

N THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

LUIS SALAS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

ISSUE 1: Whether the trial and appellate court erred in denying Petitioner's Motion for Certificate of Appealability?

- Prefix-

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED
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The Petitioner, LUIS SALAS, respectfully prays that a writ of certiorari issue to review the judgment/order of the United States Court of Appeals for the Eleventh Circuit entered on April 17, 2018.

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OPINION BELOW

On April 17, 2018 the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence. A copy of the opinion, as well as the District Court's order denying Petitioner's Motion to

Vacate and Certificate of appealability are attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the defendant in the district court and will be referred to by name or as the Petitioner. The respondent, the United States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The Petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court
Below

Petitioner was arrested and charged with conspiracy to possess with intent to distribute 280 grams or more of crack cocaine and a detectable amount of marijuana in violation of 21 U.S.C. §841(b) (1) (C) and carjacking in violation of 18 U.S.C. §2119(1) and 2. CRDE: 199 Counsel was appointed to represent Salas. CRDE:240 Following the exchange of discovery and motions, Petitioner pled guilty to the cocaine and marijuana count and the carjacking count was dismissed. CRDE:752

At Petitioner's sentencing hearing, the district court imposed a 120 month minimum mandatory sentence as to the cocaine and marijuana count. CRDE: 1091 Petitioner's counsel did not file a direct appeal. On December 15, 2015, Petitioner filed a timely Motion to Vacate Sentence under 28 U.S.C. §2255 raising the following two claims: 1. Petitioner argued that his counsel failed to negotiate a plea agreement for a statutory range of 5 to 40 years rather than the 10 years to life to which he ultimately pled guilty wherein he was denied the benefit of his ultimately computed guideline range of 87-107 months, and 2. Petitioner argued his counsel did not file a direct

appeal he requested and/or misadvised him as to his appellate options. On February 7, 2017 Petitioner, through counsel, filed his motion to supplement or clarify his first claim alleging that his counsel failed to advise him that he could have a jury trial determination of the mandatory minimum drug amount in the absence of an agreement with the Government. CVDE:14 On February 28, 2017 the magistrate court held an evidentiary hearing on the issues. CVDE: 20

Prior counsel testified that he discussed the case with Petitioner numerous times however he did not have a specific discussion with Petitioner regarding the option of submitting the crack cocaine quantity to a jury. On the subject of the jury trial option his testimony was: "Q. We talked about it a little bit before. I just want the record to be clear, because you were talking about the guidelines and I'm sure that there are a lot of dynamics. Sometimes the guidelines trump the min-mands, and sometimes vice versa. Q. I just wanna be clear. Did you have a conversation with him where you told him, listen, the jury can make this decision for you? A. I wouldn't have told him that. I recall having conversations where I told him that, for him to receive a minimum mandatory after trial, the jury would have to decide whether it was a certain quantity or greater." CVDE. 25-19

Petitioner's testimony was: "Q. Mr. Salas, when you were talking to your lawyer about settling your case, was the option presented to you that you could have a jury trial and let the jury decide, with their verdict, what your penalty range was going to be, the low end or the high end? A. No. On the drug amount? Q. It's two things, Mr. Salas. It's the type and the amount. Under the Apprendi law, the jury has to decide how much it is, what is it; did you ever have that conversation with him? A. We didn't have much discussion about trial because he came and told me that we had no chance beating trial. So that's when we started talking about plea agreements. But no, we didn't have that conversation. Q. You heard him testify earlier that you didn't want the 120-month minimum; that you wanted the 60-month minimum? A. Correct. Q. So your remedy would be to, if you couldn't agree with the government, would be to ask a jury to decide how much crack-style cocaine was involved for purposes of the verdict. Did you ever have that conversation with Mr. Louis? A. No. Q. Are you sure about that? A. Yes. Q. If you had had that conversation with Mr. Louis, would you have had a jury trial? A. Yes. Q. It would have been essentially on that issue? A. Correct. A. Go to trial. Q. Okay. And if you had a trial, did he tell you that the jury could find you guilty of a lesser quantity? A. No. Q. He never told you that? A. He said

if I go to trial, I'd be looking anywhere from 15 to 17 years. Q. Okay. When he told you that, what was your reaction? A. The best option was to take the ten to life."

D.E. 25-35-37

While Petitioner's pro se motion requested a "court hearing" to decide the drug amount, the requested remedy would be a jury trial as this is the avenue of relief to resolve disputes as to the correct statutory range of penalties.

The Magistrate Judge Report determined that Petitioner's claim regarding the jury trial advice of counsel was time barred as the court construed the claim as an independent claim from the original timely motion filed one year and nine months after the final judgment. CVDE: 21-14 The Report further held that this claim would likewise fail on the merits. CVDE: 21-12 On the issue of counsel's failure to file a direct appeal, the Magistrate Report held that Petitioner was advised of his appeal and after being advised that he could potentially receive a longer sentence after appeal that Petitioner decided not to appeal. CVDE: 21-7

On July 7, 2017, Petitioner filed objections to the above findings in the Magistrate Report. CVDE: 28

On January 18, 2018, the District Court adopted the findings of the Magistrate Report and ordered that no

Certificate of Appealability issue. CVDE: 29. Petitioner filed his notice of appeal on February 3, 2018. CVDE: 31 On March 8, 2018, Petitioner filed his Motion for Certificate of Appealability in the Eleventh Circuit Court of Appeals. On April 17, 2018 Petitioner's Motion for Certificate of Appelability filed in the Eleventh Circuit Court of Appeals was denied.

