No. 18-8891

ORIGINAL

In The
Supreme Court of the United States

October Term 2018

Warner Crider,
Petitioner,

v.

United States of America,
Respondent.

On Petition For a Writ Of Certiorari To The
Court of Appeals For The
Sixth Circuit

Petition for Certiorari

Warner Crider
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Question Presented

Crider Filed Under § 2255 fostering several issues warranting a certificate of appealability. To Crider's dismay the Sixth Circuit denied all of issues, but looked to far into the merits of his issues. This Court has directed the courts of appeals not to rest the decision to deny a COA with reference to the merits. Was Crider denied a COA improperly, where the Sixth Circuit's decision is contrary to Buck v. Davis?

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To the Chief Justice and Associate
Justices of the Supreme court:

Warner Crider ("Crider"), acting in want of counsel, respectfully moves for a petition for a writ of certiorari to the Sixth Circuit Court of Appeals, and in support states:

Opinion[s] Below

The Sixth Circuit denied a COA on April 25, 2018, and rehearing was subsequently concluded on Sept. 10, 2018, and are attached at exhibit-A

Jurisdiction

This court hsa jurisdiction under 28 U.S.C. § 1254(1)

Constitutional Provision Or Statutory Provisions

Crider Relies on 28 U.S.C. § 2253(c)(2), and Rule 22 from the Court of Appeals

I. Statement of the Case

In 2003 Crider was convicted following a jury trial for possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), and 846; aiding and abetting distribution of marijuana, contrary to 21 U.S.C. § 2, and 841; possession with intent to distribute marijuana, against 21 U.S.C. § 841; and felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1).

In 2013, Crider filed under § 2255 following a loss in the Sixth Circuit regarding his direct appeal. That motion garnered 14-claims. The district court denied the motion, concluding that three claims were procedurally defaulted and that the remaining issues lacked merit. Then the district court denied a COA or all of Crider's claims except for his ground four, that is, whether Crider was denied effective assistance concerning failing to file for discovery.

Undeterred, Crider sought reconsideration, and appealed to the Sixth Circuit for a COA. That court acknowledged that the district court denied his § 2255 on the merits but stated that Crider failed to demonstrate that the Sixth Circuit's decision is a mis-application of Buck v. Davis, 137 S.Ct. 759 (2017). In that

vein, Crider points out in his arguments below that the district court denied a COA in 27-words, and the only indication of why eludes to its decision on the merits. The Sixth Circuit recognized Crider's position but found that he failed any evidence that the district court engaged in a full consideration of the facts or legal basis. Slip op. at 3 (attached at Exhibit-B.

This Court should grant Crider a COA and GVR the case for a full briefing to the Sixth Circuit.

II. Reason[s] For Granting Certiorari

Recently, this Court issued the opinion in Rosales-Mireles v. United States 138 S.Ct. 1897 (June 18, 2018), where it found that: "The public legitmacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunites for error correction." Id. at 1908 (quoting Bowers & Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitmacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 215-16 (2012)). The Court goes on to observe "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of thier own devise that threaten to require individuals to linger longer in federal prison than the law demands?" Rosales-Mireles, 138 S.Ct. at 1908 (quoting United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014)(Gorsuch, J.)).

This was a fact intensive case, that required an attorney's unique attention, and just as the district court found that a COA was required for ground four, it should have conduct an evidentiary hearing on whether Crider was denied effective assistance on the remaining issues. Absent such a hearing the district court has no way of knowing whether Crider's claims are factual or self-serving. The fact is, there is no affidavit from counsel, and the Government never requested one either. To that end, the only evidence in denying a COA on the issue of whether an evidentiary hearing was imporperly denied is the merits of the district court's assertions. Surely, no court can suggest that the denial of effective assistance is not a significant constitutional issue. After all, the district court granted a COA on whether counsel was ineffective for failing to file a motion for discovery. Plainly, that is because the record shows that there is not one on file. The same review is warranted on Crider's remaining ineffective claims, in that, Crider's issues involved private conversations between counsel and himself and as the Fifth Circuit recently observed what more could a defendant offer without an evidentiary hearing. See United States v. Reed, 719 F.3d 368 (5th Cir. 2013).

