

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BABUBHAI PATEL — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Babubhai Patel #46049-039

(Your Name)

Federal Correctional Institution
P.O.BOX 1000

(Address)

Milan, Michigan 48160

(City, State, Zip Code)

Federal Prisoner

(Phone Number)

QUESTION(S) PRESENTED

Question # One: Did the Sixth Circuit Court of Appeals sidestep [the COA] process in Petitioner Babubhai Patel's COA Application by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction, thus did the Sixth Circuit violate U.S. Supreme Court precedents in Buck v. Davis, 137 S. Ct. 759 (2017); and Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003); and a C.O.A. should issue as Patel met his burden as required by 28 U.S.C. § 2253 (c) (2) ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 15, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 17, 2018, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment: Assistance of counsel

Fifth Amendment: Fair trial and Due Process

STATEMENT OF THE CASE

Petitioner Babubhai Patel acting pro se seeks the Supreme Court's review of the Sixth Circuit Court of Appeal's denial of his Application for a Certificate of Appealability pursuant to 28 U.S.C. §2253(c)(1)(B). Petitioner brings this appellate review request pursuant to Hohn v. United States, 524 U.S. 236, 141 L. Ed 2d 242, 118 S.Ct. 1969 (1998), where the Court determined it had appellate jurisdiction to review an appellate court's denial of application for a certificate of appealability (COA).

SUMMARY OF PROCEEDINGS

On August 10, 2011 an indictment was filed charging Babubhai Patel with one count of conspiracy to commit health care fraud (18 U.S.C. §1349), fourteen counts of health care fraud (18 U.S.C. §§1347 and 2), one count of conspiracy to distribute controlled substances (21 U.S.C. §846), eighteen counts of controlled substances distribution (21 U.S.C. §841(a)(1), and criminal forfeiture.

JURY TRIAL

Patel plead not guilty and proceeded to trial by jury. On August 10, 2012 after a six-weeks jury trial, Patel was convicted of both conspiracies, ten counts of health acre fraud and fourteen counts of drug distribution counts. On February 1, 2013, Patel was sentenced to 204 months

DIRECT APPEAL

Patel filed a timely notice of appeal. Appellate counsel for Patel raised only two issues on direct appeal. The Sixth

ultimately affirmed Patel conviction and sentence. See United States v. Babubhai Patel, 2014 U.S. App. Lexis 20437 (6th Cir.).

Patel did not seek Certiorari from the Supreme Court from the denial of his direct appeal by the Sixth Circuit.

COLLATERAL ATTACK UNDER SECTION 2255

On 09/11/2015, Patel filed a timely motion vacate, set aside, or correct sentence under 28 U.S.C. §2255, that was assigned Case No. 15-CV-13230. On 10/07/2015, the district court ordered the Government to file a response to Patel's 2255 motion. On 07/07/2017, the district court entered an order denying Patel's 2255 motion without conducting a requested evidentiary hearing. The district court denied Patel a Certificate of Appealability.

CERTIFICATE OF APPEALABILITY

On 07/ 28 /2017, Patel petitioned the Sixth Circuit Court of Appeals for a Certificate of Appealability. SEE Appendix C. On March 15, 2018, the Sixth Circuit entered an Order denying Patel's petition for a Certificate of Appealability.

REHEARING AND REHEARING EN BANC

On March 28, 2018, Patel filed a motion for Rehearing And Rehearing En Banc. SEE Appendix D, On April 30, 2018, the Sixth Circuit issued an order denying Patel's motion for rehearin.

The petitioner Babubhai Patel now seeks this Cort's review of the Sixth Circuits denial of his Petition For A Certificate of Appealability.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Panel who decided Patel's petition for a Certificate of Appealability (COA) in order to deny relief, first decided the merits of the issues presented, and then justified the denial of a COA based on the adjudication of the actual merits, thereby sidestepping proper procedures established by the Supreme Court in *Miller-El v. Cockrell*, 537 U.S. 322, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003). "Before the issuance of a COA" the Supreme Court explained, "the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims." Id. at 336-37. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA." Id. at 342. Quite recently the U.S. Supreme Court reaffirmed it's holding in *Miller-El* in *Buck v. Davis*, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017), the U.S. Supreme Court held that the Fifth Circuit Court of Appeals had clearly erred: "Because a reviewing court inverted the statutory order of operations by deciding the merits of an appeal and then denying the COA based on adjudication of the actual merits, it placed too heavy a burden on the prisoner at the COA stage, thus the Supreme Court reversed and remanded to the Fifth Circuit Court of Appeals. (emphasis added).

In the instant case under the applicable threshold standard for a COA, which "asks only if the District Court's decision was debatable," the Sixth Circuit should have granted Patel a COA.

Most important is the fact that the appellate court made no findings as to whether or not Patel claims had made "a substantial showing of the denial of a constitutional right" as 28 U.S.C. § 2253 (c) (2) requires. (See ORDER denying Patel a COA, at Appendix

