24-6687

No. 24-3631

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JASON JAYAVARMAN — 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 NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JASON JAYAVARMAN
(Your Name)
FEDERAL CORRECTIONAL INSTITUTION
TERMINAL ISLAND
(Address)
1299 South Seaside Avenue
Terminal Island, California 90731
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Is indictment duplicitous when it charges two or more offenses in a single count?

2. Does Federal Rule of Criminal Procedure 8(a) prohibit the charging of multiple offenses in one count?

3. does district court violate Rule 8(a) of the Federal Rules of Criminal Procedure when it knowingly divided Count One of the indictment into two separate sub-counts or charges?

4. Do offenses of production and attempted production of child pornography pursuant to 18 U.S.C. §§2251(c) and (e) require an act of traveling in foreign commerce for the purpose of committing the alleged crimes?

5. Do the words "and" and "or" have different meanings (especially when they are tucked into different clauses of federal statute or indictment)?

6. Does the district court make an error of law when it improperly applied AEDPA's statute of limitations?

7. Is the district court's error of law a "mistake" under Federal Rule of Civil Procedure 60(b)(1)?

8. Does the district court issue a final judgment when it denied a Rule 60 (b)(1) motion without resolving a claim of statutory error?

9. Is trial counsel ineffective when he failed to object to the duplicitous indictment and to the jury charge allowing submission of two charges in Count One to the jury?

10. Is trial counsel ineffective when he failed to communicate a government's formal plea offer prior to the offer's expiration?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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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

[x] reported at 871 F.3d 1050 (9th Cir. 2017); 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 C to the petition and is

[x] reported at 2014 U.S. Dist. LEXIS 167421 (Alaska); 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

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

The date on which the United States Court of Appeals decided my case was September 30, 2024.

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

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 6, 2024, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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

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CONSTITUTIONAL PROVISIONS

RULES

OTHER

STATEMENT OF THE CASE

Jason Jayavarman ("Jayavarman") is a federal prisoner proceeding pro se. After federal court for the District of Alaska denied his timely habeas application, Jayavarman filed a timely motion under Federal Rule of Civil Procedure 59(e), which asked the district court to rectify its own mistake and to reopen his section 2255 motion (Dkt 378). Jayavarman's claim that the court erred in applying AEDPA's statute of limitations was properly brought under Federal Rule of Civil Procedure 60(b)(1), which the court denied without resolving the underlying substantive claim. Because the district court failed to rule on the claim of statutory error, it never issued a final judgment on Jayavarman's §2255 habeas motion in this case. (Dkt 379). The district court therefore violated and/or denied his statutory rights to due process under the 5th and 6th Amendments to the U.S. Constitution. In support thereof, Jayavarman offers the following:

I. FACTS OF THE CASE AND RELEVANT HISTORY

On August 14, 2013, Jayavarman was arrested and taken into custody of Anchorage Correctional Complex ("prison").

On August 16, 2013, Jayavarman was visited by Messrs. Rex Butler and Vikram Chaobal, who introduced themselves to him as attorneys ("counsel" or "trial counsel"). During this visit, the counsel told Jayavarman that they saw the news about his arrest and wondered if he had an attorney and that they wanted to help. Thereafter, Jayavarman agreed to hire them to represent him in court. Of the two, Mr. Butler was the lead counsel.

On August 23, 2013, a federal grand jury sitting in the District of Alaska returned a six-count indictment which charged Jayavarman as follows:

Count 1 - Production of Child Pornography, in violation of 18 U.S.C. §§2251(a) and (e);

Count 2 - Transportation of Child Pornography, in violation of 18 U.S.C. §§2252A(a)(1) and (b)(1);

Count 3 - Possession of Child Pornography, in violation of 18 U.S.C. §§2252(A)(a)(5)(B) and (b)(2);

Count 4 - Engaging in Illicit Sexual Conduct in a Foreign Place, in violation of 18 U.S.C. §2423(c);

Count 5 - Travel with Intent to Engage in Illicit Sexual Conduct, in violation of 18 U.S.C. §2423(b); and

Count 6 - Travel with Intent to Engage in Illicit Sexual Conduct, in violation of 18 U.S.C. §§2423(b) and (e). (Dkt 12).

A Superseding Indictment was returned on September 17, 2014. (Dkt 75). The Superseding Indictment now charged Jayavarman in two counts: Count One - Production and Attempted Production of Child Pornography, in violation of 18 U.S.C. §§2251(c) and (e); and Count Two - Attempted to Travel with Intent to Engage in Sexual Conduct, in violation of 18 U.S.C. §§2423(b) and (e). Id.

After the return of the Superseding Indictment, Jayavarman moved to dismiss the charges on the basis that Jayavarman did not take a substantial step toward completing the alleged crimes (Dkt 85). The Government filed its response in opposition on October 21, 2014 (Dkt 96). A final Report and Recommendation on Jayavarman's motion to dismiss was issued on November 24, 2014 (Dkt 99). On December 2, 2014, the district court accepted the Report and Recommendation and denied the motion to dismiss (Dkt 100).

