No. 18-8961

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DION THOMAS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Mr. Dion Thomas #44399-424
(Your Name)

FCI-Milan/ P.O. Box 1000
(Address)

Milan, MI. 48160-0190
(City, State, Zip Code)

None (Incarcerated)
(Phone Number)

QUESTION(S) PRESENTED

QUESTION # ONE: Whether the District Court abused it's discretion by failing to conduct an evidentiary hearing by relying upon the unsworn statements of trial lawyer Myers in which do not constitute evidence, thus the lower court's denial conflicts with U.S. Supreme Court precedents in INS v. Phinpathya, 464 U.S. at 188 n. 6 (1984); and Blackledge v. Allison, 431 U.S. at 80-83 (1977) ?

QUESTION # TWO: Whether the district court violated Rose v. Lundy, 455 U.S. 509, 520 (1982), by failing to address and issue a findings of fact and conclusion of law as to Petitioner's appellate ineffectiveness claim that Attorney Scheetz failed to raise a dead-bang winner on his direct appeal proceedings in which would have resulted in reversal of his sentence on appeal ?

QUESTION # THREE: Whether Petitioner Thomas's ex-trial counsel Attorney Meyer failure to correct testimony which he knew was false or misleading constitutes ineffective assistance of counsel in violation of his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION # FOUR: Whether Petitioner Thomas, received ineffective assistance of counsel by Attorney Meyer failing to conduct an adequate background investigation, thus did Mr. Thomas's ex-trial counsel conduct his defense in a totally incompetent manner and that such incompetence prejudiced his defense in violation of his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION # FIVE: Whether the U.S. Supreme Court should recognize an argument not raised before the district court as it is critical

issue affecting Thomas's substantial rights. Did Petitioner Thomas's ex-trial counsel operate pursuant to a conflict interest when, during the course of the representation, Attorney Meyer's representation, counsel's and Petitioner's interests 'diverge with respect to a material course of action,' thus his ex-trial counsel's continued representation of Thomas violate his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION SIX: Whether the U.S. Supreme Court should recognize an argument raised for the first time with the Eighth Circuit Court of appeals as it is a critical issue affecting Thomas's substantial rights. Did Petitioner Thomas's ex-trial counsel provide him with ineffective assistance of counsel because Attorney Meyer did not fully advise him of a favorable plea offer; and the risks of going to trial versus pleading guilty, thus violating his Sixth Amendment Rights during plea-negotiations stage of trial in the case herein ?

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:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

Statutes And Rules

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

☒ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A 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 B 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

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 31, 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: January 16, 2019, 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 of the U.S. Constitution

28 U.S.C. § 2255 (b)

28 U.S.C. § 2255 Motion To Vacate

28 U.S.C. § 2253 (c) (2)

STATEMENT OF THE CASE

On December 8, 2011, Petitioner Thomas was one of six defendants charged in a six count indictment in the Northern District of Iowa. The Petitioner Thomas was named in two of the six counts. Count 1, alleged that beginning on or before January 2007 and continuing through December 2011, the defendant and the five co-defendants conspired to distribute and possess with intent to distribute 100 grams or more of heroin. Count 3, alleged that on June 23, 2011, the defendant distributed approximately 0.54 grams of heroin. Both counts alleged that the Petitioner had a prior drug felony conviction.

The Petitioner was arrested on March 8, 2012. The Petitioner was arraigned and entered not guilty pleas to both counts of the indictment. The Petitioner was assigned a court appointed lawyer. Jury trial was scheduled for August 20, 2012.

On June 27, 2012, the Petitioner filed a pro se motion for a new attorney. After a hearing, the Chief Magistrate denied the Petitioner's motion for a new attorney.

On August 6, 2012, the government filed a motion in limine. The government sought a pretrial order admitting into evidence testimony regarding the defendant's crack cocaine distribution.

On August 23, 2012, the District Court entered an Order granting the government's request to allow evidence of the defendant's alleged crack distribution.

On August 27, 2012, the case proceeded to a jury trial. On August 29, 2012, the Petitioner was convicted of both counts.

On December 21, 2012, the Petitioner filed a second pro se motion for new attorney. After hearing was conducted on January 3, 2013, the Petitioner's motion was denied.

On January 25, 2013, the Petitioner retained private counsel Attorney Raphael M. Scheetz.

On July 16, 2013, the Petitioner was sentenced to twenty years in prison, and six years of supervised release.

On July 26, 2013, the Petitioner filed a Notice of Appeal and on July 28, 2014, the Eighth Circuit Court of Appeals affirmed his conviction and sentence, however as to Issue II, declined to address Petitioner's alleged ineffective assistance of counsel claim on direct appeal.

On January 13, 2016, Petitioner Thomas filed his pro se § 2255 Motion To Vacate; and on February 1, 2017, the District Court directed the government respond to the merits of his 2255 Motion. Thereafter, Petitioner Thomas, asserts that both trial and appellate counsel were ordered to submit **Affidavits** by the district court, however both attorneys merely submitted "unsworn statements/ affidavits" on March 8, 2017 and March 19, 2017. The Government filed its Responsive Brief on April 4, 2017; and Mr. Thomas filed his Reply Brief on May 15, 2017. A Motion To Amend an existing claim of ineffective assistance of appellate counsel was filed on May 19, 2017. On August 16, 2017, the District Court denied Petitioner's § 2255 Motion To Vacate without conducting an evidentiary hearing as urged by Dion Thomas.

On September 6, 2017, Petitioner Thomas mailed off his pro se Motion To Alter or Amend A Judgment pursuant to the Fed. R. Civ. P. 59 (e), in which the Clerk's Office filed on September 14,

2017, thus under the **"Mail-Box Rule"** it was timely filed by Mr. Thomas. On December 22, 2017, the District Court denied Petitioner's pro se Motion To Alter or Amend A Judgment pursuant to Rule 59 (e), within a 3-page Memorandum Opinion, thus Petitioner Thomas's Notice of Appeal was filed on February 6, 2018. In mid-April of 2018, Petitioner Thomas submitted his pro se Application To Grant Certificate Of Appealability to the Eighth Circuit Court of Appeals raising the six Questions he now raises to this Honorable U.S. Supreme Court, thus on October 31, 2018, the Eighth Circuit Court of Appeals denied his pro se Application To Grant Certificate Of Appealability and on January 16, 2019, denied Panel Rehearing and Rehearing En Banc, therefore Mr. Thomas, respectfully request that this Honorable U.S. Supreme Court now **GRANT** him a Certificate Of Appealability as to all six questions or to any questions it deems meets the requirement of 28 U.S.C. § 2253 (c) (2), in the matter herein. (emphasis added).

