisdictional duty to consider her application for a COA, and to issue a decision granting or denying said COA.

Orders Below

The District Court's Order denying the Petitioner's Motion Under § 2255 was docketed on October 2, 2017. This Order is included in the appendix at p. 27.

The First Circuit's May 2, 2019 Orders dismissing Petitioner's application for a COA appear in the appendix at p. 38.

The First Circuit's November 12, 2020 Orders denying Petitioner's motion for rehearing are included in the appendix at p. 40.

This Court denied the petitions for a writ of certiorari (nos. 20-7946 and 20-8024) on June 7, 2021

Parties Below

Lisa A. Biron
United States of America

Statutes and Rules Involved (included in appendix, pp. 42-52)

28 U.S.C. § 2107
28 U.S.C. § 2071(a)
28 U.S.C. § 2253
28 U.S.C. § 2255
Fed. R. App. P. 3
Fed. R. App. P. 4
Fed. R. App. P. 22
R. Gov. Pro. Under Sect. 2255, 11

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1651(a) to issue an extraordinary writ compelling the First Circuit Panel (Howard, Torruella & Kayatta) to exercise its duty to consider Petitioner's application under 28 U.S.C. § 2253 for a COA filed on 7/19/2018 and docketed on 10/29/2018.

Statement of the Case

Attempt to Have the Circuit Court Consider Application for COA

Petitioner, Lisa A. Biron, a federal prisoner serving a de facto life sentence, filed a paid-counsel-assisted motion under 28 U.S.C. § 2255 to challenge the legality of her conviction for transportation of a minor (18 U.S.C. § 2423(a)) and for production of child pornography (18 U.S.C. § 2251 (a)). She alleged ineffective assistance of trial counsel for his failure to investigate a mental health defense, failure to introduce any mental health status evidence at trial to negate the specific intent mens rea elements of these crimes, and for failure to interview any witnesses.

Habeas counsel obtained lengthy extensions to gather and file evidence in support of this motion, but abandoned these tasks and completely stopped communicating with Ms. Biron long before the motion was denied. On October 2, 2017, the district court denied the § 2255-motion and refused to issue a COA. The court found that Ms. Biron failed to show she was prejudiced by counsel's deficiencies and it based this finding on its mistaken belief that 18 U.S.C. § 2251(a) is a general intent crime, which it stated conclusorily in a footnote in the Opinion. (Order (redacted) at app'x p. 27 .)

After extensive research of the federal code and rules regarding the procedure to appeal this denial, Ms. Biron learned that no appeal could be taken unless the circuit court issued a COA, and that there was no set deadline in which to apply for a COA from the circuit court. Therefore, Ms. Biron diligently did other things first. She wrote a letter to the district court judge about habeas counsel's abandonment, wherein she mentioned her intent to seek a COA from the circuit court regarding the misunderstanding

of the mens rea element.[1] She was suddenly and unexpectedly subjected to a surprise transfer from Carswell, Texas to Waseca, Minnesota, which disrupted her life and ability to work on her case for several months. She filed an attorney grievance against habeas counsel with the New Hampshire Bar Association, and then filed a motion under Rule 60(b) so the district court could provide its rationale for its conclusory assertion that § 2251(a) is a general intent crime.

When the district court dismissed her motion under Rule 60(b) as an unauthorized successive motion, she filed her application for a COA regarding the denied § 2255-motion with the First Circuit. The First Circuit refused to consider her application, citing rules regarding appeals permitted by law as of right inapplicable to seeking a COA. Rehearing was denied and this Court denied certiorari.

Issues Presented in the Rejected Application for a COA

In relevant part, Ms. Biron's § 2255-motion argued that trial counsel was ineffective for failing to investigate or present any mental health status evidence. The district court found that even assuming counsel's performance was deficient, Ms. Biron could not show she was prejudiced. It determined that mental health status evidence of diminished capacity would not have changed the outcome at trial because 18 U.S.C. § 2251(a) is a general intent crime and, thus, such evidence would be irrelevant and inadmissible. Reasonable jurists, however, have held that § 2251(a) requires specific intent and causation. See United States v. Palomino-Coronado, 805 F.3d 127

1 Ms. Biron's letter was dismissed as a motion under Rule 60(b).

(4th Cir. 2015); United States v. Crandon, 173 F.3d 122 (3d Cir. 1999); see also United States v. Gonyer, 761 F.3d 157 (1st Cir. 2014)(government must prove causation). In which case, mental health and mental status evidence are relevant and admissible to negate the specific intent mens rea element, see United States v. Kimes, 246 F.3d 800, 806 (6th Cir. 2001); United States v. Schneider, 111 F.3d 197, 201 (1st Cir. 1997), and would likely have changed the outcome at trial.

