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No. \_\_\_\_\_

IN THE SUPREME COURT OF  
THE UNITED STATES OF AMERICA

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Samuel K. Posa,  
Petitioner,

- VS -

UNITED STATES of AMERICA  
Respondent.

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District Court NO: 8:16-cv-00075-SCB-AEP  
Circuit Court Appeal No. : 16-16447-B

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ON PETITION FOR WRIT OF CERTIORARI AND  
APPLICATION FOR CERTIFICATE OF APPEALABILITY  
TO THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

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Samuel K. Posa  
# 55627 - 018  
Federal Correctional Institution  
Coleman, Medium  
P.O. Box 1032  
Coleman, Florida 33521

## QUESTIONS PRESENTED

1. ) Whether the Eleventh Circuit Court of Appeals erred in denying Petitioner's Certificate of Appealability relying on incorrect facts offered by the government stating that Petitioner did not clearly request to exercise his right to represent himself, when it clearly shows in the record Petitioner did invoke the right to represent himself. If the record was provided to reasonable jurists they would more than likely disagree with the District Courts assessment of the Petitioner's Constitutional claim. Now in light of Buck V. Davis, and Tharpe V. Sellers should the Petitioner be granted a Certificate of Appealability. See Appendix F .
  
2. ) Whether the Eleventh Circuit Court of Appeals improperly analyzed the merits of Petitioner's Constitutional claims in determining whether to issue a certificate of appealability ( Now ) in light of Buck V. Davis, 137 S.Ct. 759 ( 2017 ) and Tharpe V. Sellers, 199 L.Ed. 2d. 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ).

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**Opinions Below**

The decision of the Eleventh Circuit Court of Appeals entered on January 24, 2018 is attached hereto as Appendix ( A ), Petitioner's order denying his motion under 28 U.S.C. § 2255 and Certificate of Appealability is attached as Appendix ( B ) and ( C ).

### PARTIES TO THE PROCEEDINGS

All parties to this proceeding are the parties shown in the caption of the case , Samuel Posa V. U.S., see case numbers : 8:11-cr-555-T-24AEP and 8:16-cv-75-T-24AEP.

### JURISDICTION

The Jurisdiction of the Court is invoked under 28 U.S.C. section 1254 ( .1 ) and rule 13 of the rules of the Supreme Court. See Hohn V. United States, 524 U.S. 236, 252, 118 S.Ct. 1969 ( 1998 ), and Tharpe V. Sellers, 199 L.Ed. 2d. 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ). The date on which the Eleventh Circuit Court of Appeals is denied the Petitioner's C.O.A. on January 24, 2018 (Appendix A ) , which provided for a deadline of filing of April 23, 2018. Petitioner mailed on March 29, 2018 to this Court a request for ( 60 ) sixty days extension of time to file , which was mailed certified and delivered and signed for on April 2, 2018 ( Appendix ) , which when granted would have provided a deadline to file sometime in June of 2018. Which by the time Petitioner is now filing this request for C.O.A. would make it timely, giving this Honorable Court Jurisdiction. See ( Appendix A, C , D , E ), to demonstrate timeliness of filing.

### CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in pertinent part: " No person shall... be deprived of life, liberty, or property, without due process of law..." [ 1791 ].

The Sixth Amendment provides in pertinent part : " In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." [ 1791 ]

## INTRODUCTION

### A) Collateral Challenge to Judgement

Petitioner Samuel Posa, hereby respectfully petitions this Honorable Court on Petition for Writ of Certiorari for a certificate of appealability. Petitioner seeks to collaterally Appeal ( 28 U.S.C. § 2255 ) his convictions for ( 1 ) one count of Conspiracy to dispense and distribute oxycodone outside the usual course of professional practice and not for a legitimate medical purpose, and to further distribute and possess with the intent to distribute oxycodone; and ( 2 ) two counts of distributing and possessing with the intent to distribute oxycodone in violation of 21 U.S.C. § 841 (a)(1), where his counsel's deficient performance deprived him of his Sixth Amendment right to effective assistance of counsel, during critical stages of the proceedings.