Thereafter, the Government filed its First Motion in Limine (Dkt 101); Second Motion in Limine and Notice Regarding Anticipated Introduction of Rule

404(b) Evidence (Dkt 104). The district court issued its rulings on the Government's pre-trial motions on March 16, 2015 (Dkt 118). The court granted the Government's first motion in limine in part, granted the Government's second motion in limine, and denied the supplemental motion in limine without prejudice to renew at trial outside the presence of the jury.

Jury selection began on March 16, 2015. The Government's case-in-chief followed on March 17, 2015. The parties gave their respective closing arguments and the court provided the jury with its instructions. The jury instructions and verdict form split each of the two counts of the Superseding Indictment into two sub-counts. Count One contained sub-counts 1A and 1B, and Count Two contained sub-counts 2A and 2B. Sub-count 1A charged Jayavarman with sexual exploitation of a child, in violation of 18 U.S.C. §§2251(c) and (e); sub-count 1B charged attempted sexual exploitation of a child, in violation of 18 U.S.C. §§2251(c) and (e); sub-count 2A charged attempted travel with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. §§2423(b) and (e); and sub-count 2B charged attempting to aid and abet another person's travel with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. §§2423(b) and (e). The jury found Jayavarman guilty on sub-counts 1B and 2B and did not reach a unanimous decision on sub-counts 1A and 2A (Dkt 130).

Following the jury's verdict, Jayavarman filed a number of post-trial motions including a motion to dismiss, motion for judgment of acquittal, and motion for a new trial (Dkt 131); a renewal of motions for judgment of acquittal (Dkts 144 and 145); a request for oral argument (Dkt 146); a motion to arrest judgment (Dkt 148); a second motion to dismiss, motion for judgment of acquittal, and motion for a new trial (Dkt 160); a motion to reconsider the

denial of the aforementioned post-trial motions (Dkt 200); and another renewal of motion for judgment of acquittal (Dkt 226).

On March 24, 2016, Jayavarman was sentenced to a total term of 216 months imprisonment on each count, to be served concurrently, followed by a life term of supervised release. (Dkt 234). Jayavarman appealed his conviction (Dkt 241).

On appeal, Jayavarman argued that: (1) an offense of sexual exploitation of a child pursuant to 18 U.S.C. §§2251(c)(1) and (2)(B) requires an actual minor; (2) the jury was improperly instructed on the elements of Count One; (3) the district court constructively amended both counts of the Indictment; (4) Sections 2251(c)(1) and (2)(B) are unconstitutional; (5) there was not sufficient evidence to convict on either count; and (6) prior bad acts evidence was admitted over objection and prejudiced Jayavarman. On September 26, 2017, the Ninth Circuit Court of Appeals issued its opinion vacating his conviction on Count 2B and remanding for resentencing on Count 1B. See, e.g., United States v. Jayavarman, 871 F.3d 1050 (9th Cir. 2017).

On remand, Jayavarman filed numerous pleadings including a motion for a new trial (Dkt 264), objections to mandatory minimum sentencing and to the revised Presentence Investigation Report (Dkts 265 & 269), a motion to reconsider the denial of Dockets 264 & 265 (Dkt 286). All of Jayavarman's motions were denied, and the court sentenced Jayavarman to a term of 204 months on Count One of the Superseding Indictment at re-sentencing. (Dkt 299). Again, Jayavarman appealed; however, on October 16, 2018, his appeal was voluntarily dismissed. United States v. Jayavarman, No. 18-30131.

Thereafter, Jayavarman filed a timely Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255 on October 7, 2019. (Dkt 317).

Jayavarman raised two claims of ineffective assistance of counsel in his §2255 motion. First, Jayavarman alleged that trial counsel was ineffective for failing to communicate a formal plea offer to him prior to the offer's expiration. Id. at 8. Second, Jayavarman argued that trial counsel was ineffective for failing to object to the duplicitous Superseding Indictment and for failing to object to the jury charge allowing conviction on sub-counts of the Indictment. Id. at 12.

On May 1, 2020, the Government in its response to Jayavarman's §2255 motion rejected his indictment duplicity and legal insufficiency arguments. The Government then asserted that trial counsel had conveyed the formal plea offer to Jayavarman in a timely manner, but it provided neither the means of conveyance, either by letter or in person, nor any specific dates on which the offer had been presented to him, nor did the Government provide any records evidencing that the offer had been conveyed but rejected by him. (Dkt 328).

On May 22, 2020, in his reply to the Government's response, Jayavarman maintained that trial counsel never communicated the plea offer to him prior to its expiration (Dkt 329). Further, Jayavarman contended that trial counsel did not visit him at the prison in the entire year of 2014. Id. at 8. Therefore, Jayavarman moved for a limited discovery and an order of the production of the prison official records of trial counsel's entries for the year of 2014. Id.

