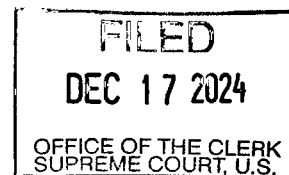


24-6309
No. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Timothy R. Defoggi — 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 Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Timothy R. Defoggi 56316-037
(Your Name)

FCI Ft Dix
PO Box 2000

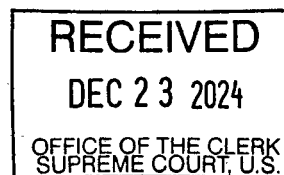
(Address)

Joint Base MDL, NJ 08640
(City, State, Zip Code)

Dale Bounds (Authorized on my behalf)
(703) 909-7240

(Phone Number)

9589 0710 5270 1873 9428 07



QUESTIONS PRESENTED

- 1) As applied to Acquitted Conduct, whether the lower court erred in improperly denying a finding of "extraordinary and compelling" under U.S. Sentencing Guideline (USSG) § 1B1.13(b)(6) or, in the alternative, USSG § 1B1.13(b)(5).
- 2) Whether the lower court erred in its' assessment of direct harm to Petitioner and others through deliberate indifference to adequate medical care as protected under the 8th Amendment to the U.S. Constitution and as may be considered for a reduction in sentence pursuant to U.S. Sentencing Guideline § 1B1.13(b)(5).
- 3) Whether the Petitioner was unfairly prejudiced by false and unsupported claims ab initio, thereby depriving Petitioner of a fair and impartial assessment of 18 U.S.C. § 3553(a) factors as they relate to a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A).

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

United States v. Timothy Defoggi, Case No. 13-CR-105-JFB

Timothy Defoggi v. United States, Case No. 24-2934, 8th Circuit

Timothy Defoggi v. U.S., Case Nos. 22-2327 & 22-2394, 8th Circuit

In Re Complaint of John Doe, JCP No. 08-20-90021

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B & C to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished. 8th Circuit Case No. 24-2934

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished. USDC for Nebraska, Case No. 13-CR-105,
ECF No. 515

☐ 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 09/30/24.

☐ 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: 11/07/24, 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).

STATEMENT OF THE CASE

On April 9, 2013 Petitioner was arrested, charged and later convicted at trial of engaging in a child exploitation enterprise (Count 1), conspiracy to advertise (Count 2) and conspiracy to distribute (Count 3) child pornography as well as the clicking of (11) links constituting access with intent to view child pornography (Counts 4-7). [See 18 U.S.C. §§ 2251 and 2252A] These charges emanated from a social networking website wherein the FBI seized control of a web server and made these same images available to the public at-large for a period of (19) days; arguably revictimizing the very same children that they claimed to protect.

Standing on a plea of not guilty, Petitioner went to trial wherein he was convicted on all (7) counts; with the sentencing court later vacating the (2) conspiracy charges as lesser included offenses of Count 1 of the indictment. Based upon the (5) remaining charges, Petitioner was sentenced to (25) years in federal prison followed by a lifetime term of supervised release.

On direct appeal, the 8th Circuit Court of Appeals overturned the sanctity of a jury verdict, vacating the child exploitation enterprise stating, "But we do not understand how the single act of accessing an image with the intent to view it by clicking on it alone from behind one's computer screen can be done 'in concert with' anyone else." The panel of judges went on to say, "The evidence was insufficient to convict defendant of engaging in a child exploitation enterprise under 18 U.S.C. § 2252A(g) because defendant did not access child pornography 'in concert with' anyone else."; thereby leaving the clicking of (11) links as the only

remaining crimes. (See United States v. Defoggi, 839 F. 3d 701(8th Cir. 2016))

Upon remand, U.S. District Judge Laurie Smith Camp unbundled the low level charges which had previously resulted in a concurrent sentence of (10) years and instead stacked them to achieve the original sentence of (25) years, rendering Petitioner's appeal meaningless. Clearly, acquitted conduct was utilized in order to increase Petitioner's sentence by 150% for the very same set of crimes, doing so without identifying any new conduct. The sentencing court justified its' excessively harsh punishment by citing online "fantasy" comments which never posed a real or credible threat to as required under 18 U.S.C. § 875(c). (See Jacobson v. United States, 118 L Ed 2d 174, 112 S. Ct. 1535 (1992))(See also Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001 (2015)).

After serving approximately (8) years in federal prison, Petitioner filed a Motion for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A) which was granted by District Court Judge Joseph F. Bataillon on June 1, 2022. (See United States v. Defoggi, 2022 U.S. Dist. LEXIS 97833) Upon government appeal, this decision was reversed by the 8th Circuit, returning Petitioner to federal custody just (2) days prior to his release from the halfway house. (See United States v. Defoggi, 2023 U.S. App. LEXIS 15640 (8th Cir. 2023)) Due to being in transit, Petitioner hired a private attorney to refile a motion on his behalf. This subsequent motion was later denied based upon arguments that centered almost

exclusively on risks associated with COVID-19, an argument that was no longer persuasive before the 8th Circuit. In order to more broadly utilize U.S. Sentencing Guidelines as promulgated during the U.S. Sentencing Commission's 2023 and 2024 amendment cycles, Petitioner filed a third Motion for Compassionate Release which the District Court judge later denied. (See Order, Appendix A) On timely appeal, the 8th Circuit summarily affirmed the lower court without affording Petitioner an opportunity to argue his case before the court. (See Judgment and Mandate, Appendix B) A timely Motion for Rehearing en banc was filed and later denied without a written opinion. (See Order, Appendix C)

REASONS FOR GRANTING THE PETITION

Affidavit of Timothy R. Defoggi
Pursuant to 28 U.S.C. § 1746

"When a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of that offense or the date of his conviction. Similarly, when a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the United States Sentencing Guidelines since the original sentencing."

and,

"Federal courts historically have exercised broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. District courts' discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence."

