No. 17A1253

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IN THE
SUPREME COURT OF THE UNITED STATES

****

Louie Anthony Salemi,
petitioner,

versus

United States of America,
respondent.

****

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

****

PETITION FOR WRIT OF CERTIORARI

****

Louie Anthony Salemi #59954-018
Federal Correctional Complex
P.O. Box 1031 (Low custody)
Coleman, Florida 33521-1031
Unit B-1

QUESTION PRESENTED

The Eleventh Circuit Court of Appeals denied Mr. Salemi a certificate of appealability with a summary order using boiler plate language.

Did the Eleventh Circuit Court of Appeals abuse its discretion by not providing a reasoned opinion to support its order? **Wilson v. Sellers,** __U.S.__ (Jan.2018).

Mr. Salemi's 28 U.S.C. § 2255 claims comprised allegations of out of court, off-record advice from counsel. Section 2255(b) provides the district court shall conduct an evidentiary hearing unless the allegations are conclusively refuted by the record. The out-of-court events were never addressed on the record.

Should the district court have conducted an evidentiary hearing? See **Machibroda v. United States,** 368 U.S. 487 (1962).

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OPINIONS BELOW

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The opinion of the United States Court of Appeals for the Eleventh Circuit on the Motion for Reconsideration appears at Appendix "A";

The opinion of the United States Court of Appeals for the Eleventh Circuit on the application for a certificate of appealability appears at Appendix "B";

The opinion of the United States District Court for the Middle District of Florida, Orlando Division appears at Appendix "C"; and

The grant of the extension of time to file a petition for a writ of certiorari to include up to July 16, 2018, appears at Appendix "D".

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit in a one-paragraph denied the motion for reconsideration appears at Appendix "B", and this Court's grant of an extension of time to include up to July 16, 2018, appears at Appendix "D".

Therefore jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

28 U.S.C. § 2255(b):

> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

STATEMENT OF THE CASE
(Procedural History)

In May 2014, Mr. Salemi pleaded guilty to Count One: distribution of child pornography in violation of 18 U.S.C. §§ 2255A(a)(1)(A) and (b)(1). Count Two: was dismissed upon motion by the government, and Count Three: possession of child pornography in violation of 18 U.S.C. §§ 2252(A)(a)(5)(B) and (b)(2).

In September 2014, Mr. Salemi was sentenced to 293 months imprisonment, thereafter Mr. Salemi filed a timely notice of appeal that was voluntary dismissed.

In February 2016, the government filed a motion for reduction of sentence pursuant to F.R.Crim.P. 35(b)(2)(B). And in March 2016, the district court granted the government's motion for a reduction of time and reduced Mr. Salemi's sentence to 211 months on Count One only.

In May 2016, Mr. Salemi filed a motion under 28 U.S.C. § 2255 claiming various grounds of ineffectiveness and off the record advice by counsel. In May 2017, the United States District Court for the Middle District of Florida denied the motion. (Appendix "C"). In July 2017, a notice of appeal was filed in the Eleventh Circuit Court of Appeals.

Mr. Salemi filed an application for a certificate of appealability that was denied (Appendix "B") and the court of appeals denied his motion for reconsideration (Appendix "A").

This Court granted an extension of time up to and including July 16, 2018, this petition follows:

REASONS FOR GRANTING THE WRIT

1. A federal appellate court that resolves a COA application by deciding the merits of the underlying claims exceeds its subject-matterjurisdiction.The Eleventh Circuit's summary denial of Mr. Salemi's COA application necessarily relied upon the district court's merits opinion. Thus, the Eleventh Circuit exceeded its jurisdiction when it denied the COA without explanation.

In January 2018, this Court decided that when an appellate court does not provide a reasoned opinion, then a second-tier-or-third-tier-court reviewing an appeal should look through the prior unreasoned, or summary, opinion to the last reasoned opinion. See **Wilson v. Seller,** __ U.S. __ No. _____(2018). This principle presumes the basis for the unexplained opinion is that of the earlier opinion.

When that logic is synthesized with this Court's holding in **Buck v. Davis,** 137 S. Ct. 759 (2017)), then an appeals court deciding to deny a certificate of appealability without explanation necessarily exceeds its jurisdiction. Put differently, in **Buck** the Supreme Court held that a federal court may not deny a certificate of appealability based upon an assessment of the COA application's merits. But when the only reasoned opinion decides the merits, then the unexplained order denying the COA is an action beyond the appellate court jurisdiction. The Eleventh Circuit Court of Appeals exceeded its jurisdiction when it issued its summary denial of the certificate of appealability.