REASONS FOR GRANTING THE PETITION

Petitioner Thomas, contends that the U.S. Supreme Court held in Hohn v. United States, 524 U.S. 236 (1998), that this Court has jurisdiction to review Federal Court of Appeals' denial of certificate of appealability concerning Federal District's denial of accused's motion under 28 USCS § 2255 to vacate federal conviction. Thus, Petitioner Thomas, asserts that this Honorable U.S. Supreme Court should **GRANT** him a Certificate of Appealability as to the six Questions presented herein as he has demonstrated to the lower court's below and will establish to this Court a substantial showing of a denial of constitutional right in which entitles Mr. Thomas to issuance of a C.O.A. consistent with U.S. Supreme Court precedents in **Slack v. McDaniel,** 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Standard For Issuance Of C.O.A.

Dion Thomas's claims deserve a certificate of appealability. Under 28 U.S.C. § 2253 (c) (2), a certificate may issue "if the applicant has made a substantial showing of the denial of a sonstitutional right." The Supreme Court has explained that a substantial showing means "a demonstration that... reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Question # ONE:

Whether the District Court abused it's discretion by failing to conduct an evidentiary hearing by relying upon the unsworn statements of trial lawyer Myers in which do not constitute evidence, thus

the lower court's denial conflicts with U.S. Supreme Court precedents in INS v. Phinpathya, 464 U.S. at 188 n. 6 (1984); and Blackledge v. Allison, 431 U.S. at 80-83 (1977) ?

Statement of Facts

On January 13, 2016, Petitioner Thomas filed his pro se § 2255 Motion, see Doc. # 1. On February 1, 2017, the district court issued a Show Cause Order directing a Response by the Government and ordered the attorneys of record to submit affidavits to the Court.

Trial counsel timely complied with the district court's Order by filing his allegedly affidavit (which is merely a unsworn statement) on March 8, 2017, see Doc. # 7; and appellate counsel filed his affidavit (which is merely an unsworn statement) on March 19, 2017, see Doc. # 8. Thereafter, full briefing commenced; and without conducting an evidentiary hearing as requested by Mr. Thomas, however the district court denied Thomas's 2255 Motion on August 16, 2017, see Appendix B.

On page 12, of the District Court's Memorandum Opinion the Court discusses it's reasoning for denying Petitioner's request for an prompt evidentiary hearing.

Reasons To Justify Granting C.O.A.

Petitioner Thomas, states that the district court abused it's discretion by failing to conduct an evidentiary hearing as to Issue C., thus herein raised as Question # Three- Failure to conduct an adequate background investigation and obtain movant's Illinois incarceration records, see Doc. # 16, at pages 20-22.

To deny this claim the District Court relied heavily as to attorney Meyer's **"unsworn statements"** as follows: "trial counsel explained in his affidavit that he did not "recall any witness testifyi-

ng at trial that he or she bought or otherwise obtained heroin or cocaine from [movant] while [movant] was in custody" (civil docket no. 7 at 3)." Thus, it is unclear how this evidence would have impeached any witnesses' testimony or otherwise assisted in movant's defense.

As Petitioner Thomas brought to the District Court's attention within his pro se Motion To Alter Or Amend A Judgment under Rule 59 (e) motion, see Doc. # 18. As pointed out by Mr. Thomas within his Rule 59 (e) motion, see Doc. #18, at pages 6-7. Petitioner Thomas, states that the District Court merely took Attorney Meyer word that no testimony was related to the time frame Thomas was incarcerated, however to the contrary Thomas was incarcerated in the beginning of **2011**. Mr. Thomas was incarcerated in **2011** from January 26, 2011 through March 11, 2011, roughly **43 days**, see Appendix C (A copy of Illinois Department of Corrections Letter to Dion Thomas which entails record dates of Incarceration in the IDC). Therefore, Petitioner Thomas, contends as reflected by the trial transcripts at page 178-180, Trial Day 2, the Government's witness Williams testified **under oath** at Dion Thomas's jury trial that Dion Thomas **sold heroin to Arthur Scott <u>at least in 2011</u>**, however this testimony is **FALSE in part** and certainly **misleading**, thus Attorney Meyer had a duty to move to correct testimony, which he knew was false or misleading, therefore constitutes ineffective assistance of counsel. See Mills v. Scully, 653 F. Supp. 885 (S.D.N.Y, 1987) (Defense counsel's failure to move to correct testimony, which he knew was false or misleading, may constitute ineffective assistance of counsel.).

A thorough review of trial counsel Attorney Meyer's **"unsworn statements"** reveals that is entitled **Professional Statement**, see Appendix

D (A copy of Attorney Meyer's trial counsel for Dion Thomas- Professional Statement filed with the District Court on March 8, 2017, see Doc. # 7), however Attorney Meyer's **"unsworn statement"** does not qualify as a **Affidavit** in which Attorney Meyer was ordered to submit by the District Court. However, an **affidavit** "is required to be sworn to by the affiant in front of an 'officer authorized to administer oaths,"' Peters v. Lincoln Elec. Co., 285 F.3d 456, 475 (6th Cir. 2002) (quoting Blacks' Law Dictionary 54 (5th ed. 1979)), and must be made on the affiant's personal knowledge. Fed. R. Civ. P. 56. 28 U.S.C. § 1746 allows for unsworn declarations to take the place of affidavits, so long as those declarations are made "under the penalty of perjury" and follow one of the statute's stated formulas. Peters, 285 F.3d at 745. Thus, Attorney Meyer's Professional Statement in which was filed as a **Affidavit** (as he was ordered to submit); or as unsworn declaration, thus Attorney Meyer's **"unsworn statements"** do not constitute evidence, see INS v. Phinpathya, 464 U.S. 183, 188 n. 6 (1984), in which may be utilized as **evidence** within his 2255 Proceedings to resolve a claim of ineffective assistance of counsel without conducting a prompt evidentiary hearing, see Quinones v. United States, 637 Fed. Appx. 42, 43-44 (2d Cir. 2016). Here, in contrast, the District Court "credit[ed] the explanation" given in an unsworn, unsigned document that was **"not evidence."** Gonzalez v. United States, 722 F.3d 118, 134 (2d Cir. 2013). By disbelieving Thomas's affidavit on the basis of trial counsel Meyer's **unsworn statements**, the District Court impermissibly failed to view the **evidence** "in the light most favorable to the petitioner." Puglisi v. United States, 586 F.3d 209, 213 (2d Cir. 2008); and Blackledge v. Allison, 431 U.S. 63, 80-83 (1977).

