

NO.

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 2018

DONELL A. THOMAS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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Donell A. Thomas

Register #42161-424

Federal Prison Camp

PO Box 1085

Oxford, WI 53952-1085

QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioner in his 2255 Motion and Rule 59(e) motion prove his claim that the the Petitioner's trial and appellate counsel's failure to object to the Petitioner's loss amount calculation, amount to ineffective assistance of counsel and thus violate his sixth-amendment constitutional right? Also, did the Petitioner prove his claim summarily and thus satisfy the two-prong test set forth in Strickland v. Washington?
2. Did the Petitioner in both his 2255 brief and Rule 59(e) motion, present sufficient claims and evidence to warrant an evidentiary hearing and/or Certificate of Appealability from the District Court?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows:

Donell A. Thomas

United States of America

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Petitioner, Donell Thomas respectfully petitions for a Writ of Certiorari to review the judgment of the Seventh Circuit in this case.

#### Orders Below

The orders of the United States Court of Appeals are reproduced in there in Appendices A and D. The orders of the District Court are reproduced in Appendices B and C.

#### STATEMENT OF THE BASIS FOR JURISDICTION

The judgement sought to be reviewed was entered on March 28, 2018 (Appendix A). Petitioner's motion for Panel Rehearing (Appendix D) was denied on May 10, 2018. The jurisdiction of this Court to review the judgement of the United States Court of Appeals for the Seventh Circuit by Writ of Certiorari is invoked under 28 U.S.C. Sect. 1254 (1).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause of the Federal Constitution's Fifth Amendment: [n]o person shall "be deprived of life, liberty or property, without due process of law."

Also, the Assistance of Counsel in criminal prosecutions of the Federal Constitution's Sixth Amendment: "In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defense."

#### 28 U.S.C. Sect. 2253 Appeal:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals

for the circuit in which the proceeding is held.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

#### STATEMENT OF THE CASE

On September 23, 2010, a grand jury returned an indictment charging the Petitioner, and three codefendants with two counts of wire fraud in violation of 18 U.S.C Sect 1343.

On June 2, 2011, a grand jury returned a superseding indictment charging the Petitioner, along with four codefendants with additional counts of wire fraud, and charging the Petitioner with a count of aggravated identity theft in violation of 18 U.S.C. Sect. 1028A (a) (1).

On June 13, 2012, a grand jury returned a second superseding indictment charging the Petitioner and one codefendant with eight counts of wire fraud and charging the Petitioner with aggravated identity theft.

The jury trial of the Petitioner and one codefendant began on July 31 2012, and on August 9, 2012, the jury returned a verdict of guilty on all counts against the Petitioner and his co-defendant.

On or about December 12, 2012, the Petitioner was sentenced to seventy months' imprisonment on the wire fraud charges (the sentences to run concurrently), and twenty-four months' imprisonment on the aggravated identity theft charge (the sentence to run consecutively with the fraud sentence).

The Petitioner filed a timely appeal of his conviction on the aggravated identity theft charge to the Seventh Circuit Court of Appeals. The Court of Appeals affirmed the conviction and sentence on August 14, 2014.

The Petitioner then on or about July 20, 2015 filed a timely Motion to Vacate, Set aside, or Correct Sentence by a person in Federal Custody, with the District Court, whose jurisdiction was invoked under 28 U.S.C. Sect. 2255 and 28 U.S.C. Sect. 2253 (c) (1).

On or about October 2, 2015, the District Court ordered the Government to respond to the Defendant's Motion by October 20, 2015.

On or about December 29, 2015, the Government responded with a Motion to File Brief Instanter, which was granted by the District Court.