Statement of the Facts

The facts on appeal arise from the record of the change of plea and sentencing proceedings and the factual proffer submitted in support of the guilty plea. The evidence of Petitioner's offense was as follows:

From January 2011 until the date of indictment, Petitioner and other conspired to distribute narcotics in the Allapattah and Little Havana Neighborhoods of Miami, Florida and elsewhere. The conspiracy members distributed cocaine base, marijuana and MDMC, all of which are controlled substances. During the involvement of Petitioner the conspiracy members and associates distributed in excess of 280 grams of cocaine base. Petitioner and the Government were in agreement that the reasonably foreseeable weight of cocaine base was at least

840 grams of cocaine base and that Petitioner was a minor participant in the case. CRDE:751.

REASONS FOR GRANTING THE WRIT

ISSUE 1: Whether the trial and appellate court erred in denying Petitioner's Motion for Certificate of Appealability?

A Certificate of Appealability (hereinafter referred to as "COA") must issue upon a "substantial showing of the denial of a constitutional right" by the Petitioner. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the Petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As this Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not A COA must issue upon a "substantial showing of the denial of a constitutional right" by the Petitioner. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, Petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree

that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As this Court has emphasized, courts "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which a petitioner has lost on the merits, this Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the requesting Petitioner, and the severity of the penalty may be considered in making this determination. See *Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

The Supreme Court recently applied this standard in *Welch v. United States*, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-1264. In that case, the Court broadly held that *Johnson v. United States*, 135 S.Ct. 2551 (2015) announced a substantive rule that applied retroactively to cases on collateral review. *Id.* at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether Welch's robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-1264, 1268. Accordingly, the Court held that a COA should issue.

The District Court's order below adopting the Magistrate Judge Report should properly be reasonably debated by reasonable jurists. The Report is quoted as stating: "Here movant initially claimed counsel failed to secure a plea under a lesser amount of drugs that would correspond to a sentencing range of 5 to 40 years. He now

claims that counsel failed to advise him that he could proceed to trial on the amount of drugs. The initial claim addressed counsel's failure to obtain a more favorable plea deal, while the new claim addresses counsel's failure to advise him that he could proceed to trial on the amount of drugs. These claims are distinct and arise from separate conduct. In the first claim he challenged counsel performance in plea negotiations, while the second claim challenges counsel's performance in advising him regarding his options for trial. Furthermore, the relief sought under the initial claim was merely an opportunity for the government to concede the amount of drugs was less, or allow the court to determine the amount of drugs. In this supplemental claim the movant seeks to completely withdraw his guilty plea and proceed to trial." Continuing, "Since the two claims are distinct and rely upon separate conduct, the amended/supplemental claim is untimely as it was filed more than one year after the conviction became final. The amended/supplemental claim should be dismissed." CVDE: 13-14 The Report concluded that the "untimely claims must have more in common with the timely filed claims than the mere fact that they arose out of the same trial and sentencing proceedings." Citing *Pruitt v. United States*, 274 F.3d 1315, 1319 (11th Cir. 2001), citing, *United States*

v. Pittman, 209 F.3d 314 (4th Cir.2000); *United States v. Duffus*, 174 F.3d 333 (3rd Cir.), cert. den'd, 528 U.S. 866, 120 S.Ct. 163, 145 L.Ed.2d 138 (1999); *United States v. Craycraft*, 167 F.3d 451 (8th Cir.1999). Under the unique facts of this case, it cannot be concluded that the claims are distinct and rely upon separate conduct. The clarification motion alleged the same factual basis however requesting a clarified, targeted, remedy which was a jury trial rather than a court hearing to determine the mandatory minimum amount. The Magistrate Court made distinction between the terms "court hearing" and "jury trial"; which can both be considered hearings, only with a different determiner of fact and applied law. Clearly this distinction can be debatable by reasonable jurists necessitating the granting of a Certificate of Appealability.

As and for the issue of the denial of a direct appeal claim, the Magistrate Report language adopted by the District Court was as follows: "counsel testified that the court advised the movant of his right to appeal. At the end of the sentencing hearing, and again in jail, counsel and the movant discussed his appeal options. Counsel asked if the movant if he had any issues and advised the movant of the potential consequences of filing an appeal after

executing an appeal waiver. Counsel testified that he made the movant aware of precedent from the Third Circuit regarding potential adverse consequences of pursuing an appeal after an appellate waiver. Among those consequences could be the loss of any benefits obtained in the plea agreement. Additionally, counsel testified there were no meritorious issues for appeal. Counsel noted that the movant was not safety valve eligible and had received the lowest possible sentence. In the absence of any issues for appeal and after discussion with counsel, the movant agreed that he should not seek an appeal. The testimony of counsel is found to be credible. The movant in his testimony corroborated counsel's testimony. The movant testified that initially he wanted to appeal but after discussions with counsel he decided not to seek an appeal. The movant's testimony describing the conversations with counsel was substantially similar to the description of those discussions provided by counsel. Based on the testimony of both counsel and the movant, there can be no finding the movant requested that counsel file an appeal. Therefore this claim should be denied as there has been no showing that counsel's performance was deficient or that the movant was prejudiced." CVDE:21-13-14 In a footnote on page 7 of the Report it included that: "Counsel provided the

citation for *United States v. Erwin*, 765 F.3d 219 (3rd Cir. 2014). In *Erwin* the Third Circuit held that by taking an appeal after entering an appellate waiver the defendant had breached his plea agreement and the government was released from the terms of the plea agreement upon resentencing. The court held that the resentencing would be de novo and the defendant was not entitled to the benefits of the plea agreement." In the absence of binding precedent in the Eleventh Circuit Court of Appeals, reasonable jurists could and can debate the advice received by Petitioner to abandon his appellate rights based upon a non-binding decision from the Third Circuit. Respectfully, a Certificate of Appealability should issue in this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

DATED this 16th day of July, 2018.

Respectfully submitted,

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APPENDIX "A"