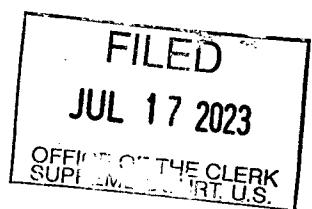


23-5205
No. _____

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Steven Lesane — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Steven Lesane
(Your Name)

Federal Corr. Inst. - Hazelton
P.O. Box 5000, Reg. No. 91258054
(Address)

Bruceton Mills, W.V. 26525
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- I. Whether the District Court abused its discretion when it denied appellant's motion to withdraw his guilty plea where 1) there was an insufficient factual basis for the plea, 2) counsel was ineffective for failing to properly advise appellant concerning whether there was a factual basis for the plea and certain enhancements, 3) the Superseding Information was defective because it referenced an amended version of the statute and 4) appellant was suffering from an illness that affected his judgment?
- II. Whether the Circuit Court abused its discretion when it denied the Pro Se Motion for Rehearing or Rehearing En Banc for the prior opinion not reviewing the denial of an evidentiary hearing and issues that fall within the scope of U.S. vs Cramer?

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:

RELATED CASES

U.S. vs. Lesane, 2020 U.S. Dist. LEXIS 24253 (S.D.N.Y.,
Decided 2/12/2020)(18-cr-527-KMW)

U.S. vs. Lesane, 2021 U.S. Dist. LEXIS 137777 (S.D.N.Y.,
Decided 7/23/2021)(18-cr-527-KMW)

U.S. vs. Lesane, 2023 U.S. App. LEXIS 3052 (Decided 2/8/2023)
(2nd Cir. Docket # 21-2057-cr)

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APPENDIX B - Order and Decision for withdrawal of Appellate Counsel and extension of time to file Pro Se Motion for Rehearing or Rehearing En Banc, by the U.S. Court of Appeals for the Second Circuit, entered 4/3/2023 (Docket # 21-2057-cr)

APPENDIX C - Order and Decision of denial of Pro Se Motion for Rehearing or Rehearing En Banc, by the U.S. Court of Appeals for the Second Circuit, entered 4/25/2023 (Docket # 21-2057-cr)

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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

[X] 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 U.S. vs. Lesane, 2023 U.S.App.LEXIS 3052; 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 _____ 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 2/8/2023.

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: 4/25/2023, 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1591 Sex Trafficking of Children or by force, fraud, or coercion

(b) The Punishment for an offense under subsection (a) is -
(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

Federal Rules of Criminal Procedure, Rule 11 Pleas

(b) Considering and Accepting a Guilty or Nolo Contendere Plea:

(3) Determining the Factual Basis for a Plea:

Before entering judgment on a guilty plea, the Court must determine that there is a factual basis for the plea.

U.S.S.G. Section 2G1.3 Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(b) Specific Offense Characteristics

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct;

STATEMENT OF THE CASE

The Appellant was arrested on or about 8/8/2018, for Conspiracy to commit Sex Trafficking and Sex Trafficking, involving at least four other co-defendants under the initial Indictment. On 9/16/2019, the parties appeared before the District Court, before Magistrate Judge Wang, for the Appellant to plead guilty to one count of the Superseding Information pertaining to the defendant sex trafficking of two female minors (one minor in the summer of 2009 and the other minor in 2011-2012). During his Rule 11 Plea Allocution hearing, the Appellant informed the court that he was under the care of a "doctor or a psychiatrist," when he answered "yes" to the Court's inquiry. The District Court for the Southern District of New York informed the defendant that under the signed Plea Agreement, that his total offense level was 35 and a Criminal History Category of III, which included a two-level enhancement for use of a computer to entice or facilitate the travel of a minor to engage in [a] sexual conduct (relating to Victim B in 2011-2012).

The Appellant told the Court that he "provided for commercial sex acts two individuals who had not yet attained the age of 18... and [he] received at least part of the money that they earned," at the 9/16/2019 hearing. On 9/18/2019, U.S. District Judge Kimba M. Wood accepted the guilty plea to 18 U.S.C. § 1591(a) and (b)(2), by Appellant. Afterwards, the U.S. Dept. of Probation made it's Guidelines recommendation in the Presentence

Investigation Report putting Appellant in a Criminal History Category V rather than III, creating a higher guideline range than the stipulated range in the Plea Agreement of 210-262 months. On 11/20/2019, the Court relieved existing CJA counsel and counsel assigned 10/15/19 was allowed to take over the case. The District Court issued a scheduling order for newly appointed counsel (former additional counsel) to file a Motion to withdraw the guilty plea on behalf of the defendant.