On September 22, 2020, the district court entered an order (Dkt 334) denying Jayavarman's second §2255 claim of ineffective assistance of counsel, but granting his first §2255 claim in its order setting an evidentiary hearing. The discovery request resulted in the production of two prison visit logs which were used as exhibits during the evidentiary hearing. These logs showed that

trial counsel had recorded his entries and signed in to the prison 38 times visiting other prisoners throughout 2014, but there was no official record of his entry for Jayavarman in the course of the year.

On November 13, 2020, at the evidentiary hearing, trial counsel testified that he had visited and discussed the formal plea offer with Jayavarman at the prison several times throughout 2014; and he further stated that the logs did not show his presence during this time because he would often conduct his visits at night, during which he was not required to record his entries (Dkt 346, P. 39). However, the prison records did show times when he was required to record his official entries during his night visits. It is wholly incredible that, during the time when the plea offer was extended, the counsel would have visited Jayavarman and not signed in to the Attorney Visitation Logs at the prison. Further, other courts have found that such contradictions between attorney testimony and prison visit logs create a credibility issue. See, e.g., Day v. United States, No. 1:07-cv-768, 2008 WL 2397664, at *6 (W.D. Mich. June 10, 2008)(noting that attorney's testimony that he presented defendant with plea agreement on a specific date was undermined by evidence of the prison logs).

Moreover, trial counsel did not provide any other evidence, such as a letter, time logs, or even notes that would indicate that he communicated the Government's plea offer to Jayavarman.

On January 26, 2021, the district court entered an order (Dkt 347) denying his first §2255 claim, finding trial counsel's testimony credible. Id.

On March 22, 2021, Jayavarman appealed to the United States Court of appeals for the Ninth Circuit for a certificate of appealability ("COA").

On November 16, 2021, the Ninth Circuit issued an order (Dkt 21-35207) denying Jayavarman's request for a COA. Therefore, Jayavarman's judgment of conviction became final on November 16, 2021, one year from which would be November 16, 2022.

II. THE DISTRICT COURT MADE AN ERROR OF LAW IN APPLYING AEDPA'S STATUTE OF LIMITATIONS

On October 6, 2022, Jayavarman filed his timely pro se motion for relief under Federal Rules of Civil Procedure 60(b)(2) and (3) with the district court (Dkts 352 and 353).

On November 28, 2022, the district court entered an order (Dkt 355) finding Jayavarman's timely filed motion time-barred and denied the motion, and the court did not notify Jayavarman of the denial until June 29, 2023. The district court in its denial stated that, "But relief under that subsection must be sought within one year from the entry of judgment. Here, the court entered its judgment on January 2021; Mr. Jayavarman did not file his motion until October 2022." Jayavarman submits that this finding of the district court was erroneous, that the court improperly applied the federal statute of limitations, and that it did not follow the legal standards and/or controlling precedents. Pursuant to 28 U.S.C. §2255(f)(1), Jayavarman's Rule 60(b) motion was indeed timely because he filed it on October 6, 2022, before the November 16, 2022 deadline. With the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), which was signed into law on April 24, 1996, and which changed the longstanding provisions of the federal habeas corpus statute, the AEDPA established a one-year period of limitations for the filing of habeas corpus petitions - that is, the petition's limitations period runs from the

date on which the judgment of conviction and sentence became final upon the completion of appellate review. United States v. LaFromboise, 427 F.3d 680, 683 (9th Cir. 2005)("the judgment does not become final, and the [§2255] statute of limitations does not begin to run, until the district court has entered an amended judgment, and the time for appealing that judgment has passed.").

III. THE DISTRICT COURT'S ERROR OF LAW IS THE "MISTAKE" UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(1)

In Kemp v. United States, 142 S. Ct. 1856, 1860, 1862 n.2, 1865 (2022), the Supreme Court ruled that, ("Federal Rule of Civil Procedure 60(b)(1) allows a party to seek relief from a final judgment based on, among other things, a 'mistake.' The question presented is whether the term 'mistake' includes a judge's error of law. We conclude, based on the text, structure, and history of Rule 60(b), that a judge's errors of law are indeed "mistakes" under Rule 60(b)(1)."); Willis v. Jones, 329 Fed. Appx. at 14, 2009 U.S. LEXIS 10578, at *16-*17 (claim that district court misapplied AEDPA's statute of limitations was properly brought under Rule 60(b)(1): "We have 'recognized a claim of legal error as subsumed in the category of mistake under Rule 60(b)(1).'").