### B) Statment of the Case

On October 27, 2011, a Federal Grand Jury charged Petitioner with:

( 1 ) one count of conspiracy to dispense and distribute oxycodone outside the usual course of professional practice and not for legitimate medical purpose, and to further distribute and possess with intent to distribute oxycodone ; and two counts of distributing and possessing with intent to distribute oxycodone.

On November 3, 2011, the District Court appointed the first of four court appointed attorney's in this case. Petitioner moved to have the attorney removed, so on February 10, 2012, a second attorney was appointed. Petitioner then moved to dismiss that attorney and proceed Pro se. On May 31, 2012 the Magistrate Judge conducted a hearing and granted the motion. Petitioner was allowed to proceed Pro se, but with the Court appointed a third attorney to act as standby counsel.

On June 4, 2012, Petitioner represented himself during a suppression

hearing Petitioner expressed frustration at his inability to perform legal research to prepare for his upcoming trial, due to the county jail he was housed took inmates Law Library access. Petitioner continued to express dissatisfaction at a hearing on June 20, 2012, where he requested that the Court appoint him counsel, only after the Court had denied to grant him Law Library access at the jail or move him to another location where access would be given. The request was granted on June 25, 2012, and his standby counsel was appointed to represent petitioner at trial.

Before trial began, Petitioner again moved the Court to dismiss his counsel. On September 10, 2012, one week before trial, the Magistrate Judge held a hearing on Petitioner's motion. During the hearing the Magistrate told Petitioner that appointed counsel would do a good job, and do what needed to be done in preparation for trial. Petitioner stated that he wanted counsel to continue to represent him, but that at this point he had no choice. In the following days leading up to trial counsel did not interview any of the discussed witness and obtain any of the records to support the defense that would be presented at trial, so the Petitioner instructed counsel to notify the Court that Petitioner would proceed Pro Se, counsel agreed and left the jail after only being with the Petitioner for about 20 minutes.

On September 17, 2012, the before trail began, Petitioner stated that he wanted to proceed Pro se in open Court directly to the Judge when it became evident that counsel never informed the Court of Petitioner's decision to do so as discussed with counsel at the jail a couple of days before. The District Court denied his request.

Pettitioner was convicted on all counts. The District Court removed appointed trial counsel before sentencing, and told Petitioner he could now represent himself at sentencing, for the conviction where he was denied his right to defend himself against the charges. The Court appointed an other



attorney to represent Petitioner during Sentencing and on Appeal. On December 14, 2012, Petitioner was sentenced to 240 months imprisonment, followed by 120 months supervised release.

Petitioner appealed, by the Court appointed Counsel, arguing that the District Court improperly instructed the jury regarding the inculpatory potential of the Petitioner's testimony and also that the evidence was insufficient to support a conspiracy conviction because it showed no more than a buyer-seller relationship between himself and his alleged co-conspirator. The Eleventh Circuit Court of Appeals affirmed Petitioner's conviction. See United States V. Posa, No: 12-16493, slip op.nt 4, 9 ( 11th Cir, May 21, 2014 )

#### 2255 PROCEEDINGS

On January 4, 2016, Petitioner filed a 28 U.S.C. § 2255 motion to vacate his sentence, raising the following claims:

- A) The Court violated his right to self-representation ;
- B) The Court forced him to be represented by ineffective trial counsel who failed to investigate, interview, or subpoena witnesses for trial ;
- C) Trial Counsel was ineffective in failing to exercise preemptory challenges on prospective jurors that had predetermined biases ;
- D) Trial and Appellate counsel were ineffective in failing to raise the differences in the language between the indictment and the evidence presented at trial ;
- E) Trial counsel was ineffective in conceding during closing argument that Petitioner was guilty, but using medication at the time of the offense ;

- F) Trial counsel was ineffective in failing to present the defense theory on which counsel and Petitioner had agreed, and in failing to investigate, subpoena witnesses, and make critical objections during trial ;
- G) Trial counsel was ineffective in failing to object to the government's introduction of suppressed evidence ;
- H) Appellate Counsel was ineffective in failing to argue that Petitioner's ten year term of supervised release exceeded the statutory maximum ;
- I) Trial Counsel was ineffective in failing to obtain an expert witness to impeach government's main witness's testimony ;
- J) Appellate Counsel was ineffective for failing to raise claims 1 through 9 and 11 on direct appeal when he presented two claims that based on a little research would have shown had no merit ; and
- K) Petitioner's Fifth Amendment right to a fair trial was violated because of prosecutorial misconduct.

