No. 18-9264

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT MARSHALL-PETITIONER

vs.

UNITED STATES-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT MARSHALL-PRO SE
#14029-002
FCI TALLADEGA
PMB 1000
TALLADEGA, ALABAMA 31560

QUESTION PRESENTED

DID THE ELEVENTH CIRCUIT WRONGLY APPLY THIS COURT'S JURISPRUDENCE IN BUCK BY FAILING TO GRANT A COA IN THIS MATTER.

LIST OF PARTIES

All parties appear in the caption on the cover page.

TABLE OF CONTENTS

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 16, 2019.

A petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on March 28, 2019, and a copy of the order denying rehearing appears at Appendix B.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2253 proscribes in pertinent part:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district court judge, the final order shall be subject to review, on appeal by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by State Court, or

(B) the final order in a proceeding under section 2255

(2) a certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)

STATEMENT OF THE CASE

This is the case of Robert Marshall, a documented drug addict that was caught up in a overarching drug conspiracy with eleven other defendants, all of whom were charged with conspiracy to distribute or possess with intent to distribute 5 or more kilograms of powder and crack cocaine.

In February 2013, a jury found Marshall guilty of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 & 841(a)(1), and using a communication facility (a cell phone) to facilitate the conspiracy, in violation of 21 U.S.C. § 843(b), in the Middle District of Alabama..

At trial, on Count 1 of the superseding indictment, the jury convicted a number of Marshall's codefendants of conspiracy. However, on Count 1, the jury convicted Marshall only of the lesser included offense of conspiracy to distribute or possess with intent to distribute 500 grams or more of cocaine powder. United States v. Bledson, et al, Case No. 2:12-cr-87-WKW.

It is not disputed that Defendants Bledson and Willie Jerome Davis were large-scale distributors of cocaine in Montgomery, Autauga, and Elmore counties, Alabama, who generally maintained separate supply sources from each other, but who purchased cocaine from each other when their own supplies were low. At trial, Defendant Rajneesh Dikka Daniels testified that she used her apartment to receive, break down, weigh, repackage, and distribute over 50 kilograms of cocaine for Davis. Daniels knew Marshall because she was his cousin. Daniels also testified that,

on at least ten occasions since 2009, she delivered two 125 gram packages of cocaine to Marshall. Therefore, per Daniel's testimony, she sold at least 2,500 grams of cocaine to Marshall on Davis's behalf between March 2009 and May 2012. Unlike Daniels's other purchases, including Defendant Bledson, Marshall did not arrange the drug purchases through Davis. Instaed, he contacted Daniels directly according to her testimony. For each sale, Daniels would personally deliver the cocaine to Marshall at his house or apartment; Marshall would pay Daniels for the drugs; and Daniels would later give Marshall's money to Davis.

At trial, Bledson testified that he also sold cocaine to Marshall. Through testimony of Bledson and Defendant Tony Gardner, as well as through audio recordings of telephone calls and video recordings of the event, the Government presented evidence that, on March 31, 2012, in a meeting Gardner had arranged Bledson met Marshall for the first time to sell Marshall 62 grams of cocaine in exchange for $2,150.00 in cash. [illegible] took [illegible] On June 4, 2013, the Honorable W. Keith Watkins sentenced Marshall to 300 months in prison on the conspiracy count, and one year in prison on the use-of-a-communication-facility count, the terms to run concurrently.

Marshall appealed, arguing that (1) the court erred in granting the Government's "reverse Batson challenge"; (2) the evidence against him was insufficient to establish he was guilty of either conspiracy to distibute cocaine or using a cell phone to facilitate the conspiracy and established only that he engaged

in buy-sell transactions; and (3) the court erred in allowing the Government to introduce Fed. R. Evid. 404(b) evidence that he was convicted in 1999 of the sale of a controlled substance.

On June 1, 2015, the Eleventh Circuit affirmed Marshall's convictions and sentence. United States v. Reese, 611 F.App'x 961 (11th Cir. 2015). Marshall filed a petition for writ of certiorari in the United States Supreme Court, which this court denied on November 2, 2015.