IV. THE DISTRICT COURT DENIED JAYAVARMAN'S HABEAS MOTION WITHOUT RESOLVING THE CLAIM OF CONSTITUTIONAL ERROR

In his Rule 59(e) motion, Jayavarman asked the district court to alter its judgment. consistent with the Rule's corrective purpose, Jayavarman urged the court to correct its manifest error of law, which is indeed the mistake under Rule 60(b)(1), and to resolve the substance of his claim in order for the court's judgment to be final and reviewable on appeal (Dkt 378). The district court denied the Rule 59(e) motion without ruling on or seeming to

recognize the underlying substantive claim. ... Because the district court failed to resolve the claim of constitutional error, it never issued a final judgment on Jayavarman's §2255 habeas motion. In accordance with the timeline for appealing a judgment after the denial of a Rule 59(e) motion, Jayavarman then filed a notice of appeal (along with a request for a COA) to challenge the district court's rejection of his habeas application (Dkt 379). But the Ninth Circuit denied the appeal, holding that the district court did not abuse its discretion (Dkt 24-3631).

28 U.S.C. §2253. See Browder v. Director, 434 U.S. 257, 265 (1978); see also United States v. Hayman, 342 U.S. 205, 209 (1952), Rule 11 of the Rules governing Section 2255 Proceedings for the United States District Courts (time for appeal of final order under 28 U.S.C. §2255 determined by Fed. R. App. P. 4(a)). See also Andrews v. United States, 373 U.S. 334, 340 (1963)("standard of finality to which the Court has adhered [in permitting appeals] in habeas corpus proceedings [is] no less exacting" than in other cases); see, e.g., Collins v. Miller, 252 U.S. 364, 365 (1920)(the Supreme Court generally "has jurisdiction on writ of error and appeal ... only from final judgments"; same "rule applies to habeas corpus proceedings"); Porter v. Zook, 803 F.3d 694, 695 (4th Cir. 2015)(appeal of denial of habeas corpus petition is dismissed because district court failed to resolve claim and accordingly "its decision was not a final order over which we have jurisdiction"); Puitatti v. McNeil, 626 F.3d 1283, 1307 (11th Cir. 2010), cert. denied, 564 U.S. 1046 (2011)(Clisby v. Jones rule that district court should "'resolve all claims for relief raised in a petition for writ of habeas corpus ... regardless [of] whether habeas relief is granted or denied'" "contain[s] no limitation or exception based on

why a district court ... [might believe it appropriate to leave] some claims unresolved"; district court thus erred in declining to reach the merits of Puitatti's penalty-phase claims on ground that district court's grant of relief on one claim mooted other claims); Long v. United States, 626 F.3d 1167 (11th Cir. 2010)(per curiam)(Clisby v. Jones rule applies not only to substantive claims for relief but also procedural issues, and thus district court erred in dismissing section 2255 motion as untimely without addressing petitioner's statutory tolling argument: "[I]n a post-conviction case, the district court must develop a record sufficient to facilitate our review of all issues pertinent to an application for a COA and, by extension, the ultimate merit of any issues for which a COA is granted. If the post-conviction motion or petition is dismissed as untimely, the district court must create a record that will facilitate meaningful appellate review of the correctness of the procedural ruling, the merit of the underlying substantive claims, or both, as required by Slack v. McDaniel, 529 U.S. 473, 484 (2000) ... . This will require the district court to resolve all claims the petitioner raises for tolling of the limitations period, regardless of whether those claims are denied or granted."); Ferrell v. United States, 343 Fed. Appx. 403, 404 2009 U.S. App. LEXIS 18858, at *2 (11th Cir. 2009)(per curiam)(extending Clisby, infra, to apply to section 2255 motions in addition to section 2254 petitions); Nunez v. Sec'y for the Dep't of Corr., 214 Fed. Appx. 927, 928-29, 2007 U.S. App. LEXIS 1312, at *2-*6 (11th Cir. Jan. 19, 2007)(per curiam)(vacating district court's denial of relief because district court failed to address one of petitioner's claims and therefore violated rule of Clisby v. Jones, infra; state's request that court of appeals decide unresolved claim on the merits in the first instance because the error was

harmless is rejected because "nothing in Clisby indicates the harmless-error analysis should apply where the district court has erred under Clisby and we have not so far required such"); Clisby v. Jones, 960 F.2d 925, 938 & n.17 (11th Cir. 1993)(en banc)(exercising supervisory authority to order district courts within the circuit to address all claims in habeas corpus petition notwithstanding grant of relief on one or more claims, and announcing that court of appeals "will vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims whenever the district court has not resolved all such claims"; Clisby v. Jones, 960 F.2d at 938 & n.17 ("The havoc a district court's failure to address all claims in a habeas petition may wreak in the federal and state court systems compels us to require all district courts to address all such claims."); Corcoran v. Levenhagen, 558 U.S. 1, 2 (2009)(per curiam)(in case in which "district court granted habeas corpus relief on Corcoran's claim of a Sixth Amendment violation" but "did not address" other claims because "they were 'rendered mooted'" by writ grant, 7th Circuit erred by reversing on 6th Amendment claim and remanding with "instructions to deny the writ" but "without mentioning" Corcoran's other claims: "Seventh Circuit should have permitted the district court to consider Corcoran's unresolved challenges ... on remand, or should have itself explained why such consideration was not necessary").

