

In The
Supreme Court of the United States

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RICHARD DZIONARA-NORSEN,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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TABLE OF CONTENTS

| | |
|--|-------------|
| October 28, 2024 | <u>PAGE</u> |
| TABLE OF CONTENTS..... | i |
| TABLE OF AUTHORITIES..... | ii |
| PETITION FOR REHEARING..... | 1 |
| GROUNDS FOR REHEARING..... | 1 |
| CONCLUSION..... | 15 |
| CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL..... | 15 |

TABLE OF AUTHORITIES

| <u>CASES:</u> | <u>PAGE</u> |
|--|-------------|
| <u>United States v Pecoraro</u> , 592 F.Supp 3d 4 (NDNY 2021)..... | 6 |
| <u>STATUTES:</u> | |
| U.S. Const. Amend. V..... | 1,2,4,7 |
| U.S. Const. Amend. VI..... | 1,2,6,11 |
| U.S. Const. Amend. VIII..... | 2,8,10 |
| U.S. Const. Amend. XIV..... | 1,2,4,7 |

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner respectfully petitions this Court for rehearing of its October 7, 2024 order denying the petition for a writ of certiorari in this case. Petitions for rehearing of an order denying certiorari are generally granted in two instances: if a Petitioner can demonstrate "intervening circumstances of a substantial or controlling effect"; or if a Petitioner raises "other substantial grounds not previously presented." R. 44.2. As set forth below, Petitioner argues both categories.

GROUND FOR REHEARING

This petition provides an unparalleled vehicle for review of critically important issues, not reviewed on their merits, by the Second Circuit in this case. The record of the District Court pretrial, trial and postconviction proceedings demonstrate the following violations of Petitioner's Constitutional Rights:

1 Prejudice and Suffering

1.1 Whether prosecutorial remarks gravely prejudiced Petitioner by misstating and fabricating evidence, thereby misleading the jury and creating a false image of Petitioner, in violation of the Fifth and Fourteenth Amendments?

Whether defense counsel's performance was ineffective for failing to object to these false and prejudicial statements and failing to introduce evidence of Petitioner's normal sexual preferences, in violation of the Sixth Amendment?

1.2 Whether the considerable suffering Petitioner and his family experienced during his appx. 2.5 years on pretrial release, caused by Petitioner's strict release conditions, poor mental health and

financial burden, violated his Sixth Amendment?

Whether defense counsel's performance was ineffective for failing to file a "Dismissal with Prejudice" motion based on the Speedy Trial Violation, in violation of the Sixth Amendment?

1.3 Whether jail staff's brutal beating of Petitioner mere days after losing trial, due to Petitioner's mental disability and conviction's stigma, violated his Eighth Amendment?

Whether defense counsel's performance was ineffective for failing to immediately file a "Dismissal with Prejudice" motion upon learning of the beating incident, in violation of the Sixth Amendment?

Whether the District Court and government abused their discretion for failing to take any action despite being aware of the beating incident, in violation of the Fifth and Fourteenth Amendments?

2 Whether the destruction of evidence, authorized by the District Court and executed by the government without Petitioner's knowledge nor consent, violated his Fifth and Fourteenth Amendments?

Ground 1.1

During the opening and closing arguments at trial, the government made remarks intended to mislead the jury. The government also made remarks to falsely portray Petitioner as a deviant, dangerous individual who has attraction to minors, criminal propensity and bad character. Petitioner was not indicted for his sexuality, which is that of a typical heterosexual male, but the government's remarks placed Petitioner's sexuality at issue. This is an example of Prosecutorial Misconduct, which is a violation of Petitioner's Fifth and Fourteenth Constitutional Rights to Due Process.

The government will likely never admit it, but Petitioner was charged based on false pedophile accusations in the FBI's criminal complaint, accusations he has denied. Petitioner's first attorney, Ms. Sonya Zoghlin Esq., told him that the federal government decided to prosecute him because of these accusations, otherwise his case would have been dropped to State.

