No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MICHAEL ROCKY LANE
(Your Name) — PETITIONER

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. DISTRICT COURT, DISTRICT OF ARIZONA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Rocky Lane
(Your Name)

FCI Phoenix, 37910 N. 45th Ave.
(Address)

Phoenix, AZ 85086
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Whether, under this Court's precedent in Miller-El v. Cockrell, 537 U.S. 322 (2003) and buck v. Davis, 137 S.Ct. 759 (2017), it is sufficient for purposes of obtaining a Certificate of Appealability, under 28 U.S.C. §2253(c)(2), that an applicant make a showing that: "reasonable jurists could debate" whether the petition states a "valid claim of a constitutional right;" that is whether a reasonable jurist could debate whether (or, for that matter agree that) the petition should have been resolved in a different manner, or that issues presented were adequate to deserve encouragement to proceed further, in order to make a "substantial showing of the denial of a constitutional right"?

Whether, in the denial of a Certificate of Appealability by the U.S. Court of Appeals, it is necessary that the Court give a statement of reasons suficient that a litigant understand the deficiencies in the application, or whether the simple claim that, appellant has not made a "substantial showing of the denial of a constitutional right," is all that is necessary, even when, as to each claim below, the applicant has made a showing that "jurists of reason could debate whether the petition should have been resolved in a different manner"?

LIST OF PARTIES

[x] 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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OTHER

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 C 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[x] is unpublished.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 G to the petition and is

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

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 6, 2018.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 29, 2018, 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. § 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

Fifth Amendement to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes:

* 28 USC §2253 (c)(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.

* 28 USC § 2255

  A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

Michael R. Lane ("Lane"), filed a timely motion to Vacate, Set Aside or correct judgement and sentence, under 28 U.S.C. § 2255, in the United States District Court for the District of Arizona on or about November 30, 2016.

Lane raised five (5) issues in his motion. These issues were: (1) that Counts One and Three are the same conspiracy, and therefore counsel were ineffective for failing to raise the issue of Counts One and Three being multiplicitous; (2) Under Mc Fadden, counsel was ineffective for failing to raise that the government was required to prove that Lane knew both the chemical structure of the analogue and the chemical structure of the controlled substance, and that Lane was prevented from presenting a defense that he did not know the chemical structure; (3) that counsel was ineffective at sentencing for failing to raise the issue of pyrovalerones potency and pharmacological effects, as required by USSG §201.1 cont. app. nt. 6; (4) that counsel was ineffective for failing to raise the issue at sentencing that the standard of proof at sentencing should have been clear and convincing and (5) The Analogue Act is void for vagueness under Johnson v. United States, 135 S. Ct. 2015.

The Magistrate Judge wrote a Report and Recommendation ("R&R") on about December 14, 2017, recommending the denial of the motion. Lane filed timely objections to the Magistrate Judge's R&R on or about December 25, 2017.

The Court wrote it's opinion denying Lane's §2255 motion on or about April 2, 2018. Lane filed a timely motion for reconsideration on or about April 12, 2018. The Court denied Lanes motion for reconsideration on April 19, 2018. Lane filed a timely notice of appeal on April 16, 2018. The District Court in it's order denying Lane's §2255 motion also denied a Certificate of Appealability.

Lane filed a timely Application for Certificate of Appealability to the United States Court of Appeals for the Ninth Circuit on or about May 2, 2018. The Ninth Circuit Court of Appeals denied Lane's Application for Certificate of Appealability in a one sentence opinion, stating:

> "The request for Certificate of Appealability (Docket Entry No.4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)."

Lane filed a timely motion for rehearing pointing out that as to each issue he had in fact showed that "Jurists of reason could have debated whether the District Court correctly decided the issue," on or about August 29, 2018. On August 29, 2018 The United States Court of Appeals denied Lane's request for rehearing.

This petititon follows:

REASONS FOR GRANTING THE PETITION

I. Lane made a "substantial showing of the denial of a constitutional right" by showing as to each issue raised that "jurists of reason could have debated whether the petition should have been resolved in a different manner," and the issues raised deserved encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322 (2003); and Buck v. Davis, 137 S.Ct. 759(2017).

For instance, in Lane's first issue, raised in his motion to Vacate, Set Asside or Correct Sentence, under 28 U.S.C. §2255, Lane argued that Counts One and Three of the Superseding indictment were multiplicitous, in violation of the Double Jeopardy Clause, as they both charged a single conspiracy.

The District Court in deciding the issue utilized the five factor test announced by the Ninth Circuit in Arnold v. United States, 366 F.2d 347, 350 (9th Cir. 1964), for determining if two charged conspiracies are in fact one single conspiracy. These five factors include (1) the time periods; (2) the locations of the two conspiracies; (3) the persons involved; (4) the overt acts, and; (5) the statutes alleged to have been violated.

The District Court agreed that the fourth and fifth factors favored a single conspiracy but opined that the first three factors showed to separate conspiracies.

In Lane's application for Certificate of Appealability ("COA"), he showed a jurist of reason could debate whether the District Court incorrectly decided the locations were different, by pointing that the Magistrate Judge in this case agreed the locations were the same;this same District Court Judge (Campbell) had held previously in this case, in response to Lane's co-defendant's motion to sever, that the locations were the same, and that the Ninth Circuit in United States v. Stoddard, 111 E. 3d 1450, 1455 (9th Cir. 1996) held that because both alleged conspiracies were in the same federal district and county they were in the "same location", for purposes of Arnold's second factor.

Lane also pointed out, as to the First Factor, time periods of the conspiracies, that this same District Court Judge, in response to Lane's co-defendant's motion to sever pre-trial, held that the time periods were the same. Therefore a jurist of reason could debate whether the issue was correctly decided.