Therefore, Petitioner Thomas, argues firmly that consistent with U.S. Supreme Court precedents and 28 U.S.C. § 2255 (b), thus as the result of the 2255 Proceedings record in the instant case as to Question # One does not "conclusively show" that under no circumstances could Dion Thomas establish facts warranting relief under § 2255, therefore he is entitled to an evidentiary hearing, see Fontaine v. United States, 411 U.S. 213, 215 (1973). (emphasis added).

In conclusion, Petitioner Thomas, respectfully request that this Honorable U.S. Supreme Court GRANT him a C.O.A. as to Question # One as "the issue presented were adequate to deserve encouragement to proceed further," see Slack, 529 U.S. 473, 484 (2000).

Question # TWO:

Whether the district court violated Rose v. Lundy, 455 U.S. 509, 520 (1982), by failing to address and issue a findings of fact and conclusion of law as to Petitioner's appellate ineffectiveness claim that Attorney Scheetz failed to raise a dead-bang winner on his direct appeal proceedings in which would have resulted in reversal of his sentence on appeal ?

Statement of Facts

In the instant case, Petitioner Thomas, contends that a thorough review of the District Court's Memorandum Opinion denying Petitioner's 2255 Motion, see Doc. # 16 Filed 08/16/17 at pages 24-29. Although the District Court mentioned that Mr. Thomas raises appellate ineffectiveness; the court's imposition of supervised release conditions, however the problem is that the District Court failed altogether to issue a findings of fact and conclusion of law as to appellate ineffectiveness for failing to raise dead-bang winner on Petitioner's direct appeal proceedings, thus Mr. Thomas brought this

to the District Court's attention within his Rule 59 (e) motion, see Doc. # 18, at pages 3-5; and it was raised within his 2255 Brief at pages 54-58, see Doc. # 1, thus because the District Court failed altogether to issue a findings of fact and conclusion of law as to this appellate ineffectiveness in which is a violation of his Sixth Amendment constitutional rights as required pursuant to 28 U.S.C. § 2255 (b). (emphasis added).

The U.S. Supreme Court has explained that "[p]olicy considerations clearly favor the contemporaneous consideration of allegations of constitutional violations grounded in the same factual basis: a **one-proceeding treatment** of a petitioner's case enables a more thorough review of his claims, thus enhancing the quality of the judicial product." Rose v. Lundy, 455 U.S. 509, 520 (1982). The Eleventh Circuit Court of Appeals requires district courts within their jurisdiction to address **all of the claims raised** in the prisoner's Motion to Vacate his sentence pursuant to 28 U.S.C. § 2255; and the failure of the district court to do so requires the district court's order to be vacated and remanded because it failed to address all the claim[]s raised in the prisoner's § 2255 motion, see Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992) (en banc); and Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009). The Eleventh Circuit defines a claim for relief as follows: "A claim for relief for purposes of [Clisby] is any allegations of a constitutional violation." Clisby, 960 F.2d 925, 936 (11th Cir. 1992).

To Sixth Amendment to the U.S. Constitution guarantees the accused in a criminal case the right to the effective assistance of counsel, see Strickland v. Washington, 466 U.S. 668, 684-86 (1984). This right is "firmly established" not only for trial but also for

a first appeal as of right, see Evitts v. Lucey, 469 U.S. 387, 83 L. Ed. 2d 821, 836 (1985). Under the familiar two-pronged test of Strickland, Mr. Thomas must show both that his attorney's performance was deficient and that he was prejudiced as a result, see Harrington v. Richter, 562 U.S. 86, 104 (2011).

To satisfy the deficient performance prong, a petitioner must show that the representation his attorney provided fell below an objective standard of reasonableness, see Strickland, 466 U.S. 668, 688 (1984).

On January 25, 2013 private attorney, Raphael M. Scheetz filed an apperanace on behalf of Dion Thomas after being hired by Thomas's mother to represent him as a substitute counsel for court-appointed attorney Mark Meyer. On March 25, 2013, the Court held a sentencing hearing, which would turn out to be the first of two sentencing hearings. The Court ordered attorney Scheetz and government counsel, AUSA Amy Koopman to submit new sentencing positions. Thereafter, Attorney Scheetz filed Defendant's Sentencing Memorandum, see Doc. # 292; and Government counsel filed Government's Memorandum, see Doc. # 291. The Court after a brief presentation of arguments informed the parties that the court would take the matter under advisement and issue a Sentencing Memorandum Order at a later date, see Sent. Trans, of 03/25/13.

On March 26, 2013, the Court issued a minute order directing the parties that if they had additional arguments they wished to make do so by close of business on March 29, 2013, see Doc. # 295. On March 29, 2013, Thomas's counsel Attorney Scheetz filed PSIR Objections, see Doc. # 297 (under seal). However, Mr. Thomas's PSIR Objections specifically objected to relevant here the PSIR

recommendation that he participate in mental health treatment and evaluation. Also, that he not visit any casino or gamble during his term of supervised release, see Doc. # 297, at pages 6-8.

On July 16, 2013, Mr. Thomas appeared before the Court for sentencing. During the sentencing hearing Attorney Scheetz argued Thomas's position as to the conditions of supervised release in which were recommended by the PSIR, thus including no use of alcohol during the period of supervised release, see Sent. Trans. at page 37, line 22-25; page 38, line 1-25; and page 39, line 1-4.