On May 16, 2016, the District Court denied the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence by a person in Federal Custody. (See Appendix B)

The Petitioner filed a timely Rule 59 (e) motion, to alter or amend the judgment and it was denied on June 23, 2017. (See Appendix C)

The Petitioner then filed a timely Application for a Certificate of Appealability with the Seventh Circuit Court of Appeals, which was denied on March 28, 2018. (See Appendix A)

The Petitioner then filed a timely motion for a Panel Rehearing which was denied on May 10, 2018. (See Appendix D)

## REASONS FOR GRANTING THE WRIT

## A. QUESTIONS PRESENTED WITH ARGUMENT:

1) DID THE PETITIONER IN HIS 2255 MOTION, RULE 59 (E) MOTION AND APPLICATION FOR CERTIFICATE OF APPEALABILITY, PROVE HIS CLAIM THAT THE PETITIONER'S COUNSEL'S FAILURE TO OBJECT TO PETITIONER'S LOSS AMOUNT WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND THUS A VIOLATION OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT? ALSO, DID THE PETITIONER PROVE HIS CLAIM SUMMARILY AND THUS SATISFY THE TWO-PRONG TEST SET FORTH IN *Strickland v. Washington*? (citing *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 801 Ed. 2d 673 (1984)).

First, to support a claim of ineffective assistance of counsel "a convicted defendant...must identify the acts or omissions of counsel that are alleged not to have been reasonable professional judgement. The Court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making the determination the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." (*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 801 Ed. 2d 673 (1984)).

Petitioner's counsel did not exercise reasonable professional judgement when failing to object to or address in any manner the Petitioner's loss amount. By failing to object to the loss amount before or during the Petitioner's trial, nor at the Petitioner's sentencing, or on direct appeal, the

Petitioner's counsel failed to "make the adversarial testing process work," with regard to the loss amount calculation. At trial, the Government provided and relied upon an exhibit labeled "CF-2." (See attached Appendix A) This exhibit, for instance, clearly shows money being returned to the victim prior to detection of any crime by law enforcement. In particular, the column titled "Funding Amt" shows the funding amount, while the column titled "Payment Received" shows the amount returned to the Funder, and the amount returned also includes all interest paid, and the handwritten column shows the total interest paid for each transaction funded. The United States Sentencing Guidelines, Section 2B1.1, application note 3 (E) which governs the determination of the sentences for "economic offenses" including fraud, states "loss shall be reduced by the following: (i) the money returned...by the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or a government agency; or (II) the time the defendant knew or reasonably should have known the offense was detected or about to be detected by a victim or government agency." The Government's exhibit clearly shows the loss calculation used to determine the Petitioner's sentence is inaccurate because it did not account for the interest payments made to the victims, particularly Ryan Moore of Coastal Funding and Jeff Olson of First Funding Source LLC., prior to the Government or either victim detecting any crime; and evidence overwhelmingly suggests this. (See United States v. Snelling, 2014, 6th Cir.). Since the Government's exhibit and subsequent loss calculation

was not objected to or challenged by the Petitioner's counsel and the loss calculation used at sentencing is clearly inaccurate, it is without any doubt that the loss calculation was not subject to the adversarial testing required by Strickland. Therefore, the Petitioner's counsel acted unreasonably and her assistance deemed ineffective.

The Petitioner was prejudiced by his counsel's ineffective assistance in failing to object to the loss calculation. "The defendant must show that the deficient performance (of Petitioner's counsel) prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 801 Ed.673 (1984)). Reducing the loss calculation attributed to him at sentencing of \$4,100,000, by the monies returned to the victims, before the detection of any crime as evidenced in Exhibit A, the Petitioner asserts, would result in an adjusted loss calculation of \$1,924,325. This revised loss calculation, as stated in previous motions to the District Court, will result in a lower sentencing range and a downward departure of 2-4 levels. This represents between a 13-24 months reduction of the Petitioner's sentence and a dramatic reduction of the imposed restitution. This is a substantial amount of prison time and clearly reflects the prejudice the Petitioner has suffered as a result of his counsel's deficient, negligent, and ineffective performance.

The District Court acknowledges the Petitioner was prejudiced by his counsel's ineffective and negligent assistance in its May 16, 2016 ruling where the District Court

conceded in its ruling that "if correct, (i.e. the Petitioner's claims regarding the loss calculation) this would indeed result in a reduction of the applicable guideline range." (See District Court's May 16, 2016 ruling, pg. 13, Attached as Appendix E) This serves as an admission by the District Court that indeed the Petitioner was potentially prejudiced by his counsel's deficient, negligent, and therefore ineffective performance.