Further, Lane cited United States v. Edwards, 994 F.2d 417, 421 (8th Cir. 1993); and United States v. Delgado, 653 F.3d 729, 736 (8th Cir. 2011) for the proposition that if the time frames in the indictment significantly overlap, than the time periods are the same. In this case the time period for Count One was "from early 2011 through in or about July of 2012", and Count Three alleged from "October 2011 through about July 25, 2012." Therefore a jurist of reason could have debated whether the petition as to issue number One should have been resolved in a different manner.

As for issue number two, Lane cited United States v. Makkar, 810 F.3d 1147 (10th Cir. 2015) for the proposition that jurists of reason could have debated whether the district court correctly decided Lane's claim that counsel was ineffective for failing to raise the issue that he was denied his right to present the defense that he did not know that the chemicals at issue were controlled substance analogues.

Therefore, Lane clearly made a showing of the denial of a constitutional right, by showing that jurists of reason could have debated whether the first and second issue in the petition should have been resolved in a different manner, as required by Buck, and the Ninth Circuit in Frost v. Gilbert, 818 F.3d 469, 474 (9th Cir. 2016).

Lane does not believe that full review of this petition will be necessary, should this Court Grant, Vacate and remand this petition in light of this Court's precedent in Buck v. Davis, Supra., the Ninth Circuit will see that in fact, Lane made a substantial showing of the denial of a constitutional right.

II. The Ninth Circuit Court of Appeals ruling that Lane failed to make "a substantial-showing of the denial of a constitutional right," when denying his application for Certificate of Appealability, was in direct conflict with this Court's rulings in both Miller-El v. Cockrell, 537 U.S. 322 (2003); and Buck v. Davis, 137 S.Ct. 759 (2017), since Lane showed, as to each claim below, that jurists of reason could have debated whether the District Court correctly decided the issues in Lane's § 2255.

The Ninth Circuit denied Lane's Application of Certificate of Appealability in an one sentence, statement, without a statement of reasons, or any real opinion, just the bald claim that:

> "The request for Certificate of Appealability (Docket entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." (Quoting 28 U.S.C. §2253(c)(2) and Miller-El v. Cockrell.)

On information and belief it is the practice and policy of the Ninth Circuit to deny 'Pro Se' applications for certificates of appealability 'en masse' without written opinion or a statement of reason, other than a one sentence statement word-for-word the same as the one in this case.

In fact, with just a little research, Lane, with his limited access to resources, was able to find that in 2018 alone the Ninth Circuit has denied at least 254 requests for COA using the same one line denial as used in this case. Of these 254 denials 73.5% were 'Pro Se' filings. It is almost inconceivible that none of these 'Pro Se' filings made the 'deminimis' showing that "jurists of reason could debate whether the issues below were correctly decided" Buck v. Davis, Supra. for example, on February 22, 2018, Ninth Circuit Judges Trott and Fisher denied 24 applications*, 18 'Pro Se', 4 from public defenders, and 2 by private attorneys (possibly C.J.A. attorneys) using the one sentence denial used in this case. Is the public suppose to believe that they reviewed 24 applications and that not one of them could or did make a showing that a "jurist of reason could have debated whether the petition should have been resolved in a different manner."? Buck v. Davis, Id. at 757.

On information and belief, the Ninth Circuit has, because of an extremely overcrowded dockets, started denying "Pro Se' applications for COA, 'en masse', because the judiciary committee has repeatedly refused their request for severance of the Ninth Circuit into two Circuit Courts of Appeals (as was done in the Fifth Circuit, creating the Eleventh Circuit), thereby freeing up time and resources for non-'Pro Se' cases.

Lane is not asking this Court for a full review of his issues. He believes that a "GVR" (Grant, Vacate and Remand), under Buck v. Davis, Infra., will be sufficient to have the Ninth Circuit panel look at his application for COA, in light of the standard set forth in Buck, and see that, in fact, Lane made a showing that jurists of reason could have debated whether the petition should have been resolved in a different manner, and not look to the merits, which is forbidden by statute, as held in both Miller-El and Buck.

* The cases decided on February 22, 2018 were:

(1) Lopez v. Davis, LEXIS 4289

(2) Montalbo v. Fraunenheim, LEXIS 4288

(3) Lee v. Fraunenheim, LEXIS 4292

(4) USA v. Thomas, LEXIS 4291

(5) Buggs v. Ducart, LEXIS 4299

(6) Scott v. Nooth, LEXIS 4302

(7) Van Tilburg v. Callahan, LEXIS 4325

(8) Haney v. Muniz, LEXIS 4334

(9) Cuevas v. Beard, LEXIS 4335

(10) Gonzales v. Asuncion, LEXIS 4376

(11) Flores v. Fox, LEXIS 4551

(12) USA v. Marquez, LEXIS 4553

(13) Herd v. USA, LEXIS 4563

(14) USA v. Hernandez, LEXIS 4562

(15) Pena v. Paramo, LEXIS 4561

(16) Ross v. Santoro, LEXIS 4570

(17) Freeman v. Lizarraga, LEXIS 4574

(18) Yun v. Beard, LEXIS 4577

(19) Carrillo v. Montgomery, LEXIS 4576

(20) Bernal v. Sherman, LEXIS 4579

(21) Rizo v. Gastelo, LEXIS 4584

(22) USA v. LeChabrier, LEXIS 4308

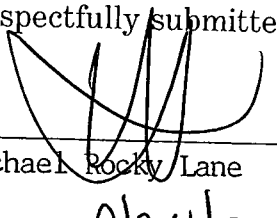
(23) Ciccone v. Blades, LEXIS 4566

(24) Burton v. Muniz, LEXIS 4293

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Michael Rocky Lane

Date: 9/28/2018