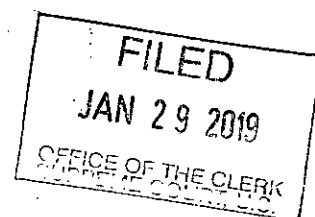


No. 18-7958 ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

John Lohmeier

(Your Name)

— PETITIONER

vs.

United States of America

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Seventh Circuit Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

John Lohmeier #45383-424

(Your Name)

Federal Correctional Institution
P.O.Box 1000

(Address)

Milan, Michigan. 48160

(City, State, Zip Code)

Federal Prisoner no phone.

(Phone Number)

QUESTION(S) PRESENTED

I. Was Petitioner's plea of guilty knowingly and voluntarily entered where counsel's failure to inform petitioner that all offenses charged in the indictment were time-barred by statute of limitations; and waiver of time-bar defense through guilty plea without objection was not knowingly and voluntarily entered, make a "substantial showing of the denial of a constitutional right" requiring a Certificate of Appealability (COA) to issue pursuant to the requirements of *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003) and *Slack v. McDaniel*, 120 S.Ct. 1595 (2000) ?

II. Was counsel ineffective under the two prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to inform petitioner that all charges he was pleading guilty to were time-barred by the statute of limitations; and advising petitioner to waive a time-bar statute of limitations defense without making objections to the time barr waiver?

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

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A-D 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☒ is unpublished.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 United States district court appears at Appendix E 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 October 10, 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: November 26, 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 Right To Counsel : In all criminal prosecutions, the accused shall enjoy the right.....to have the Assistance of Counsel for his defense.

Fifth Amendment Due Process Of Law: No person shall be..... deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

On December 20, 2012, the Grand Jury in the Northern District of Illinois, returned a ten-count indictment which charged the petitioner John Lohmeier and his wife Rebecca Lohmeier with mail and wire fraud in furtherance of a scheme to defraud customers of Enterprise Trust; in violation of 18 U.S.C. §§1341 and 1343. Both defendants were arraigned on January 9, 2013, and released on an unsecured \$10,000 bond.

On January 31, 2013, a 12-count superseding indictment was returned by the Grand Jury which charged John Lohmeier and his wife Rebecca Lohmeier with mail, wire, and securities fraud; in violation of 18 U.S.C. §§1341 and 1343; 15 U.S.C. §§78j(b) and 78ff; and 17 Code of Federal Regulations §240.10b-5.

On January 9, 2015, a three-count superseding information was filed charging John Lohmeier and his wife Rebecca Lohmeier with conspiracy to commit wire, mail and securities fraud in violation of 18 U.S.C. §371 and 15 U.S.C. §77q(a) and 77 x. Count One of the Superseding information charged that no later than March 2008, John Lohmeier and Rebecca Lohmeier conspired and agreed to willfully devise and participate in a scheme to defraud customers of Enterprise Trust and others, involving the offer, purchase and sale of securities, and to obtain property by means of material false and fraudulent pretenses, promises and representations and by concealment of material facts and in furtherance of the scheme caused the use of the mails, interstate wires and means and instruments of transportation and communication in interstate commerce in violation of statutes prohibiting mail fraud 18 U.S.C.

§1341, wire fraud; 18 U.S.C. §1343 and securities fraud 15 U.S.C. §§77q(a) and 77 x; all in violation of 18 U.S.C. §371.

Count 2 of the superseding indictment charged on or about February 1, 2008, in furtherance of the conspiracy alleged in Count One. John and Revecca Lohmeier, in offer and sale of a security, namely shares of ProShares Ultrashort DOW 30, caused the use of a means and instrument of transportation and communication in interstate commerce, including the placement of a telephone call in Chicago as part of the process to sell short 25,000 shares of ProShares Ultrashort DOW 30 for approximately \$2,400,000 for an Enterprise Trust margin account, collateralized in part by misappropriated custodial customers' assets; in violation of 15 U.S.C. §§77q(a) and 77x.

