No.: _____

IN THE
SUPREME COURT OF THE
UNITED STATES

BOBBY CRUZ,
PETITIONER;

V.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE EIGHTH CIRCUIT COURT OF APPEALS

Bobby Cruz
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QUESTIONS PRESENTED

I. DID THE SEVENTH CIRCUIT COURT OF APPEALS ERR IN DENYING BOBBY CURZ A CERTIFICATE OF APPEALABILITY CONCERNING THE DISTRICT COURT'S DENYING CRUZ'S AMENDED 28 U.S.C. § 2255 IN VIOLATION OF MAYLE V. FELIX, 545 U.S. 644 (2005) AND ITS PROGENY?

II. DID THE SEVENTH CIRCUIT COURT OF APPEALS ERR IN DENYING BOBBY CRUZ A CERTIFICATE OF APPEALABILITY CONCERNING THE DISTRICT COURT'S DETERMINATION ON THE MERITS OF THE AMENDED ISSUE IN (a) MAKING A CREDIBILITY DETERMINATION WITHOUT AN EVIDENTIARY HEARING VIOLATING CRUZ'S DUE PROCESS; AND (b) COUNSEL WAS INEFFECTIVE FOR PROVIDING ERRONEOUS ADVICE WHICH INDUCED HIS GUILTY PLEA IN VIOLATION OF HILL V. LOCKHART, 474 U.S. 52 (1985) AND ITS PROGENY?

CERTIFICATE OF INTERESTED PERSONS

I certify that the following persons have an interest in the outcome of these proceedings:

Bobby Cruz, Petitioner-Defendant;

Jennie Horwitz Leven, Assistant United States Attorney;

Daniel Hesler, Counsel for Defendant.

I declare the foregoing to be true and correct to the best of my knowledge and belief.

7-10-18
Date

Bobby Cruz
Petitioner-Defendant
Pro se

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STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals denied Bobby Cruz's Certificate of Appealability on May 11, 2018. Cruz v. United States, 17-2952 (7th Cir. May 11, 2018). See Appendix B., p. 32.

The United States Supreme Court has jurisdiction to entertain this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254. See also Hohn v. United States, 524 U.S. 236 (1998)(holding that the Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) to review the denial of applications for a certificate of appealability.)

Statement of the Case

PROCEDURAL POSTURE

On or about November 30, 2011 Mr. Bobby Cruz ("Cruz") was indicted by a federal grandjury in the Northern District of Illinois in an eight (8) count indictment including four (4) counts of production of child pornography (18 U.S.C. § 2251(a)); one (1) count of crossing a state line with intent to engage in a sexual act with a person who had not attained 12 years of age (18 U.S.C. § 2241(c)); two (2) counts of transportation of child pornography (18 U.S.C. § 2252A(a)(1)); and one (1) count of possession of child pornography (18 U.S.C. § 2252A(5)(B)).

On or about November 21, 2012 Mr. Cruz was indicted by a federal grandjury in the Central District of Illinois in a two (2) count indictment of production of child pornography (18 U.S.C. § 2251(a))).

On or about September 30, 2013 Mr. Cruz plead guilty on advice from counsel pursuant to a written plea agreement to counts five (5) of the Northern District Indictment and Counts One (1) and Two (2) of the Central District's indictment. All other counts were dismissed.

On or about April 14, 2014 Mr. Cruz was sentenced to 360 months imprisonment on Counts One and Two and 600 months on Count Five. All sentences were to run concurrent.

Mr. Cruz did not file a direct appeal nor for a Writ of Certiorari.

On or about April 1, 2015 Mr. Cruz filed a Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Cust-

ody pursuant to 28 U.S.C. § 2255. On or about September 23, 2016 Cruz filed his Reply including his amended issue, and filed a Motion to Amend concomitant with the Reply.

On or about July 19, 2017 the District Court denied Cruz's 2255 and denied the motion to amend.

Cruz timely filed his Notice of Appeal and an Application for a COA on December 13, 2017. The Seventh Circuit Court of Appeals denied the Application for a COA on or about May 11, 2018.

BACKGROUND

On or about September 2010, a Yahoo email account was found to be sending and receiving child pornography.

On or about april 25, 2011, a search warrant was executed on that Yahoo email account holder. Records suggested that the Yahoo user was sharing child pornography with a Google email account holder, later identified as belonging to Bobby Cruz.

In August 2011 a federal agent, acting in an undercover capacity, contacted Mr. Cruz via email inviting him to trade child pornography with the agent. Several files of child pornography were sent to the agent.