In addition, apart from its error apprehending § 2251(a)'s scienter element is the district court's error in discounting Ms. Biron's likelihood of successfully presenting an insanity defense. In summarily dismissing this claim, the court noted that the psychologist, "Dr. Burns did not find that [Ms.] Biron suffered from any kind of psychological disorder that may have precluded her from being able to make rational and informed calculations." (Oct. 2, 2017 Order on § 2255 at 12.) But Dr. Burns was not hired to investigate a mental health defense; he was hired post-conviction for sentence-mitigation purposes. Dr. Burns explained that "[he] did not offer a specific diagnosis" because "[he] was not hired for that purpose . . . ." (Burns' Mar. 26, 2018 Letter to Ms. Biron.) He stated that if he had been asked to investigate a mental health defense by trial counsel, "[he] would probably not have accepted the referral in that [he did] not feel qualified enough to undertake such a specific charge." (Id.) Consequently, reasonable jurists could find that the court's relience on Dr. Burns' failure to diagnose Ms. Biron was misplaced, and that she was prejudiced by counsel's failure to properly investigate a severe mental disease or defect defense by failing to hire a qualified mental health expert to examine her.
(See Application for Certificate of Appealability at app'x p. 14.)

Argument: Reasons for Granting the Writ of Mandamus

Introduction

Ms. Biron filed an application under 28 U.S.C. § 2253 in the First Circuit Court of Appeals seeking a COA so that she could, then, appeal the denial of her motion under 28 U.S.C. § 2255. The First Circuit, however, has failed to act and has refused to consider her application which is within its jurisdiction and which it has a duty to consider. She seeks mandamus ordering the circuit (or circuit Panel) to consider her application.

"The Supreme Court . . . may issue all writs necessary or appropriate to the usages and principles of law." 28 U.S.C. § 1651(a). The writ of mandamus may be used to compel an inferior court to act on a matter within its jurisdiction, see Ex parte Burtis, 103 U.S. 238 (1881); Ex parte Parker, 120 U.S. 737 (1887); Ex parte Republic of Peru, 318 U.S. 578 (1943), or to mandate the correct application of court rules which is, by law, the duty of the Supreme Court to formulate and put in force. See Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927); McCullough v. Cosgrave, 309 U.S. 634 (1940); LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), reh den 352 U.S. 1019.

Three conditions warrant issuance of the writ: First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires — a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." Cheney v. United States Dist. Court, 542 U.S. 367, 380-81 (2004) quoting Kerr v. United States Dist. Court for Northern Dist. of Cal., 426 U.S. 394, 403 (1976)(internal quotation marks omitted); Ex parte Fahey, 332 U.S. 258, 260 (1947). Second, "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." Cheney, 542 U.S. at 381, quot-

ing Kerr, 426 U.S. at 403 (internal quotation marks omitted). "Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." Id. These hurdles are demanding but not insuperable. Id.

No Other Means of Relief

Ms. Biron has no other means to obtain the relief she seeks. While she has sought re-hearing and a writ of certiorari, neither avenue is adequate in this situation because she is not seeking typical appellate review of a court's decision. There is no opinion or record to review because the First Circuit has repudiated its duty to consider her COA-application and issue either a COA or a denial. This is a quintessential case for issuance of the writ: A court (the First Circuit) has incorrectly found that a potential appellant has not complied with applicable statutes and court rules for perfecting an appeal. See Ex parte Parker, 120 U.S. 737 (issuing writ of mandamus directing inferior court to reinstate an appeal dismissed for want of jurisdiction). The grant of the writ by this Court is Ms. Biron's only avenue for relief.