The District Court denied the Motion to withdraw the guilty plea, despite holding that the motion was timely. The District Court held that any defect with the Superseding Information was an error that was "immaterial", the defendant's health issue did not render the plea involuntary, and that there was a factual basis for the plea on the interstate commerce element. See U.S. vs. Lesane, 2020 U.S. Dist. LEXIS 24253. On 5/25/2021, the defendant filed his own Pro Se Motion to Withdraw the Guilty Plea, raising Ineffective Assistance of Counsel claims [for failure to raise certain defenses], and the defendant filed a Letter Motion requesting a Fatico hearing to challenge the "Guideline enhancement(s) and specific inflammatory allegations affecting Sentencing." In the Pro Se Motion proceeding, the defendant raised that former counsel could have filed a Suppression motion on the staleness of the search warrant and filed a Motion to Dismiss the Indictment based on a Jurisdictional Defect, along with other claims. The District Court denied both Pro Se motions without an evidentiary hearing to determine the Pro Se motions,

on or about 7/23/2021. See U.S. vs. Lesane, 2021 U.S. Dist. LEXIS 137777.

On 7/27/2021, the Appellant appeared before the District Court for Sentencing. The District Court adopted the Guideline calculation set forth in the Plea Agreement and overruled most of the remaining factual objections to the PreSentence Investigation Report. Defense counsel was emailed a copy of released victim impact statement from Victim B (minor in 2011-2012) on the morning of the Sentencing hearing. The Appellant was sentenced to 256 months imprisonment with five years of supervised release and his Judgment of Conviction (under docket 18-cr-527) was entered August 17, 2021. A timely notice of appeal was filed afterwards.

The Appellant appealed his case before the U.S. Court of Appeals for the Second Circuit under docket number 21-2057-cr and Robert J. Boyle (Esq.) briefed the case raising two arguments on appeal. Appellate counsel's first argument centered on Withdrawal of the Guilty Plea based on appealing both prior denied Motions to Withdraw the guilty plea. Appellate Counsel second argument raised [a] Sentencing Disparity issue in challenging the Unduly Harsh Sentence of 256 months. The U.S. Court of Appeals affirmed the Judgment and Sentence of Conviction and dismissed the appeal. See U.S. vs. Lesane, 2023 U.S. App. LEXIS 3052; also see Appendix A. The U.S. Court of Appeals granted the Appellant an extension of time to file his own Pro Se Motion for Rehearing or Rehearing en banc, and granted Appellate

Counsel request to withdraw from the case. See Appendix B. Appellant's Pro Se Motion for Rehearing or Rehearing en banc was denied on or about 4/25/2023. See Appendix C. Appellant files this Pro Se petition for a Writ of Certiorari, on two arguments raised in the Circuit Court proceeding.

REASONS FOR GRANTING THE PETITION

I

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHERE

1) THERE WAS AN INSUFFICIENT FACTUAL BASIS FOR THE PLEA, 2) COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE APPELLANT CONCERNING WHETHER THERE WAS A FACTUAL BASIS FOR THE PLEA AND CERTAIN ENHANCEMENTS, 3) THE SUPERSEDING INFORMATION WAS DEFECTIVE BECAUSE IT REFERENCED AN AMENDED VERSION OF THE STATUTE AND 4) APPELLANT WAS SUFFERING FROM AN ILLNESS THAT Affected HIS JUDGMENT

The Circuit Court decision in Lesane is in conflict with past precedent such as U.S. vs. Juncal, where the Court of Appeals held that a plea [to be voluntary] "must not be a product of mental coercion overbearing the defendant's will or the product of the defendant's sheer inability to weigh positions rationally." See 245 F.3d 166, 172 (2nd Cir. 2001). The Appellant entered the plea agreement while suffering pain caused by a potentially cancerous mass in his ankle. An evidentiary hearing was never held on the issue despite the Circuit Court's past rulings that such a hearing is warranted "where the defendant presents some significant questions concerning the voluntariness or general validity of the plea..." See U.S. vs. Gonzalez, 970 F.2d 1095, 1100 (2nd Cir. 1992). The issue put before this

Court asks this Supreme Court how a district court should address such a matter in a motion to withdraw proceeding. The Circuit Court never addressed the straight forward issue on whether counsel rendered effective assistance by rushing his client into a Plea Agreement knowing his client's medical condition required surgery and caused the defendant pain that would otherwise cloud his judgment even if presented for a Court inquiry.

The Sixth Amendment guarantees an accused the effective assistance of counsel at all critical stages of including plea negotiations. See Hill vs. Lockhart, 474 U.S. 52, 57 (1985). The direct appeal of Lesane pointed out that the Appellant was charged with the 2015 version of a statute that did not exist during the offenses alleged to have been committed between 2008 and 2012, which was something assigned counsel should have been aware of when advising his client to enter a stipulated plea agreement. Under Fed.R.Crim.P. Rule 11(b)(3), a "Court must determine that there is a factual basis for the plea," which is brought to question here. This Supreme Court may review the insufficient evidence and other defects within the Plea Allocution hearing as being in conflict with the Circuit Court's holding in U.S. vs. Murphy, where the case conviction was vacated and dismissed as the criminal conduct was covered by a state conviction and the "intent" behind the same conduct did not satisfy the Federal statute. See 942 F.3d 73, 87 (2nd Cir. 2010).