The FBI complaint alleged that Petitioner got aroused during a Colorado Retreat when babysitting a minor. Petitioner only revealed that he babysat at the Colorado Retreat after verbal threats by SA Markovich of, "We can do this the easy way or the hard way," yet never stated that he got aroused by a minor. If the FBI Agent would have pressed further, Petitioner would have told him that he was babysitting with a 19-year old woman who he found attractive.

During a pretrial hearing this Colorado story was deemed prejudicial and therefore suppressed. The government said he would not introduce it at trial if the issue of sexuality was not introduced by Defense Counsel. Despite this promise, he still made other highly prejudicial remarks at trial which attacked Petitioner's sexuality to portray him as a pedophile:

In the transcripts the government makes several baseless accusations:

- I) Sexual arousal to images of child pornography¹
(T: p.25, ln.24-25 & p.26, ln.1-5)
- II) Petitioner has been into child pornography for years
(T: p.30, ln.15-21)
- III) Repeats that Petitioner had a physical reaction to images
(T: p.561, ln.3-6)

*There are no images/videos in this case!

Furthermore, the government misrepresents the evidence:

- I) Implying these images are several of many
(T: p.11, ln.9-12)

¹ Other trial transcript examples of government's false portrayal of Petitioner:
(T: p.12, ln.10-17), (T: p.24, ln.10-12), (T: p.24, ln.18-25 & p.25, ln.1-3),
(T: p.28, ln.13-18), (T: p.30, ln.25 & p.31, ln.1), (T: p.561, ln.20-23),
(T: p.577, ln.4-22), (T: p.580, ln.13-19), (T: p.581, ln.8-9)

II) Refers to "titles," but the statute deals with images/videos
(T: p.27, ln.8-10)

III) Implying file shows illegal child rape
(T: p.573, ln.13-14)

*Again, there are no images/videos and it is a continued violation
of due process.

Contrary to the statements above, the government's own witnesses testified that no images/videos of child pornography were found:

DEFENSE COUNSEL: ...when you looked at those files there was no substance in those files, correct?

GOVERNMENT WITNESS: Correct.

DEFENSE COUNSEL: And there was no child pornography in those files, correct?

GOVERNMENT WITNESS: Correct.

(T: p.162, ln.2-7), See also (T: p.523, ln.3-11 & p.523, ln.14-24)

*How is the government allowed to say false statements when no images/videos were found?

The jury members obviously couldn't understand what the government was saying because they didn't have the educational background to comprehend it. It takes special training to understand what occurs in peer-to-peer sharing. Instead, the government drew their attention toward false, prejudicial remarks about Petitioner's sexual preferences and fabricated stories on evidence. And with no friendly faces to testify in Petitioner's defense, it's no wonder the trial ended in a conviction. Petitioner did not receive a fair trial as required by the Due Process Clause of the Fifth and Fourteenth Constitutional Amendments.

Ground 1.2

Even before his arrest, Petitioner had been psychologically unstable. He suffers from autism spectrum disorder (ASD), severe depressive disorder and anxiety disorder. On February 13, 2018 his mother called the police because he had an autism-meltdown and suicidal ideations. He was "mental-hygiene" arrested, taken to Strong Memorial Hospital Emergency Department for evaluation and released the next day. On August 19, 2018, for the same reasons, she called the police and the same "mental-hygiene" arrest process was completed. On...

August 20, 2018 Petitioner was arrested and confined in Monroe County Jail for appx. 2 weeks. His mother had to rent him an apartment because all rental prospects rejected him due to a false article released by the District Attorney's office.

During the course of pretrial release, Petitioner fell into a deeper depression and became increasingly suicidal. He would call his mother, saying he "didn't want to live anymore," and that "he prayed he wouldn't wake up in the morning." He would lay in bed most hours of the day, rarely leaving the apartment, to try escaping reality. He had no social life, cutting contact with what little friends he had. Losing motivation, he remained unemployed due to the embarrassment and stigma of the pedophile label, fear for his safety, restricted freedom from ankle-monitoring and failing mental health. The ankle-monitoring device was humiliating, caused skin abrasions, exacerbated already severe anxiety and depression and restricted physical activity.