On November 1, 2011 a search warrant was executed on Mr. Cruz's address in Des Plaines, Illinois and Mr. Cruz was arrested. Cruz was subsequently charged in an eight count indictment in the Northern District of Illinois and a two (2) count indictment in the Central District of Illinois.

I. DID THE SEVENTH CIRCUIT COURT OF APPEALS ERR IN DENYING BOBBY CRUZ A CERTIFICATE OF APPEAL ABILITY CONCERNING THE DISTRICT COURT'S DENYING CRUZ'S AMENDED 28 U.S.C. § 2255 IN VIOLATION OF MAYLE V. FELIX, 545 U.S. 644 (2005)?

A

Rule 15 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") allows pleadings to be amended. See generally Fed. R. Civ. P. 15. Section (c) of Rule 15 allows limited amendments when the statute of limitations has run——to those that "relate back" to the date of the original, timely filed, pleading. Scarborough v. Principi, 541 U.S. 401, 417 (2004).

Rule 15(c)(1)(B) states in pertinent part "the amendment asserts a claim or defense that arose out of the same conduct, transaction, or occurrence set out——or attempted to be set out——in the original pleading."

In Mayle v. Felix, 545 U.S. 644 (2005) overruled the Ninth Circuit's interpretation of "relation back"——establishing the relation back doctrine in the habeas arena. In Mayle's holding, the relation back doctrine applies to habeas' when the amended pleading presents claims supported by facts of the same time and type which are tied to common core of operative facts. Id. at 650 and 664.

B

Mr. Cruz timely filed his Application for a Certificate of Appealability ("COA") on or about December 13, 2017 to the Seventh Circuit Court of Appeals. Appendix B, pp. 33-49. On or about May 11, 2018 the Seventh Circuit denied Cruz's COA tersly stating "[w]e find no substantial showing of denial of

a constitutional right[,]" denying the COA. Cruz v. United States, 17-2952 (7th Cir. May 11, 2018) Appendix B, p. 32.

In his Application for a COA Cruz claimed that the district court erred in denying his motion to amend. He asserted that in his initial 28 U.S.C. § 2255 (2255) in Ground One's supporting facts "that the element of intent was not applicable in his conduct[,] because he didn't intend to travel across state lines to have sex with the minor." United States v. Cruz, 1:15-cv-03188 (N.D. IL 2017), Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255. Appendix C, p. 54 (ECF 1, p. 5). Mr. Cruz further stated "that to assume jurisdiction pursuant to 18 U.S.C. § 2241(c) the government must show the element of intent . . . ." Memorandum of Law ("Memorandum) in support of 28 U.S.C. § 2255. Appendix C, p. 58 ("ECF 3", p. 4). The memorandum asserted:

> [t]he Government would offer that Mr. Cruz's intentions were to go on this trip in order to have sex with the 11 year old victim. That this victim was his mindset and focus for agreeing with the victim's parent's to go on this trip. This element of the "intent", is needed to sustan 18 U.S.C. § 2241(c) as the offense that Mr. Cruz committed. Appendix C, p. 62.
> Mr. Hesler failed to raise jurisdictional[1] issues that pr[e]cluded the application of [] 18 U.S.C. § 2241(c) [as] applied to Mr. Cruz. Id. at 67.

Mr. Cruz clearly gave notice to both the Government and the Court that he was raising the issue of the element of "intent" contained in 18 U.S.C. § 2241(c).

In Cruz's Reply he raised a new legal theory that his

1. Mr. Cruz's jurisdictional issue was based solely on the "intent element of 18 U.S.C. § 2241(c).

counsel was ineffective for his erroneous advice concerning "intent" which induced his plea of guilty. Appendix C, pp. 70-75 (ECF 19, pp. 6-11). Mr. Cruz asserted that counsel advised him that the element of "intent" was presumed in the instant case. Id.; see also id. at pp. 77-80 (Declaration of Bobby Cruz (ECF 19, pp. 18-21)). In Cruz's Declaration he stated that he advised his attorney multiple times that he did not travel with any intent to engage in a sex act. Id. at 79 (ECF 19, p. 20 ¶22). He further stated that his counsel advised him multiple times that "intent" was presumed because he had taken pictures of victim C prior to the travel. Id. at p. 79-80. He advised the Courts below that he agreed to plead guilty to Count 5 because his attorney advised him that "intent" was "presumed" in the instant case. Id. at 80. He further advised the Courts had he been provided proper advice, that is to say the Government was still required to prove the intent element of 18 U.S.C. § 2241(c) beyond a reasonable doubt, he would not have pled guilty and insisted on going to trial. Id. at p. 80.