On June 17, 2016, Marshall, acting pro se, filed his intial § 2255 motion asserting claims that his trial counsel rendered ineffective assistance by (1) failing to present a defense that he was in merely a buyer/seller relationship with his codefendants, that he bought cocaine for his personal use and the use of his friends (and not for resale), and that he was a drug addict, not a drug distributor; (2) failing to challenge the accuracy of the Government's organizational chart depicting the structure of the drug ring and the roles of the various coconspirators; (3) failing to challenge the admission of Fed. R. Evid. 404(b) evidence of his prior drug-sale conviction on the ground the court made no finding that the probative value of such evidence outweighed its prejudicial value; (4) failing to advise him of his right to testify and preventing him from testifying in his own defense; (5) failing to argue that a cell phone call he made to codefendant Delmond Bledson was to buy drugs for his personal use only, and thus he could not be guilty of the 21 U.S.C. § 843(b) count in the indictment; (6) failing to move for a severance of his trial from that of his codefendants; (7) failing to investigate one of the prior convictions used to classify him as

as a career offender at sentencing. Marshall also asserted claims that he was actually innocent of the offenses of which he was convicted and that his guidelines sentence enhancement as a career offender violates the Supreme Court's holding in Johnson v. United States, 135 S. Ct. 2551 (2015).

On February 13, 2017, Marshall amended his § 2255 motion to add a claim that under Mathis v. United States, 136 S. Ct. 2243 (2016), his prior Alabama convictions for cocaine distribution should not have been used to classify him as a career offender because the convictions were obtained under a statute, § 13A-12-211, Ala. Code 1975, that defines a controlled substance offense more broadly than the definition of the offense contained in the career offender guideline at U.S.S.G. § 4B1.2(b).

On May 21, 2018, the Magistrate Judge filed a Recommendation that Marshall's 28 U.S.C. § 2255 motion be denied. Marshall timely filed objections.

One of the main points of contention was the contradictory affidavit's of Marshall and trial counsel, James R. Cooper, Jr.. On the one hand, Marshall attested that he informed Cooper that he was a drug user whom had been enrolled in a drug treatment program and had failed several state-ordered drug tests. That he bought cocaine for his personal use and he wanted to testify to these facts disputing his involvement in a conspiracy between himself and his codefendants, and on the other hand, in an affidavit addressing Marshall's allegations, Cooper avered that Marshall never told him he was chemically dependent or that he was only buying cocaine for his personal use. Cooper, volunteered a hypothetical response, offering that in order to make the most of such a defense, Marshall would have had to testify, but explained Marshall chose not to testify after he

was adivsed his prior drug convictions could be used to impeach him. Cooper stated he also advised Marshall that his codefendants Delmond Bledson, Tony Gardner, and Dikka Daniels could testify in rebuttal about Marshall's drug buys if he testified. Because of the conflicting affidavits, the Government conceded that Marshall was entitled to an evidentiary hearing as to whether his counsel was ineffective in failing to properly advise him as to his right to testify.

On June 29, 2018, the district court denied Marshall's § 2255 without a hearing concluding that despite the conflicting affidavits and the Government's concession, an evidentiary hearing was not necessary to resolve the petition because, even if the assertions in Marshall's affidavit are true, he is not entitled to relief. The Court held "He has not demonstrated a reasonable possibility that, if he had testified regarding that defense or if his counsel had presented that defense to the jury, the outcome of the case would have been different." Appendix C at 7.

Marshall subsequently filed a Rule 59(e) motion raising several distinct claims. On August 28, 2018, the district court denied 59(e) relief and refused to grant a COA in the matter. Appendix D.

Thereafter, Marshall sought COA in the Eleventh Circuit arguing that a substantial showing of a denial of a constitutional right had been made regarding: (1) Whether the district court erred in denying Marshall's claim, without an evidentiary hearing, of ineffective assistance of counsel for failing to present a defense that he was merely in a buyer/seller relationship with his codefendants, that he bought cocaine for his personal use and the use of his friends (and not for resale), and that he was a drug addict, not a drug distributor;

(2) Did the district court error in denying ineffective assistance of counsel claim for failing to challenge the accuracy of the Government's Organizational Chart depicting the structure of the drug ring and the roles of the various coconspirators; (3) Whether the district court erred by denying ineffective assistance of counsel claim for failure to investigate and object to prior conviction; (4) Did the district court commit error by failing to grant petitioner's claim based on the right to testify without a hearing; (5) Was Marshall's Sixth Amendment right to effective assistance of counsel violated when counsel failed to challenge conviction for violation of Title 21 Subsection 834(b).