Associate Justice Sonia Sotomayor
Concepcion v. United States, 142 S. Ct. 2389, 213 L Ed 2d
731 (2022)

- 1) As applied to Acquitted Conduct, whether the lower court erred in improperly denying a finding of "extraordinary and compelling" under U.S. Sentencing Guideline (USSG) § 1B1.13(b)(6) or, in the alternative, USSG § 1B1.13(b)(5).

Opinion of the 8th Circuit: Utter silence from both the panel and en banc reviews; no opinion offered.

Opinion of the U.S. District Court: "[T]he case he [defendant] cites to is a denial of certiorari, not a case constituting a change in the law. See *McClinton v. United States*, 143 S. Ct. 2400 (2023). Furthermore, the Court notes that the acquitted-conduct argument was extensively litigated as part of Defoggi's direct appeal."

Rebuttal: First, as to this argument, the Government never opposed Petitioner's challenge to acquitted conduct. As such, local Nebraska Criminal Rule 12.3(c)(2) applies - "A party's failure to brief an issue raised in a motion may be considered a waiver of that issue."

The constitutionality with regard to the use of acquitted conduct is not a recent topic of concern within American jurisprudence as it is a clear violation of the 5th and 6th Amendments to the U.S. Constitution and it undermines public confidence in our American judicial system. However, this unjust practice has only recently reached public scrutiny, prompting the Highest Court and members of Congress to take action. Unfortunately, the method of resolution was punted back and forth between the Judicial, Executive and Legislative branches of government.

Following many discussions between the U.S. Supreme Court, the U.S. Sentencing Commission and both chambers of Congress, Senators Chuck Grassley (R) and Dick Durbin (D) introduced a bill titled "Prohibiting Punishment of Acquitted Conduct Act of 2023" (S. 2788). The U.S. House of Representatives also introduced companion legislation (H.R. 5430), seeking to amend 18 U.S.C. § 3661. These proposed changes in the law sought to preclude courts from considering acquitted conduct at sentencing. To attest to the bipartisan support of this legislation, the House version passed with a vote of 405 to 12. The law ultimately failed to make it into law in 2023, despite its popularity on the Hill.

After much debate, the U.S. Supreme Court decided to re-list and then deny Certiorari on more than a dozen cases involving acquitted conduct, not because the cases lacked merit as implied by

the District Court of Nebraska but rather because the U.S. Sentencing Commission had agreed to take up the issue during their 2024 Amendment cycle. (See McClinton v. United States, 216 L Ed 2d 1258, 143 S. Ct. 2400, et al (2023). Ultimately, the U.S. Sentencing Commission did pass an amendment to U.S. Sentencing Guidelines §§ 1B1.3 and 6A1.3, limiting the use of acquitted conduct for those defendants acquitted of charges at trial. These guideline changes went into affect on November 1, 2024. As to the retroactive application of these changes, the Commission failed to vote on the matter at its meeting on August 12, 2024. However, retroactive application of these changes may be considered persuasive even though they may not be controlling under USSG § 1B1.13(b)(6). The force of non-retroactive changes in the law have since created a circuit split, requiring the High Court to interpret the applicability under this guideline.

"In the absence of guidance from Congress or the Sentencing Commission, appellate courts split on whether district courts could consider non-retroactive changes in the law as a factor when deciding whether extraordinary and compelling reasons existed for compassionate release. Compare United States v. Chen, 48 F. 4th 1092 (9th Cir. 2022), United States v. Ruvalcaba, 26 F. 4th 14 (1st Cir. 2022), and United States v. McCoy, 981 F. 3d 271 (4th Cir. 2020), with United States v. Crandall, 25 F. 4th 582 (8th Cir. 2022), United States v. Andrews, 12 F. 4th 255 (3rd Cir. 2021), and United States v. Thacker, 4 F. 4th 569 (7th Cir. 2021). And, until now we have not definitively decided this issue, a decision applicable only to motions decided by district courts prior to November 1, 2023."

and,

"The question before the court is a simple one: does a sentencing court have the discretion to hold that non-retroactive changes in the law, when combined with extraordinary rehabilitation, amount to extraordinary and compelling reasons warranting compassionate release? Considering this question carefully, we answer it in the

affirmative."

United States v. Joel Francois Jean, 108 F. 4th 275 (5th Cir. 2024)

As a background for the High Court, Petitioner was acquitted on Count 1, Child Exploitation Enterprise on direct appeal but on remand, the District Court unbundled Counts 4-7, simple access with intent to view child pornography, crimes that carried a (10) year concurrent sentence, and instead stacked them to give Petitioner the very same sentence of (25) years, adding (15) years to his sentence for conduct that the 8th Circuit had previously vacated for a lack of evidence. (See U.S. v. Defoggi, 839 F 3d 701 (8th Cir. 2016)) Based upon a change to the U.S. Sentencing Guidelines, Petitioner would argue that he was sentenced using "acquitted conduct" and should therefore be eligible for a reduction in sentence under USSG § 1B1.13(b)(6).