Ruling favorably on one claim in a typical multiple-claim civil complaint does not "end[] the litigation on the merits and leave[] nothing for the [district] court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945)(defining "final judgment"). The same is not true of the prisoner who loses on one of several claims. That prisoner will keep

litigating until she succeeds, thereby creating precisely the situation presumed by Civil Rule 54(b) and justifying the rule of Collins v. Miller, 252 U.S. 364 (1920), and Andrews v. United States, 373 U.S. 334 (1963), rendering partial-denial orders unappealable. See supra note 13 and accompanying text. So, too, the prisoner who raises multiple claims, only some of which are exhausted, is likely to keep pursuing the unexhausted claims if those claims are denied without prejudice on non-exhaustion grounds when the other claims are denied on the merits. Accordingly, the rule of Rose v. Lundy, 455 U.S. 509 (1982), requiring dismissal of petitions containing at least one unexhausted claim conserves judicial resources in a way that forbidding appeal from partial-grant orders does not.

Fed. R. Civ. P. 59(e). Banister v. Davis, 140 S. Ct. 1698, 1702-03 (2020)("Rule 59(e) applies in federal civil litigation generally. (Habeas proceedings, for those new to the area, are civil in nature. ...) The Rule enables a party to request that a district court reconsider a just-issued judgment. ... ¶ Rule 59(e) allows a litigant to file a 'motion to alter or amend a judgment.' ... The Rule gives a district court the chance 'to rectify its own mistakes in the period immediately following' its decision. ... In keeping with that corrective function, 'federal courts generally have [used] Rule 59(e) only' to 'reconsider[] matters properly encompassed in a decision on the merits.' ... In particular, courts will not address new arguments or evidence that the moving party could have raised before the decision issued. ... The motion is therefore tightly tied to the underlying judgment.").

Accordingly, Jayavarman's motion in the present case, which alleges that the district court misapplied the federal statute of limitations set out in §2244(d), fits this description.

V. THE SUPERSEDING INDICTMENT WAS DUPLICITOUS AS IT CHARGED MULTIPLE OFFENSES IN A SINGLE COUNT

Inclusion of two or more offenses in a single count is called "Duplicity" and is prohibited by Rule 8(a) of the Federal Rules of Criminal Procedure. Upon objection, the government must elect one offense on which to proceed. Should it refuse to elect, the remedy is dismissal. United States v. Bradford, 344 A.2d 208, 210 (D.C. 1975); Murray v. United States, 358 A.2d 314, 317 (D. C. 1976); United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1977).

In the instant case, each Count One and Two of the Superseding Indictment contained two separate and distinct offenses. However, because Count Two was ultimately vacated on appeal, only Count One is discussed herein.

Count One of the Superseding Indictment charged that:

> Between on or about April 7, 2010 and August 14, 2013, in the District of Alaska and elsewhere, the Defendant, JASON JAYAVARMAN, did, and did attempt to, employ, use, persuade, induce, entice, and coerce a minor child to engage in any sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct and thereafter transported such visual depiction to the United States by any means, including by using any means of facility of interstate or foreign commerce.

All of which is in violation of 18 U.S.C. §2251(c) and (e). (Dkt 75). Emphasis added.

Given the above, the Superseding Indictment was duplicitous because it charged both the substantive and attempted charges in the same count. Duplicitous charging documents threaten the defendant's right to notice of the charges, freedom from double jeopardy, and a unanimous jury verdict. See United States v. Bradford, 344 A.2d 208, 210 (D.C. 1975). Id. at 211-12.

> [T]he deliberations would not only be confused by a duplicitous count but a verdict of guilty would be improper, since a unanimous finding of guilt is required by Rule 31(a) of the Federal Rules of Criminal Procedure. A general verdict of guilty ... would not reveal whether the defendant was unanimously found guilty of one crime or innocent of the others or unanimously found guilty of all. Id. at 212.

The Bradford indictment charged both voluntary and involuntary manslaughter in one count. Because these are separate crimes, the Court affirmed an order dismissing the indictment. Id. at 218.

The right to a unanimous verdict does, however, require that the jurors reach a "consensus as to the defendant's course of action," agreeing on "just what a defendant did as a preliminary step to determining whether the defendant is guilty of the crime charged." United States v. Gibson, 553 F.2d 453, 457-58 (5th Cir. 1977); see also Ruth v. United States, 438 A.2d 1256, 1262 (DC 1981) (reference to two robberies as predicate of single felony murder count was not duplicitous because language required unanimous finding of both robberies, and separate convictions of both robberies demonstrated that finding).