Ms. Biron's Right to Issuance of the Writ is Clear and Indisputable

The First Circuit has refused to consider Ms. Biron's application for a COA and has repudiated jurisdiction by relying on pre-1996, pre-Antiterrorism and Effective Death Penalty Act ("AEDPA") procedures that apply only to appeals permitted by law as of right. Specifically, the circuit court dismissed Ms. Biron's application for a COA (calling it an "appeal") for lack of jurisdiction because she did not file a notice of appeal ("NOA")

on time.[2]

"Prior to the enactment of the [AEDPA], a federal prisoner appealing from the denial of a section 2255 petition could appeal directly to the Court of Appeals . . . ." Smith v. United States, 989 F. Supp. 371, 372 (D. Mass. 1997). The appeal was taken as of right and, as such, Federal Rules of Appellate Procedure 3 and 4 — appropriately titled, "Appeal as of Right" — applied. Those Rules, in sum, require filing a NOA within a prescribed period of time as a jurisdictional prerequisite to perfecting "[a]n appeal permitted by law as of right from a district court to a court of appeals. . . ." Fed. R. App. P. 3; see generally Fed. R. App. P. 3 & 4.

The AEDPA drastically changed the process to appeal a district court's § 2255-decision. After the enactment of the AEDPA, the § 2255-movant no longer has the right to take an appeal directly to the circuit court unless she has been issued a COA. See 28 U.S.C. § 2253(c)(1)(B). Had the district court issued a COA to Ms. Biron, she would, then, have had the right to appeal, and Fed. R. App. P. 3 and 4 would have operated to prescribe the appeal procedure, including the requirement to file a timely NOA with the district court. Having no COA issued by the district court and, consequently, no right to appeal, she was required to apply to the circuit court for a COA.

The First Circuit claimed to dismiss her "appeal" for want of jurisdiction because of an untimely filed NOA. (See May 2, 2019 Orders, app'x at 38.) But the circuit has no jurisdiction over the appeal of a § 2255 proc-

2 Ms. Biron eventually filed a NOA and a motion to extend the time to appeal with the district court after the circuit clerk told her to. The application for the COA was filed (when mailed) on July 19, 2018, but not docketed till October 29, 2018. The NOA was filed (when mailed) on October 2, 2018.

eeding unless and until a COA has issued. Consequently, even if Ms. Biron had filed a NOA within the time limits set by Fed. R. App. P. 4(a), the circuit court still would not have had jurisdiction over the appeal because she was without a COA. Ms. Biron was not taking an appeal; she was applying to the circuit for a COA. And a circuit court's threshold consideration of an application for a COA, just like its threshold consideration of an application to file a second or successive § 2255 motion, are not appeals but gatekeeping functions. See Spitznas v. Boone, 464 F.3d 1213 (10th Cir. 2006).

And no law enacted by Congress, and no rule promulgated by this Court, informs a § 2255-COA-applicant to file a notice of appeal when applying to the circuit court for a COA: Section 2255 directs a potential appellant that she may appeal as one would appeal a "judgment on an application for a writ of habeas corpus." 28 U.S.C. § 2255(d). Chapter 153, title 28 U.S.C. § 2253, "Habeas Corpus - Appeal", states, that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1)(B)(emphasis added). "If the [district] court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Rules Gov. Proc. Under Sect. 2255, 11(a)(emphasis added). "[I]n a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1)(emphasis added).

"Congress mandates that a prisoner seeking postconviction relief . . .

has no automatic right to appeal . . . . Instead, Petitioner must first seek and obtain a COA." Slack v. McDaniel, 529 U.S. 473, 481 (2000). "At the COA stage, the only question is whether the applicant has shown 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.'" Buck v. Davis, 137 S. Ct. 759, 773 (2017) quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). "[W]ithout the certificate of appealability, the Circuit has no jurisdiction. What, then, would be the purpose of forwarding [a] notice of appeal before the certificate of appealability issues? To inform the circuit that jurisdiction may transfer in the future?" Washington v. Ryan, 833 F.3d 1087, 1115 (9th Cir. 2016)(emphasis in original)

Clearly, the law and rules are adamant: a § 2255-movant without a COA cannot appeal. So, unless some procedural directive applicable to § 2255 proceedings advises a potential appellant to notice an appeal, which she cannot by law take, how would she (in the post-AEDPA era) ever imagine that filing a NOA is a jurisdictional prerequisite to applying for a COA? "Well, that's just the way it has always been done" has no place in a supposed nation of laws.

Title 28 U.S.C. § 2253, which governs appeals of proceedings under § 2255 does not mention a "notice of appeal." The Rules Governing Proceedings Under Section 2255 require filing a timely notice of appeal according to the civil action time limits in Fed. R. App. P. 4(a) "if the district court issues a certificate of appealability." R. Gov. Proc. Under Sect. 2255, 11(b).[3]

3 Advisory Committee notes explain that this sentence was added by 1979 amendment to clarify that the longer civil deadlines applied to § 2255 proceedings even though the, then, new section 2255 rules considered the proceeding a continuation of the criminal case and not a separate civil action.

