No. 22-6804

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH MARK WILLIAMS, JR. — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSEPH MARK WILLIAMS, JR., #21719-040
(Your Name)

U.S. PENITENTIARY TUCSON, P.O. BOX 24550
(Address)

TUCSON, AZ 85734
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the 90 days under 28 U.S.C. § 1254 and Supreme Court Rule 13 applies to an order granting a motion to withdraw an appeal.

2. Whether the "use" element of 18 U.S.C. § 2251(a) is satisfied when a clothed (or partially clothed) minor appears in an image but is not actually "engaged" in any "sexually explicit" conduct.

3. If it is not, is it professionally reasonable for counsel to encourage and allow their client to plead guilty, instead of arguing that the content of the image did not constitute an offense.

LIST OF PARTIES

[X] 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:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[XX] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[XX] reported at 2022 U.S. App. LEXIS 34264 (6th Cir. 2022); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at (not available) to the petition and is

[ ] reported at D.C. No. 1:20-cv-00092-RJJ; or,
[XX] 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[ ] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 12, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254, states:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree[.]

Rules of the Supreme Court of the United States

Rule 13. Review on Certiorari: Time for Petitioning, provides:

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by [...] a United States court of appeals [...] is timely filed when it is filed with the Clerk of this Court within 90 days after entry of the judgment. ...

3. The time to file a petition for a writ of certiorari runs from the date of entry of judgment or order sought to be reviewed[.]

28 U.S.C. § 2255(f), provides:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final[.]

18 U.S.C. § 2251(a), provides:

"Any person who ...uses... any minor to engage in, or who has a minor assist any other person to engage in, ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" is guilty of a crime under this section. (cleaned up)

STATEMENT OF THE CASE

1. Williams was represented by counsel when he pled guilty to three counts (Counts 3, 4, and 7) of a seven-count indictment.
2. In Counts 3-4, Williams pleaded guilty to sexual exploitation of a child, 18 U.S.C. § 2251(a), (e), and, in Count 7, to distribution of child pornography, 18 U.S.C. § 2252A(a)(2)(A), (b)(1). (Counts 1-2 and 5-6 were dismissed.)
3. The trial court accepted the guilty plea and sentenced Williams on April 18, 2018, to 80 years in prison.
4. Williams appealed but voluntarily dismissed that appeal on December 7, 2018.
5. On January 30, 2020, Williams signed and mailed his 28 U.S.C. § 2255 motion for relief to the district court, raising 11 claims.
6. The § 2255 motion was received by the district court and filed on February 3, 2020.
7. The district court ordered briefing on the timeliness of the § 2255 motion.
8. Williams argued, and the government conceded, that under 28 U.S.C. § 1254 and Supreme Court Rule 13, it was unclear as to whether the 90 days should be added to the final order, in this case, the order granting the motion to dismiss the appeal.
9. On June 30, 2022, the district court denied relief, finding the § 2255 motion untimely.
10. Williams appealed, seeking a certificate of appealability ("COA") on two of his 11 claims, both alleging that trial counsel was

was ineffective: for (2) improperly inducing Williams to plead guilty and (7) failing to argue that Williams's conduct did not constitute the offenses charged in the three counts. App. B.

11. Williams also appealed the district court's finding that the § 2255 motion was untimely. App. B.

12. On December 12, 2022, the Sixth Circuit entered its judgment, denying the request for a COA. App. A.

REASONS FOR GRANTING THE PETITION

I. 28 U.S.C. § 1254(1) APPLIES TO AN ORDER GRANTING A MOTION TO WITHDRAW AN APPEAL BECAUSE IT IS A "JUDGMENT OR DECREE" TO WHICH "ANY PARTY" MAY PETITION FOR CERTIORARI.

13. The instant case presents an excellent vehicle to resolve a question that is not clear amongst the lower federal courts: whether the 90 days under 28 U.S.C. § 1254 applies to an order granting a motion to withdraw an appeal. In the instant case, the District Court for the Western District of Michigan, citing to a long list of lower court decisions, says it does not. See D.C. Case No. 1:20-cv-00092-RJJ (ECF:28) (not in Petitioner's possession, therefore not attached in the appendices.) In the Sixth Circuit's order, the Sixth Circuit held: "Williams argues that the district court erred in holding his § 2255 motion untimely. But even assuming that procedural ruling debatable, it is not enough to warrant granting a COA." App. A-3. Without addressing the procedural default, the issue remains unsettled.