The Petitioner's counsel's clear and manifest errors and omissions with respect to investigating the discovery documents and the trial records more thoroughly, to attempt a more successful defense at trial, sentencing, and on direct appeal, also clearly asserts the Petitioner's claim of his counsel's deficient and ineffective performance, in the Petitioner's showing that a much stronger claim or argument was available, namely the contestation of the loss calculation, to effectuate a stronger defense at trial and/or during post-trial proceedings to attempt to reduce the loss amount attributed to the Petitioner's, thereby reducing his sentence. (See Shaw v. Wilson, 721 F. 3d 908, 915 (7th Cir. 2013); See also Vineyard 804 F. 3d at 1228; and Makiel, 782 F. 3d at 898-99). Defense counsel's argument on direct appeal was not nearly as strong as the improper calculation of the loss amount applied by the District Court in the Petitioner's sentencing hearing, and this faulty loss calculation continues to impose and unjust sentence upon the Petitioner. A strategic choice based on what appears to be a misunderstanding of law or fact, however, can amount to ineffective assistance. "An attorney's ignorance of a point

of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." (Hinton v. Alabama, 571 U.S., 134 S. Ct. 1081, 1089 (2014); see also, e.g. Thomas v. Clements, 789 F. ed 760, 768-69 (7th Cir, 2015)).

The District Court's rejection of the Petitioner's 2255 petition should be overturned at least in part, due to the fact of the Court conceding in its May 16, 2016 ruling that, if indeed the Petitioner is correct, regarding his very specific claims as to the inaccuracy of the loss calculation, that he could be entitled to relief (See District Court's May 16, 2016 ruling, pg. 13, attached as Appendix E), yet the Petitioner was denied both an evidentiary hearing and a Certificate of Appealability because in part the documents submitted to the court were deemed "illegible" and "does not support Thomas' position." (See District Court's May 16, 2016 ruling, pg. 15, attached as Appendix E) It is confounding as to how the District Court could assert this document (Attached as Appendix F) which is said to be "illegible" could also ascertain that is also "does not support Thomas' position," one would find it difficult to reason how the District Court could be certain the document "does not support" the Petitioner's assertion, if the Court has declared the document to be "illegible." Yet these documents were prepared by the Government during discovery, placed before the jury at the Petitioner's trial and used by the Government to assert their position as to the loss calculation used for sentencing the Petitioner. The document in question, and attached here as

Appendix F, are the same documents that the Petitioner's counsel, upon conducting a reasonable investigation into the Government's discovery should have used to support USSG 2B1.1 for a downward departure at sentencing for the Petitioner's defense. Yet these documents, which also are apart of the trial record, were also provided to the District Court and Appellate Court by the Petitioner to no avail.

Additionally, no reasonable attorney would apply a trial strategy that would allow their client to be subjected to a 2-4 level enhancement under the sentencing guidelines. Therefore, one could assume the loss calculation and supporting Government documents were not subject to the "adversarial testing" as required under Strickland. The Petitioner's claims were not "vague, conclusory, or palpably incredible," but instead were "detailed and specific" and based on Counsel's failure to object to the Government's asserted loss calculation as incorrect and contradicted by the trial record. If as the District Court claims, the documents provided by the Petitioner, although also produced and used by the Government to support sentencing the Petitioner at a Guideline range supported by a loss figure of \$4,100,000, are indeed "illegible," as the District Court purports, the District Court's ruling should also be vacated, because the loss calculation for sentencing was based upon these same "illegible" documents. As a result, the Petitioner at minimum to assert no violation of his constitutional rights had been violated, should have been granted an evidentiary hearing to determine if there was any validity to his ineffective assistance of counsel claim, but this action was not taken by

the District Court and affirmed by the Appellate court.

2) DID THE PETITIONER PRESENT SUFFICIENT CLAIMS AND EVIDENCE TO WARRANT AN EVIDENTIARY HEARING?