Dwight A. Reed filed under § 2255 claiming that he was denied effective assistance of counsel at the plea negotiations. According to Reed a discussion took place between his attorney and him regarding his sentencing range. The § 2255 court denied a COA but the Fifth Circuit granted him one, and then it vacated the judgment for a evidentiary hearing on that ground. Like the case

there was no affidavit in the Reed case. The fact is, the Fifth Circuit specifically turned to Reed's affidavit to determine that his "allegations are not speculative or conclusionary," and that his affidavit was based on specfic personal knowledge. Id. at 374. Crider did precisely the same thing. The only difference is that the Fifth Circuit, in that case, did not review the merits of Reed's claim before granting a COA.

The Sixth Circuit, on the other hand, when faced with the same circumstances denied Crider a COA on his evidentiary hearing. The evidence of the district court's as well as the Sixth Circuit's error in looking to merits is founded on the fact that it denied the hearing and then followed suit in denying a COA for the same reason. A hearing was the epergne to each and every one of his claims that were filed under effective assistance of counsel. A review of the decision Huff v. United States, 734 F.3d 600 (6th Cir. 2013), shows that "in reviewing a § 2255 motion in whcih a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims."' citing Valintine v. United States, 488 F.3d 325, 333 (6th Cir. 2007) (citations omitted). The Valintine court goes on to find when a defendant presents an affidavit containing a factual narrative of the events that neither contradicted by the record nor inherently incredible and the Government offers nothing nore than contrary representations to contradict it, the defendant is entitled to an evidentiary hearing. Valintine, 488 F.3d at 334.

In this case, the only answer as to why the district court and the Sixth Circuit did not grant a COA is that looked into the merits

of Crider's claims. As the district court stated: "Movant is denied a certificate of appealability, with repect to all arguments except Movant's argument that his counsel was ineffective for failure to file a Motion for Discovery." Not once does Judge Tarnow state that jurist of reason would not find his claims debatable. The fact is, the district court rested its decision to deny a COA on what it found in the merits or lack thereof. The Sixth Circuit simply agreed with the district court and denied Crider a COA. Crider believes that the sole reason that Judge Tarnow denied his § 2255 is because he granted Crider a reduction under Amendment 782 in the same order. See Exhibit-B at 32. In Judge Tarnow's mind since he granted Crider Amendment 782, there was no more to grant.

In Buck, the Fifth Circuit at least phrased its determination in terms that "jurist of reason would not debate that Buck should be denied relief." Buck, 137 S.Ct. at 773. The district court, in this case simply looked back to what it had already denied, with no analyzation of the COA. This Court has determined that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not previal." Buck, 137 S.Ct. at 774 (quoting Miller-El v. Cockrell, 537 U.S.322, 338 (2003)). In this case, the two courts below set the bar for a COA too high to meet.

A. The Following Issues Required An Evidentiary Hearing To Establish Crider's Assertions

1. At an Evidentiary Hearing Crider Could Have Demonstrated Was Required To File For A New Trial, And Jurist Of Reason Would Find The Issue Debatable.

Like Crider's Motion for Discovery, counsel too had a duty to move for a new trial. The Eighth Circuit apparently establishes that jurist of reason would find this issue debatable. That is, in United States v. Hilliard, 392 F.3d 981 (8th Cir. 2004). With the blinding behind the scenes information that the United States would muster, it is quintessential that Crider be provided with all that Government intends to rely on, and counsel has a duty to protect Crider's rights to due process. That is, it is beyond dispute that an evidentiary hearing would have called for discovery. Discovery that, if obtained would have established that the Government withheld crucial information that would have led to impeachment of witnesses and formed the very foundation for a new trial. Crider does not dispute that a lawyer filed a motion for a new trial, but with absolutely no imput from Crider.

The Hilliard court found that a lawyer who fails to file timely a Motion for a new trial does not meet the objectiveness required by Strickland v. Washington, 466 U.S. 668 (1984). Simply put, jurist of reason would find this matter debatable. This further establishes that the courts below relied on the merits when they denied Crider a COA.

2. This Court's Precedent Establishes That Crider Was Entitled To COA On Ground Six, That Is, Whether He Was Denied Effective Assistance When, As The Record Shows, Counsel Failed To File For A Motion To Suppress Detective Schuette's Statements As False.