Rule 22 of the Federal Rules of Appellate Procedure directs the district clerk's procedure "[i]f an applicant files a notice of appeal." Fed. R. App. P. 22(b)(1)(emphasis added).

Finally, 28 U.S.C. § 2107, entitled, "Time for Appeal to Courts of Appeals", provides jurisdictional time-limits on filing a notice of appeal to bring an appeal of a civil[4] proceeding before a court of appeals. An application for a COA is not an appeal, see Slack, 529 U.S. at 481, and, consequently, is not covered under the plain terms of the statute.

The law and rules do not direct a § 2255-COA-applicant to file a NOA. The NOA jurisdictional time-limits do not apply. Moreover, Congress has set no deadline for applying for a COA. Thus, the First Circuit was wrong in refusing to consider her application, and Ms. Biron's right to issuance of the writ is clear and indisputable.

The Writ is Appropriate Under the Circumstances

Issuing the writ in these circumstances is an appropriate use of the Court's power to ensure the circuit court is performing its Congress-prescribed duties and are implementing, correctly, the rules promulgated by this Court. As argued above, the circuit court is mandating a process for applying for a COA that is not found anywhere in the federal code or rules. Its error is violating the due process rights of federal prisoner-COA-applicants and corrective action is necessary.

Moreover, the court rules prescribed by this Court for the conducting

4 Because a § 2255 proceeding is considered a continuation of the criminal case and not a separate civil action (like a state prisoner's § 2254 proceeding), it is doubtful that 28 U.S.C. § 2107 applies at all to the § 2255-movant — even in a case where a district court has issued a COA.

of court business are to be "consistent with Acts of Congress." 28 U.S.C. § 2071(a). If Congress did not establish that filing a NOA was required, or that jurisdiction-killing deadlines apply to an application for a COA, then the circuit court's application of Fed. R. App. P. 3 and 4 to repudiate jurisdiction is tantamount to judicial veto of the mandatory language in § 2017(a).

Lastly, granting the writ is in aid of the Court's appellate jurisdiction. This Court has the ultimate say on important questions of federal criminal law. Allowing the circuit courts to avoid their threshold, gatekeeping duty of considering a COA application wrongly ends and truncates the appellate process ensuring that important legal questions cannot be reviewed by this Court. Mandating the circuit court to perform its duty to consider COA-applications[5] will allow this Court a decision to review if it chooses to grant certiorari.

Conclusion

The circuits that impose the "appeal as of right" notice of appeal requirement and time-limits against § 2255-COA-applicants are enforcing a non-promulgated procedure that has not existed since before the enactment of the AEDPA when § 2255-movants could, by law, take an appeal as of right. Back then, a timely NOA was a jurisdictional prerequisite. While Ms. Biron does not imagine she possesses the statutory interpretation genius of the late Justice Scalia, her analysis herein is correct: jurisdiction lies for this threshold circuit court function.

Wherefore, the writ of mandamus should issue to require the First Cir-

5 With no set jurisdictional time-limits, the doctrine of laches, if properly raised by the government, would apply to bar federal prisoners' applications for COAs in appropriate circumstances not present in Ms. Biron's case.

cuit to consider and issue a decision on her application for a COA, and, in so doing, provide a measure of assurance that things like procedural due process and fair notice and rule of law are not just academic concepts.

Respectfully submitted,

7-1-2021
Date

Lisa Biron

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APPENDIX

United States Court of Appeals
For the First Circuit

Lisa Biron,
Appellant

V.

United States of America

Case no. _____
D.N.H. Case no. 16-CV-108-PB
12-CR-140-PB

Application for Certificate of Appealability

Appellant-Movant, Lisa Biron, hereby applies to this Honorable Court for a certificate of appealability ("COA") under 28 U.S.C. § 2353(c) to appeal the October 2, 2017 Judgment of the District of New Hampshire which denied her motion for relief under 28 U.S.C. § 2255, and denied her a COA.

Grounds for Application

Appellant filed a timely motion under § 2255 arguing that trial counsel was ineffective under Strickland v Washington, 466 U.S. 668 (1984). Appellant argued that counsel was ineffective for failing to investigate or present any mental health status evidence, and for failing to interview a single witness. The District Court summarily denied the motion.