In rejecting Cruz's amended claim the District Court held, and Appellate Court did not find debatable, that the amendment did not relate back in that the "original claim that [Cruz's] attorney should have challenged either the Norther District of Illinois' 'venue' or 'subject matter jurisdiction' based on where he formed the intent to engage in a sexual act with victim C." District Court's Opinion, Appendix A, p. 22. Further stating that while the "new claim relates to advice that he allegedly received from his lawyer about how Respondent could

meet its burden to prove Petitioner's intent." Id. "One pertains to a motion that his attorney allegedly should have filed" and the other "is about specific advice that he received in deciding to enter into the plea." Id. What the District Court indentified as the core operative facts are infact legal theories.

The core operative facts involved in the instant case surround the element of intent and counsel's misapprehension of whether intent must be proven or is presumed and whether to file a motion to dismiss for lack of subject matter jurisdiction due to the lack of intent. Counsel's erroneous advice was central to Mr. Cruz's decision to enter into the plea. The wisdom or merit of the argument of intent as it relates to subject matter jurisdiction is of no moment. What is relevant is whether counsel's erroneous advice concerning intent relates back to the claim that counsel was ineffective for his failure to move to dismiss for lack of subject matter jurisdiction due to the lack of intent. Appendix B, p. 39.

In fact Mr. Cruz's amended 2255 did relate back and only added a new legal theory for relief which is permissable. Id. In Cummins v. Phillips, 1:16-cv-00023, 2017 U.S. Dist. LEXIS 119748, Section II, ¶5 (M.D. TN July 31, 2017) finding that a new claim of "prosecutorial-misconduct[,][] to-wit the prosecutor's comments in his opening statement . . . regarding [Cummins] manufacturing of methamphetamine: suffciently 'related back' to the original claim that counsel was ineffective for failing to "object to the admission of evidence of prior bad acts, namely, the admission of evidence that Petitioner

manufacture methamphetamines." See also Jenning v. United States, 3:16-cv-404, Section III, ¶8 (N.D. IN 2016)("[t]he type of claim (sic) differ: one is based on a change in constitutional law and the other is based on vacatur . . . they are on the same occurences[,] Mr. Jennings prior conviction and the court's treatment . . . at sentencing. That is enough"); Torres v. United States, 08-cv-714, 2012 U.S. Dist. LEXIS 43976 (S.D. IL 2012)(granting in part for counsel's failure to subpoena expert to verify the drug amount used to increase base offense level relates in both time and type to counsel's failure to subpoena expert to verify petitioner's mental capacity; Ray v. United States, 07-C-1072, 2010 U.S. Dist. LEXIS 96031 (E.D. WI 2010)(granting motion to amend in that the Brady claim is closely related to claim of ineffective assistance of counsel for failing to file a motion to suppress. "The facts underlying both claims are similar in time and type, in that both around petitioner's alleged beating, trip to the hospital, and [] confession.")

Mr. Cruz's amended 2255 as included in his Reply did relate back to the initial timely 2255. Therefore the District Court abused its discretion in denying the amendment and the Appellate Court erred in not issuing a COA.

Mr. Cruz prays this Honorable Court to GRANT this Writ of Certiorari on this issue.

II. DID THE SEVENTH CIRCUIT COURT OF APPEALS ERR IN DENYING BOBBY CRUZ A CERTIFICATE OF APPEALABILITY CONCERNING THE DISTRICT COURT'S DETERMINATION ON THE MERITS OF THE AMENDED ISSUE IN (a) MAKING A CREDIBILITY DETERMINATION WITHOUT AN EVIDENTIARY HEARING VIOLATING CRUZ'S DUE PROCESS; AND (b) COUNSEL WAS INEFFECTIVE FOR PROVIDING ERRONEOUS ADVICE WHICH INDUCED CRUZ'S GUILTY PLEA IN VIOLATION OF HILL V. LOCKHART, 474 U.S. 52 (1985) AND ITS PROGENY

(a) Making a Credibility Determination Without An Evidentiary Hearing violating Cruz's Due Process.