14. The Seventh Circuit has concluded that the 90 days under § 1254 applies - even to an order granting a motion to withdraw an appeal. See Latham v. United States, 527 F.3d 651 (7th Cir. 2008)(finding that the time period for filing a Section 2255 motion did not expire one year after Latham's direct appeal was dismissed on his attorney's

motion; defendant's motion to reinstate the appeal put off finality of the judgment; and in any event defendant would have had 90 days to petition for certiorari under 28 U.S.C. § 1254.)

15. In reaching its conclusion in Latham, the Seventh Circuit reasoned that 28 U.S.C. § 1254:

> "allows 'any' party, including the prevailing party, to petition for certiorari. See Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, Supreme Court Practice 86-89 (9th ed. 2007). It also allows review whether or not a court of appeals has issued a final decision. Id. at 81-86. All that is necessary is that a case be 'in' the court of appeals. A notice of appeal from a final decision puts the case in the court of appeals. Hohn v. United States, 524 U.S. 236 (1998). That some later event -- such as the issuance of mandate or the denial of a certificate of appealability -- puts the case 'out' again does not defeat the Supreme Court's authority. It can issue a writ of certiorari to decide whether the case should have remained in the court of appeals rather than being ejected."

16. In contrast, the Third Circuit, in the unpublished opinion of United States v. Sylvester, 258 Fed. Appx. 411 (3rd Cir. 2007), much like in the instant case, declined to issue a certificate of appealability when a district court dismissed a § 2255 motion as untimely, holding that the one year period of limitations begins to run on the date that petitioner's direct appeal is voluntarily dismissed.

17. Four years later, the Third Circuit, in another unpublished opinion, reversed course, stating:

> "We write primarily for the parties and therefore

need not recite the underlying facts or procedural history of this appeal except to note that Parker filed his petition on March 27, 2008, and the district court thereafter dismissed it as untimely. To its very substantial credit, the government now concedes that the petition was not time-barred, and that the Assistant U.S. Attorney erred in arguing that the petition was untimely. See Appellee's Br. at 10 ("[u]pon consideration of the matter, the government believes that its position before the district court was in error, and now agrees with Parker's view."). We agree. See 28 U.S.C. § 1254, and Latham v. United States, 527 F.3d 651 (7th Cir. 2008). As the government so candidly states: "There is no known precedent for a proposition that a criminal defendant who seeks voluntary dismissal of an appeal is foreclosed from filing a petition for certiorari challenging the dismissal." Appellee's Br. at 14.

Accordingly, we vacate the order of the district court dismissing the appellant's petition as untimely. In doing so, we note that the government's handling of this appeal is truly exemplary and in the best tradition of prosecutor as an officer of the court and the legal representative of all the people of the United States, including those convicted of crimes."

United States v. Parker, 416 Fed. Appx. 132 (3rd Cir. 2011)(unpublished).

18. Unlike the district court in the instant case, and the numerous lower court opinions it cited to find Williams's § 2255 motion untimely by not affording Williams the 90 days under § 1254, a district court in the Eastern District of Arkansas concluded just the opposite, and pointedly addressed the issue for which Williams now seeks a writ of certiorari. In Courtney v. United States, the district court said:

> "In the absence of binding precedent from the Supreme Court or the Eighth Circuit, the Court concludes that the decision of the Seventh Circuit in Latham is the more persuasive interpretation of § 2255(f)(1). As the Seventh Circuit noted in Latham, the fact that a convicted person voluntarily dismisses his appeal does not preclude his filing a petition for writ of certiorari in the Supreme Court of the United States pursuant to 28 U.S.C. § 1254. Hence, the period of limitations under § 2255(f)(1) begins to run 90 days after a convicted person voluntarily dismisses his appeal."

Courtney, 2011 U.S. Dist. LEXIS 27836 (E.D. Ark., March 16, 2011)(emphasis added).

19. The district court in the instant case diasagrees, concluding that the voluntary dismissal of a direct appeal is as if the appeal were never taken in the first place. See D.C. Case No. 1:20-cv-00092-RJJ (ECF:28). One of the fatal flaws with this reasoning is that if an appellant were to, for example, voluntarily dismiss their appeal a year-and-a-day after the notice of appeal had been filed, then the one year under § 2255(f)(1) would have already passed. Yet another flaw, is that such a holding creates an unequal application of § 1254 - to one person 90 days, and to another a loss of days back to the day the notice was filed. Lastly, another consideration would be that of judicial economy -- as such a holding forces future appellants to maintain what they have come to realize is a meritless appeal, just so they don't risk losing the full one-year under § 2255(f)(1).