In ruling on the motion, the District Court found that trial counsel's failure to investigate or present any mental health evidence did not prejudice the appellant because evidence of Ms. Biron's impaired mental status would not have changed the outcome of the trial. It based its finding on its erroneous understanding of 18 U.S.C. § 2251(a) as a general intent crime.

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Further, the court found that because the psychologist that evaluated the appellant post-conviction did not make a diagnosis that she was legally insane there was no evidence to support a defense of insanity.

Procedural Status

After the District Court's denial of her § 2255 Motion, the Appellant notified the court of habeas counsel's deficient performance in abandoning her habeas case. The court treated this notification, which requested, inter alia, that the court reopen judgment to allow the Appellant to bring claims and present evidence that habeas counsel failed to provide (see Appellant's Letter November 1, 2017 on PACER), as a motion under Rule 60(b) and denied said motion.

Consequently, Appellant filed an attorney grievance against habeas counsel which was dismissed. Between the filing of the November letter and the Attorney Grievance, Appellant was taken from Carswell FMC, Texas on January 30, 2018 at 2:00 a.m. on a surprise transfer to Waseca, MN.

After approximately one (1) month, Appellant received her property including most of her legal papers. Appellant was promptly assigned to work in the kitchen which assured that she had minimal access to the law library and no ability to pursue her legal remedies in this case. Despite Appellants several requests to staff (emails available on request) for "legal leave" to work on her case, her requests were denied.

After finally obtaining a new job assignment in June 2018, Appellant filed a Motion for Relief from Judgment under Rule 60(b) to give the District Court the opportunity to address its errant conclusion that the production of child pornography is a general intent crime as this premise effected the integrity of the entire trial as well as its analysis of the motion under § 2255. On July 18, 2018, the District Court denied the mot-

ion without addressing the merits. Appellant has filed a Notice of Appeal to appeal this denial.

Presently, Appellant seeks a COA to appeal the denial of her motion under § 2255 which, despite habeas counsel's deficient performance, presents a strong case that trial counsel was ineffective for failing to present or investigate evidence of Ms. Biron's mental health/status.

Argument in Support of Issuance of COA

In ruling on her motion under § 2255, the District Court found that trial counsel's failure to investigate or present any mental health evidence was not ineffective assistance of counsel based on the erroneous premise that the production of child pornography (18 U.S.C. § 2251(a)) is a general intent crime when it is a specific intent crime that requires proof that Ms. Biron acted to cause R.B. to engage in sexually explicit conduct for the purpose of filming it; and because the psychologist that evaluated Ms. Biron post-conviction did not diagnose her as legally insane when he was not asked to do so, and was not qualified to make such a diagnosis.

Legal Standard

To obtain a COA, Ms. Biron is required to make "a substantial showing of the denial of a Constitutional right." 28 U.S.C. § 2253(c)(2). "The COA inquiry is not coextensive with a merits analysis." Buck v. Davis, 123 S. Ct. 159, ____ (2016). At this stage, Ms. Biron must show only "that jurists of reason could disagree with the district court's resolution of [her] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)).

This is a threshold inquiry that does not include "full consideration of the factual or legal bases." Buck, 137 S. Ct. at ____ (quoting Miller-El, 537 U.S. at 336.

I. Evidence of Diminished Capacity is Admissible to Negate the Mens Rea Element of a Specific Intent Crime

In denying her § 2255 Motion, the District Court found that evidence of Ms. Biron's impaired mental status would not have changed the outcome of the trial based on its belief that § 18 U.S.C. § 2251(a) (the production of child pornography) is a general intent crime.[1]

Specifically, the court stated that "Count One was [Ms.] Biron's only crime of specific intent[, and her] seven[2] other crimes were general intent crimes." (Oct. 2017 Order at 14 & 14 n.7)(emphasis added). This finding, of course, precludes the use of mental health status short of insanity as evidence at trial.

In fact, Counts 2 through 7 (18 U.S.C. § 2251(a)) are also specific intent crimes that require the highest level of mens rea and, at a minimum, "but for" causation in order to convict, which makes evidence of Ms. Biron's mental status relevant and admissible to negate the element of mens rea.