Petitioner's pretrial experience drained his family's financial resources. In addition to the apartment's rental fees, his family had to retain experts for his defense. His family's constant worry for his well-being and financial strain caused them great anxiety.

At one point, on April 18, 2019, Petitioner felt so suicidal, light-headed and dizzy that he was taken to Strong Memorial Hospital Emergency Department. The next day he was transferred to a group program at St. Mary's Psychiatric Unit where he was evaluated and admitted until May 6, 2019.

During his stay, an arrest warrant was issued under the guise that he had violated pretrial release "curfew" conditions, despite his Pretrial Officer (PO) knowing his exact location and circumstances. While aware of his ongoing suicidal ideations, the program's medical personnel still released him. He was arrested on the premises of St. Mary's Hospital and escorted by US Marshalls to the Courthouse. Magistrate Payson determined, against psychiatric testimony, to arrest and confine Petitioner in Monroe County Jail for appx. 3 weeks.

Petitioner was on pretrial release for a lengthy amount of time and experience considerable amount of prejudice and suffering, even though the government's case was weak -- the government admitted that "this is the smallest amount of evidence I have ever seen in a case like this." He admitted that he tried to get the case dropped but his boss ordered him to go ahead with the prosecution. Most individuals are federally charged with massive stores of child pornography.

It is unconstitutional to punish a non-convicted individual, yet that is exactly what happened. As an individual with ASD and on Federal Disability, the stigmatized charges in combination with strict, constraining release conditions were exceptionally harsh on Petitioner.

For the appx. 2.5 years of pretrial release, Petitioner was constantly pushed to the edge of suicide. His case is atypical and it is appalling how the FBI targetted, intimidated and coerced him to extract statements, given his neurodevelopmental disorder and underlying conditions. He was maliciously prosecuted with several charges thrown at him, without regard for his suffering.

In a case that bares a striking resemblance to Petitioner's, United States v Pecoraro, 592 F.Supp 3d 4 (NDNY 2021), Pecoraro's motion for Dismissal of Indictment with Prejudice was granted based on an alleged violation of the Speedy Trial Act. The government's disregard for his case created anxiety in defendant, an individual with disabilities (ASD), and his ability to assist in his own defense had suffered. As a result of the serious, but limited, charge brought against him, defendant had already been severely penalized both mentally and with nearly two years on home detention.

Petitioner's own circumstances mirrored Pecoraro's, but his defense counsel was ineffective for failing to file a motion for Dismissal of Indictment with Prejudice. Petitioner's Sixth Amendment Constitutional Right to Speedy Trial was violated due to the considerable suffering he experienced during pretrial

release in stark contrast to the weakness of his case.

The issue of Petitioner's prejudice and suffering is inextricably interwoven with the circumstances surrounding the FBI's interrogations:

Defense counsel's performance was ineffective for failing to argue the FBI's illegal tactics utilized to obtain Petitioner's statements on all its merits, in violation of his Constitutional Right to be free from involuntary self-incrimination protected by the Fifth and Fourteenth Amendments.

Due to Petitioner's autism, he is anti-social, introverted, prone to manipulation and has a tendency to appease others to avoid conflict. ASD is a neurodevelopmental disorder, and individuals with autism have deficits in communicative and social skills. In addition, at the time of the FBI interrogation his mental health problems were exacerbated by his recent "mental-hygiene" arrest involving suicidal ideations, autism meltdown and self-sabotaging behavior. He was being medicated for his psychological instability. A reasonable person can clearly see that Petitioner cannot be considered a typical, reasonable person -- he is vulnerable to psychologically coercive tactics.