Under the Rule of Lenity, Petitioner would also offer that the District Court should have also considered this argument sua sponte under USSG § 1B1.13(b)(5) - Other.

And finally, as to the District Court's assertion that "[T]he acquitted conduct argument was extensively litigated as part of Defoggi's [Petitioner's] direct appeal.", the argument of acquitted conduct was never raised as the sentencing phase predated the changes to the U.S. Sentencing Guidelines. (See Defoggi v. United States, 878 F. 3d 1102 (8th Cir. 2018))

Note: Per USSG § 1B1.13(e), "[T]he fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement."

- 2) Whether the lower court erred in its' assessment of direct harm to Petitioner and others through deliberate indifference to adequate medical care as protected under the 8th Amendment to the U.S. Constitution and as may be considered for a reduction in sentence pursuant to U.S. Sentencing Guideline § 1B1.13(5).

Opinion of the 8th Circuit: Utter silence from both the panel and en banc reviews; no opinion offered.

Opinion of the U.S. District Court: "The majority of Defoggi's [Petitioner's] argument focuses on other the health conditions and treatment of other inmates. The information about his own medical treatment has already been presented and weighed. This argument does not provide a new reason to grant Defoggi a compassionate release." [Quoted as written]

"Deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, regardless of whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."

and,

"Deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment."

Estelle v. Gamble, 50 L. Ed 2d 251, 97 S. Ct. 798 (1976)

Rebuttal: Petitioner provided the District Court with personal attestations of deliberate indifference with regard to medical care but chose to also include similar instances with other inmates in an effort to demonstrate the sheer magnitude of health care issues at Ft Dix, and across the Bureau of Prisons at-large e.g., See Senate bill S. 5394 requiring Federal law enforcement and prison

officials to obtain or provide medical attention to individuals in custody who display medical distress.

Previously argued examples of egregious indifference to adequate medical care are cited below: (See USDC Case No. 13-CR-105, Motion for Compassionate Release, Initial Brief, ECF No. 504 *5; Reply-Brief, ECF No. 512 *4; 8th Circuit Case No. 24-2934, (submission of initial brief not permitted by panel); rehearing en banc *7; and Motion to Supplement, ECF No. 5446245)

Petitioner, Timothy Defoggi, Age: 66

1) Eyes - Cataracts: On 09/16/15 an Optometrist diagnosed Petitioner with large floaters and deris-retina, with vision in his left eye at 20/100 and 20/60 in the right. (Reply-Brief (RB) -Exhibit H) On 11/09/15 an Ophthalmologist diagnosed Petitioner with nuclear sclerosis cataracts in both eyes, with vision in his left at 20/400 and the right at 20/100. (Initial Brief (IB) -Exhibit A) The American Association for the blind defines the threshold for legally blind at 20/200. Petitioner was at twice that threshold. On 09/27/17 an Ophthalmologist examined Petitioner's eyes and determined the vision in his right eye to be 20/400 and vision in the left much worse than 20/400 based upon pinhole refraction. The Ophthalmologist stated in his report, "Please schedule cataract surgery of the left eye as soon as possible as this patient has very poor vision and cannot function with his activities of daily living." (RB - Exhibit L) On 04/25/18, more than 29 months after being diagnosed at twice the limit for legally blind, Petitioner finally underwent cataract surgery on the left eye; this well after exhaustion of his administrative remedies wherein he begged for treatment.

2) Eyes - Botched Post-op: On 04/25/18, while Petitioner was undergoing surgery for glaucoma of the left eye, the Ophthalmologist performed an additional procedure, inserting an implant in Petitioner's left eye. A stent was reportedly implanted as a method to treat Petitioner's open-angle glaucoma. Immediately following surgery, Petitioner was returned to Ft Dix at which time medical staff provided a single prescription eye drop. Mr. Martin of Ft Dix medical stated that he was not aware of the proper dosage but advised Petitioner to use 2 drops twice daily. By late that evening or early morning, Petitioner had lost all sight in his left eye. Upon examination by Ft Dix medical the following morning, they noted Petitioner's eye pressure to be 41, with normal ranges between 12 and 22. Ft Dix medical subsequently arranged for an emergency trip to the Ophthalmologist for treatment. Upon examination by the Ophthalmologist, Petitioner learned that the doctor had actually prescribed eight (8) post-op medications due to the invasive nature of an implant. However, Ft Dix medical had only provided a single medication, needlessly causing trauma and temporary blindness that would last nearly (3) days. (RB - Exhibit M)

3) Eyes - Cataracts: On 07/12/18 an Ophthalmologist examined Petitioner's eyes and determined the vision in Petitioner's right eye to be 20/500. (RB - Exhibit N) On 08/03/18, more than 33 months after being diagnosed at twice the limit for legally blind, Petitioner finally had his full vision restored.