Specifically, counsel Scheetz objected to paragraphs 52 and 53 of the PSIR. Attorney Scheetz informed the Court that Thomas denied informing the Probation Office that he has a gambling problem and that gambling helps him cope with his anger, see Sent. Trans. at page 37, line 22-25 through page 38, line 1-4. Counsel informed the Court that the PSIR incorrectly states that Thomas had claimed he dranked from age 13 to 25. When Thomas position is he took his first drink at age 13 and remained abstinent until he was age 25,, see Sent. Trans. page 38, line 14-20. Attorney Scheetz also challenged the Probation Office recommendation that Thomas receives mental health treatment and evaluations upon release.

Counsel argued that there is no history of mental health issues with Mr. Thomas. That Thomas never been on any kind of mental health medication, see Sent. Trans. page 39, line 1-4. In response to counsel's objections the following events transpired:

The Court: Can I just go back to the Special Conditions ?

Mr. Scheetz: Yes.

The Court: Ms. Clark [Probation Officer whom prepared the PSIR] are you the one that did the interview with Mr. Thomas ?

Probation Officer: I am, Your Honor.

The Court: Have you correctly stated at paragraph 52 what he told you about his gambling ?

Probation Officer: Yes, I have, Your Honor.

The record shows that the Court went on to make the following observation:

The Court: All right. So I understand why he's trying to back away from that, because he doesn't want to stay out of the casinos, but there was no timely objection to that paragraph, and so I am going to stand by what Ms. Clark has said he said during the interview. And I will base my findings on what the appropriate supervised release conditions should be based on what he told Ms. Clark, keeping in mind you didn't object to it until-- it wasn't objected to in the draft presentence report, so it's not timely-- is his statement here that he doesn't gamble a lot and he doesn't gamble because of his anger. And I just don't accept that. If that was really untrue, Mr. Meyer would have objected to it in the first instance and I wouldn't be hearing about it right up at sentencing.

The other thing is that the mental health evaluation and/ or treatment program relates to the anger issues that he has admitted in paragraphs 52, and so I will be imposing that because that's what he told Probation. And I know he doesn't want-- I know he's trying to back away from it now, but he told Probation that. He didn't object to it until he saw the ramifications of what he said. So I'm going to take him at his word, and that would be the reason for mental health evaluation and treatment. It could be that, when he comes out of prison and is evaluated, they will find that no treatment is necessary. I'm going to impose the gambling limitation based, again, on what he told Probation, and it wasn't timely obje-

cted to." See Sent. Trans. at page 39, line 16-25 through page 40, line 1-20.

Dion Thomas, asserts that the District Court abused it's discretion in several ways first, the Court held that Thomas made an untimely objection to the PSIR Special Condtion of Supervised Release, however the was error because Attorney Scheetz has just taken over the case from Attorney Meyer, and was not counsel when the Draft PSIR was written. Second, the Court extended to the government and counsel an opportunity to make additional arguments and to have such filed by March 29, 2013 by close of business, see Doc. # 295. Third, the Court did not require the government to show the accuracy of the PSIR findings. Fourth, the Court failed to make the factual findings required pursuant to 18 U.S.C. § 3583 (d) that the special conditions Probation sought had any relation to the offense of which Dion Thomas was charged. Fifth, the Court abused it's discretion in accepting as factually accurate the statements of Probation Officer Jessica Clark that Thomas had made the statements to her absent placing her under oath and permitting defense counsel the opportunity to cross-examine, see United States v. Stapleton, 268 F.3d 597, 598 (8th Cir. 2001) (The Eighth Circuit held that: "the district court erroneously relied on only the presentence report and the **unsworn statements** of the probation officer who prepared it. **VACATED** and remanded for resentencing hearing); and U.S. v. Wise, 976 F.2d 393, 404-05 (8th Cir. 1992) (holding that a trial judge's decision to put the probation officer who wrote a presentence report under oath during the sentencing hearing and allow the defense to voice its objections and cross examine the probation officer was constitutionally sufficient). (emphasis added).

Thus, Petitioner Thomas, argues that his sentencing phase counsel

provided him 'deficient performance' at the appellate stage by objecting at sentencing, however failing to raise on appeal, thus establishing the first prong of the **Strickland** test, see Nearly v. United States, 998 F.2d 563, 566-567 (8th Cir. 1993) (Trial counsel objected to enhancement of defendant's sentence for "obstruction of justice" under the Guidelines, but failed to raise the issue on appeal which constituted performance below an objective standard of reasonableness and required an evidentiary hearing to resolve ineffective assistance of counsel claim). (emphasis added).

Petitioner Thomas, asserts to establish actual prejudice, thus he must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, see Harrington v. Richter, 562 U.S. 86, 178 L. Ed. 2d 624, 642 (2011).

Thus, Dion Thomas, argues firmly that his sentencing phase counsel Attorney Scheetz made objections to the PSIR and ay sentencing, however during the appellate stage he failed to raise this meritorious issue, the omitted issue was "obvious from the [sentencing phase] trial record and [is] one which have resulted in a reversal on appeal," see United States v. Cook, 45 F.3d 388, 395 (10th Cir. 1995). There is a reasonable probability that, but for counsel's unprofessional errors during the appellate stage the outcome would have been different, thus actual prejudice exist in violation of Petitioner's Sixth Amendment Rights in the case herein. See **Strickland**, 466 U.S. 668, 694 (1984).

Therefore, Petitioner Thomas, argues that Question # Two merits issuance of a C.O.A. in accordance with U.S. Supreme Court precedents in **Slack**, 529 U.S. 473 (2000); and 28 U.S.C. § 2253 (c) (2), as Dion Thomas has demonstrated a substantial showing of a denial of

his Sixth Amendment constitutional rights, see Miller-El, 537 U.S. 322, 336 (2003).

Question # THREE:

Whether Petitioner Thomas's ex-trial counsel Attorney Meyer failure to correct testimony which he knew was false or misleading constitutes ineffective assistance of counsel in violation of his Sixth Amendment Rights of the U.S. Constitution ?