However, without conducting an evidentiary hearing the District Court denied the § 2255 motion. The Court concluded that the first two claims were procedurally defaulted and meritless, and the remaining claims were meritless. The Court denied Petitioner a ( C.O.A. ) and denied him leave to appeal ( IFP ). Petitioner then moved for a ( C.O.A. ) and I.F.P. status in the Eleventh Circuit Court of Appeals, in which both were denied, this matter now comes before this Honorable Court.

#### C) STATEMENT REGARDING ( C.O.A. ) APPEAL

Notice of Appeal and/or ( C.O.A. ) was filed in the District Court and the Eleventh Circuit Court of Appeals, however, ( both ) Courts where without

this Honorable Courts recent holding in Buck V. Davis, 137 S.Ct. 759 (2017), and also, Tharpe V. Sellers, 199 L.Ed. 2d.424 \_\_\_\_ U.S. \_\_\_\_ (2018).

#### INCORRECT PROCEDURE

The Eleventh Circuit Court of Appeals looked at the merits of the Petitioner's case, using the District Courts incorrect facts that were set out by the Government, that are clearly contradictory to the the record. The proper standard for a ( C.O.A. ) was whether reasonable jurists could disagree with the findings of the District Court, this Honorable Court clarified in Buck V. Davis, 137 S.Ct. 759 (2017), the Court essentially created an exception for Buck's unique circumstances, Thomas argued, he was joined by Justice Samuel A. Alito Jr. holding:

" Having settled on a desired outcome, the Court bulldozes procedural obstacles and misapplies settled law to justify it. " Thomas said. See Buck Id.

Thus, to put it differently, a court of Appeals should limit its examination at the ( C.O.A. ) stage to a threshold inquiry into the underlying merits of the claims, and ask only if the District Court's decision was debatable. Id. Also see recently Tharpe V. Sellers, 199 L.Ed. 2d. 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ). ( C.O.A. remanded back to the Eleventh Circuit Court of Appeals.

Therefore this matter requires this Honorable Court to intervene and remand this matter back to the Eleventh Circuit Court of Appeals in light of Buck V. Davis, 137 S.Ct. 759 ( 2017 ). And recently done in Tharpe V. Sellers, 199 L.Ed. 2d. 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ), as discussed further therein.

## REASONS FOR GRANTING WRIT

Title 28 U.S.C. § 2253(c)(2) , as revised by the Antiterrorism and effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 Apr.24 1996 ( "The Act" ), requires a §2255 movant who appeals a denial of his motion by a district court to obtain a Certificate of Appealability from a circuit justice or judge by making a " substantial showing of the denial of a Constitutional right." 28 U.S.C. § 2253 (c)(2). The Act further requires that Certificates of Appealability " indicate which specific issue or issues" are found to be appealable. 28 U.S.C. § 2253(c)(3).

Previously this Honorable Court held that it has Statutory Authority to review a denial by a single circuit court Judge or panel of judges, of an unsuccessful habeas corpus petitioner's application for a Certificate of Appealability. Hohn V. United States, 524 U.S. 236, 118 S.Ct. 1969 (1998). The decision focused on what it means for a "case" to be " in " the court of appeals under the most frequently invoked jurisdictional statute in the Supreme Court's certiorari jurisdiction to review "cases in the courts of appeals..." Justice Anthony M. Kennedy said the application for a certificate of appealability falls within the reach of that phrase. The fact that § 2253 (c)(2) permits the Certificate to be issued by a Circuit Justice or Judge " does not mean that the action of the Circuit Judge in denying the Certificate is his or her own action, rather than the action of the Court of Appeals..." the majority said. The majority also pointed to indications that the appeals courts view such applications as cases, including the court's adoption of local rules and directives to govern the disposition of Certificate applications, and the Eighth Circuit's adoption of a rule allowing an individual judge's grants of Certificates to be revised by the entire court.