On January 16, 2019, United States Circuit Judge Charles R. Wilson issued a summary order denying the motion for a COA. See Appendix A. The summary order contained a one paragraph recitation that Marshall had failed to establish jurist would find debatable both (1) the merits of an underlying claim; and (2) the procedural issue that he seeks to raise, citing 28 U.S.C. § 2253(c)(2); and Slack v. McDaniel, 529 U.S. 473, 478 (2000). Marshall filed a timely petition for rehearing and rehearing en banc that was denied on August 28, 2019. Appendix B.

I. LEGAL STANDARDS FOR ISSUANCE OF A COA

28 U.S.C. § 2253 proscribes in pertinent part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district court judge, the final order shall be subject to review, on appeal by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by State Court, or
>
> (B) the final order in a proceeding under section 2255
>
> (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
>
> (3) the certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)

To obtain a COA under section 2253(c), a habeas petitioner must make a substantial showing of the denial of a constitutional right, a demonstration that under Barefoot v. Estelle, 463 U.S. 880 (1983), includes showing that reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed futher". Barefoot, supra., at 893, and n.4. A court of appeals should limit its examination

to a threshold inquiry into the underlying merit of the prisoner's claim, rather than ruling on the merit of the prisoner's claim.

When discussing the requirements necessary to satisfy the procedures of section 2253 the Supreme Court has found when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurist of reason would find it debatable whether the district court was correct in its procedural ruling.

An appellate court reviews the district court's denial of a hearing under section 2255 for abuse of discretion. A district court abuses its discretion when its decision rests on a error of law or a clearly erroneous factual finding, or when its decision, though not necessarily the product of legal error or a clearly erroneous finding of fact, cannot be located within the range of permissible decisions. And while the district court has wide discretion in developing the record it will use to determine a habeas petition, that discretion does not extend to summary dismissals of petitions presenting facially valid and off the record interactions with trial counsel.

More recently the Supreme Court held in Buck v. Davis, ___ U.S. ___ (No. 15-8049 decided Feb. 22, 2017), the Fifth Circuit exceeded the limited scope of the COA analysis. The court identified that the COA statute sets forth a two-step process: an intial determination whether a claim is reasonably debatable and, if so, an appeal in the normal course. 28 U.S.C. § 2253. At the first stage, the only

question is whether the applicant has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or ... could conclude the issues presented are adequate to deserve encouragement to proceed futher. "Miller-El v. Cockrell, 537 U.S. 322, 327. The court found that the Fifth Circuit had phrased its determination in proper terms, but it had reached its conclusion only after essentially deciding the case on the merits, repeatedly faulting Buck for having failed to demonstrate (extraordinary) circumstances. The Court reasoned the question for the Court of Appeals was not whether Buck has shown that his case was extraordinary, it was whether jurist of reason could debate that issue.

II. DID THE ELEVENTH CIRCUIT WRONGLY APPLY THIS COURT'S JURISPRUDENCE IN BUCK BY FAILING TO GRANT A COA IN THIS MATTER

In this matter the Eleventh Circuit failed to properly consinder Marshall's COA petition in accordance with Buck. Marshall traversed these proceedings pro se at each juncture setting out clear facts that could not be reconciled by the record before the district court. Upon applying for a COA in the Eleventh Circuit Marshall's pleadings were rejected in a summary order without futher consideration. Appendix A. It is Marshall's contention simply that the Eleventh Circuit has not faithfully applied the two-step process based on the facts and legal arguments raised resulting in a denial of due process. To appreciate the magnitude of the Eleventh Circuit's misapplication of the COA's requirements a recitation of the facts and legal contentions asserted is prudent.

(A) ISSUES RAISED DERSERVING COA CONSIDERATION.

In Marshall's COA application he posed the question:

> (1) Whether the disrict Court erred in denying Marshall's claim, without an evidentiary hearing, of ineffective assistance of counsel for failing to present a defense that he bought cocaine for his personal use and the use of his friends (and not for resale), and that he was a drug addict, a drug distributor.