20. Although the Court of Appeals for the Sixth Circuit has declined to squarely confront the unequal application of

§ 1254 to orders granting a motion to withdraw an appeal, as argued in Williams's Application for Certificate of Appealability (App. B), this leaves the issue unresolved, only to invite future harms.

21. For these reasons, this Court should grant certiorari to resolve the split among the lower federal courts on this important procedural question that frequently arises in federal habeas proceedings.

II. THE "USE" ELEMENT OF 18 U.S.C. § 2251(a) IS NOT SATISFIED WHEN A MINOR MERELY APPEARS IN AN IMAGE BUT IS NOT ACTUALLY "ENGAGED" IN ANY "SEXUALLY EXPLICIT" CONDUCT.

22. The instant case presents yet another excellent vehicle to resolve a question of which the circuit courts are split: whether the "use" element of 18 U.S.C. § 2251(a) is satisfied when a minor only appears in an image, but is not "engaged" in any "sexually explicit" conduct. In the instant case, the District Court for the Western District of Michigan did not fully address the merits of Williams's claims regarding, inter alia, whether it was professionally reasonable of counsel to encourage and allow him to enter a guilty plea to charges including conduct that did not actually constitute an offense. See D.C. Case No. 1:20-cv-00092-RJJ (ECF:28).

23. Williams stated in his Application for Certificate of Appealability (App. B), the he was "unable to bring an appeal on any of his initial grounds for relief, because the District Court's two-and-a-half pages dedicated to the 'discussion' on the merits of those eleven (11) grounds, is more focused on the procedural nature as opposed to their factual merits."

See App. B-3; B-6; and B-8,9.

24. In the Sixth Circuit's order denying Williams' request for a COA, the Sixth Circuit appears to have read more into the district court's order denying Williams's § 2255 motion than that which Williams was able to ascertain. The Sixth Circuit noted that Williams argued that the statutes as charged did not apply to Williams since they "do not contain content that fits within the definition of any of the federal statutes at issue." App. A-3. The panel, examining a cold record describing the content of the images, applied its holding in United States v. Wright, 774 F.3d 1085, 1089 (6th Cir. 2014) (holding that "the 'use' element is satisfied if a minor is photographed in order to create pornography."). App. A-3; and A-4. The problem with that holding as applied to Williams's claims and the content-contested images themseleves, is that the images do not portray: (1) a minor being "used," (2) nor is a minor "engaged" in any "sexually explicit" conduct, and (3) the content of the images does not constitute "pornography" within the meaning of any of the federal statutes defining such portrayal or conduct. Whilst the holding in Wright is correct as cited, it is only correct insofar as the "use" element being satisfied when the minor is engaged in sexually explicit conduct. In the instant case, Williams argued that none of these elements or definitions were present, with the exception of one of the images, but not those contested here.

25. In Counts 3 and 4, Williams was charged with violations of 18 U.S.C. § 2251(a). Amongst the images to which counsel encouraged and allowed Williams to plead guilty were: an

image of a sleeping, clothed minor female whose legs are across the lap of Williams. In the image, Williams is holding his erect penis, and his common-law wife is taking the picture. This was one of the images that supported Count 3. The other images supporting that count were of like nature, including a bare-chested female minor (in her underwear), photographed looking in the bathroom mirror. These images are not of the type which § 2251(a) criminalizes.

26. 18 U.S.C. § 2251(a), provides:

> "Any person who ...uses... any minor to engage in, or who has a minor assist any other person engage in, ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" is guilty of production of child pornography.

27. The Sixth Circuit's interpretation of § 2251(a), and their application of it to the instant case, runs afoul of other circuit court holdings. For example, Williams cited to three persuasive cases out of other circuits to support his position. See App. B-8. Among them, was United States v. Howard, 968 F.3d 717, 721-22 ((7th Cir. 2020). Howard has had a significant impact on cases much like the instant case. For example, in United States v. Sprenger, 14 F.4th 785 (7th Cir. 2021), the Seventh Circuit determined that Sprenger's conduct, "as admitted in the plea agreement and at the change of plea colloquy, does not constitute the production of child pornography within the meaning of § 2251(a)." Id. Citing to Howard, the panel further explained, that "[i]n Howard, we held that § 2251(a) requires that the offender create images that depict a minor, and not the offender alone, engaged in sexually explicit conduct." Howard, 968 F.3d at 721.