On June 13, 2018, FBI Agents interrogated Petitioner using intimidation and coercive tactics that imprinted upon him the impression that he would not be prosecuted and the interaction was in complete confidence. Here is an example:

SA COUCH:...you can imagine we are a small unit out here we have lots of important things to deal with...we just want to make sure you're not somebody we need to be concerned about toward the FBI or target or anything like that.
(Interrogation: at appx. 3:02-3:57)

This statement indicates that this interaction is unimportant and Petitioner is not in trouble. It further misstates/misrepresents the true nature of their interrogation, which is to obtain statements to bolster their case -- without which they don't have a case -- rather than a simple "checking-up" on unimportant, routine matters.

SA COUCH: You can actually talk to your therapist about this...you know I wouldn't necessarily recommend "hey last night I downloaded child pornography" because then she has to report that.
(Interrogation: at appx. 7:57-8:44)

This statement indicates that this interaction will be "between us," but if you tell anyone, I cannot promise confidence.

PETITIONER: This doesn't go on my record does it?

SA COUCH: ...uh no as far as anything like a criminal record.
(Interrogation: at appx. 14:10-14:52)

Any reasonable person would agree that SA Couch's response indicated that Petitioner is free from prosecution -- and to be free from prosecution, this interaction must be in complete confidence. SA Couch used this false promise to obtain Petitioner's "consent" to seize/search a laptop. In light of this illegal coercion to obtain it, Petitioner's statements and any evidence obtained from the laptop should have been suppressed, had counsel done an effective job.

Ground 1.3

While in federal custody, Petitioner's Eighth Amendment Constitutional Right to be free from cruel and unusual punishment was blatantly violated. Both the District Court and prosecutor were aware of the violation, yet no action was taken.

On November 25, 2020, just 5-days after losing trial, an unprovoked attack occurred when Petitioner was viciously and brutally beaten by Brett Kirkpatrick and David Gerten, officers of Monroe County Jail -- a federal holding facility. This incident is currently under litigation; Civil Case no. 6:21-cv-06715. Petitioner is diagnosed with autism spectrum disorder, major depressive disorder and anxiety disorder, and jail staff were aware of these disorders. At no time was Petitioner threatening to jail staff and the force used against him was malicious and sadistic, unreasonable under the circumstances, shocks the conscious, and what's more constitutes discrimination by reason of his disability. Petitioner is a qualified individual with a disability under federal law, as defined by the Americans with Disabilities Act (ADA), 42 USC § 12101, and Section 504,

Because of his disabilities, Petitioner was placed in the "Constant Supervision" area of the jail for his own protection, and as such staff cannot claim ignorance with respect to his disability. Furthermore, Petitioner had been at the federal holding facility on several instances prior to the beating that occurred on November 25, 2020. He was on his way to speak to a mental health counselor for a scheduled meeting. Before he could see the counselor, Kirkpatrick ordered Petitioner to return to his cell with no explanation. He was on his way to mental health because he had a need based on what he perceived to be mistreatment, i.e. the denial of use of the phone system. To an autistic mind, an obligation to appear at a certain place and time is something that must be carried out, and since no one gave him a reason not to comply with an obligation, he hesitated to follow Kirkpatrick's order. This same process was repeated with Gertin when Petitioner arrived at the nurse's station.

In retaliation for Petitioner's lack of compliance, Gertin slammed him against the wall without justification. Then Kirkpatrick immediately ran over and punched Petitioner in the right side of the head/face no less than four times. As a result of being punched numerous times on the right side, the left side of his head was repeatedly slammed into the end of an open metal door. After numerous blows to the head Petitioner, unconscious by then, was slammed to the ground causing further injury. The officers continued to strike him numerous times in the body and head while both men applied their full weight to Petitioner's body in spite of him being unconscious.

After the incident Petitioner was taken to the emergency room where he was diagnosed with multiple facial fractures, injuries to his right ear, cuts to his forehead and face and injuries and bruising throughout his body. In an effort to cover the abuse Gertin, Kirkpatrick and Sheriff Baxter held a "disciplinary hearing" whereby Petitioner was sentenced to 20 days in the SHU and fined \$25. In a continued effort to further whitewash what took place, internal affairs investigated, suspending Kirkpatrick 29 days although he was

permitted to use sick time towards the suspension.