"As with any question of statutory interpretation, [the Court's] analysis begins with the plain language of the statute." Jimenez v. Quarterman, 555 U.S. 113, 118 (2009). It is presumed that the"legislature

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1 That the District Court held this fundamental misunderstanding of the law was only just revealed in its order denying the § 2255 motion. As stated, supra, Ms. Biron filed a motion for relief from judgment under Rule 60(b) to allow the court to address this exceptional circumstance that undermines the integrity of the entire trial. Undaunted, the court summarily denied the motion on 7/18/18 without addressing the merits and Ms. Biron has filed a Notice of Appeal.

2 Count Eight (possession of child pornography) is a general intent crime — the only general intent crime of the eight (8) counts.

says in a statute what it means and means in a statute what it says there." Dodd v. United States, 545 U.S. 353, 357 (2005).

In the present case, the text of the statute upon which Counts 2 through 7 are based is unambiguous. To convict Ms. Biron under 18 U.S.C. § 2251(a), the government must prove, beyond a reasonable doubt, that she "employ[ed], use[d], persuade[d], induce[d], entice[d], or coerce[d] the minor [(R.B.)] to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . ." 18 U.S.C. § 2251(a). Clearly, a statute that requires a defendant to cause a minor to engage in certain behavior for the purpose of filming it, requires the highest level of scienter — purposeful intent — and, at a minimum, "but for" causation.

The reasonable jurists in the Fourth Circuit explained: "As the text indicates, § 2251(a) contains a specific intent element: the government must prove that production of a visual depiction was a purpose of engaging the [minor] in the sexually explicit conduct." United States v. Battle, 695 Fed. Appx' 677, 679 (4th Cir. 2017)(citing United States v. Palomino-Coronado, 805 F.3d 127, 130 (4th Cir. 2015). "It is simply not enough to say 'the photo speaks for itself and for the defendant and that is the end of the matter'." Id. (quoting United States v. Crandon, 173 F.3d 122, 129 (3d Cir. 1999)(discussing the "purpose" requirement in the related cross-reference under U.S.S.G. § 2G2.2(c)(1)). "That is, a defendant must engage in[, or engage the minor in,] the sexual activity with the specific intent to produce a visual depiction. It is not sufficient simply to prove that the defendant purposefully took a picture." Palomino-Coronado, 805 F.3d at 131. "It is also necessary for the prosecution to

establish that the defendant caused the minor to engage in [the sexually explicit] conduct." United States v. Gonyer, 761 F.3d 157, 167 (1st Cir. 2014). "The acts with which the defendant caused the minor to engage in sexually explicit conduct — whether they consist of persuation, inducement, enticement, coercion, or some other thing — are as integral a part of the offense as the conduct itself. . . ." Id.

The Merriam Webster Dictionary defines "engage" as "cause to participate." (1997). The Supreme Court has explained that phrases such as "results from", "because of", and "by reason of", import "but for" causation. See United States v. Burrage, 134 S. Ct. 881, 888 (2014). "For the purpose of" is such a phrase.

In interpreting other statutes that contain the phrase "for the purpose of", this Circuit has explained that these words "were included in the statute to define the quality of the required intent . . ." United States v. Sheehy, 541 F.2d 123, 127 (1st Cir. 1976)(quoting United States v. Niro, 338 F.2d 439, 441 (2d Cir. 1964); see also United States v. Hibbs, 356 F. Supp. 820, 823 (E.D. Pa. 1973)(The crimes set forth in 18 U.S.C. § 1010 clearly require "proof of more than a general mens rea. The words . . . 'for the purpose of' . . . are descriptive of that specific mens rea . . .").

Therefore, because Counts 1 through 7 require proof of specific intent and causation to sustain a conviction, evidence of Ms. Biron's diminished capacity by lay witnesses as well as expert witnesses was relevant and admissible to negate mens rea and would almost certainly have changed the outcome of the trial.

Diminished Capacity

In discussing the effect of the Insanity Defense Reform Act, 18

U.S.C. § 17, on the presentation of mental health evidence, the Sixth Circuit explained that an insanity defense applies where the defendant's mental condition "completely absolves him of criminal responsibility regardless of whether or not guilt can be proven[,]" United States v. Kimes, 246 F.3d 800, 805 (6th Cir. 2001), whereas evidence of diminished capacity is used to show that the defendant's "mental condition is such that he or she cannot attain the culpable state of mind required by the definition of the crime." Id. at 806.