(i) SUMMARY OF FAILRE TO RAISE DEFENSE CLAIM

Based on the filings submitted in the lower court and without an evidentiary hearing, the Magistrate issued a Report and Recommendation ("R&R") recommending that the district court deny Marshall's claim. Marshall timely filed objections. The district court in its June 29, 2018, ruling held, "He [Marshall] has not demonstarted a reasonable possibility that, if he had testified regarding that defense or if his counsel had presented that defense to the jury, the outcome of the case would have been different." Appendix C at 7.

This determination by the district court was made in consideration of Strickland v. Washington, 466 U.S. 668 (1984)(To establish a Sixth Amendment violation, defendant must prove that his counsel rendered deficient performance and that the deficient performance prejudiced his defense). Under the prejudice prong, the defendant msut show that there is a reasonble probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Id. at 694. A failure to establish either deficient performance or prejudice defeats the claim. Id. at 697.

Here, the court focused on the prejudice prong to adjudicate the claim that counsel was ineffective for failing to present a

defense that Marshall was merely in a buyer/seller relationship with codefendants, that he bought cocaine for his personal use and the use of his freinds (and not for resale), and that he was a drug addict, not a drug distributor..

(ii) JURSIT OF REASON COULD HAVE DEBATED WHETHER THE PETITION SHOULD HAVE BEEN RESOLVED IN A DIFFERENT MANNER

At the applellate juncture a prima facie case for issuance of a COA was made by Marshall by his arguments asserting that the district court had made several factual determinations that were clearly erroneous and constituted a misapplication of facts, and had committed manifest error of law that amounted to a denial of a constitutional right. A mainfest error is the wholesale disregard, misaaplication, or failure to recognize controlling precedent.

The court based its conclusion that Marshall was a complicit member of the conspiracy, in part, on the finding that Marshall himself was a distributor of cocaine whom would buy wholesale amounts from coconspirators and distribute it to others. Appendix C at 21. The court found reason for this inference from the Affidavit of Marshall, arguments raised in the intial § 2255 and reply brief. Appendix C at 12-13. ["Thus, although Petitioner claims that he purchased drugs for himself, he openly admits in his briefs and in sworn testimony that the purpose of his drug purchases was to obatin possession of drugs that he intended to distribute to others"] this inference comes from mischaracterization of the evidence resulting in a clear error of fact. The exerpt that the court leans on is from the reply brief of Marshall, this

pro se unsworn discussion, attempted, however inarticulately, to explain the contrast between a buyer whom intends to redistribute the narcotics purchased and a buyer whom intends only to consume the goods. It was by no means a admission by Marshall that he intended to distribute in the accepted definition of the term [21 U.S.C. § 802(11)], the cocaine purchased wholesale. There is no other evidence from the record for the court to conclude that Marshall planned to resale the cocaine purchased. In fact, the lack of evidence to substantiate that Marshall was a distributor is strong. In 2012, when the DEA executed its search and arrest warrant for Marshall there was no drugs confiscated at his residence, no cache of money found, no lavish lifestyle, or drug paraphernalia, such as, scales, baggies, or cutting agents. The same corroborating evidence found in the possession of his alleged codefendants.

It can also not be discounted that one of the leaders of the conspiracy testified that Marshall was not in his inner circle, and that out of 2500 intercepted phone calls Marshall was only recorded once. See Trial Transcript Volume V at 7-176. Tony Gardner testified that he was paid by Bledson $50.00 for each deal he set-up, he [illegible] confirmed that he arranged a deal between Marshall and Bledson on one occassion. See Trial Transcript Volume V at 180-213. The testimony of Rajneesh Dikka Daniels, which was heavily relied upon merely established that over a three-year period (2009-2012), she provided cocaine to Marshall 10 times (roughly three times a year).

The juries finding that Marshall was less culpable that his codefendants by declaring him responsible for 500 grams of cocaine shows that the government failed to establish that Marshall was a

integral part of the conspiracy.

The purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, and other distributors, who do intend to redistribute drugs for prtofit, thereby furthering the objective of the conspiracy. United States v. Smith, 2011 U.S. Dist. LEXIS 119199 (11th Cir. 2011). The Eleventh Circuit has made clear "While we have held that agreement may be inferred when the evidence shows a continuing relationship that resulted in the repeated transfer of illegal drugs to the purchaser," United States v. Johnson, 889 F.2d 1032, 1035-36 (11th Cir. 1989), "the cases in which we have done so involved typical drug transactions intended for resale and the generation of proceeds. If the evidence only shows a buy-sell relationship , the fact that the sales are prepeated, without more, does not support an inference that the buyer and seller have the same joint criminal objective to distribute drugs. Id.