Count three of the superseding information charged on or about February 4, 2008, in furtherance of the conspiracy alleged in Count One, John and Rebecca Lohmeier, in offer and sales of a security, namely shares of ProShares Ultrashort S&P 500, caused the use of a means and instrument of transportation and communication in interstate commerce, including the placement of a telephone call in Chicago as part of the process to sell short 80,000 shares of ProShares Ultrashort S&P 500 for approximately \$4,800,000 for an Enterprise Trust margin account, collateralized in part by misappropriated customers assets ; in violation of 15 U.S.C. §§77q(a) and 77x. (See Appendix G, Superseding Indictment).

On January 13, 2015, the petitioner John Lohmeier appeared before the Honorable Samuel Der-Yeghiayan and plead guilty to

all three counts of the indictment pursuant to a non-binding written plea agreement. On May 31, 2016, petitioner John Lohmeier was sentenced to statutory maximum term of 180 months. No direct appeal was taken and no petition for a writ of Certiorari was filed.

On April 28, 2017, petitioner John Lohmeier filed a timely motion under 28 U.S.C. §2255 to vacate, set aside or correct an illegal sentence. (See Appendix F). On June 28, 2017, the district court entered an Order denying John Lohmeier's motion under §2255 and denying a certificate of appealability. (See Appendix E,). On or about February 19, 2018, John Lohmeier filed an Application For A Certificate of Appealability to the Seventh Circuit Court of Appeals. (See Appendix C). On October 10, 2018, the Seventh Circuit entered an Order denying John Lohmeier's application for a certificate of appealability. (See Appendix D). On October 24, 2018, John Lohmeier filed a Petition For Rehearing And Rehearing En Banc to the Seventh Circuit. (See Appendix B). On November 26, 2018, the Seventh Circuit entered an Order denying John Lohmeier's petition for rehearing and rehearing en banc. (See Appendix A).

John Lohmeier your petitioner now petitions the Supreme Court of the United States to issue a Certificate of Appealability based on the substantial showing of the denial of his constitutional right under the Sixth Amendment to effective assistance of counsel.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit Court of Appeals Order denying petitioner John Lohmeier's application for a Certificate of Appealability (COA) is in conflict with the Supreme Court's holdings in *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003); *Slack v. McDaniel*, 120 S.Ct. 1595 (2000) and *Strickland v. Washington*, 466 U.S. 668, 80 L.ED 2d 674 (1984).

QUESTION PRESENTED

Was Petitioner's plea of guilty knowingly and voluntarily entered where counsel's failure to inform petitioner that all offenses charged in the indictment were time-barred by the statute of limitations; and waiver of time bar defense through guilty plea without objection was not knowingly and voluntarily entered make a "substantial showing of the denial of a constitutional right" requiring a Certificate of Appealability (COA) to issue pursuant to the requirements of *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003); *Slack v. McDaniel*, 120 S.Ct. 1595 (2000) ?

REASONS FOR GRANTING COA

The Superseding Information in this case charges three Counts. Count One charges a Conspiracy under 18 U.S.C. §371, Count One charges the last overtact of the conspiracy as "in or about March 2008". (See Appendix G, page 4, paragraph 2). Count Two charges a violation of Title 15 U.S.C. §77q(a) and 77x, that occurred "on or about February 1, 2008. (See Appendix G, page 12, paragraph 4). Count Three charges a violation of Title 15 U.S.C.

§§77q(a) and 77x, that occurred "on or about February 4, 2008," (See Appendix G, page 13, paragraph 2). The §371 conspiracy charged in Count One has a statute of limitations of five (5) years pursuant to 18 U.S.C. §3282. The security fraud offenses charged in Count's Two and Three have statute of limitations of Three (3) years from the date of the offense. See Elliot Graphics, Inc. v. Stein, 660 F. Supp 378 (7th Cir. May 18, 1987). By the time the Superseding Information was filed-charging John Lohmeier with Count One §371 conspiracy and Count's Two and Three charging security fraud under 15 U.S.C. §§77q(a) and 77x,-on January 9, 2015, the statute of limitations had already run on the charges in all three counts of the superseding information-and there existed a valid statute of limitations defense. The charges in the superseding information are twenty three months past the five year statute of limitations as to all three counts.