This Circuit has noted that "[t]he reception of evidence of the defendant's abnormal mental condition, totally apart from the defense of insanity, is certainly appropriate whenever that evidence is relevant to the issue of whether he had the mental state which is a necessary element of the crime charged." United States v. Schneider, 111 F.3d 197, 201 (1st Cir. 1997). Likewise, the Sixth Circuit has stated that evidence of diminished capacity is permitted for the purpose of negating the mens rea element of a specific intent crime. Kimes, 246 F.3d at 806.

Evidence Relevant to Intent in Ms. Biron's Case Presented at Trial

In the instant case, the relevant evidence is summarized as follows. As to Counts 2 through 5 (the 3 video clips and photo of R.B. and Kevin Watson in Canada), there is no proof (certainly no proof beyond a reasonable doubt) that the defendant caused the sexually explicit conduct for the purpose of filming it.

Specifically, Watson testified that there was no discussion about setting up cameras to make a video. He testified that he was already in the process of having sex with R.B. and then Ms. Biron picked up the camera and took the videos. (Tr. Trans. Day 2, at 114). He further

testified that Ms. Biron did nothing to make or cause R.B. to have sex, (id. at 92), and that he and R.B. had planned to have sex as they had been having sex over Skype® for months before meeting in person. (Id. at 90-97). Watson stated, "[T]he plan was for Lisa and R.B. to kind of have sex with me, that's their plain[,]" (id. at 95), which is why he met with them. (Id. at 96).

Regarding the still photo of Watson holding his exposed penis, Watson testified that Ms. Biron set up the camera timer to take the picture of the three of them. (Id. at 83-84). Further, Watson testified that there were several other times when Watson and R.B. had sex that were not filmed. (Id. at 81).

Government witness Rob Hardy, likewise,provided no evidence that proved Ms. Biron caused R.B. to engage in sexually explicit activity for the purpose of creating an image of it. Hardy testified that R.B. told him that "she [(R.B.)] went to Canada and she [(R.B.)] lost her virginity and that Lisa recorded it." (Id. at 200-01). He also testified that Ms. Biron told him that they went to Canada for R.B. to lose her virginity and she (Ms. Biron) recorded it. (Id.).

Government witness Lisa Brien testified that R.B. wanted a video made of her first sexual experience for a "keepsake." (Id. at 208).

Government witness Brandon Ore testified that R.B. and Ms. Biron told him that "they had been drinking one night and had been intoxicated and planned to go up there [(to Canada)]." (Id. at 142). Ore stated, "I do not know if there was a plan to make a video." (Id. 159). "They had never said they wanted to produce a video." (Id.).

Regarding Count 6, (the video clip depicting Ore and R.B.), Ore testified that Ms. Biron had encouraged him to have sex with R.B. in the living room. (Id. at 131). On cross examination, however, Ore clarified that R.B. and he were boyfriend and girlfriend and R.B. had complained to Ms. Biron (R.B.'s mother) that Ore did not initiate sex with her and that R.B. always had to initiate it. It was in this context, because of this complaint by R.B., that Ms. Biron encouraged Ore to take the initiative. (Id. at 167). Ore also testified that Ms. Biron took pictures of everything. (Id. at 172). Likewise, government witness and case agent Gibley testified that he recovered from Ms. Biron's house "a large number of pictures, a very large number of pictures." (Id. at 234). Ore explained that the banter that can be heard on the video clip was of a humorous nature. (Id. at 134-35).

Regarding Count 7 (the video of the two women), government witness Michael Biron identified Ms. Biron's and R.B.'s voices on the video, (id. at 242), and identified the living room in the video. (Id. at 253). Scientific evidence presented by the government showed that this video had been deleted from the original device and was automatically backed-up in a file with a 40-character hexadedimal name that was inaccessible until the FBI extracted it using a program called Blacklight. (Id. at 22); 28-29).

Evidence in the Government's Discovery Not Presented or Investigated

In Ms. Biron's case, there were multiple statements in the government's discovery that suggested that Ms. Biron was intoxicated much of the time. Evidence about her intoxication at the time each image was taken should have been investigated and presented by counsel as evidence

of her diminished capacity.

In relation to the video (of the two females) in Count 7, R.B. told the case agent that "[Ms. Biron] was very drunk when it happened and that she passed out shortly after it was filmed." (R.B. Statement, 1/1/13, at 5). In regard to the events that transpired during this time period, R.B. stated that "she thought her mother became addicted to pain medication and that she had a, [sic] 'melt down', [sic] which started the entire process, [sic] 'of everything'." (Id. at 7)(incorrect comma usage in original).