Based on the same reply brief excerpt the court distinguished Marshall's acts as distribution by finding Marshall "used his own money to purchase drugs, then later determined who would receive the drugs based on who attended his parties and reimbursed him for the cost of the drug" Appendix C at 14. "Petitioner's [Marshall] purchases are distinct from the sort of situation where the buyer uses pooled money (made up of contributions form specific people) to purchase drugs, then uses the drugs immediately together with the same people who had already contributed to the purchase money".

The court's factual conclusion that Marshall was engaged in "his own drug distribution activities", wholly disregards the record, and was therefore claer error. There is simply no support in the

record to establish that Marshall was a distributor.

Joint posession of a controlled substance, in and of itself, does not prove a conspiracy to distribute, when two persons jointly acquire narcotics intending to consume it themselves, their crime is personal drug abuse. United States v. Hardy, 595 F.2d 1331 (11th Cir. 1990).

(iii) THE DISTRICT COURT'S PREJUDICE DETERMINATION WAS FLAWED

For a § 2255 claim to succeed, a petitioner must show prejudice. To do that, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." In this instance the court found the prejudice prong lacking. A district court abuses its discretion if it misaplies the law or makes findings of fact that are clearly erroneous. Kelly v. Sec'y for the Dep't of Corr. 377 F.3d 1317 (11th Cir. 2004).

See Appendix C at 21.

> "Put another way, if presented at trial by Petitioner's counsel or testimony, Petitioner's admission that he used his codefendants as the supply source for his own drug distribution activities would have been, in effect, an outright confession to the very charges on which the jury found him guilty, thus, Petitioner has not established a reasonable possibility that, even if the allegations in his affidavit are true, and even if he had presented testimony or a defense that he purchased the drugs for himself and for distribution to his friends, the jury would not have found him guilty of the conspiracy (and, by extension, of using a cell phone in futherance of the conspiracy)

> Therefore, Petitioner cannot prevail on his claim of ineffective assisatnce of counsel, and he is not entitled to an evidentiary hearing.

Of course, as explained infra. the characterization of the facts is clear error. This error skewed the overall prejudice determination thereby resulting in a misapplication of controlling precedent.

Arguably a reasonable jury could have inferred that Marshall did not share a similar goal to distribute narcotics for profit. "Possession of a large quantity of drugs is not, by itself sufficient to support a conspiracy conviction." See Rivera, 273 F.3d at 755

Viewing the allegations in Marshall's affidavit as true, a de novo review of the record shows a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability sufficient to undermine confidence in the outcome. To make this determination, federal habeas courts must weigh the evidence adduced in the habeas proceeding and that adduced at trial.

If trial counsel had presented a defense premised on Marshall being in a buyer-seller relationship with his codefendants, that he bought cocaine for his personal use (and not for resale), and that he was a drug addict not a drug distributor as instructed by Marshall, it is apparent that the scant evidence of a conspiratorial agreement between Marshall and the others on trial would have produced a reasonable probability sufficient to undermine confidence in the outcome. The overall effect of this evidence

negates the theory of a conspiracy as a matter of law. It does not amount to a outright confession to the very charges on which the jury found Marshall guilty, as the district court concluded. "[T]he mere fact of the purchase by a consumer of a amount of an illegal substance does not make of the seller and buyer conspirators under the federal [controlled substance] statutes." United States v. Brown, 872 F.2d 385, 391 (11th Cir. 1989).

The Eleventh Circuit held in Marshall's direct appeal:

> "Viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility determinations in the Government's favor, there was sufficient evidence for a reasonable jury to convict Marshall. Marshall's knowledge of and knowing participation in the conspiracy could reasonably be inferred from his repeated purchases from Rajneesh Dikka Daniels of Davis's cocaine and from his relationship with Tony Gardner, who could reasonably be construed as a middle man between Marshall and Bledson, it could also be inferred from his meeting with Bledson, the drug purchases associated with that meeting, and his subsequent telephone conversation with Bledson arranging for futher transactions. The jury was free to discount as unreliable Bledson's statement that Marshall was not a member of the conspiracy."