VI. FEDERAL RULE OF CRIMINAL PROCEDURE 8(a) PROHIBITS THE CHARGING OF MULTIPLE OFFENSES IN A SINGLE COUNT

Joinder of Offenses: The indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Duplicity: Rule 8(a) of the Federal Rules of Criminal Procedure permits two or more offenses, whether felonies or misdemeanors, to be joined in the

same indictment or information in a separate count for each offense. This portion of the Rule is designed to prevent duplicity of charges in a single count; duplicity is often confused with misjoinder of counts.

Misjoinder of counts is the charging of separate and distinct offenses which arise out of different transactions that have no connection or relationship to each other. In Optner v. United States, 13 F.2d 11 (6th Cir. 1926), the court explained between duplicity and misjoinder of counts:

> There is substantial difference between duplicity and misjoinder, although this distinction is not always strictly observed in the use of these terms. Duplicity consists in joining in the same count two or more distinct and separte offenses arising out of wholly different transactions having no connection or relation to each other.

The Southern District of New York had occasion to offer instruction as to the nature and implications of duplicity. The instruction came in the form of an opinion, issued in United States v. Kearney, 560 F.2d 1358 (9th Cir. 1977). Kearney was indicted for conspiracy (Counts I and IV), aiding and abetting the obstruction of correspondence (Counts II and III), and unlawful wiretapping (Count V). Kearney moved to dismiss Counts II, III and V as duplicitous. The court began its consideration of Kearney's motion by offering a definition of duplicity:

> Rule 8(a), Fed. R. Crim. P., requires that two or more offenses, if contained in the same indictment, be charged in a separate count for each offense. Duplicity is the joining of two or more offenses in the same count in contravention of that Rule.

The court then discussed the reasons why duplicity cannot be tolerated:

> The prohibition against duplicity has constitutional underpinnings in the Sixth Amendment's guarantee that an accused be adequately informed of the nature and cause of the accusation and the Fifth

> Amendment's interdiction against double jeopard ... . The possibility that a less than unanimous verdict will be returned by the jury is an additional danger sought to be obviated by the Rule.

An additional concern is that the defendant may be prejudiced by evidentiary rulings, in that evidence may be admissible to establish one offense but inadmissible to establish the commission of another.

VII. INTERPRETING STATUTES AS TO "ANDS" AND "ORS"

Many statutes have lots of "ands" and "ors" tucked into different clauses, and the thrust of the statute often depends on which clauses are joined by an "and" and which by an "or." When clauses are joined by an "or," it means that the conditions in at least one of the clauses must be present, but not all. When clauses are joined by an "and," the conditions in all the clauses must be met.

Interpreting "ands" and "ors," (Consider the following provision taken from 42 U.S.C.A. Section 416):

> An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:
>
> (A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits-
>
> (i) such insured individual-
>
> (I) has acknowledged in writing that the applicant is his or her son or daughter
>
> (II) has been decreed by a court to be the mother or father of the applicant, or
>
> (III) has been ordered by a court to contribute to the

> support of the applicant because the applicant is his or her son or daughter,
> and such acknowledgement, court decree, or court order was made not less than one year before insured individual became entitled to old-age insurance benefits or attained retirement age (as defined in subsection (I) of this section),
> whichever is earlier ...

Interpretation: to be considered a child of an insured individual, a person must satisfy at least one of the three conditions under Section (A)(i), because of the use of the word "or," and the conditions must be met within one year of when the insured individual became entitled to old-age insurance benefits or attained retirement age, because of the "and."

IIX. THE DISTRICT COURT SPLIT COUNT ONE OF THE INDICTMENT INTO TWO SUBCOUNTS IN VIOLATION OF RULE 8(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Each count of the Superseding Indictment contained two sub-counts, and each sub-count charged distinct and separate crime.

Further, the district court's instructions to the jury did not cure the duplicity, but rather improperly broadened the Indictment. The Preliminary Closing Jury Instruction No. 11 stated as follows:

> A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count. In this case, there are separate theories for each count. The Verdict Form gives you instructions on how to consider these theories.

(Dkt 128) at 12. The verdict form itself contained the instruction under Part A:

If you find the defendant not guilty on Part A of Count One, continue to Part B of Count One. If you find the defendant guilty on Part A of Count One, continue to Verdict: Count Two.

(Dkt 130).

IX. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DUPLICITOUS SUPERSEDING INDICTMENT AND TO THE JURY CHARGE ALLOWING CONVICTION ON SUBCOUNTS

Here, had trial counsel properly objected to the duplicity contained in the Superseding Indictment, the Government would have been forced to elect one offense on which to proceed to trial, rather than both being submitted to the jury.

Based on the language of the Superseding Indictment, Jayavarman could only be convicted of Count One if the jury found he "did, and did attempt to," violate 18 U.S.C. §2251(c) and (e). Because the Superseding Indictment contained the joinder "and" rather than "or," each would have had to be proven in order to convict on Count One. However, the jury did not reach a unanimous decision on the substantive act of Count 1A. Therefore, Jayavarman should not have been convicted of Count One per the language in the Superseding Indictment.