4) Eyes - Vitreous Detachment: On 10/26/18 Petitioner was taken out on an emergency medical trip due to what was believed to be a

detached retina. Upon examination by an Ophthalmologist, Petitioner was diagnosed with an acute posterior vitreous detachment of the retina, combined with mild vitreous hemorrhaging of the left eye. It is believed that the detachment was onset by earlier swelling of the eye due to a botched post-op treatment of an implant on 04/25/18. (RB - Exhibit I)

5) Eyes - Other: Petitioner continues to have other serious medical issues with his eyes that remain untreated by the Bureau of Prisons (BOP) at Ft Dix. They are: 1) Glaucoma which was diagnosed over (6) years ago. Petitioner asserts that he has already suffered an estimated 25% loss of vision due to a lack of treatment. (See 8th Circuit Case No. 24-2934, Motion to Supplement, ECF No. 5446245) and (Appendix AA); 2) benign choroidal nevus right eye which can turn into melanoma over time; 3) disorder of the iris ciliary which, if untreated, can lead to glaucoma or vision loss; disorder of sclera which, if untreated, can cause permanent damage and vision loss. (RB - Exhibit J) and (en banc *5)

6) Inguinal Hernia: On 05/05/17 Petitioner was diagnosed with an inguinal hernia. Over the period of more than a year, Petitioner fought to have his debilitating and painful injury treated through the BOP administrative remedy process but was denied at every stage, to include the BOP Central Office in Washington DC who asserted that hernia repair surgery was "elective". Based upon the lengthy delays in treatment, Petitioner's hernia continued to tear, eventually causing him to have to push his intestines back in when he went to bed at night in order to ensure that it did not become strangulated while he slept.

(RB - Exhibit O) As the High Court is likely aware, a strangulated hernia can cause serious health care issues, to include death e.g., As below, Ft Dix inmate Harvey Pluff died from a strangulated abdominal hernia that went untreated. On 06/18/18, after more than a year of painful suffering, Petitioner was finally taken out for hernia repair surgery.

7) As was cited in Petitioner's Initial Brief, Petitioner has a history of cancer. (IB *4) and (RB - Exhibit Q) Ft Dix medical is aware that Petitioner has approximately (10) cysts that have yet to be biopsied to determine if they are cancerous. (IB *4)

8) On the morning of 12/04/24 Petitioner noticed that much of his left eye appeared severely bruised. Petitioner went to FT Dix medical for treatment. Upon arrival Ms. Hills advised Petitioner to come back later as they had just done a recall of inmates back to their housing unit due to a staff event that afternoon. Ms. Hill advised Petitioner to return later while presumably knowing that medical staff would not be returning to work. Ms. Hills refused to even do a cursory exam of Petitioner's eye. Shortly after lunch Petitioner showed his eye to the housing officer who attempted to contact medical by phone and twice on the radio. Medical never responded, prompting the Officer to say, "I hope no one dies." Shortly thereafter, Petitioner reached out to the Associate Warden (AW) for help but was met with no response. On the morning of 12/05/24 Petitioner again went to medical and was met by Ms. Halls. Petitioner advised her of the extensive health care issues with his eyes but Ms. Hills seemed unmoved, telling Petitioner to return tomorrow as they were seeing a quarantine unit

that day. Petitioner again sent a staff message to the AW which was once again met with silence. (See Appendix AB) On 12/06/24 Petitioner again went to sick call a third time and was finally examined by medical staff who diagnosed Petitioner with an acute subconjunctival hemorrhage of the left eye. Medical advised that the condition needed to be monitored closely and that Petitioner should return on 12/10/24.

Former Inmate Harvey Pluff, 49499-179 (Deceased 10/29/19)

On 10/28/19, Harvey Pluff collapsed on the compound as he was returning from his job at the Ft Dix dining facility. His collapse is reportedly the result of a strangulated abdominal hernia which went untreated for several years. Mr. Pluff was taken to a nearby hospital where he was pronounced dead. (IB *7), (RB *7) and (en banc *7)

Former Inmate James Byrne, 94319-004 (Deceased 01/13/23)

Sometime in 2022, James Byrne was diagnosed with kidney cancer at the age of 82. Early one morning after the breakfast meal was served at Ft Dix, Mr. Byrne was called to the Lieutenant's Office at which time staff advised him that he was going out for surgery. Mr. Byrne advised them that he had eaten breakfast that morning as he was unaware of the impending surgery. The on-duty Lieutenant reportedly advised the escorts to go ahead and take him to the hospital regardless, allowing the surgeons to decide whether they wanted to operate. Upon questioning by pre-op hospital staff relative to eating and recent use of prescribed medications, the surgeons refused to operate and sent Mr. Byrne back to Ft Dix. (One has to wonder what the BOP was needlessly charged when they

abruptly cancelled professional services of multiple surgeons, anesthesiologists, surgical nurses and other hospital staff.) Several weeks later Mr. Byrne was sent to the Special Housing Unit (SHU) which is customary before going out for surgery. This allows for certain medications to be stopped and prevents inmates from eating or drinking. Mr. Byrne went to the hospital the next morning as scheduled at which time he underwent removal of his entire kidney. Almost immediately following a highly invasive surgery, Mr. Byrne was returned to his housing unit at Ft Dix where he would receive no post-op care or treatment. After approximately (3) weeks passed, it was no surprise that Mr. Byrne's wound would become infected and the incision open up. Ft Dix "medical" was now forced to treat Mr. Byrne and provide him with antibiotics to stop the infection. Several months later, at the age of 83, James Byrne was dead. (IB *7), (RB *7) and (en banc *7)

Former Inmate Edwin Browning, 91990-053 (Deceased 10/20/24)

Not as much is known about Mr. Browning other than it is reported that he had cancer that went untreated by Ft Dix medical staff and he was eventually overcome by the disease and died.