Of course , this rendition of the evidence is viewed in the light most favorable to the Government. When the record is accessed de novo to determine whether Marshall's contentions undermine confidence in the outcome, a contrary result is reached. Counsel's failure to bring forth evidence of Marshall's drug addiction nullifies the inference that Marshall entered into any agreement with the joint objective of distributing drugs. The record does not present evidence beyond 'the mere agreement

of one person to buy what another [person] agreed to sell." United States v. Dekle, 165 F.3d 826, 829 (11th Cir. 1999). None of the principals in the conspiracy ever testified as to any agreement with Marshall. It can also be reasonably inferred from the testimony of Bledson that there was no agreement, and Tony Gardner was merely a conduit in a buyer-seller relationship, and only he [Gardner] possessed a agreement with Bledson. The evidence withheld, that Marshall consumed the narcotics and did not engage in redistribution as part of a supply chain goes to the hart of the agreement.

The Eleventh Circuit noted in United States v. Clanton, 515 Fed. Appx. 826 (11th Cir. April 4, 2013), "Although [t]he existence of an agreement may be proven by circumstantial evidence, including inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme," United States v. Silvestri, 409 F.3d 1311, 1328 (11th Cir. 2005), we reiterated in Dekle that the application of that premise applied only in cases that involved typical drug transactions intended for resale and the generation of proceeds. 165 F.3d at 830. Contrary to other cases where we have sustained such a inference, there is no evidence that Blackledge received any profits from her repeated marijuana purchases or that she possessed any items associated with drug distribution, such as drug packing paraphernalia or large quantities of money. Moreover, the minimal amount of marijuana purchased-one to three ounces per week, for joint personal use between five people-does not support an inference of distribution or possession with intent to distribute.

See United States v. Brown, 872 F.2d 385, 390-91 (11th Cir. 1989); see also Hardy, 895 F.2d at 1334-35.

Moreover, with the admittance of this evidence and argument a jury instruction as to the theory of the defense outlining a buyer-seller relationship would have been warranted. See United States v. Chandler, 996 F.2d 1073, 1099 (11th Cir. 1993)(explaining where a defendant does not request an instruction for a lesser-included offense, and fails to object to the omission at trial of such an instruction, it is not error for a district court to fail to sua sponte give such an instruction). See United States v. Farias, 836 F.3d 1315 (11th Cir. 2016)(We've said that, "[a]s long as there is some basis in the evidence and legal support, the jury should be instructed on a theory of the defense).

Futhermore, trial counsel's argument that Marshall was a minor player was demonstratively deficient, conceeding the key element(s) of the conspiracy. See United States v. Calderon, 127 F.3d 1314 (11th Cir. 1997)("once the government establishes the existence of the underlying conspiracy, [] it only need to come forward with slight evidence to connect a particular defendant to the conspiracy"). With that in mind, the fact the jury ultimately found Marshall guilty of a lesser included crime of 500 grams supports a reasonable probability that if a defense premised on a buyer-seller relationship, coupled with Marshall's evidence of drug use and lack of intent to redistribute the narcotics, would have resulted in acquittal.

(iv) THE DISTRICT COURT COMMITTED MANIFEST ERROR OF LAW IN ITS FAILURE TO ADDRESS MARSHALL'S CLAIM UNDER MCCOY V. LOUISIANA

In Marshall's objections to the R&R issued by the Magistrate, Marshall raised a objection to the standard of review applicable to his claim that trial counsel was ineffective for failure to raise the desired defense. ["THE R&R MAKES A UNREASONABLE DETERMINATION THAT PETITIONER WOULD NOT HAVE SUCCEEDED BY PURSUING A DIFFERENT LINE OF DEFENSE"]. Relying on the Supreme Court decision of McCoy v. Louisiana, No. 16-8255, decided May 14, 2018, which held the Sixth Amendment gurantees a defendant the right to choose the objectives of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guiltoffers the defendant the best chance to avoid the death penalty.

As such, Marshall addressed the standard of review based on the facts of the claim presented. If well taken, the Supreme Court instructed, "futhermore, the Court's ineffective-assistance-of-counsel jurisprudence, see Strickland v. Washington, 466 U.S. 668 (1984), does not apply here, where the client's autonomy, not counsel's competence, is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. See id., at 692. But here, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to upsurp control of an issue within McCoy's sole perrogative. Violation of a defendant's Sixth Amendment-secured autonomy has been ranked "structural" error; when present, such an error is not subject to harmless error error review. See, e.g., McKaskle v. Wiggins, 465 U.S. 169, 177, n.8; United States v. Gonzalez-Lopez, 548 U.S. 140; Waller v.