Counsel's failure to object on this ground constitutes ineffective assistance of counsel which plainly prejudiced Jayavarman as a result. As such, Jayavarman is entitled to §2255 relief.

X. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO COMMUNICATE A GOVERNMENT'S FORMAL PLEA OFFER PRIOR TO ITS EXPIRATION

Claims of ineffective assistance of counsel are governed by the familiar two-prong test set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, Jayavarman must show that his counsel's performance was both objectively unreasonable and

prejudicial. Id. at 687-88. Jayavarman can satisfy the first prong by demonstrating that his counsel's performance fell below an objective standard of reasonableness. Id. at 688. The second prong can be satisfied by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

On July 17, 2014, prior to the return of the Superseding Indictment, the Government met with trial counsel and discussed a plea offer that would allow Jayavarman to plead guilty to Count 6 of the Indictment, which was favorable and carried no mandatory minimum prison sentence. During this meeting, the Government agreed that, as part of the plea agreement, Counts 1 to 5 would be dismissed and that trial counsel would respond by the end of the following week. However, trial counsel did not inform Jayavarman of this meeting, nor did the counsel present the offer to him prior to its expiration.

On August 12, 2014, the Government followed up on the plea offer and telephoned trial counsel, inquiring into whether Jayavarman had accepted the offer. The same day, trial counsel in his answer to the telephone call sent an email, informing the Government that he had visited Jayavarman at the prison and provided him with copies of various scenarios, since there was no formal plea offer from the Government. The counsel further stated that if the Government was so inclined he wanted to see the offer in writing.

On August 13, 2014, the Government sent a response to trial counsel reminding him of the plea offer made at the July 17 meeting. The offer was to plead guilty to Count 6 of the Indictment. The Government added that trial counsel should have responded by the end of the previous week, and that it was now proceeding with trial preparation. The same day, trial counsel now

recalled the Count 6 offer and assured the Government that he would go back to the prison and present the offer to Jayavarman. Trial counsel did not visit Jayavarman at the prison, nor did the counsel convey the offer to him as promised.

On August 26, 2014, the Government sent a formal, signed letter informing trial counsel that it considered reopening plea negotiations. The Government then provided a hard deadline of noon on September 10, 2014 for trial counsel to discuss the plea offer with Jayavarman. Again, trial counsel did not communicate to Jayavarman that the Government had reopened the plea negotiations prior to its expiration on September 10, 2014 deadline.

> [A]s a general rule, defense counsel has the duty to communicate formal plea offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exception to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Missouri v. Frye, 566 U.S. 134, 145 (2012). Here, trial counsel's performance was below that guaranteed by the Sixth Amendment when he failed to communicate and advise Jayavarman of the formal plea offer to Count 6 of the Indictment. Thus, Jayavarman met the first prong of the Strickland test with respect to this claim. However, Jayavarman must also demonstrate prejudice. The Court explained in Frye that:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability that they would have accepted the earlier plea offer

had they been afforded effective assistance of counsel, defendants must also demonstrate a reasonable probability that the plea would have entered without the prosecution cancelling it or the trial court refusing to accept it, if they had the authority to execute that discretion. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id. at 147.

Jayavarman submits that had he had effective assistance of counsel, he would have accepted the Government's formal plea offer to Count 6 of the Indictment, which would have carried no mandatory minimum prison sentence. It is evident from the Government's letter that it would not have rejected Jayavarman's acceptance if provided prior to the September 10, 2014 deadline. As noted in its letter, the Government stated:

> If Mr. Jayavarman accepts the offer by noon on September 10th, we will quickly provide you with the written plea agreement and with the court's permission, we will use the September 17th status hearing date for the guilty plea. Obviously, the sooner you accept the offer, the sooner I can provide you the written plea agreement.

In addition, there was no evidence to indicate that the court would have rejected the proposed plea offer. Finally, the Government's formal plea offer would have resulted in a reasonable probability of a lesser sentence, as Jayavarman would not have been subject to the statute's mandatory minimum term of imprisonment and his Guidelines Calculations would have produced a lower range.

Here, it is evident that Jayavarman received ineffective assistance of counsel when his trial counsel failed to communicate the Government's formal

plea offer to him prior to the offer's expiration. Jayavarman suffered prejudice as a result. The proper remedy under these circumstances would be to vacate Jayavarman's conviction and sentence and for the Government to re-offer its formal plea agreement.