The above instances of deliberate indifference are certainly not exhaustive as Petitioner is not aware of the full scope of the events at Ft Dix or across the Bureau of Prisons.

In Petitioner's case however, he was callously left to navigate a federal prison blind for more than (29) months instead of restoring his sight through a routine surgery that takes approximately 15 to 20 minutes; was rendered temporarily blind once more through botched post-op medical care; needless endured excruciating pain from an untreated inguinal hernia for more than a

year; and now, Petitioner is losing his sight due to a lack of treatment for glaucoma that was diagnosed more than (6) years ago. As was also cited, some have even lost their very lives due to the deliberate indifference to medical care of those who have been forced into the care of the Federal Bureau of Prisons. One would be hard pressed to characterize their purposeful neglect as anything less than deliberate indifference; inflicting a punishment never handed down by a federal court or one that is allowed for under the 8th Amendment to the United States Constitution. And sadly, the deliberate indifference extends up the chain of command, all the way to the U.S. Department of Justice, Office of the Inspector General (OIG). In a letter to the OIG of 02/23/22, Petitioner expressed deep concerns over the lack of adequate medical care being provided at Ft Dix. Nearly (3) years have passed and the Department of Justice has yet to answer or to even acknowledge receipt of the complaint. (RB - Exhibit P) Perhaps that is why the lower chamber of Congress passed a bill to create an independent oversight of the Bureau of Prisons, H.R. 3019. Or, as cited above, a proposed bill in the upper chamber, S. 5394, requiring federal prisons to obtain or provide immediate medical attention to individuals in custody.

Given the above, it is asserted that Petitioner has met the objective component of deliberate indifference as the deprivation was sufficiently serious to pose a risk of serious harm to Petitioner and others confined at Ft Dix. Petitioner would also argue that likewise, he has met the subjective component of deliberate indifference as Ft Dix medical staff knowingly and willfully disregarded inmate health and safety.

- 3) Whether the Petitioner was unfairly prejudiced by false and unsupported claims ab initio, thereby depriving Petitioner of a fair and impartial assessment of 18 U.S.C. § 3553(a) factors as they relate to a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A).

Relevant Job History of Petitioner

- Special Agent, USAF, counterintelligence support for the Air Force ground launch cruise missile program. (See Appendix AC)
- Intelligence Analyst, Military Intelligence, honor graduate from AIT training. (See Appendix AD)
- Managed U.S. State Department terrorist name check system.
- Program Director and Counterintelligence Officer for a U.S. Intelligence Agency. (See Appendix AE)
- Recurring member of CIA's Counterintelligence Center (CIC) working group, implementing countermeasures for the monitoring of cleared staff within the U.S. Intelligence Community.
- Director of Cyber Security for a federal agency of the United States government. (See Appendix AF)
- Appointed by the Chairman of the Federal Communications Commission to serve as a voting member of the FCC's Communications Security, Reliability and Interoperability Council.
- Provided counterintelligence support to the FBI regarding China, Russia and other foreign adversaries.
- Top Secret National Security clearance with SCI and "Q" access to nuclear weapons data, with counterintelligence polygraph.
- Achieved (16) industry recognized Information Technology certifications which led to the sentencing court issuing the below statement:

"Mr. Defoggi is a very intelligent person. And he's a person with very high levels of computer skills. Perhaps he's among a handful of people in the country who have such high levels of computer skills and such knowledge of the TOR network, also known as the Onion Router."

Judge Laurie Smith Camp (Deceased)
Sentencing Transcript, Page 30, Lines 19-24

Note: Petitioner's job history is intended to assist the High Court in placing some actions by the U.S. District Court and that of the U.S. government in proper perspective. And as a reminder, Petitioner was falsely convicted of (3) crimes at trial, later overturned on appeal. Petitioner's only remaining crimes are (4) counts, or (11) clicks, constituting "access with intent to view child pornography" which resulted in a sentence of (25) years in federal prison; (13) of which have already been served.

Opinion of the 8th Circuit: Utter silence from both the panel and en banc reviews; no opinion offered.

Opinion of the Government (Response Brief *11 and *24 respectively): "Instead of accepting responsibility for the offense, he laid the blame on his adopted son (Tr. Sent at 12-13)" and, "Although Defoggi [Petitioner] now argues he has been rehabilitated while incarcerated, he has failed to ever show remorse or to take responsibility for his egregious conduct further showing his dangerousness to society."

In referencing an acquittee being wrongfully detained by the State of Louisiana, the U.S. Supreme Court stated, "[I]f such persons are not mentally ill but do not prove that they would not be dangerous to others, violates the due process clause of the Federal Constitution's Fourteenth Amendment."

Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780 (1992)

and,

"Requiring an insanity acquittee to prove both a lack of present mental illness and dangerousness, is clearly contrary to Foucha, and violates the substantive protections of the Due Process Clause as defined by the Supreme Court."