However, recently regarding ( C.O.A. ) proceedings, this Honorable Court

touched base again in determining how ( C.O.A.'s ) should be handled in Buck V. Davis, 137 S.Ct. 759 (2017), as metioned earlier.

Petitioner wishes to emphasize to this Honorable Court that the Eleventh Circuit Court of Appeals, in making its decision whether to grant the application for a Certificate of Appealablity was inconsistent with Buck V. Davis, 137 S.Ct. 759 (2017). Petitioner contested his conviction on grounds that he was denied the effective assistance of counsel at both trial and direct appeal. In derogation of his rights under the Sixth Amendment, and that he was deprived of a fair trial in violation of his Fifth Amendment right to Due Process. Petitioner maintains that the specific errors and omissions that prejudiced his defense in the district court and appeals court by both attorneys that were assigned to the petitioner's case reflecting entitlement to a ( C.O.A.) on certain issues, if not all, in light of Buck V. Davis,137 S.Ct. 759 (2017) and Tharpe V. Sellers, 199 L.Ed. 2d. 424, \_\_\_ U.S. \_\_\_ (2018).

- 1) Whether the Eleventh Circuit Court of Appeals improperly analyzed the merits of Petitioner's ( 11 ) Constitutional claims in determining whether to issue a Certificate of Appealability ( Now ) in light of Buck V. Davis, 137 S.Ct. 759 (2017). and Tharpe V. Sellers, 199 L.Ed. 2d. 424, \_\_\_ U.S. \_\_\_ (2018).

Petitioner maintains that the Eleventh Circuit Court of Appeals improperly analyzed the merits of the following ( 11 ) Constitutional claims in determining whether to issue a Certificate of Appealability ( Now ) in light of Buck V. Davis, 137 S.Ct. 759 (2017) and Tharpe V. Sellers, 199 L.Ed. 2d. 424, \_\_\_ U.S. \_\_\_ (2018).

First, Petitioner's (Self-Representation) claim was misapplied and misconstrued by the Eleventh Circuit Court of Appeals, because the standard was whether reasonable jurists could disagree with the findings of the district

court as clarified in Buck, the Eleventh Circuit Court of Appeals misapplied. See Faretta V. California, 422 U.S. 806, 45 L.Ed.2d. 562, 95 S.Ct. 2825 (1975). ( An individual has a Constitutional right to represent himself), also see Appendix ( F ) in support of this claim.

Second, Petitioner's claim that ( Trial counsel was ineffective when he failed to exercise peremptory challenges on prosecutive jurors with predetermined biases ), was whether reasonable jurists could disagree with the findings of the district court, as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ). See Flowers V. Mississippi, 136 S.Ct. 2157 (2016), Foster V. Chatman, 136 S.Ct. 1737 ( 2015 ).

Third, Petitioner's claim that ( Trial Counsel and Appellate Counsel were ineffective in their assistance when they failed to raise an argument based on the differences in the language between the indictment and the evidence presented at trial, resulting in the Petitioner being denied a fair trial ) was whether reasonable jurists could disagree with the findings of the district court as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ). See Stirone V. United States, 361 U.S. 212, 80 S.Ct. 270 (1960), and Southern Union Co. V. United States, 183 L.Ed. 2d. 318, 567 U.S. 343 (2012).

Fourth, Petitioner's claim that ( Trial counsel was further ineffective in admitting during closing argument that Petitioner was guilty of the crimes charged , but attempted to excuse the commission of the crimes by explaining that the petitioner was on medication, when the court had given a jury instruction informing the jurist that being on medication was not a defense recognized by the law.) For the C.O.A. application the question was if reasonable jurists could disagree with the findings of the district court, as clarified by Buck, the Eleventh Circuit Court of

Appeals further ( misapplied ). See Tharpe V. Sellers, 199 L.Ed.2d 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ). See Appendix ( G ) in support of this claim.

