No. 18-9329

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Sean Barnhill, pro se — PETITIONER

vs.

United States of America — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Sean Barnhill, appearing pro se

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White Deer, PA 17887
(City, State, Zip Code)

QUESTIONS PRESENTED

1. Did the Sixth Circuit err by exceeding the scope of the COA analysis when it re-adjudicated the merits of pro se petitioner's § 2255, and then denied the COA request after determining that reasonable jurists either "would not disagree" with or "would not debate" the District Court's conclusions?

2. Did the Sixth Circuit create a new rule of law, not supported by statute or this Court's precedent, by requiring evidentiary and/or case law support for a COA request?

3. Did the court circumvent the law by failing to conduct an evidentiary hearing, preventing the record from being reopened?

4. Should this Court grant Petitioner a Certificate of Appealability?

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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 AUTHORITIES CITED

STATUTES AND RULES PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix 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[X] is unpublished.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

[X] reported at 2018 U.S. Dist LEXIS 94393 (ND OH June 4, 18); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

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[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was January 14, 2019.

[ ] 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: February 12, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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

United States Constitution:

Preamble - We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselve and our Posterity...

Amendment 5 - No person shall be...debrived of life, liberty, or property, without due process of law"

Amendment 14 - No state...shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws

United States Code:

18 U.S.C. § 2252(a)(2): knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if -- the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct;

28 U.S.C. § 1254: Cases in the Courts of Appeals may be reviewed by the Supreme Court by the followin methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree

28 U.S.C. § 2253: (a) In a habeas corpus proceedin or a proceeding under section 2255 [28 USCS § 2255] before a district 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.

(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 --
(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

28 U.S.C. § 2255: (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction t impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgement was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgement aside and discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

Federal Rules of Civil Procedure:

Rule 8 General Rules of Pleading; (a) Claim for releif. A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing the pleader is entitled to relief; and (3) A demand for relief sought, which may include relief in the alternative or different types of relief.

(e) Construing pleadings. Pleadings must be construed so as to do justice.

Rules Governing Section 2255 Proceedings:

Rule 4: (b) Initial consideration by the judge. The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to nofity the moving party. If the motion is not dismissed, the judge must order the United States Attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Rule 7: Expanding the Record. (a) In general. If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. (b) Types of materials. The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.

Rule 8: Evidentiary Hearing. (a) Determining whether to hold a hearing. If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

STATEMENT OF THE CASE

STANDARD OF REVIEW

The Supreme Court has jurisdiction to review Certificate of Appealability denials. Hohn v. United States, 542 U.S. 263 (1998). See also 28 U.S.C. §§ 1254 and 2253.

As a pro se petitioner, a document filed is "to be liberally construed', Estelle v. Gamble, 429 U.S. 97, 106 (1976) and a 'pro se complaint, however inartfully pleaded, must be held to less strigent standards than formal pleadings drafted by lawyers' ibid. c.f. Fed. R. Civ. P. 8(f)('All pleadings shall be construed as to do substantial justice')" Erickson v. Pardus, 552 U.S. 89, 94 (2007).

Petitioner respectfully asks this court to take careful notice in reviewing this Petition. The case is, at first blush, simple. However, it is extremely complex, involving international, federal, and military law. Furthermore, there are intrically interwoven chains of events, where each event was determined by the manner in which the other took place.

PROCEDURAL HISTORY

On July 13, 2015 in the N.D. of Ohio, Petitioner, an active duty commissioned officer in the U.S. Coast Guard, entered a plea of guilty under the advice of retained counsel and with no plea agreement. On October 30, 2015, the Honorable Judge Boyko sentenced Petitioner to 180 months imprisonment and lifetime supervised release. A timely appeal followed.

Court appointed counsel raised ineffective assistance of counsel for trial counsel's failing to investigate. The Sixth Circuit dismissed the Appeal without prejudice on October 31, 2016 so the issue could be brought in a § 2255.

On October 22, 2017, Petitioner filed a 5 ground Motion to Vacate pursuant to 28 U.S.C. § 2255. Petitioner requested leave and filed a 4 ground supplement on November 11, 2017. In addition to the additional grounds for relief, an appendix to ground 2 was addeded and an affidavit was submitted to support the Ineffective Assistance and Conflict of Interest claims. Both submissions included evidence and case law to support.

On February 5, 2018, Petitioner again requested leave and filed a Motion to Compel Discovery under Rule 6 of the Rules Governing Section 2255 Proceedings. Coincidently, this document was submitted to prison officials for mailing the morning the Government's Opposition to the 2255 was received that afternoon. The Motion requested 7 different pieces of

potential evidence previously undiscovered. The District Court denied the Motion on February 13, 2018 after the government's opposition to it was filed on February 12.

Petitioner filed his Response to the Government's § 2255 Opposition on March 12, 2018. The § 2255 requested a withdrawal of the guilty plea, an evidentiary hearing, appointment of counsel, and it contained a claim of actual innocence which went unanswered. Again, case law and/or evidence was included. The District Court denied the Motion on the merits with no Evidentiary hearing mentioned on June 4, 2018. A timely appeal followed.

On July 23, 2018, a 6 ground request for Certificate of Appealability was filed in the Sixth Circuit. Those six grounds were rewrites, streamling the grounds on the § 2255. There was no law or evidence included. On January 14, 2019, in a clerk's order, the Sixth Circuit denied the request for COA after determining the 9 § 2255 grounds and the denial of an evidentiary hearing (Ground 1 of the COA requst) as meritless so "jurist of reason would not disagree/debate" the District Court's conclusions.