Other arguments regarding counsel's failure to raise certain defenses in the case (e.g. "statute of limitations", "staleness of warrant", etc.) [were] raised in the Pro Se motion for reconsideration merit further review.

Since Appellant entered a plea agreement without a "device, computer, or email" linking him to online commercial advertisement and/or communications to transport a minor for illegal sexual acts, "how does the record satisfy both the federal statute for 18 U.S.C. § 1591(b)(2) and the enhancement pursuant to U.S.S.G. Section 2G1.3," thus a review of the denial of motion(s) is warranted. For this [first] argument raised, the Pro Se Petition for a Writ of Certiorari should be granted and ordered that new appointed counsel should brief this claim. And grant such other and further relief this Supreme Court deems just and proper.

II

THE CIRCUIT COURT ABUSED IT'S DISCRETION WHEN IT DENIED THE PRO SE MOTION FOR REHEARING EN BANC FOR THE PRIOR OPINION NOT REVIEWING THE DENIAL OF AN EVIDENTIARY HEARING AND ISSUES THAT FALL WITHIN THE SCOPE OF
U.S. vs. CRAMER

The Appellant requested that the U.S. Court of Appeals for the Second Circuit issue an Opinion on the legal sufficiency of evidence on the two-level enhancement applied to his case

under U.S.S.G. Section 2G1.3(b)(3)(A), in his Pro Se Petition for Rehearing or Rehearing en banc. There is no U.S. Supreme Court precedent laying out the factual basis the lower court would need to satisfy for this specific enhancement related to offenses pursuant to 18 U.S.C. § 1591(a) and (b)(2). The decision to affirm the Sentence, along with the factual basis for the enhancement, is contrary to the holding for Count 2 in the case of U.S. vs. Cramer, 777 F.3d 597 (2nd Cir. 2015).

The Circuit Court in Cramer held that "[a] finding of fact is clearly erroneous only if, after reviewing all the evidence, this Court is left 'with the definite and firm conviction that a mistake has been committed.'" See Id at 601 (quoting Anderson vs. Bessemer City, 470 U.S. 564, 573 [1985]). In the case of Lesane, there was no desktop computer found in his home linking any communications with him and Victims A & B, nor was there a computer found linked to any solicitation advertisement for commercial sex trafficking. The Ninth Circuit Court of Appeals has held when there exist factual matters truly in controversy and bearing directly on the plea, and not resolved in a Rule 11 colloquy, Circuit Courts have been disposed to remand for an evidentiary hearing. See U.S. vs. Davis, 428 F.3d 802 (9th Cir. 2005). No remand for an evidentiary hearing happened in the instant appeal of U.S. vs. Lesane, nor was a remand ordered via the Pro Se Letter Motion for Rehearing or Rehearing en banc. See Appendix A & C. A brief before this

Supreme Court will note that the Appellant possessed no email linked to any online advertisement if this petition were granted.

Furthermore, in the instant case, the [warrant] search of the Appellant did not result in any recovered smart phone "containing or used" to post ads, nor messages to "entice" or "solicit" a minor were found on any such smartphone [device]. Despite the Court of Appeals in Cramer finding that the lower court erred in applying the U.S.S.G. § 2G1.3(b)(3)(A) enhancement to Count 2, the Circuit Court affirmed the sentence as the other Section 2G1.3(b)(3) enhancements applied to Counts 1, 3, & 4, making any error harmless. See *supra* at 607. The case of Lesane is distinguishable in that both Victims A & B were used for count one and subject to the mentioned enhancement. This Supreme Court should review this matter applicable to numerous cases across the Circuit Courts.

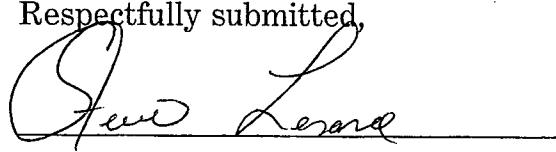
The Second Circuit Court of Appeals decisions (see Appendix A & C) are in conflict with other precedent such as U.S. vs. Hogg, which the Sixth Circuit Court of Appeals vacated a conviction on a second motion to withdraw the [guilty] plea where the defendant was misinformed of the applicable statutory range. See 723 F.3d 730 (6th Cir. 2013). This U.S. Supreme Court long ago held that "on a timely application, the [lower] court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear, or inadvertence." See Kercheval vs. U.S., 274 U.S. 220 (1927). The Appellant, with an eleventh grade

education, [who] entered a plea misinformed and suffering pain in his ankle from a health issue requiring surgery, was a matter made clear to the district court in the motions filed in this proceeding. The issue of whether the Appellant was entitled to an evidentiary hearing to determine his raised claim(s) is incorporated into this argument. For this argument raised, the Pro Se Petition for a Writ of Certiorari should be granted and ordered that new counsel be appointed to brief this claim before this U.S. Supreme Court. And grant such other and further relief this Court deems just and proper.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steve Lerner".

Date: July 12, 2023