B). The question is the debatability of the underlying constitutional claim, and not the resolution of that debate. In Patel's case the debate was whether Patel's trial counsel was constitutionally ineffective based on the numerous claims Patel presented in his petition for a certificate of appealability. Instead of addressing the debatability of Patel's underlying constitutional claims the Circuit Court panel who decided Patel's COA petition "resolved the debate" by first addressing the merits of Patel's ineffective assistance of counsel claims and then denied a COA based on the various merit findings. The Sixth Circuit panel was without jurisdiction to deny Patel a COA based on a merits determination of Patel's underlying ineffective assistance of counsel claims. Thus, a thorough review of Patel's Denial Opinion from the Sixth Circuit demonstrates that the Sixth Circuit panel did not limit it's examination to a threshold inquiry into the actual merits of Patel's constitutional claims of ineffective assistance of counsel, however instead conducted a full examination of the actual merits and then denied Patel's COA Application, see Appendix D, Order Denying COA, however by doing so the Sixth Circuit Court of Appeals clearly violated established U.S. Supreme Court precedents, see Slack v. McDaniel, 529 U.S. at 481, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) (When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the merits of his claims); Miller-El v. Cockrell, 537 U.S. 322, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003) ("before the issuance of a COA" the Supreme Court explained, "the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims." id. at 336-37. "Deciding the substance of an

appeal in what should only be a threshold inquiry undermines the concept of a COA." id. at 342. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." § 2253 (c) (2). he satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. E.g., id., at 484, 146 L. Ed. 542, 120 S. Ct. 1595. He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Reversed and remanded.); and *Buck v. Davis*, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017) (The Fifth Circuit Court of Appeals committed error "because a reviewing court inverted the statutory order of operations by deciding the merits of an appeal and then denying the COA based on adjudication of the actual merits, it placed too heavy a burden on the prisoner at the COA stage." Reversed and remanded). (emphasis added).

Petitioner Patel, argues firmly that all (11) eleven claims raised within his COA Application merited issuance of a COA had the Sixth Circuit Court of Appeals adhered to U.S. Supreme Court precedents, thus the Sixth Circuit's denial of COA is in violation of **Slack v. McDaniel**, 529 U.S. 481, 481 (2000); **Miller-El v. Cockrell**, 537 U.S. 322, 336-37 (2003); and **Buck v. Davis**, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017), thus Mr. Patel, respectfully request that this Honorable U.S. Supreme Court **GRANT** a C.O.A. as to the eleven claims raised within his attached COA Application and reversed &

remanded for further proceedings in the case herein.

APPELLATE COURT MISAPPREHENDED PATEL'S CLAIMS

In addition to deciding Patel's COA Application under the incorrect standard as described above the appellate court panel misapprehended and recharacterized Patel's claims so that the claims would not satisfy the requirements of § 2253 (c) for the granting of a COA. After reviewing Patel's grounds for a COA reasonable jurists could agree that the Sixth Circuit panel's assessment of Patel's constitutional claims debatable or wrong. A review of the claims presented in Patel's petition for a COA (Appendix C) show that the Sixth Circuit panel did not give consideration to the substantial evidence and law Patel put forth in support of his constitutional claims of ineffective assistance of counsel.

EVIDENTIARY HEARING

"In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

In addressing the district court's denial of Patel motion for an evidentiary hearing and request to issue a subpoena duces tecum the Sixth Circuit panel made an erroneous factual finding concerning the requested McKesson Corporation Billing Records that the Government withheld from Patel's trial counsels'. The Sixth Circuit panel stated, "**The McKesson records likely would not have changed the outcome of Patel's trial.**" How could the Sixth Circuit panel or the district court know the McKesson records would likely not have changed the outcome of Patel's trial when the McKesson records

were withheld by the Government in violation of **Brady v. Maryland**, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). The Government provided it's Administrative Investigation Report after three weeks into Patel's trial but never provided McKesson Corporation Billing Records that would show it was McKesson and its billing Division Access Health that **fraudulantly billed Medicare and Medicaid and not Patel Pharmacies.** (emphasis added).

The Sixth Circuit panel or the district court never viewed the McKesson billing records and have no personal knowledge what information those records contain in regards to the criminal charges against Patel. At trial the defense counsel, the trial judge and the jury **all asked** why the Government had not obtained the McKesson records. (See 2255 Motion Ground Two). Patel's trial attorney Mr. Niskar told the jury, "The McKesson records are the best evidence" and yet he didn't subpoena the McKesson records or McKesson Employees. Trial counsel Mr. Niskar was ineffective for not obtaining the McKesson Billing records and for not challenging the Government's withholding of the McKesson Billing records from the defense. See **Wiggins v. Smith**, 539 U.S. 510, 522-23, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (It is well established that under Strickland counsel has a duty to conduct a reasonable investigation into the facts of a defendant's case, or to make a reasonable determination that an investigation is unnecessary.). (emphasis added).

The district court's denial of Patel's motion for evidentiary hearing and motion for subpoena duces tecum was wrongly decided by both the district court and the Sixth Circuit. The issue of denial of an evidentiary hearing and denial of subpoena duces tecum to obtain McKesson Billing records is debatable among juri-

st of reason and should have been resolved in a different manner. See Machibroda v. United States, 368 U.S. 487, 495 (1962) (when § 2255 motion raises "'detailed and specific' factual allegations whose resolution requires" information outside record or judge's "personal knowledge or recollection," hearing must be held). Thus, Petitioner Patel, respectfully request that a Certificate of Appealability is issued as to this issue.

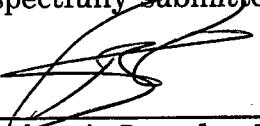
The motions, files and records of this case show that Petitioner Patel has satisfied the Strickland v. Washington, 466 U.S. 668 (1984), "deficient performance" and "actual prejudice" test for determining ineffective assistance of counsel of trial counsel, and has satisfied the Miller-El v. Cockrell, 537 U.S. 322 (2003), standard for obtaining a Certificate of Appealability on his ineffective assistance of counsel claims.

Therefore, Babubhai Patel, respectfully request that this Honorable U.S. Supreme Court GRANT him a Certificate of Appealability on all issues presented herein. (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Babubhai Patel, Petitioner

Date: 7/08/2018