Statement of Facts

Petitioner Thomas, contends that his Jury Trial commenced in **June** of 2011, thus on Trial Day 2, the Government's witness Williams testified **under oath** at Dion Thomas's Jury Trial that Dion Thomas sold heroin to Arthur Scott **at least in 2011**, however this testimony is **false in part and is certainly misleading**, see Jury Trial Transcripts- Trial Day 2, at pages 178-180; and review Appendix C, Illinois Department of Corrections records. Mr. Thomas, states that contrary to the Government's witness Williams testimony Dion Thomas was in fact incarcerated in the Illinois Department of Corrections in 2011 from **January 26, 2011** through **March 11, 2011**, roughly 43 days, see United States v. Freeman, 650 F.3d 673, 677-679 (7th Cir. 2010), conviction vacated in light of false testimony as the defendant Freeman was incarcerated in Illinois Department of Corrections during period of time of Government's witness testimony.

Reasons To Justify Granting C.O.A.

Petitioner Thomas, states that the District Court merely relied upon trial counsel's **unsworn statements** within his Affidavit in which the Court stated as follows:

"trial counsel explained in his affidavit that he did not "recall any witness testifying at trial that he or she bought or otherwise

obtained heroin or cocaine from [movant] while [movant] was in custody" (civil docket no. 7 at 3). Thus, it is unclear how this evidence would have impeached any witnesses' testimony or otherwise assisted in movant's defense." See Appendix B, at page 22 of 32.

Petitioner Thomas, contends that consistent with U.S. Supreme Court precedents in Napue v. Illinois, 360 U.S. 264, 269 (1959) (When the government obtains a conviction through the knowing use of false testimony, it violates a defendant's due process rights); and see also U.S. v. Bagley, 473 U.S. 667, 679 n. 8 (1984). Furthermore, Napue stands for the proposition that if the false testimony affected or might have affected the judgment of the jury then a conviction must fall. Therefore, Petitioner Thomas, argues firmly that the credibility of witness Williams was crucial and under **Strickland**, then, the focus is on whether a defendant has received a fair trial. The relevant facts and circumstances presented here as a whole put to the fact that Dion Thomas was not accorded a fair trial, thus Attorney Meyer's failure to correct false or misleading testimony constitutes ineffective assistance of counsel in violation of Petitioner's Sixth Amendment Rights of the U.S. Constitution, see Mills v. Scully, 653 F. Supp. 885 (S.D.N.Y., 1987) (Defense counsel's failure to move to correct testimony, which he knew was false or misleading, may constitutes ineffective assistance of counsel.). (emphasis added).

Therefore, Petitioner Thomas, argues firmly that Question # Three is adequate to deserve encouragement to proceed further, see **Slack**, 529 U.S. at 484 (2000); and Dansby v. Hobbs, 133 S. Ct. 2767, 186 L. Ed. 2d 215 (2013).

Question # FOUR:

Whether Petitioner Thomas, received ineffective assistance of

counsel by Attorney Meyer failing to conduct an adequate background investigation, thus did Mr. Thomas's ex-trial counsel conduct his defense in a totally incompetent manner and that such incompetence prejudiced his defense in violation of his Sixth Amendment Rights of the U.S. Constitution ?

Statement of Facts

The facts and circumstances of Dion Thomas's jury trial in which he was represented by Attorney Mark C. Meyer which is supported by the record is as follows:

While awaiting sentencing, on December 21, 2012, the defendant filed a second pro se motion for new counsel, see Doc. # 245. On January 3, 2013, at the hearing for new counsel, the defendant advised Chief Magistrate Judge Scoles that this appointed attorney Meyer had **never** visited him after being directed to do so by Judge Scoles at the first hearing for new counsel.

The defendant stated:

> And I also want to process the insufficient counsel on Mr. Meyer's behalf. I mean during my whole trial, my rights was violated. Mr. Meyer refused to allow me to see any statements. I never seen any statements made against me in this trial. After you told him-- after I tried to get rid of him the first time and you told him to come up there and talk to me and show me all of my stuff that was accused -- that I was accused of and everything, he never once came up there and talked to me before trial or went over anything for me before trial or anything.
>
> I called him when I had pretrial examination in front of Ms. Reade. He told me that same day when I called him that I asked was he coming up there that day to go over the whole trial and everything, he told me he did not have time to come up there. He was going out of town over the weekend and my trial was supposed to start that Monday.

New counsel hearing transcript at 7.

Attorney Meyer did not dispute Thomas's claims- that Meyer did not visit Mr. Thomas after Chief Magistrate Judge Scoles had instructed him to do so, and that he did not visit Thomas between the ti-

me of the pretrial conference and the beginning of the jury trial because Attorney Meyer was going out of town. Attorney Meyer did state that he reviewed discovery with the defendant, see Doc. # 329, Appendix E (A copy of Motion For New Counsel Hearing held before U.S. Magistrate Judge Jon Stuart Scoles on January 3, 2013, see Doc. # 329).

The concerns of Dion Thomas regarding Attorney Meyer's time spent working on the case were reflected throughout the record of the pretrial and trial proceedings. On several occassions, the district court, Chief Judge Linda R. Reade, admonished Attorney Meyer for failing to follow basic court procedures. See Appendix G, Order ("The court notes that Defendant failed to submit a separate brief in accordance with Local Rule 7. Nevertheless, the court shall address Defendant's Motion in Limine."); see also, Appx. G, Order ("once again, Defendant failed to submit a separate brief in accordance with Local Rule 7. Nevertheless, the court shall address Defendant's Supplemental Motion in Limine.").

See also, trial transcript at 242 (Meyer failed to timely disclose identity of defense witnesses to government, or to follow Touhy procedures in which to secure the presence of the witness at trial, which cause the Chief Judge to exclude the witnesses from testifying at trial- Chief Judge Reade: "So I'm not going to let you call the [defense] witnesses. They haven't- you're not in compliance with the Court's order. It's not the only way you haven't been in compliance in this trial, but that's one of the ways."). See also, trial transcript at 238-240 (Meyer failed to follow district court trial management order when he did not disclose defense exhibits to government and district court prior to trial). See also, trial transcripts at 262 (during direct examination of first defense wi-

tness Kevin Jackson, Meyer acknowledged that he had never interviewed or spoken with Jackson prior to Jackson taking the stand- "Q. And you've never actually spoken with me before, have you ? A. No, I have not.").