Fifth, Petitioner's claim that ( Trial Counsel was further ineffective in failing to pursue the only theory of defense that was set forth and explained to the court before trial, and failing to investigate and subpoena certain witnesses for trial, and to request for Jencks material), was whether reasonable jurists could disagree with the findings of the district court, as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ) . See Tharpe V. Sellers, 199 L.Ed. 2d 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ).

Sixth, Petitioner's claim that ( Trial counsel was ineffective assistance in failing to object to the government's introduction of evidence obtained through illegal ( G.P.S. ) tracking, because during the suppression hearing the government represented that it would not introduce this evidence that was obtained through the ( G.P.S. ) tracking at trial.), was whether reasonable jurists could disagree with the findings of the district court as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ). See Grady V. North Carolina, 191 L.Ed. 2d 459, \_\_\_\_ U.S. \_\_\_\_ ( 2015 ) and Tharpe V. Sellers, 199 L.Ed. 2d 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ).

Seventh, Petitioner's Claim that ( Appellate Counsel was ineffective in failing to argue the Petitioner's Ten-Year term of Supervised Release exceeded the statutory maximum ) was whether reasonable jurists could disagree with the findings of the district court as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ). See Tharpe V. Sellers, 199 L.Ed. 2d 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ).

Eighth, Petitioner's claim that ( trial counsel was ineffective when he declined Petitioner's request to ask the court to

approve funds to retain an expert witness to offer testimony on oxycodone usage and its effects on the memory and the state of mind of a person using the drug, especially someone like the government's witness who was using extremely large amounts on a daily basis ), was whether reasonable jurists could disagree with the findings of the district court, as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ). See Hinton V. Alabama, 188 L.Ed. 2d. 1, \_\_\_\_ U.S. \_\_\_\_ ( 2014 ).

Ninth, Petitioner's claim that ( Appellate Counsel was ineffective for failing to raise meritorious claims on direct appeal, when with the proper presentation and demonstration of prior case law precedent would have given the Petitioner relief, but instead Appellate Counsel presented claims that were easily shown to be without merit and had numerous case law examples to support the Court's denial of Court Appointed Appellate Counsel's claims submitted to the Appellate Court, when he had agreed to at least file the Sixth Amendment right to Self-Representation claim that based on the facts and all of the supporting case law from the district courts to the Supreme Court was a certain winner), was whether reasonable jurists could disagree with the district court, as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ). See Evitts V. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830 ( 1985 ).

Tenth, Petitioner's claim that his ( Fifth Amendment right for a fair trial was violated because of prosecutorial misconduct that his court appointed counsel knew was taking place and did nothing to expose it or refute it with evidence that he possessed during Petitioner's trial), was whether reasonable jurists could have disagreed with the findings of the district court, as clarified in Buck, the Eleventh Circuit Court of Appeals further ( misapplied ) . See Berger V. United States, 295 U.S. 78,



88, 55 S.Ct. 629, 79 L.Ed. 1314 ( 1935 ).

Eleventh, Petitioner's ( C.O.A. ) regarding the District Court's denial of his request for an evidentiary hearing on his 2255 petition, was further required with the ( Affidavits ) and ( Additional evidence ) petitioner presented in the District Court.

Consequently, the Court of Appeals never had the opportunity to properly review Petitioner's § 2255 records in order to make an informed decision in light of Buck V. Davis, 137 S.Ct. 759 ( 2017 ). However, had the Eleventh Circuit Court of Appeals made it's proper standard for a ( C.O.A. ) under Buck, Petitioner maintains that certain issues would have required further determination, in which this Honorable Court should now determine in light of Buck, and Tharpe V. Sellers, 199 L.Ed. 2d 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ).

#### CONCLUSION

For all of the foregoing reasons, Petitioner prays that his petition be granted and that a Certificate of Appealability issue in light of this Honorable Courts ( Now ) standard under Buck V. Davis, 137 S.Ct. 759 ( 2017 ), and more recently set forth in Tharpe V. Sellers, 199 L.Ed. 2d 424, \_\_\_\_ U.S. \_\_\_\_ ( 2018 ).