Revels v. United States, 519 F. 3d 734 (8th Cir. 2008)

At the very core of this case is the Government's misplaced assertion that Petitioner is uniquely dangerous; that based solely on "fantasy" comments attributed to him yet ones that never posed a real or credible threat to anyone. (See "fantasy" comments held as protected speech in Jacobson v. United States, 118 L Ed 2d 174, 112 S. Ct. 1535 (1992)), also out of the 8th Circuit. As in Foucha and the 8th Circuit's own ruling in Revels, the onus is on the

Government to prove their assertion of "dangerousness" beyond that of pure conjecture; anything else is a clear violation of the 5th and 6th Amendments to the U.S. Constitution.

The well established science behind the First Step Act's Needs Assessment and the Department of Justice's PATTERN predictive tool are in direct conflict with the narrative offered by the Government. Petitioner's First Step Act Needs Assessment shows no anger/hostility issues, no antisocial peers behavior and no mental health concerns. (See IB - Exhibit F) Likewise, the Department of Justice's PATTERN predictive tool assesses Petitioner as a "Minimal" risk of reoffending once released back into the community. (See IB - Exhibit G) PATTERN scores run from (109) at the greatest risk of recidivism down to (-22) at the least risk of reoffending. Petitioner's score has been consistently rated at (-19), indicating an almost non-existent threat of reoffending.

It is under this backdrop that Petitioner will argue his case for unfair prejudice ab initio, as raised earlier within his Initial Brief, pages 13-19; his Reply-Brief, pages 11-13; and within his en banc before the 8th Circuit, pages 13-16.

Foundation for Argument of Unfair Prejudice

Petitioner's Adopted Son, Christopher Casto: Petitioner originally met Chris and his biological family while working at the U.S. Treasury in Parkerburg, WV. Chris was 10 years of age at the time and was residing with his mother and two siblings. Chris was born with a cleft pallet which his mother had chosen to ignore even though the birth defect could have been corrected as an infant, and at no cost to his mother as she relied almost exclusively on public

assistance. When Chris was approximately (14) years of age, Petitioner sought and was granted guardianship of Chris at which time Petitioner placed Chris on his health insurance. Soon thereafter, Petitioner proceeded to the first step in the reconstruction process by scheduling him for a bone graft so that he could develop teeth. The bone graft was completed as proscribed. On the morning that Chris was scheduled for his plastic surgery, Chris' mother refused to allow him to go. Over the next several months, Petitioner engaged in multiple discussions with Chris' mother and grandparents wherein they finally relented and agreed to allow Chris to obtain the much needed surgery. Between the ages of 10 and 16, Chris would spend weekends or summers with Petitioner and Mr. Bounds. In 2006, at the age of 17, Chris moved in with Petitioner, and at the age of 18, Petitioner legally adopted Chris. Chris remained with Petitioner and Mr. Bounds through the date that Petitioner was arrested for the clicking of (11) links constituting "access with intent to view child pornography".

Support for Argument of Unfair Prejudice

1) Assignment and use of IP addresses: In 2013 when this case was first prosecuted, the common protocol for connecting computers across the internet was Internet Protocol (IP) version 4, or commonly referred to as "IPv4". This early version of IP addressing was only capable of interconnecting 4,294,967,296 devices worldwide. In order to overcome this growing shortage of unique IP addresses, Internet Service Providers (ISPs), government agencies and the private sector alike overcame the rapidly dwindling address problem by utilizing what is known as private

address space. A router in a business or home had a single unique IP address that would communicate across the internet but each computer inside the home or business would utilize a private address that was NOT unique across the globe. For instance, the U.S. State Department may have a single unique IP address for communicating across the globe but several thousand computers inside the Department of State would be assigned private addresses, perhaps using a private address such as 192.168.0.48.

As was established at trial and as attested to by Petitioner under sworn testimony, the internet activity that was the impetus of the criminal investigation was traced back to Petitioner's residence alone and not to Petitioner himself. However, the government tried to infer that since the internet account was in Petitioner's name, he must therefore be the one 'behind the computer'. Petitioner resided with Christopher Casto and Dale Bounds. (See testimony of FBI SA Gordon TR. T. P. 133 L. 12-25) and (Petitioner sworn testimony TR. T. P. 648 L. 4 - P. 649 L. 7)

2) Execution of Search Warrant: Upon execution of a search warrant of Petitioner's home, Supervisory Special Agent Michael Mizer stated that he was the first in after the basement door was breached by Detective Smith. (TR. T. P. 330) Mizer stated that upon entry, he observed a white male in light colored underwear heading up the stairs at which time he yelled, "We've got someone coming upstairs!" (TR. T. P. 332) This verbal warning was overheard and corroborated by Special Agent Patricia Teakle. (TR. T. P. 316) This is highly relevant as Petitioner typically had to search for his shared laptop each morning so that he could access his government email before leaving for work.