XI. OFFENSES OF PRODUCTION AND ATTEMPTED PRODUCTION OF CHILD PORNOGRAPHY PURSUANT TO 18 U.S.C. §§2251(c) AND (e) REQUIRE TRAVEL IN FOREIGN COMMERCE FOR THE PURPOSE OF COMMITTING ALLEGED OFFENSES

The Superseding Indictment charged Jayavarman with both production and attempted production of child pornography in one count, in violation of 18 U.S.C. §§2251(c) and (e). During trial, the Government neither proved nor even introduced any evidence that Jayavarman had traveled in foreign commerce for the purpose of producing and attempting to produce child pornography. Because the Government did not introduce any evidence that Jayavarman had violated 18 U.S.C. §2423, which prohibits traveling in foreign commerce for the purpose of committing crime, Sections 2251(c) and (e) are unconstitutional as applied.

The Commerce Clause gives Congress the power to regulate (1) "the use of the channels of" commerce; (2) "the instrumentalities of ... or persons or things in" commerce; and (3) economic activities that "substantially affect" commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995). Applied to section 2251(c), subpart (2)(A) may allow an attempt theory, because the defendant could be shown to have had the intent, at the time he made the visual depiction, to bring to the United States: he intended to use the channels of commerce for an illegal purpose. But subpart (2)(B) is different. The Government must prove the defendant was "in [foreign] commerce" when he committed his crime: transported the illegal video. Lopez, 514 U.S. at 559.

If the video is not illegal (no minor), Congress would be regulating purely intracountry conduct without even showing an intent to touch or affect foreign commerce. As for a "substantial effect on foreign commerce," that is unavailing as well. Congress "may not regulate noneconomic activity, such as sex crimes, based on the effect it might have on ... commerce." See, e.g., United States v. Morrison, 529 U.S. 598, 617-18 (2000). The argument that a defendant who traveled overseas without illegal intent, had sex with an adult he subjectively believed to be a minor, filmed it, and returned with the legal video, creates a sufficient nexus to foreign commerce, must fail. Under the Lopez factors, Congress lacked the power under the Foreign Commerce Clause to pass §2251(c)(1) and (2)(B), as applied to a non-minor victim. See, e.g., United States v. Al-Maliki, 787 F.3d 784 (6th Cir. 2015)(no authority to criminalize intracountry sexual abuse of a minor without intent to commit offense at time to travel)(dicta). For this additional reasons, 2251(c)(1) and (2)(B) cannot be found to apply where there is no minor victim. See, Argument supra.

The application of Section 2251(c)(1) and (2)(B) in this matter, to consensual sex between two adults where the Government contended Jayavarman "believed" the person to be a minor, unconstitutional chilled legitimate adult conduct. As set forth above, 2251 is a strict liability offense: to convict the Government need not show Jayavarman's knowledge of the age of the video's subject. "The age and purpose clauses insulate from liability persons engaged in constitutionally permissible speech, such as sexually explicit conversations between two adults, because conversations of that nature would not involve the narrow category of criminal sexual activity with a minor." Id.

The intent to produce a sexually explicit video between two adults is

protected speech; there can be no prosecution under 2251(c)(1) and (2)(B) without a minor involved. Allowing prosecution for subjective belief the adult participant is a minor, would unconstitutionally chill protected speech: creation of pornography between two adults. Two consenting youthful adult citizens would be deterred from making a sexually explicit video while on their trip to Paris, and bringing it back home, because of the possibility that the Government could prosecute on the theory one "believed" the other to be under age. Imagine being subject to a 15 year mandatory minimum term of imprisonment because the Government claims you believed your adult girlfriend was under age when you filmed yourselves having sex overseas and returned with the video? Clearly, a defendant such as Jayavarman could only be certain of avoiding liability by holding his tongue, causing him "to make only statement which 'steered far wide[] of the unlawful zone.'" Id. Young adults, or those who look young, would not be free to make consensual sex tapes, and young looking pornographic actors would not be able to find work.

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not have been convicted of Count One because the jury did not return a unanimous finding of guilt on both charges, and because a unanimous finding of guilt is required by Rule 31(a) of the Federal Rules of Criminal Procedure; (3) trial counsel was ineffective for failing to object to the Duplicitous Superseding Indictment and for failing to object to the jury charge allowing submission of both charges to the jury; (4) trial counsel was ineffective for failing to communicate the Government's formal plea offer prior to the offer's expiration; and (5) Jayavarman should not have been convicted of production and attempted production of child pornography in a foreign country because he had not traveled in foreign commerce for the purpose of committing the alleged crimes.

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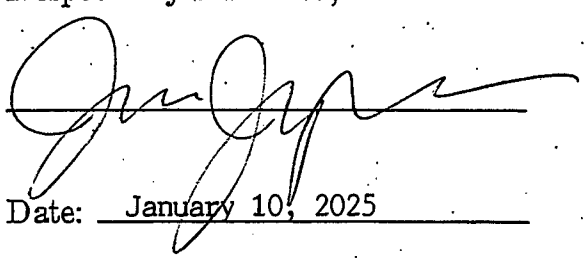
CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: January 10, 2025