In **Buck,** this Court pronounced that an appellate court lacks subject-matter jurisdiction to decide a habeas appeal based on the lack of merit, when it does not first grant a certificate of appealability. **Id.,** By failing to identify the factual predicates and legal premises underlying its opinion, the Eleventh Circuit necessarily relied upon the district court's order (App."C"). A district court that resolved the § 2255 motion and the application for COA by analyzing the merits.

In other words, the Eleventh Circuit did indirectly what this Court's forbid the Fifth Circuit to do directly: it decided an application for a COA based on a merits analysis. As this Court identified, such an order is tantamount to a court acting without subject-matter jurisdiction; thus any order it issued is a nullity. **United Student Aid Funds, Inc. v. Espinosa**, 559 U.S. 260, 271 (2010).

The Eleventh Circuit's use of a summary, boilerplate order in denying the certificate of appealability effectively places the circuit's COA rule in diametric opposition to this Court's holding. This Court should grant the writ and realign the Eleventh Circuit with this Court's precedent and its sibling circuits.

2. In denying a certificate of appealability, the Eleventh Circuit sanctioned the district court's departure from the ordinary and use cause of the judicial proceedings, as well as this court's precedent on when to conduct an evidentiary hearing.

Louie Anthony Salemi's arguments are primarily legal in nature. The district court's errors prevented the development of a factual record. The district court did not permit discovery (§ 2255 Rule 6), did not expand the evidentiary record (§ 2255 Rule 7), and did not conduct an evidentiary hearing. **28 U.S.C. § 2255(b)**. Which brings us to the position that, under governing principles, presumptions, and precedent, summary remand is appropriate.

Governing authority obligates the district court to presume Mr. Salemi's allegations are true. **28 U.S.C. § 2255(b)**(2017). The Fourth Circuit——which usually decides § 2255's on motions to dismiss——articulates the principle as well or better than any. "In assessing whether a federal habeas corpus petition was properly dismissed without an evidentiary hearing or discovery, we must evaluate the petition under the standards governing motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure." **Conaway v. Polk**, 453

F.3d 567, 587 (4th Cir. 2006)(citing **Walker v. True**, 399 F.3d 315, 319 n.1 (4th Cir. 2005)). "Accordingly, we [the Court of Appeals] are obligated to accept a petitioner's well-pleaded allegations as true, and to draw all reasonable inferences therefrom in the petitioner's favor." **Conaway**, 453 F.3d at 582).

The Eleventh Circuit's precedent mirrors the Fourth Circuit's rules. "[I]f the petitioner alleges facts that if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claims." **Aron v. United States**, 291 F.3d 708, 714, n.5 (11th Cir. 2002). "Further a petitioner need only allege—not prove—reasonably specific non-conclusory facts that, if true, would entitle him to relief." **Id.** at 715, n.6.

Of course, this rule does not stretch to absurdity; "a district court need not hold a hearing if the allegations are patently frivolous, based on unsupported generalizations, or affirmatively contradicted by the record. **Winthrop-Redin v. United States**, 767 F.3d 1210, 1216 (11th Cir. 2014).

Here, Mr. Salemi's verified statements and his plea-hearing statements are the only valid evidence bearing on his sentencing. Yet, the district court and the court of appeals ignored both the statute and this court's precedent that entitled Mr. Salemi to an evidentiary hearing. **28 U.S.C. § 2255(b)**(2016); **Fontaine v. United States**, 411 U.S. 213, 215 (1973); **Townsend v. Sain**, 372 U.S. 293 (1963).

Mr. Salemi's claims "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." **Williams v. United States**, 660 Fed. Appx. 847 (11th Cir. 2016)(quoting **Machibroada v. United States**, 368 U.S. 487, 494-95 (1962)). Mr. Salemi's allegations involve communications with counsel, and his own comprehension of these communications. All of which the record can speak to. The district court should have conducted an evidentiary hearing where the court could observe and evaluate Mr. Salemi's credibility.

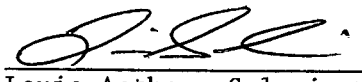
Bringing us to our last point, even if the government were to contest Mr. Salemi's thoughts and communications, then governing authority still requires an evidentiary hearing. This court holds that "contested fact issues in [§] 2255 cases cannot be on the basis of affidavits" or written documents. **Williams**, 660 Fed. Appx. at 850 (quoting **Friedman v. United States**, 588 F.2d 1010, 1015 (5th Cir. 1979)).

In sum, the district court departed from governing authority when the court refused to grant Mr. Salemi an evidentiary hearing.

CONCLUSION

This Court should grant the writ of certiorari to the Eleventh Circuit Court of Appeals in order to vacate the extrajurisdictional opinion denying the certificate of appealability.

Respectfully submitted on this 8th day of July, 2018, by:



Louie Anthony Salemi