The second defense witness was Thomas's mother, Debra McKenzie. She testified that the defendant was with her in Chicago, Illinois, on the afternoon of June 23, 2011, at the time of the alleged controlled buy of heroin. Trial transcript, pages 276-284. Attorney Meyer **never** interviewed Mr. Thomas's star defense witness as to Thomas's **alibi defense.** Since the defendant was in Chicago with his mother on the date and time of the controlled buy, the defense argued that it would have been impossible for the defendant to also have been in Waterloo, Iowa.

The government presented two rebuttal witnesses. The first rebuttal witness was a manager at the Isle Capri Casino located in Waterloo, Iowa, see Trial Trans. at 288. The casino manager testified that a person using the casino "Players Club" card registered to the defendant was in the casino on the after-noon of June 23, 2011, see Trial Trans. at 292. The government argued that this evidence contradicted the alibi testimony of the defendant's mother.

The second government rebuttal witness was a Special Agent Matthew Schalk with the Iowa Division of Criminal Investigations, see Trial Trans., at page 297. Schalk was stationed at the Isle Capri Casino in Waterloo, Iowa. Schalk testified that on May 15, 2011 (approximately 1 1/2 months prior to the date of the controlled buy of heroin allegedly involving the defendant), he investigated activities of the defendant at the Casino. According to Schalk, a person using the Players Club card registered to the defendant was

"...putting a large amount of bills into two different slot machines on the gaming floor, and it was unusual because he was doing it simultaneously at the same time to both slot machines and wasn't playing any spins. He wasn't- he was just putting the money in and not playing any of the money off." Trial Trans., at 297.

These two Government witnesses were utilized to rebut Dion Thomas's **alibi defense**, however had such trial strategy been properly thought out and Government & defense witnesses interviewed prior to trial such alibi defense would have **never** utilized at Thomas's Jury Trial. (emphasis added).

Therefore, Petitioner Thomas, asserts that Attorney Meyer's representation was incompetent during his pre-trial stage in at least four (4) respects:

1. Failing to interview his mother Debra McKenzie before she testified before the jury and defense witness Kevin Jackson. See Bealey v. United States, 491 F.2d 687 (6th Cir. 1974) (Trial counsel failed to interview witnesses before trial constituted ineffective assistance of counsel); thus also as the record reflects trial counsel failed to interview the Government's witnesses also prior to trial in which also constitutes ineffective assistance of counsel. See Wiggins v. Smith, 539 U.S. 510, 522-23 (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.). This "includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." Towns v. Smith, 395 F.3d 251, 258 (6th Cir. 2005).

2. Attorney Meyer failed to consult with Dion Thomas about a tri-

al strategy and failed to advise Thomas of his constitutional right to testify at his jury trial. Mr. Thomas proceeded to jury trial on August 27, 2012, however the Linn County Correctional Center Inmate Jail Log-In Sheets reflect that the last attorney-client visit occurred on **June 22, 2012 at 1:41 p.m.**, therefore Attorney Meyer **never consulted** with Dion Thomas to prepare him for his jury trial in **August of 2012**, see Appendix F (A copy of Linn County Correctional Inmate Jail Log-In Sheets printed 11/19/2015).

Petitioner Thomas, states that he brought the fact that Attorney Meyer had **never** came to visit him prior to his jury trial commencing as trial counsel was ordered to do so by Chief Magistrate Judge Scoles at this is within the record, see Appendix E.

Petitioner Thomas, argues firmly that the failure of trial counsel during the critical pre-trial period to **consult** with Dion Thomas, thus he could not fulfill his duty to reasonably investigate matters. Mitchell v. Mason, 325 F.3d 732, 743 (6th Cir. 2003) (citing **Strickland**, 466 U.S. at 691 (1984)). A complete failure by trial counsel Attorney Meyer to ever meet or consult with his client during the critical pre-trial stage constitutes a deprivation of counsel during a "critical period," thus prejudice is persumed as the Sixth Circuit Court of Appeals found to constitute "constructive denial of counsel" under **Cronic**. See Mitchell v. Mason, 325 F.3d 732, 744 (6th Cir. 2003). See also, Graves v. Padula, 773 F. Supp. 2d 611, 622 (D.S.C., Mar. 30, 2010) (**GRANTING** a C.O.A. as to whether failure to consult during the pre-trial stage constitutes per-se prejudice under **Cronic**). (emphasis added).

Mr. Thomas provided to the District Court and the Eighth Circuit Court of Appeals Visitor Log-In Records from the County Jail he

housed at during his criminal proceedings in U.S. District Court, thus the U.S. Supreme Court held that: "It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and other such sources." See Machibroda v. United States, 368 U.S. 487, 495 (1962).

3. Attorney Meyer **never** explained the dangers of going to trial versus pleading guilty and failed to explain to Thomas that the Government's ability to bring crack cocaine into his trial through 404 (b) evidence.

4. The multiple pre-trial errors and lack of preparation was actually demonstrated repeatedly by trial counsel Attorney Meyer, see Appendix G (A copy of the District Court's Pre-Trial Order, see Doc. # 165 11-Page **ORDER** signed by District Court Judge Linda R. Reade on August 23, 2012).

Thus, Petitioner Thomas, argues firmly that Attorney Meyer's perfo-rmance constitutes 'deficient performance', thus establishes the first prong of **Strickland**, 466 U.S. 668, 687-88 (1984).

Petitioner Thomas, asserts that actual prejudice exist in the case herein "if" this Honorable U.S. Supreme Court declines to find prejudice persumed, therefore actual prejudice exist based upon the following:

Attorney Meyer did not undertake an adequate pretrial investigation, he did not interview a single witness, thus it is quite difficult to see how Attorney Meyer could make an informed assessment of the strengths and weaknesses of the government's case without attempting to ascertain specifically what the testimony of the go-

vernment's witnesses would be. In general, Meyer's ability to cross-examine the government's witnesses effectively was seriously compromised by his failure to interview them, since he would have little idea as to the specific areas of testimony which could be challenged. Thus, Attorney Meyer's failure to interview the Government's witnesses; defense counsel's witnesses; failing to consult with his client Dion Thomas during the critical pre-trial period; other pre-trial errors rendered as discussed herein within Question # Four; failure to explain to Thomas his right to testify at his jury trial; and the total lack of preparation and investigations clearly reveals that Attorney Meyer was incompetent. Since Attorney Meyer did not interview either his client, witness Kevin Jackson; Thomas's mother Debra McKenzie, thus corroboration for Dion Thomas's defense was **never fully developed.** See McQueen v. Swenson, 498 F.2d 207, 217 (8th Cir. 1974) ("The most able and competent lawyer in the world can not render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitmate justicable defense."). (emphasis added).