28. Recently, in United States v. McCoy, Case No. 21-3895 (8th Cir. 2023), the Eighth Circuit reversed the judgment of the district court, holding that two videos of a nude female minor in a bathroom, recorded without her knowledge, were not "sexually explicit conduct" as required for a violation of § 2251(a). The panel noted that the statute makes clear that any display of the genitals must be "lascivious," and further stated that, "[c]onsequently, we have repeatedly explained 'mere nudity' is not enough to convict. [3 citations omitted]. We have also explained that a visual depiction 'is "lascivious" only if it is sexual in nature.' [Citations omitted]."

29. The similarities between Howard, Sprenger, McCoy, et al, and the instant case, are virtually indistinguishable in every way. The only difference is that the conduct in those other cases was found to have not been in violation of § 2251(a), and rightly so by the plain meaning of the statute.

30. Aside from the fact that one of the contested images shows Williams holding his erect penis, not only is it entirely subjective to conclude that "he's masturbating" (App. A-4), the Sixth Circuit's holding that "'[s]exually explicit conduct' includes actual or simulated masturbation. 18 U.S.C. § 2256(2)(A)(iii)[,]" is misplaced. A plain reading of § 2251(a) requires that the offender take one of the listed actions to cause a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction of that conduct.

31. The Seventh Circuit confronted this issue in Howard,

considering Howard's reading of § 2251(a):

> "a person commits this offense if he takes one of the listed actions to cause a minor victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of it."

Howard, 968 F.3d at 721 (emphasis in original).

The panel went on:

> "The government takes a radically different view, arguing that it does not matter whether the minor victim engaged in any sexually explicit conduct. On the government's reading, § 2251(a) sweeps much more broadly, covering someone like Howard - who made a video of his own solo sexually explicit conduct - if the offender somehow "uses" a child as an object of sexual interest."

Id. (emphasis in original).

The panel then reasoned:

> "The government's interpretation is strained and implausible. Indeed, taken to its logical conclusion, it does not require the presence of a child on camera at all. The crime could be committed even if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street. The government resists the hypothetical by protesting that such 'incidental uses' of a child would fall outside the scope of the statute. But nothing in the government's interpretation contains that limiting principle.
>
> The most natural reading of the statutory language requires the government to prove that the offender took one of the listed actions to cause the minor to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct."

Id. (emphasis in original).

32. The Sixth Circuit is at odds, with at least the D.C., Second, Seventh, and Eighth Circuit, wherein those circuits have concluded, and rightly so, that the type of content in the

contested images in this case do not fall within the scope of § 2251(a) nor any of its related definitions.

33. This Court should grant certiorari to resolve the split among the circuits on this important issue that is commonly encountered in the lower federal courts.

III. IT IS PROFESSIONALLY UNREASONABLE FOR COUNSEL TO ENCOURAGE OR ALLOW THEIR CLIENT TO PLEAD GUILTY TO A CRIME WHEN THE ELEMENTS OF THE OFFENSE ARE NOT SATISFIED

34. The legal standard governing claims involving the depravation of the Sixth Amendment right to the effective assistance of counsel is generally governed by Strickland v. Washington, 466 U.S. 668 (1984).

35. The Court in Strickland held that to prove such a claim, a defendant must show that, (1) counsels representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. Id. at 694.

36. In the instant case, although Sixth Circuit law was not "clear" as to how § 2251(a) is violated, the langauage of the statute itself is. Williams posits that as such, it is always professionally unreasonable of counsel to not consider whether the elements of the statute were satisified by the facts - in this case the content of the images - charged in the indictment, and the underlying conduct.

37. Williams has no doubt that the result of the proceeding would have been different had counsel made such a determination and subsequent argument. At a minimum, the issue would have been

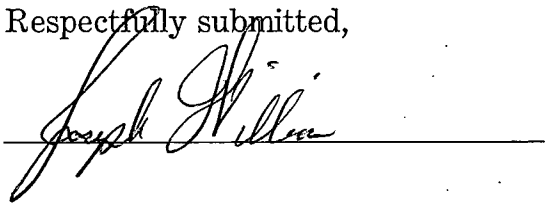
preserved, both for appeal, and if unsuccessful on appeal, preserved for future collateral relief when the law of the Sixth Circuit changes - as it must according to a plain reading of § 2251(a).

38. Should the Court grant certiorari on "II" supra, Williams asks that certiorari be granted on whether it was therefore professionally reasonable of counsel to encourage and allow him to plead guilty to charges in which the underlying conduct, though abhorent, did not constitute an offense according to the elements and definitions of the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: FEBRUARY 2nd, 2023