The facts and records show Lohmeier had a valid statute of limitations defense when he plead guilty and waived any statute of limitations defense. But Lohmeier was unaware that the statute of limitations has expired on all the charges in the superseding information because his attorney failed to advise him that the statute of limitations had already expired. Lohmeier's attorney was ineffective for failing to inform him that all the charges were time-barred. Here Lohmeier's claim that his attorney was ineffective for failing to inform him that all charges were time-barred is "debatable among jurists of reason" . Three federal circuits have held that counsel is

ineffective for failing to inform a defendant that charges against him are time-barred; and waiver of time-bar defense without objection was not voluntary. See *United States v. Hansel*, 70 F.3d 6 (2d Cir. 1995) "Counsel's failure to inform defendant counts were time-barred constitutes ineffective assistance of counsel; and waiver of time-bar defense without objection through guilty plea was without objection was not voluntary". Also see *Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999) "Finding ineffective assistance of counsel where counsel failed to object to government's untimely filing of charges that led to as many as three convictions that would otherwise be time-barred". Also see *McGraw v. United States*, 1997 U.S. App. Lexis 1222 (4th Cir. 1997) "Defense counsel was ineffective by not advising the inmate of a colorable statute of limitations defense and not advising the inmate of the defense before he plead guilty and inmate should be given opportunity to reconsider his plea agreement). In the instant case John Lohmeier claims that his guilty plea was not knowingly and voluntarily entered and that his counsel was ineffective are debatable among jurists of reason .

The claims presented in Lohmeier's §2255 motion (Appendix F) and Application For Certificate of Appelability (Appendix C) satisfy the standard for issuance of a COA established in this Court's decisions in *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003) and *Slack v. McDaniel*, 120 S.Ct 1595 (2000).

In denying John Lohmeier's application for a certificate of appealability the Seventh Circuit panel ignored the law of the Supreme Court other Circuit Court of Appeals and even the law of the Seventh Circuit. In *United States v. Barfield*, 6 Fed. Appx. 351; 2001 Lexis 5611 (7th Cir. 2001), the Seventh Circuit adopted the *Strickland v. Washington*, standard of "reasonableness to determine when trial counsel is ineffective for failing to raise a statute of limitations defense. In Barfield, the court identified the standard in the Seventh Circuit to be used for determining when a trial lawyer is ineffective for failing to raise a valid statute of limitations defense. The Barfield, court stated:

In order to prevail on his argument that his trial lawyer was ineffective for failing to raise a statute-of- limitations defense to the conspiracy charge, Barfield must show that "counsel's representation fell below a objective standard of reasonableness" and that he was prejudiced as a result, *Strickland v. Washington*, 466 U.S. 668, 688, 80 L.Ed 2d 674, 104 S.Ct. 2052 (1984). In this case, Barfield would have to prove the same thing under each prong--a viable statute of limitations defense that counsel did not raise. *Id Barfield*, 6 Fed. Appx. at 355.


In the instant case John Lohmeier's claim that his trial lawyer was ineffective for failing to raise a viable statute-of-limitations defense satisfies both the "cause and prejudice" requirements of Strickland for determining when a trial lawyer provides deficient performance for failing to advise a defendant that he has a viable statute-of-limitations defense. Based on the Barfield decision John Lohmeier's claim of ineffective assistance of counsel is "debatable among jurists of reason", and the Seventh Circuit panel abused its discretion when it denied Lohmeier's application for a certificate of appealability (COA).

The petitioner John Lohmeier has shown his ineffective assistance of counsel claim is debatable among jurists of reason and he should be granted a certificate of appealability for the reasons stated herein. Lohmeier requests the Court grant him a certificate of appealability and remand his case to the Seventh Circuit Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


John Lohmeier

Date: 1-7-19