3) In a statement provided to the FBI by Christopher Casto, Petitioner's son acknowledged that he was the owner and primary user of an eMachine desktop computer located in the basement of the home. (See IB - Exhibit D) and (Appendix AG)

4) Occupancy of Basement in Petitioner's Home: As Jimmy "Dale" Bounds asserted before a Grand Jury and as he stated in his sworn affidavit, Christopher Casto was the sole occupant of the basement of the home where Petitioner, Casto and Bounds resided. Petitioner and Mr. Bounds rarely entered that area of the home as it was Casto's private living space. (See RB - Exhibit R) and (Appendix AH)

5) In a forensic letter filed with the USDC (14) days ahead of Petitioner's initial sentencing (See ECF No. 275, Exhibit 9), the defense forensic examiner stated, "The eMachine file creation dates for much of the pornographic content were apparently created during times that Defoggi [Petitioner] was likely at work." and, "The eMachines computer had much of the CP [child pornography] and child erotica images placed there because it was backing up an IOS device such as iPhone." Casto was the admitted owner/user of the eMachine computer and the only one in the home that owned an Apple device; he owned both an iPhone and iPad tablet. (See IB - Exhibit E) and (Appendix AI) The controverted claims were never addressed by the court as required under F.R.Crim.P. Rule 32(i)(3)(B).

6) During Petitioner's trial, FBI forensic examiner, Mr. Hsu confirmed that child pronography and child erotica were found on Chris Casto's eMachine computer. (TR. T. P. 490 L. 17 - P. 494 L. 17)

Unfair Prejudice Resulting in Plain Error

1) Denial of Right to Classified Testimony: On or about 12/16/13 Petitioner submitted a notice letter to the court wherein he asserted a need to present classified testimony at trial. This included a partial list of intelligence programs created by or directly supported by Petitioner. (See Appendix AJ) On 07/24/14 a hearing was held before Magistrate Judge Thomas Thalken in order to determine the needs and requirements associated with the the release of classified information as governed by the Classified Information Procedures Act (CIPA). Following consideration of arguments, the court decided to defer its decision of the use of classified testimony to the currently assigned trial judge, Joseph Bataillon. The court placed the government on notice to be prepared in the event that release of classified information was afforded under CIPA guidelines. On the morning of the first day of trial, Petitioner made a formal request to invoke his right to provide classified testimony in his defense. After speaking to the trial judge, defense counsel stated that Judge Laurie Smith Camp denied Petitioner's request as she claimed not to know anything about it. A denial of Petitioner's right to provide classified testimony in his defense requires dismissal of the indictment under 18 U.S.C. § App. 6(e)(2), US v. Moussaoui, 382 F. 3d 253, 2004 US App. LEXIS 19770 (4th Cir. 2004), and as is allowed for under Plain Error review pursuant to F.R.Crim.P. Rule 52(b). (See also JCP 08-20-90021)

2) Unfair Prejudice in Voir Dire Process, F.R.Crim.P. Rule 24:

a) Seating of prejudicial juror: During the voir dire

process, an admittedly biased juror was seated despite defense counsel's use of a removal for cause. (TR. T. P. 49 L. 6 - P. 50 L. 7)

Mr. Berry [CJA]: "Does anyone think they can't presume Mr. Defoggi [Petitioner] innocent?"

Ms. Cramer [Prospective Juror]: "...child pornography is so despicable that I think it would be hard -- you'd have to really prove it to me that he was innocent."

Mr. Berry: "If Mr. Defoggi does not testify and the government does not meet its burden, can you still find Mr. Defoggi not guilty?"

Ms. Cramer: "I believe I could but it would be difficult."

Despite Ms. Cramer's assertion that she would have great difficulty in being objective, Judge Smith Camp seated Ms. Cramer as a juror after earlier agreeing to have her removed for cause. (TR. T. P. 50 L. 2-3) The court's prejudicial action is reversible under Plain Error review. (See also JCP 08-20-90021)

b) Petitioner Denied Jury of His Peers: Petitioner was denied his Constitutional right to a jury of his peers when each of the prospective jurors with an appreciable knowledge of modern-day technology were methodically and systematically removed from the jury pool through the voir dire process. Too, none were from Petitioner's home district of Maryland where the clicking of links actually occurred.

The Court [Judge Smith Camp]: "Have any of you had special training in computers, internet, chat rooms, file sharing -- that's fine. I'm asking a broad question about computer-savvy people here in the courtroom." (TR. T. P. 18 L. 11-14)

and,

The Court: "All of those who answered that question talked about special training they had or special expertise they had related to their work. Does anyone else here engage in chats - internet chats on chat rooms or file sharing activities?" (TR. T. P. 20 L. 1-5)

Due to the complexity and nature of the case, only those prospective jurors cited within Appendix AK had the requisite knowledge, skills and experience to render a fair and impartial decision as to Petitioner's guilt or innocence. It is asserted that the Court knowingly allowed for each to be peremptorally challenged and removed, leaving only the most computer illiterate to remain on the jury. It is asserted that the court's prejudicial action is reversible under Plain Error review. (See also JCP 08-20-90021)

3) Images not Constituting a Crime: As has been held in other child pornography cases, an evidentiary hearing should have been held as a pre-trial matter. It has been opined by the Eighth Circuit that "The District Court should make a preliminary review of whether materials offered by the government depict sexually explicit conduct as a matter of law, to avoid the potential prejudice of submitting to the jury a large volume of prurient materials that could not properly be found to be child pornography." US v. Kain, 589 F. 3d 945 (8th Cir. 2009)

It is asserted that (5) or more of the (11) clicks constituting access with intent to view child pornography failed to meet the legal standard for child pornography as described in 18 U.S.C. §

2256(8)(B). (See Appendix AL) Failure to conduct a pre-trial evidentiary hearing not only resulted in the potential for wrongful convictions for images constituting counts 4-7 but also unfairly prejudiced Petitioner, supporting the government's claim that he had greater culpability with regard to the Pedobook website. It is asserted that the court's prejudicial action is reversible under Plain Error review.