Furthermore, inadequate follow-up medical and psychological care amounted to cruel and unusual punishment under the Eight Amendment to the United States Constitution. The prohibition against cruel and unusual punishment encompasses the requirement that prison officials provide humane conditions of confinement, including adequate food, clothing, shelter, and medical care, and taking reasonable measures to guarantee the safety of inmates. Deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment.

Petitioner continues to experience lasting physical and psychological suffering following the Monroe County Jail police brutality incident. The memory of this horrific experience will be everlasting and, surrounded by Correctional Officers (COs), the prison setting constantly sparks negative emotions, like fear that another unprovoked prison personnel attack may occur without warning.

Whenever he looks in the mirror, the scars on his face and his broken nose cultivate feelings of rage and he is unsure if scar revision surgery and rhinoplasty can restore his appearance and functionality.

Petitioner was so horrified and frightened following the incident, that he wrote his mother and included a will in case the guards killed him. No parent should have to go through what his mother has endured for years as a result of the treatment he received at Monroe County Jail (MCJ) and the fact they turned a blind eye.

The law enforcement personnel involved with the November 25, 2020 beating incident still remain unprosecuted despite undisputable video footage and admissions that they used excessive force. There is no doubt in Petitioner's mind that his jailers would have killed him if not for luck. He holds ever-growing fear of law enforcement and the legal system.

For their part, the BOP has done nothing in the way of follow-up physical and psychological treatment. Better yet they pretend it doesn't exist and as

proof, there is no mention of the injuries suffered or the beating that caused them, in his medical records. Psychology has offered no counselling whatsoever. In most cases regarding cruel and unusual punishment there are grey areas, but in the case at hand the evidence is clear. Petitioner has suffered cruel and unusual punishment and continues to suffer cruel and unusual punishment at the hands of his jailors.

Upon learning of the beating incident, defense counsel failed to immediately file a "Dismissal with Prejudice" motion, in violation of Petitioner's Sixth Amendment.

Ground 2

The following is a sequence of events in opposition of the forfeiture and destruction of evidence:

- I) On September 9, 2020 Mr. Pilato Esq. signed a "Stipulation for Forfeiture" document. Later on November 13, 2020 (Docket #136) Mr. Ciardi Esq. signed a "Final Order of Forfeiture" document. These two versions of the forfeiture stipulations were prepared and signed by the government and defense counsel without Petitioner's knowledge nor consent, despite stating that it was "knowing and voluntary" on the part of their client. The property in question was the computer and power cord the government alleges contained a two-second clip of child pornography. Furthermore, the final order stated, "...claim expired on April 6, 2021, and no persons have filed a petition with the court." During that period the Petitioner was incarcerated in Monroe County Jail after being brutally beaten by his jailors and contracting covid and the District Court and counsel failed to notify him of the expiration. Subsequent counsel was likewise deficient by not notifying their client of the events that took place.
- II) Upon discovery of the forfeiture machinations, Petitioner explicitly requested preservation of the Dell laptop and power cord, stated

in his pro se brief submitted December 19, 2022 (Section XI, Docket #120).

III) The government responded to the pro se brief on March 20, 2023 (Docket #133) fully aware of the information therein regarding the opposition to the "Stipulation of Forfeiture" and evidence preservation request.

IV) In spite of this knowledge, on April 13, 2023 (Docket #177) the District Court ordered that the "...authorized federal agency shall dispose of the forfeited property according to law." Petitioner only recently learned of this crucial evidence destruction 5-days after the writ of certiorari submittal, completed without his knowledge nor consent in a criminal case that is still ongoing (i.e. not closed).

* Note: Honorable Geraci signed the final order, which stated, "Whereas, on January 14, 2021, this Court entered a Preliminary Order of Forfeiture against...One Dell laptop computer...based upon defendant's guilty plea to a one-count information (Docket #19-CR-6131, ECF No. 42) on or about November 20, 2020."

To the contrary, Petitioner never signed a guilty plea deal.