It is a well settled tenent that a court cannot appropriately make a credability determination without the benefit of an evidentiary hearing, simply based on affidavits, if the affidavits are not wholly incredable. In fact every circuit addressing this issue has held that a court cannot make a credibility determination without holding an evidentiary hearing. See Cullen v. United States, 194 F.3d 401 (2d Cir. 1999)(reversing in part the district court's rejection of the magistrate's credibility finding without an evidentiary hearing); Hill v. Beyer, 62 F.3d 474 (3d Cir. 1995)(same); United States v. Heini, No. 99-6428, 1999 U.S. App. LEXIS 26529 (4th Cir. 1999)(holding the district court erred in making a credibility determination without an evidentiary hearing); Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980)(finding the district court erred in rejecting the magistrate's credibility determination without holding an evidentiary hearing); United States v. Scribner, 832 F.3d 252 (5th Cir. 2016)(same); United States v. Ridgway, 300 F.3d 1153 (9th Cir. 2002)(same); United States v. Campos-Almazan, 8:12-CR-00358, 2014 U.S. Dist. LEXIS 81480 (D. NEB 2014)(determining that the court could not make a

credibility determination without an evidentiary hearing——ordering an evidentiary hearing.

In fact the Seventh Circuit has also come to the same conclusion. See Daniels v. United States, 54 F.3d 290, 295 (7th Cir. 1995)(citing Castillo v. United States, 34 F.3d 443, 445 (7th Cir. 1994)("a determination of credability cannot be made on the basis of an affidavit.")

Ignoring this well settled principle, the District Court, bolstered by the Appellate Court's denial of a COA, impermissably made a credibility determination. In assessing Cruz's amended claim the Court stated "Petitioner has a learning disorder that makes [it] difficult to learn or retain information." Appendix A, p. 23 (ECF 20, p. 23). Continuing with:

> He then proceeds to recount——in detail——the events underlying the Agravated Sexual Abuse Count from October 2010 . . . . This Court is not persuaded. These allegations directly contradict the "facts" that Petitioner admitted in his plea were true and could be proven beyond a reasonable doubt, namely that "[a]t the time of the travel, [Petitioner] intended to engage in a sexual act with Victim C, who was 11 years old, once arriving in Missouri." Plea Agreement ¶6(a) . . . . Petitioner offers no explanation as to why he admitted that specific fact in his plea agreement if it was untrue. Petitioner's plea also states that if he went to trial "the jury would be instructed that [he] is presumed innocent, that the government has the burden of proving [him] guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing all the evidence, it was persuaded of his guilt beyond doubt." Id. at ¶24(a)(iii). Petitioner makes no effort to reconcile this statement, which he acknowledged in 2013 that he understood (id. ¶36), with his present allegation that he did not know the Government had to prove his guilt beyond a reasonable doubt . . . . Frankly it is hard to square how Petitioner can acknowledge that he has difficulty retaining information [19, at 18], yet profess to remember specific words that his attorney used in a conversation more than three years earlier . . . . The IMPLAUSIBILITY of Petitioner's recall is only underscored by the way that he minimizes his behavior . . . . It is simply NOT CREDIBLE that his attorney ignored his

> molestation history in their discussion about how Respondent would prove intent . . . . This kind of distortion is a RED FLAG that Petitioners DOES NOT ACCURATELY REMEMBER these remote conversation. Appendix A, pp. 23-25 (emphasis added).

The District Court, ignored by the Appellate Court, impermissably made credability determinations without the benefit of any evidentiary hearings denying Mr. Cruz due process guaranteed by the Constitution.

Mr. Cruz advised the Appellate (and District Court) that he had a learning disability and difficulty retaining inforamtion. Appendix B, p. 41 (COA at 10). At no time did he advise either court that he was INCAPABLE OF LEARNING OR RETAINING INFORMATION. Mr. Cruz advised the courts below that he advised counsel multiple times that he did not understand why he was being charged with crossing state lines with the intent to engage in a sex act since he did not have that intent. Id. He further advised the courts below that counsel advised him an equal number of times that the Government did not need to prove intent because it was presumed because of previous times he had taken pictures of Victim C. Id. In fact it appears that the District Court seems to also support this erroneous position when stating "it is simply not credable that his attorney ignored his molestation history in their discussions about how Respondant would prove intent." Id. Though prior bad acts may be introduced to show a propensity, it would be prohibited to use it to prove intent in the instant case.

Mr. Cruz further complained to the Appellate Court that the court below impermissably formed a medical diagnostic determination as to the extent Cruz could retain information through rep-

etition without the benefit of a medical expert's examination of Cruz. Id. at p. 42.

Mr. Cruz submitted a declaration specifically identifying his allegations. They were not vague, conclusory, nor palpably incredible. Appendix B, p. 44 (COA at p. 13). cf. Abascal v. United States Government, SACV 13-0946-CAS (JEM), 2013 U.S. Dist. LEXIS 103146 (C.D. CA 2013):

> Petitioner posits largely incoherent and palpably incredible allegations that he was subjected to mind altering substatnces . . . by federal authorities causing retains (sic) in petitioner's memories of the events and communications on those days and the events and communications between those days . . . and certain telephone communications between those days. These are also the days that federal authorities unlawfully, unjustly and unconstitutionally adjudicated petitioner's life, activities, thoughts, liberty and Constitutional rights . . . . Appendix B, p. 44 (internal quotation marks omitted).