4) Unsupported Enhancements at Sentencing:

As required under USSG § 6A1.3(b): "The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P." As cited below, controverted claims were never heard by the court.

a) In a statement to the FBI, Christopher Casto acknowledged ownership of the eMachine computer located in the basement living area of Petitioner's home. (IB - Exhibit D) and (Appendix AG)

b) In an affidavit by Dale Bounds, Chris Casto was the sole occupant of the basement living space within the home. It was also attested to that the eMachine computer located in Casto's room was there for his exclusive use. (RB - Exhibit R) and (Appendix AH)

c) As cited within a forensic letter filed with the court (14) days ahead of Petitioner's initial sentencing hearing, "The eMachine file creation dates for much of the pornographic content were apparently created during times that Defoggi was likely at work." [emphasis added] and, "The eMachines computer had much of the CP [child pornography] and child erotica images placed there because it was backing up an IOS device such as an iPhone." Chris Casto was the only occupant of the home with an IOS device. (IB -Exhibit E) and (Appendix AI)

d) Per the FBI forensic report, a thumb drive containing child pornography was found in Chris Casto's room in the basement.

e) Based upon the child pornography found on Chris Casto's computer AND on the thumb drive found in Chris Casto's room, Petitioner was wrongly assessed (9) points of enhancements, raising his offense level from (22) to (31).

f) On the morning of Petitioner's resentencing on remand, Petitioner's counsel did not receive a copy of the Presentence Investigation Report (PSR) until approximately (2) hours prior to sentencing and was therefore unable to review the impactful changes or to allow for Petitioner to submit appropriate comments or concerns as required under F.R.Crim.P. Rule 32(e)(2). (See Resentencing T. P. 5 L. 6 - 16) Defense Counsel also renewed his objections from the initial sentencing, which would include the forensic letter filed as ECF No. 275. The court summarily denied Petitioner's objections, contravening requirements under USSG § 6A1.3. (See RS. T. P. 8 L. 15-22)

Both narratives can not be true. Either the forensic report is wrong OR AUSAs Keith Becker, Sarah Chang and Michael Norris (retired 06/30/23) engaged in egregious conduct, prejudicing Petitioner before the Court. Petitioner asks the High Court to take Judicial Notice of the above factual evidence under F.R.E. Rule 201 as they demonstrate unfair prejudice ab initio. Petitioner need not remind the High Court that he was falsely convicted of at least (3) very serious crimes and yet, the Government has yet to accept responsibility for their actions nor have they shown remorse to Petitioner or his family. It is asserted that unfair and prejudicial actions are reversible through Plain Error review.

5) And lastly, but perhaps the most subversive and egregious acts thus far, the government not only tried Petitioner outside the District of Maryland where the crime occurred in violation of Article III of the U.S. Constitution and as guided by F.R.Crim.P. Rule 18 but willfully and purposefully pursued a trial strategy of unfair prejudice. Even the 8th Circuit acknowledged venue as Maryland versus Nebraska when overturning a conviction, stating, "But we do not understand how the single act of accessing an image with the intent to view it by clicking on it alone from behind one's computer screen can be done 'in concert with' anyone else." The government repeatedly violated F.R.E. Rule 403 when they methodically and intentionally inflamed the emotions of the jury by attributing an online user name "fuckchrist" (hereafter "FC") to Petitioner; a name that was never attributed directly to Petitioner i.e., no one personally observed anyone using that name. While Petitioner's trial lasted (4)+ days, the government used the inflammatory AKA one-hundred six times (106), (7) of which were used in closing arguments in an apparent effort to elicit emotions so that guilt or innocence would not be based upon evidence alone. It should be noted that even judge Smith Camp used the AKA on (4) separate occasions. Petitioner can find NO probative value in the repeated use of the "FC" online username. Inflammatory attributions such as these can be so emotionally charged that it can divert a jury's attention from material issues. (See United States v. Fawbush, 634 F. 3d 420, 2011 U.S. App. LEXIS 2325 (8th Cir. 2011)(See also U.S. v. Miller, 688 F. 3d 322, 2012 U.S. App. LEXIS 15523 (7th Cir. 2012))

It is asserted that this Plain Error can only be remedied through a retrial as allowed for under F.R.Crim.P. Rule 33.


Under 28 U.S.C. § 1746, I Timothy R. Defoggi swear or affirm that the foregoing statements are true and correct to the best of my knowledge and belief.

CONCLUSION

No one could argue that the government hasn't asserted that Petitioner poses some unique threat to the community (ad nauseam)² and yet, they have never shown any empirical evidence or offered a psychological assessment in support of their claims. Petitioner would remind the High Court that he was falsely convicted of (3) imaginary crimes at trial. As such, Petitioner asks the High Court for a de novo review based upon the facts presented herein.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date:

12/16/24