Georgia, 467 U.S. 39. An error is structural if it is not designed to protect defendants from erroneous conviction, but instead [illegible] protects some other interest, such as "the fundamental legal principle that a defendant must be allowed to make his own choice about the proper way to protect his own liberty." Weaver, 582 U.S. at -- ((citing Faretta, 422 U.S. at 834). Counsel's admission of a client's guilt over the client's express objection is error structural in kind, for it blocks the defendant's right to make a fundamental choice about his own defense. [illegible]

It is clear that the Court's Memorandum Opinion and Order [illegible] failed to address the merits of this constitutional claim. See Appendix E, and also, Clisby v. Jones, 960 F.2d 925, 927-28, 934 (11th Cir. 1992(en banc) (instructing district courts to "resolve all constitutional claims raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 [] before granting or denying relief.")

(B) THE ELEVENTH CIRCUIT'S FAILURE TO GRANT COA WAS A DENIAL OF DUE PROCESS

Eleventh Circuit Judge's denial of a COA misapprehended the standard for issuing a COA as set forth in 28 U.S.C. § 2253. Circuit Judge Charles R. Wilson issued a one paragraph summary order phrasing its determination as based on the underlying merits-because Marshall has failed to satisfy the Slack test for his claims, his motion for a COA is Denied. Appendix A.

The Supreme Court has directed that "issuance of a COA must not be a pro forma or matter of course. " Miller-El, 537 U.S. at 337. The COA inquiry is not coextensive with a merits analysis.

At the COA stage, the only question is whether the applicant has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurist could conclude the issue presented are adequate to deserve encouragement to proceed futher." Id., at 336. When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Id. The opaque summary order by Circuit Judge Wilson further fustrates this process because it does not identify the rationale behind the denial.

There is nothing in the summary order to negate the legal conclusion that Judge Wilson analized the merits of the underlying claim in clear disregard for the Supreme Court's holding in Buck v. Davis, 580 U.S. ___, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017). In Buck, the Supreme Court reiterated its holding in Miller-El that at the COA stage the threshold question "is whether the applicant has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." 580 U.S. at ___, 137 S. Ct. at 773 (quoting miller-El v. Cockrell). Nothing more.

Put simply, the underlying merits are not a factor in a intial COA inquiry.

A pro se litigant is held to a less stringent standard than a attorney. See Hughes v. Rowe, 449 U.S. 5 (1980); Estelle v. Gamble,

449 U.S. 97 (1976); and Haines v. Kerner, 404 U.S. 519 (1972)(same).[1/]

The motion for COA contained ample support for the issuance of a COA. Reasonable jurist surely could debate the district court's finding in claim 1. See Appendix E at 7-18. Valid arguments were raised addressing the substance of the district court's factual and legal conclusions. In the lower court the government itself conceeded that a evidentiary hearing was needed to address the factual dispute caused by the affidavit's provided by Marshall and those of trial counsel James R. Cooper, Jr.. See Appendix E at 13-16. Additionally, Marshall challenged the court's failure to address the merits of his claim that the court comitted manifest error of law in its failure to analyze Marshall's claim under the holdings in McCoy v. Louisiana, see appendix E at 16-19, citing Clisby v. Jones, 960 F. 2d 925 (11th Cir. 1992)(en banc).

CONCLUSION

In closing, Marshall prays that this Court grant certiorari relief and remand this matter to the Eleventh Circuit for futher consideration in light of Buck.

This document is signed, dated and sworn pursuant to 28 U.S.C. § 1746 under penalty of perjury on this 6 day of May, 2019.

Respectfully submitted,

Robert marshall

Robert Marshall, pro-se
#14029-002

1/ Circuit Judge Wilson has issued numerous summary orders which are not ipso facto error, but reliance on the merits upsurps the process. See Johnson v. United States, 2018 U.S. App. LEXIS 12176 (11th Cir. 2018); Horton v. United States, 2018 U.S. App. LEXIS 12208 (11th Cir. 2018); Cooks v. United States, 2017 U.S. App. LEXIS 27716 (11th Cir. 2017).