There were no opposing declarations from the Respondant, nor evidence that disputes Cruz's declaration. Id.

The District Court impermissibly made a credibility determination concerning Mr. Cruz without a benefit of an evidentiary hearing denying him due process; and the Appellate Court erred in denying a COA——not only was it debatable that the lower court erred——but clearly erroneous.

Mr. Cruz prays this Honorable Court to grant him a Writ on this issue for further briefing.

b. Counsel Was Ineffective For Providing Erroneous Advice which Induced Cruz's Guilty Plea In Violation of Hill v. Lockhart, 474 U.S. 52 (1985) and Its Progeny.

In Hill v. Lockhart, 474 U.S. 52 (1985) the United States Supreme Court has held that an attorney has an obligation to

provide a defendant with accurate advice. In fact Hill holds that a defendant may attack a guilty plea as involuntary where the erroneous advice induced the plea. Id. at 56-57.

In Pidgeon v. Smith, 785 F.3d 1165, 1172 (7th Cir. 2015) the Circuit Court reiterated that the deficient performance prong, of Strickland's test, is met where counsel provides erroneous advice which induced a guilty plea. Pidgeon reiterates that deficient performance of erroneous advice which induces a client to forego their constitutional right to a trial is prejudice in and of itself. Id. at 1173. "The correct prejudice inquiry is not whether he would have been better off going to trial, but whether he would have elected to go to trial." Id.; see also Ward v. Jenkins, 613 F.3d 692, 700 (7th Cir. 2010).

In rejecting Mr. Cruz's claim the District Court stated "Petitioner offers no supporting evidence to show that these conversations occured." Appendix A, p. 25. The Court further dismissed Mr. Cruz's claim with impermissible conjecture stating that "[Cruz] speculates that the Word 'presumed' was used to mean legally presumed, he fails to consider that his attorney simply meant highly likely to found (sic) true in the end." Id. at 26 n.7.

Curiously the District Court questions whether the conversations ever took place——then offers its own speculation as to what counsel meant during those conversations. Id. at 25 and 26.

The Court continued stating "Petitioner's affidavit merely states he would not have plead guilty to the Count '[] this is,

the Aggravated Sexual Abuse Count. Conspiciously absent from his his Affidavit is a claim that he also would have rejected the plea on his other nine counts." Id. at 28.

This Court rejected the District Court's position that Mr. Cruz offered no supporting evidence that the conversations occurred; or offered nothing more than allegations in Machibroda v. United States, 368 U.S. 487 (1962). The Machibroda Court held the sentencing court erred in making findings on controverted issues of facts——without a hearing stating:

> we cannot agree with the Government that a hearing . . . would be futile because of the apparent lack of any eyewitnesses to this occurrences alleged, other than the petitioner himself and the Assistant United States Attorney. The petitioner's motion and affidavit contain charges which are detailed and specific. Id. at 495

Mr. Cruz submitted a specific claim that counsel provided erroneous advice. He submitted a declaration, signed under penalty of perjury which asserted specific claims that his attorey advised him that intent was presumed; and absent that erroneous information he would have insisted on going to trail on that count.

The District Court misrepresented the facts when it stated that Cruz provided no evidence to support his claims, in fact he did provide an uncontroverted declaration.

The District Court's analysis of the prejudice prong was wholly inappropriate when it stated "even accepting that this would have been a better course . . . that he even had a theoretical possibility of prevailing on this defense with [the] jury." Appendix A, p. 26. The correct prejudice prong inquiry "is not whether he would have been better off going to trial,

but whether he would have elected to go to trial in lieu of accepting a plea." Pidgeon, 785 F.3d at 1173.

CONCLUSION

Mr. Cruz has presented two (2) questions for this Court's consideration. Both questions involve Constitutional issues and the application of clearly established Supreme Court law. He has presented sufficient facts for this Court to GRANT this Application for a Writ of Certiorari for further briefing.

Mr. Cruz prays this Honorable Court to GRANT this Application for a Writ of Certiorari or in the alternative Grant, Vacate and Remand to the Seventh Circuit Court of Appeals for a COA for briefing or any other relief which is fair and just.

Respectfully Submitted,

7-10-18
Date

Bobby Cruz
Petitioner-Defendant