The Petitioner alleged facts in his 2255 petition that the District Court acknowledged would entitle him to relief "if correct." (See District Court's May 16, 2016 Ruling, pg. 13, attached as Appendix E) "The Petitioner's burden for receiving an evidentiary hearing is relatively light..." (Torres-Chavez v. United States, 828 F. 3d 582, 586 (7th Cir. 2016) A District Court must grant an evidentiary hearing if the Petitioner alleges facts that, if proven, would entitle him to relief (Martin v. United States, 789 F. 3d 703, 706 (7th Cir. 2015) and produces claims that a "reasonable" investigation by the Petitioner's counsel would have produced. (Strickland, 466 U.S. at 691) The District Court stated in its May 16, 2016 ruling, "in his reply brief, Thomas offered a revised figure of \$1,924,325 as his actual loss amount. If correct this would indeed result in a reduction of the applicable guideline range." (See District Court's May 16, 2016 ruling, pg. 13, attached as Appendix E) The District Court also stated, "indeed under some scenarios, the amount (i.e. the loss calculation) is potentially less." (See District Court's May 16, 2016 ruling, pg. 14, attached as Appendix E) Additionally, the District Court concedes in its May 16, 2016 ruling that it could not conclusively determine from the evidence presented by the Petitioner, that the Petitioner is not entitled to any relief (See 28 U.S.C. 2255 (b)) and is now subject to being irreparably harmed. The

District Court essentially concedes in its ruling that the Petitioner has alleged facts, that if proven would entitle him to relief. (See Martin, 789 R. 3d at 706) Yet the District Court chose not to request an evidentiary hearing, to investigate these claims. The Petitioner asserts that this was an abuse of discretion by the District Court and therefore prays that this Court will grant the Petitioner the relief the law provides him and ensure that his and others sixth amendment rights are not violated and to ensure that he and others are not irreparably harmed.

Moreover, the District Court's failure to exercise its authority in requesting these claims be adjudicated through an evidentiary hearing, does not fall within the exceptions that the law allows it, to deny affording a defendant an evidentiary hearing. "It is well-established that a District Court need not grant an evidentiary hearing in all 2255 cases." id For instance, a hearing is not required if the motion and the files and records of the case conclusively show the prisoner is entitled to no relief." (Sect. 2255 (b)) Additionally, if the record contains sufficient facts to explain Counsel's actions as tactical,' generally no hearing is required. (See Osagiede, 543 R. 3d at 408). Finally, a hearing is unnecessary if the Petitioner makes allegations that are 'vague, conclusory, or palpably incredible,' rather than 'detailed and specific.' (Martin, 789 F. 3d at 706) Regarding the first point, the District Court specifically stated as previously referenced, "indeed under some scenarios, the loss amount is potentially less." (See District Court's May 16, 2016 ruling, pg. 14, attached as Appendix E) The

District Court also stated "in his reply brief, Thomas offers a revised figure of \$1,924,325 as his actual loss amount. If correct, this would indeed result in a reduction of the applicable guideline range." (See District Court's May 16, 2016 ruling, pg. 13, attached a Appendix E) This language and these statements from the District Court is a clear concession that the Petitioner's claims and the trial records of the case do not conclusively show the Petitioner is not entitled to any relief, an therefore abused its authority and discretion, by not at minimum conducting an evidentiary hearing, and the Appellate Court failed to conduct proper oversight of the District Court by failing to mandate an evidentiary hearing be conducted or granting a COA. These statements also show that the Petitioner's claims are indeed, "detailed and specific," because the District Court recognized the Petitioner's assertion as to what he purports to be the correct loss amount, and that as a result, if his claims are proven true, could be entitled to a reduced applicable guideline range.

Finally, no reasonable jurists at would employ a "tactical" strategy that would result in a sentencing guideline range of 2-4 points higher than what the defendant deserves and justice demands. In fact, judicial historical precedent recognizes as a viable tactic an attorney not defending their client in attempts to gain a three-point sentencing reduction for their client's acceptance of responsibility. If the Courts can allow an attorney to do nothing to gain a three-point reduction, then it is inconceivable that the Court's would view any "tactic" whatsoever that would increase a client's applicable

sentencing guideline range by 2-4 points, as reasonable.

CONCLUSION

The Petitioner prays this Honorable Court will review the record, consider all of the Petitioner's pro-se issues, both substantive and procedural, and identify such issues warrant encouragement to proceed further by granting the Petition for Writ of Certiorari prayed for within.

May God bless this Honorable Court.

Respectfully submitted,

By: 

Donell A. Thomas

Register # 42161-424

Federal Prison Camp

PO Box 1085

Oxford, WI 53952-1085

Pro-Se Litigant