The destroyed evidence possessed exculpatory value, as it was clearly proven during Petitioner's trial that the Dell laptop was free of any images/videos of child pornography. The government knew that Petitioner had requested its preservation for future examination, but intentionally allowed its destruction. More so, Petitioner still needs the laptop and power cord in his forthcoming defense, including examination by a computer forensic expert.

How is the government allowed to destroy crucial case evidence when the criminal case is still ongoing? Petitioner's Constitutional Right to present his own computer forensic expert at trial was violated. The government does not have a blank check to operate freely, without cross-examination.

The issue of evidence destruction is inextricably interwoven with that of insufficiency of evidence to support Petitioner's conviction:

Petitioner's conviction is not supported by sufficient evidence to prove guilt beyond a reasonable doubt, just conjecture and speculation. Petitioner was convicted of child pornography charges without a single image/video having been discovered on his computer. Essentially, his conviction was based on file titles without any accompanying content and coerced statements made by a mentally fragile, vulnerable young man, all of which should have been suppressed.

The government claims that on March 13, 2018 Inv. Turner downloaded a two-second video clip from a peer-to-peer folder on a computer it claimed belonged to Petitioner. At trial, the government failed to establish that Petitioner downloaded or accessed this particular file which was not on his computer when it was examined, that Petitioner knew it contained sexually explicit material involving an actual child, and that Petitioner knew it was in his shared folder. Without the two-second clip on the computer, the government failed to establish that the clip was obtained from the computer and on the date specified in the indictment. In addition, neither the government nor its witnesses could provide information on the identity of the person depicted, her age, when it was created, who created it, where it was created, etc. No search terms were discovered and no witness could testify as to what search was used to locate the files the government claims contained child pornography. File titles alone, regardless of their obscure nature, without an accompanying image/video of child pornography, cannot be deemed sufficient proof beyond a reasonable doubt as they may have contained unrelated material. To convict based on file titles requires deep speculation as to what the files "probably" contained. Here, the evidence was barely even circumstantial and does not come close to the caliber required to prove guilt beyond a reasonable doubt.

The government presented no evidence, and defense counsel failed to argue the premise of single-source connection and file transfer. In the case at hand, the government never cross-matched any "hash values" against a database to confirm the alleged content as child pornography nor presented evidence of a single-source download. The FBI Agent failed to download the complete file and failed to show it was accessible on its end or the opposing end of the connection. As such, no probable cause was established. Without evidence that the FBI's P2P file-sharing software utilized a single-source connection to obtain the alleged two-second clip, the origin of the clip cannot be proven. Multiple users can be connected to a single file, where the file's origin is a sole user uploading (distributing) the file. The government did not prove that the alleged two-second clip was distributed by Petitioner, as opposed to another user, from a potential multitude of users connected to the file. In fact, the computer forensic evidence supports the conclusion that the alleged two-second clip was never possessed, received or distributed by Petitioner, since the file is not on the laptop or any other device, nor is its file title. Defense counsel also failed to question the potential of the FBI's P2P file-sharing software to modify program sharing settings and access a user's private files illegally.

CONCLUSION

In the present case, the record contains substantial evidence of prejudice experienced by the Petitioner during pretrial, trial and postconviction stages. The weakness of the government's case combined with Petitioner's documented mental state at the time did not warrant federal criminal prosecution, but that is what happened.

Petitioner now seeks argument on the numerous ways he was gravely prejudiced, including his suffering during pretrial release, the government's misleading/misstated remarks at trial and the brutal beating he experienced just 5-days after conviction. Defense counsel failed to present these issues at respective stages during case proceedings.

Petitioner also seeks argument on a recent development -- the destruction of chief-in-case evidence -- a Dell laptop and power cord the government alleged were used in connection with criminal activity. Petitioner's case is still ongoing, and as such he still requires access to this evidence.

For all the foregoing reasons, Petitioner respectfully prays that this Court grant his rehearing application, grant his writ of certiorari and permit briefing and argument on the issues presented.

Respectfully Submitted,

X 
Richard Dzionara-Norsen

CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

X 
Richard Dzionara-Norsen