This Court's decision establishes that counsel has a duty to pursue a motion to suppress. See Premo v. Moore, 562 U.S. 115, 121-22 (2011). To prevail on such a claim, a habeas movant must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Harrington v. Richter 562 U.S. 86, 104 (2011). The Premo decision finds that a lawyer who fails to file to suppression is unreasonable. Had the courts below not looked to the merits, it would have recognized the teaching in Premo and granted a COA.

3. It Was At Least Debatable That Since The State Of Michigan Does Criminalize Ammunition A Competent Lawyer Would Have Argued That Crider Could Not Have violated § 922(g)(1).

Recently, this court found that "when federal and state law conflict, federal law prevails and state law is preempted." Murphy v. NCAA, 138 S.Ct. 1461, 1475 (2018). here there was no conflict between federal and state law, and therefore counsel had a duty to argue that since Michigan law did not forbid Crider from possessing ammunition, then just as Michigan recently legalized marijuana, the federal Government was prevented from prosecuting Crider under § 922(g)(1). This is because for Crider to be convicted, his conduct must violate both federal and state laws.

In addition, this Court has found that "[a]n individual who bought a car two years ago and may buy another in the future is not active in the car market." Nat'l Fed. of Indep. Bus. v. Sebulius, 132 S.Ct. 2566, 2590 (2012)(Robert, CJ,). This combined with the fact that Michigan law does not make it unlawful for a felon to possess ammunition, calls into question the veracity of the Government's conviction and leaves it highly debatable amoung jurist of reason.

4. It Is Beyond Dispute That Jurist Of Reason Find It Debatable Whether A Lawyer Must File Objections To The § 851 Enhancement.

Before a defendant may challenge the imposition of a § 851 enhancement, he must first object to the provision applicability. 21 U.S.C. § 851(c). Here, counsel failed to submit such an objection and left Crider with no options regarding challenging the enhancement. Plainly, this prejudice Crider as with that enhancement Crider faced a mandatory minimum of 10-years instead of of the twenty-years that he now has. In addition, had the courts below granted Crider a COA, it would have been able to ask counsel at a hearing whether and why he did not preserve such an issue. finally, had Crider prevailed on any issue in his § 2255, P.L 111-220 would have sent his mandatory penalty to five to forty instead of the 10 to life which after the § 851 was 20 to life.

5. Jurist Of Reason Find It Debatable Whether Failure To Object To A Drug Finding Constitutes Ineffective Assistance Of Counsel.

This court's decision in Alleyne v. United States, 133 S.Ct. 2151 (2013), demonstrates that when a mandatory minimum is increases on a fact not found by a jury there is error. Recently, the Eleventh Circuit found that Dan McCarthan was not entitled to relief under the saving clause because had he "raised his claim earlier, perhaps he could have been the successful litigants that Deondery Chambers or Larry Begay later became to be." McCarthan v. Dir. of Goodwill Indust- Suncoast Inc., 851 F.3d 1076, 1087 (11th Cir. 2017)(en banc). In other words, had counsel pressed his drug quantity attributability Crider could have been the reason for over-turning.

Is this matter debatable? Yes. An objection to uncharged drugs finds itself at the heart of the justice system as Crider types. See Jones v. United States, 135 S.Ct. 8, 8-9 (2014) (Scalia, J., dissenting from certiorari). As Justice observed: "This has gone on long enough." Id. at 9.

Shortly after Justice Scalia's opinion in Jones, then- Judge Gorsuch similarly observed that "[i]t is far from certain whether the Constitution allows" a judge to increase a defendant's sentence within the statutorily authorized range "based on facts the judge finds without the aid of a jury or the defendant's consent." United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014)(citing Jones). Then, there is then-Judge

Kavanaugh's concurring opinion in United States v. Bell, 808 F.3d 926, 932 (D.C. Cir. 2015), where now-Justice Kavanaugh has the opportunity to follow his dissent in Bell from denial of rehearing. id. at 927 ("shar[ing] Judge Millett's over-arching concern" and observing that a solution "would likely require" intervetion by this Court.). The Justices of this Court should see the obvious oversight from the courts below and grant certiorari, and GVR to the Sixth Circuit for full briefing.

Conclusion

This Court should grant ceriorari and GVR the case for review from the Sixth Circuit with an order granting a COA.

Filed this 20th day of November 2018 under 28 U.S.C. § 1746.

Warner Crider

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