Likewise, there are several statements in Dr. Burns' evaluation report that suggest, at least, a mental state of diminished capacity. Specifically, he opined:

> "[T]his is an anxious individual who is significantly depressed."
> "[She] lived for the moment"
> "[There occurred a] dramatic relapse into substance abuse"
> "[she was] overwhelmed"
> "[T]he stress became too much"
> "[All of this] contributed to a synergistic meltdown"
> "Ms. Biron ceased to function as an autonomous adult"
> "[She] gave up on being an adult and regressed"
> "The [MMPI-II] profile suggests evidence of confused and perhaps disordered thought"
> "[The] degree of impairment is fairly acute"

A Reasonable Jurist Would Likely Find Counsel Was Ineffective

Under its errant understanding of the law, the District Court stated that "The evidence presented against [Ms.] Biron at trial was overwhelming. The jury's verdict was quickly returned and her conviction is well supported by the record." (Oct. Order at 15). But the court's failure to analyse Ms. Biron's claim of ineffective assistance of counsel under a correct understanding of the mens rea element belies the court's conclusion. At best the evidence proved that Ms. Biron knowingly took pictures

and videos of sexually explicit activity. And if that were what § 2251(a) proscribed,the evidence was, indeed, overwhelming. But this is not the crime Congress described in § 2251(a). The court's failure to analyse Ms. Biron's claim of IAC correctly has resulted in the wrongful denial of her § 2255 motion. Certainly, the low bar required for obtaining a COA is easily met.

II. The Insanity Defense

Wholly apart from the District Court's error in apprehending the scienter element and its relation to diminished capacity is its error in discounting Ms. Biron's likelihood of successfully presenting an insanity defense.[3]

In summarily dismissing this claim, the Court noted that "Dr. Burns did not find that [Ms.] Biron suffered from any kind of psychological disorder that may have precluded her from being able to make rational and informed calculations." (Oct. Order at 12). The court, however, misconstrued what trial counsel hired Dr. Burns to do. Dr. Burns was hired post-conviction "to try to understand why these events took place." (Jan. 22, 2013, Engagement Letter from Moir to Burns). In his March 26, 2018 letter to Ms. Biron, Dr. Burns explained that "[he] did not offer a specific diagnosis" because "[he] was not hired for that purpose . . . [and he] did not see how speculating on a diagnosis was all that helpful and might even be something of a distraction." He stated that if he had been asked to investigate a mental health defense, "[he] would probably not have accepted the referral in that [he did] not feel qualified enough to undertake such a specific charge." (Burns Mar. 26, 2018 Letter to Ms. Biron, available on PACER).

3 Title 18 U.S.C. § 17 provides, "It is an affirmative defense...that, at the time of the commission of the acts constituting the offense, the defendant, as

Consequently, the court's reliance on Dr. Burns' failure to diagnose the defendant is misplaced. As it stands, the District Court has found that Ms. Biron was not prejudiced by trial counsel's failure to investigate an insanity defense because trial counsel did not properly investigate an insanity defense.

III. Conclusion

In failing to understand the correct standard of mens rea required to sustain a conviction, the District Court failed to properly determine the prejudice prong of Strickland. Reasonable jurists could have found, under a proper analysis, that both lay witness observation testimony and expert testimony as to Ms. Biron's mental status could have negated the specific intent element of Counts 1 through 7. An expert could have made an official diagnosis of insanity, or, at least, explained to the jury a link or a relationship between, for example, "disordered thought" or "regression to adolescence" and the ability to form the required mens rea in this case. See United States v. Brown, 326 F.3d 1143, 1146 (10th Cir. 2003).

Wherefore, as Ms. Biron has shown that jurists of reason would find it debatable whether her motion states a valid claim of the denial of a constitutional right, she requests this Honorable Court grant her a Certificate of Appealability.

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a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts."

Respectfully submitted by

7/19/18
Date

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Certification

I hereby swear, under penalty of perjury, that two (2) copies of the foregoing Application have been mailed to the First Circuit Court of Appeals by depositing same in the inmate legal mail system U.S. postage prepaid on this date, and that a copy was mailed to AUSA Seth Aframe.

7/19/18
Date

Lisa Biron
Lisa Biron