Therefore, Petitioner Thomas, argues firmly that he received defective representation, thus the cumulative errors during the pre-trial stage is sufficient to establish **actual prejudice,** and, therefore rendering his trial proceedings fundamentally unfair which justifies reversal of Dion Thomas's two drug convictions as he was certainly denied a fair trial in light of the ineffective assistance of counsel provided to him by Attorney Meyer in violation of his Sixth Amendment Rights of the U.S. Constitution, see Lockhart v. Fretwell, 506 U.S. 364, 368-369 (1993). (emphasis added).

In conclusion as to Question # Four, thus Mr. Thomas, concludes that a Certificate of Appealability should issue in accordance with the U.S. Supreme Court precedents in Slack; and 28 U.S.C. § 2253 (c) (2), as Dion Thomas has demonstrated a substantial showing of a denial of his Sixth Amendment constitutional rights, see Slack, 529 U.S. 473 (2000).

Question # FIVE:

Whether the U.S. Supreme Court should recognize an argument not raised before the district court as it is critical issue affecting Thomas's substantial rights. Did Petitioner Thomas's ex-trial counsel operate pursuant to a conflict interest when, during the course of representation, Attorney Meyer's representation, counsel's and Petitioner's interests 'diverge with respect to a material course of action,' thus his ex-trial counsel's continued representation of Thomas violate his Sixth Amendment Rights of the U.S. Constitution ?

Petitioner Thomas, contends that he did not raise this argument before the district court, however raised for the first time to the Eighth Circuit Court of Appeals within his C.O.A. Application. Thus, the "Supreme Court and the Eighth Circuit have recognized in criminal cases federal courts can examine a critical issue affecting substantial rights **sua sponte** under Fed. R. Crim. P. 52 (b)." United States v. Granados, 168 F.3d 343, 345-46 (8th Cir. 1999) (in appeal from denial of § 2255 motion, granting relief sua sponte because of ineffective assistance of counsel at sentencing). Under Rule 52 (b), the federal courts may grant relief where there has been "(1) error, (2) that is plain,... (3) that affects substantial rights," and (4) that seriously affects the (continues on next page)

fairness, intergrity, or public reputation of judical proceedings." United States v. Lovelace, 585 F.3d 1080, 1090 (8th Cir. 2009).

Ineffective assistance of counsel may result from an attorney's conflict of interest. See Strickland v. Washington, 466 U.S. 668, 692 (1984). In Cuyler v. Sullivan, the Supreme Court ruled that a defendant can demonstrate a Sixth Amendment violation by showing that (1) counsel was actively representing conflicting interests, Cuyler, 446 U.S. 335, 348-50 (1980); and (2) the conflict had an adverse effect on specific aspects of counsel's performance. See Cuyler, 446 U.S. at 348.

(1) error;

Petitioner Thomas, asserts that an constitutional error exist by a conflict of interest during his pre-trial period; thereafter continued through out Dion Thomas's jury trial in August of 2012, thus violating his Sixth Amendment Rights of the U.S. Constitution.

An attorney has an actual conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action, see Cuyler v. Sullivan, 466 U.S. 335, 356 n. 3, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980).

The record reflects that two separate occassions after Attorney Meyer was appointed on March 28, 2012, to represent Dion Thomas that Mr. Thomas filed pro se Motion For New Counsel on June 27, 2012, see Doc. # 109. Three months had passes since Meyer was appointed to represent the Petitioner Thomas. This was sufficient time for Thomas to realize that he was justifiably dissatisfied with Attorney Meyer. See, transcript of first hearing on substitute counsel at 19 ("Like I said, I don't- I don't trust him at all when it comes down to my case."); see also id. at 9 ("Part

of my frustration is that every time I talk to my attorney all he's saying is to accept a plea agreement.").

While awaiting sentencing, on December 21, 2012, the Petitioner Thomas filed a second pro se Motion For New Counsel, see Doc. # 245. On January 3, 2013, at the hearing for new counsel, thus Mr. Thomas advised Chief U.S. Magistrate Judge Scoles that his appointed attorney Meyer had **never** visited him after being directed to do so by Judge Scoles at the first hearing for new counsel, see Appendix E.

Petitioner Thomas, argues firmly an actual conflcit of interest exist as during the course of his representation, Attorney Meyer's and Petitioner Dion Thomas's interests diverge with respect to a material course of action as Attorney Mark C. Meyer **repeatedly** tried to convince Dion Thomas to plead guilty accept the Government's plea agreement, however Mr. Thomas persisted on proceeding to jury trial **only** because he was not willing to accept a plea offer that entailed a stipulation to "crack" cocaine. Thus, Petitioner Thomas, asserts that as the result of all Attorney Meyer wanted to discuss was him pleading guilty he felt as if Mr. Meyer could not be trusted and his loyalty was to Mr. Thomas. These facts and circumstances lead to a complete breakdown in communications between Attorney Meyer and Dion Thomas, therefore an actual conflict of interest existed in the case herein.

(2) that the error is plain;

Petitioner Thomas, argues firmly that from the existing U.S. District Court record is apparent that his Conflict of Interest error constitutes a plain error as it is a fundamental error, see United States v. Rosnow, 977 F.2d 399, 411 (8th Cir. 1992).

(3) that affects substantial rights;

Petitioner Thomas, argues that his meritorious Conflict of Interest claims affects his substantial rights as the result of actual prejudice exist as Attorney Meyer's conflict had an adverse effect on specific aspects of counsel's performance, see Cuyler, 446 U.S. at 348 (1980).

In the instant case, Petitioner Thomas, contends that Appendix E, F, and G fully support that the conflicting interests resulted in Attorney Meyer's failing to even the minimum requirement to afford Dion Thomas effective assistance of counsel; and coupled with the break-down communication, thus constituting an actual prejudice in violation of Petitioner Thomas's Sixth Amendment Rights of the U.S. Constitution, see Cuyler, 446 U.S. at 349-50 (1980) (Once a petitioner has shown that an actual conflict of interest adversely affected defense counsel's performance prejudice to the petitioner is persumed and no further showing is necessary for reversal).

(4) that "seriously affects the fairness, intergrity, or public reputation of judicial proceedings."

Petitioner Thomas, argues firmly that he did not enjoy his Sixth Amendment right to counsel. Dion Thomas did not receive a fair trial due to the Conflict of Interest that existed, thus Dion Thomas should receive a new trial on both counts of conviction. See U.S. v. Young, 418 U.S. at 810 (1987) (a fundamental error that "undermines confidence in the intergrity of the criminal proceeding."); and Lopez v. Scully, 58 F.3d 38, 42-43 (2d Cir. 1995) (Lopez in a pro se motion to withdraw his guilty plea asserted that counsel was ineffective, thus at that point counsel had a conflict of interest. The court remanded for resentencing

with appointment of new counsel).

Because Dion Thomas's jury trial was conducted by Attorney Meyer who operated under Conflict of Interest, therefore resulting Mr. Thomas not receiving a fair trial there can be no doubt in light of the facts and circumstances of Thomas's case that the "plain error" serious affects the fairness, intergrity, or public reputation of judicial proceedings, thus a C.O.A. should issue as Dion Thomas has demonstrated a substantial showing of a denial of his Sixth Amendment Rights of the U.S. Constitution. See **Slack**, 529 U.S. 473 (2000).

Question # SIX:

Whether the U.S. Supreme Court should recognize an argument raised for the first time with the Eighth Circuit Court of Appeals as it is a critical issue affecting Thomas's substantial rights. Did Petitioner Thomas's ex-trial counsel provide him with ineffective assistance of counsel because Attorney Meyer did not fully advise him of a favorable plea offer; and the risks of going to trial versus pleading guilty, thus violating his Sixth Amendment Rights during plea-negotiations stage of trial in the case herein ?

Petitioner Thomas, states that he did not raise this argument before the district court, however raised for the first time to the Eighth Circuit Court of Appeals within his C.O.A. Application. Thus, the "Supreme Court and the Eighth Circuit have recognized in criminal cases federal courts can examine a critical issue affecting substantial rights **sua sponte** under Fed. R. Crim. P. 52 (b)." United States v. Granados, 168 F.3d 343, 345-46 (8th Cir. 1999) (in appeal from denial of § 2255 motion, granting relief sua sponte because of ineffective assistance of counsel at sentencing).

Under Rule 52 (b), the Eighth Circuit Court of Appeals may grant relief where there has been "(1) error, (2) that is plain,... (3) that affects substantial rights," and (4) that "seriously affects the fairness, intergrity, or public reputation of judicial proceedings." United States v. Lovelace, 565 F.3d 1080, 1090 (8th Cir. 2009).

On March 8, 2017, his ex-trial counsel Attorney Meyer submitted his court ordered "Affidavit" (unsworned statement), however for the first time Dion Thomas realized after Attorney Meyer stated that the Government's Final Plea Offer extented to Dion Thomas that a "no quantity element" with no mandatory minimum sentence was extented to him, see Doc. # 7, at page 1 , see Appendix D.

Petitioner Thomas, asserts that plea-bargaining stage is a critical stage and the right to effective assistance of counsel attaches. See Missouri v. Frye, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012) (The Sixth Amendment right to the assistance of counsel during criminal proceedings extends to the plea-bargaing process.). Thus, criminal "defendants are entitled to the effective assistance of counsel" during that process. See Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

> If a plea bargain has been offered, a defendant has the right to effective assistance in considering whether to accept it. If that is denied, prejudice can be shown if lost of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of more severe sentence. Id. at 1387.

As reflected by page 2, of Dion Thomas's Affidavit (unsworn declaration under penalty of perjury and under § 1746), see Doc. # 1. On **July 11, 2012,** Attorney Meyers merely discussed the Final Plea Offer extented by the Government over the telephone, see #14-15.

Therefore, Petitioner Thomas, asserts that Attorney Meyer provided him with 'deficient performance' by failing to come visit him to fully explain the critical terms of the Final Plea Agreement to his client Dion Thomas; the dangers of proceeding to trial versus pleading guilty; the fact that the Government could still introduce "crack" cocaine at his jury trial under 404 (b) evidence; the dispartity between pleading guilty accepting Final Plea Offer of the Government versus proceeding to Jury Trial, however Attorney Meyer failed to do these things, thus he failed to provide professional guidance to Dion Thomas regarding his sentence exposure prior to denial of plea, thus constitutes deficient perforance, see Smith, 348 F.3d at 553 (6th Cir. 2003).

Furthermore, Petitioner Thomas, argues that actual prejudice exist as the result of the disparity in sentencing between pleading guilty accepting the Government's Plea Offer of a "no quantity element" no mandatory minimum sentence which would have yielded an "advisory" guideline range of 108-135 months versus the 240 months actually received after trial, thus the 105 months difference constitutes actual prejudice, Frye, 566 U.S. 134, 182 L. Ed. 2d at 392-393 (2012).

Likewise, Dion Thomas, states that there is a reasonable probability that the District Court would have accepted the Government's Plea Offer because roughly a decade or more is a lengthy sentence and the District Court generally accepts plea offers extented by the Government to criminal defendants in U.S. District Court, thus there is a reasonable probability that the District Court would have accepted the Plea Offer in the case herein. See Cooper, supra; and Frye, supra. (emphasis added).

Therefore, Petitioner Thomas, argues firmly that Question # Six establishes a substantial showing of a denial of Dion Thomas's Sixth Amendment Rights, thus a Certificate of Appealability should issue, see **Slack**, 529 U.S. 473 (2000).

Respectfully Submitted,

Date: 04 / 13 / 19

Mr. Dion Thomas
#44399-424
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Dian Thomas

Date: April 13, 2019