Petitioner submitted a timely petition for rehearing with suggestion for En Banc. The petition for rehearing was denied February 12, 2019, followed by the En Banc denial on February 28, 2019.

Petitioner now timely submits this petition for writ of certiorari.

RELEVANT FACTS

An investigation timeline created from government evidence was included as a part of the Response to the Government Oppositoin (Appendix I, pg 2 -2). It shows inconsistencies and gaps in the investigation. It has been included, after update for brevity as Appendix H.

A summary of the relevant facts follows:

During the execution of a search warrant of his home, on January 8, 2015, an active duty commissioned officer in the U.S. Coast Guard, Petitioner, was interviewed by FBI Agent's about a Russian photo sharing website. The petitioner provided that in August 2014, he had posted a folder of pictures of his wife and a second folder of other legal pictures, the sum total of images being about 20. Both folders were password protected with no provocative names or distinguishing labels. He used the site as storage and did not share the folder password with anyone. He had no knowledge of illegal images being on the site. The account was closed in August 2014. During a discussion of email addresses, petitioner provided an old email address (wakeup469@gmail.com) which had been deleted sometime in the past.

To verify him not being a threat to his family and neighborhood, and to help agents clear up the case, he agreed, when asked, to go take a polygraph. His going was on the premise the Coast Guard was unaware of investigation so he could get things cleared up before they found out. At the FBI

office, the Agent said he needed to ask some questions to get background information for the polygraph. During the three-plus hour interrogation, Petitioner answered the Agent's leading questions. Two hours in, Petitioner was informed a statement was being drafted which he later signed. After the interrogation, Petitioner pleaded with the Agent to give him a polygraph to prove he was not a threat. The agent finally conceeded.

Mr. Puterbaugh was retained as counsel on our about January 10, 2015. On February 4, 2015, Petitioner was shown a Cleveland Plain Dealer article by his new supervisor (he had been relocated as a result of his security clearance being suspended pending the case), which stated a grand jury had returned an indictment for his violation of 18 U.S.C. §§ 2252(a)(2) and 2252A(a)(5)(B). Petitioner notified his unaware counsel and self-surrendered to the FBI on February 5, 2015. At the arraignment, he entered a not guilty plea. During pre-trial, counsel met with Petitioner and told him he was looking at 11 years in prison. (A FBI-302 was later discovered in the Governments § 2255 Opposition detailing this meeting.) Puterbaugh stated "He didn't know what to do." (Appendix J) He said the government was inquiring about a file of images, allegedly retrieved from the devices depicting an underage "Jessica". He said the government would offer relief for information. Later, Petitioner remembered and informed his counsel of the web address for the legal website he downloaded the "Jessica" files from, believing they were of a legal adult.

"Jessica" was a carrot the Coast Guard Agents used to coerce Petitioner's spouse (a Coast Guard member) to talk. She was shown pictures and told by the Agents (the lead of which was her new supervisor's spouse (Appendix J)), her husband of 12 years had been having an online relationship with the depicted underage female for 2 to 3 years. It was then she provided the incidents introducted by LCDR Gullo into the proceeding as UCMJ violations, and added to the PSR. There is, nor was, any facts to support the Agents blatant falsehood. In fact, the Governments § 2255 Oppositio states "the FBI has been unable to [ ] determine the nature of Barnhill's relationship to [Jessica]" (1:15-cr-00048, Doc #46, PageID #678).

Puterbaugh brought on Koukoutas who took over the case in June, after the meetings with the government had occurred. Koukoutas focused on the uncounseled statement. Petitioner asserted his innocence to the charges, but was rebutted by Koukoutas that because of the statement to the agents for the polygraph he would lose at trial and go to prison for 15 years. Koukoutas then said the images obtained from the Russian site were not found on the devices. He said that statement proved distribution, and images were found on the computers so "they had to get there somehow", satisfying the distribution charge. Flabbergasted, Petitioner asked Koukoutas, "so even though there is no evidence and because of my honesty and their deceptive tactics, I'm going to prison?" He replied that had Petitioner "kept his mouth shut" he'd be home. Koukoutas said the

statement could not be suppressed because a motion to do so would be frivilous since Petitioner went to the FBI office voluntarily, was told he could leave, and answered their questions. The best option was to plead guilty.

Koukoutas advised an open plea, stating there would be no plea bargining and the decorated 18+ year career in the Coast Guard would mitigate the sentence, plus no waiver of appellate rights. Koukoutas met with Petitioner's spouse, telling her that with a guilty plea, Petitioner would probably get 7 to 9 years. He also provided that with good time credit, Petitioner's twin sons, then 4, would only be 10 upon release. Plus I'd be eligible for a camp. Trusting in his advice, Petitioner entered the guilty plea, despite the belief of innocence.

At the plea hearing, a valid email address (wakeup469@gmail.com) was provided by the government as the means to distribute. The polygraph or its statement was not mentioned. Heeding counsel's advice to avoid the risk of more prison, Petitioner answered the Court's questions. During the § 2255 preparations, Petitioner learned the wakeup469 email address was in fact deleted 8 months before the indicted offense.

While on house arrest during pretrial, a court ordered psychological evaluation was conducted, and lasted 60 mins in March 2015. The PSR lists the result of that evaluation with being diagnosed as "Pedophilia-Exclusive Type". During the PSR review before sentencing, Petitioner objected, but Koukoutas told him to "bring it up on appeal". In efforts to do so, a report from Faust Psychological Services as been requested under HIPAA, FOIAA, and a Motion to Compel Discovery. Family has called, letters written, but four years later, no report to substantiate the PSR. This and other factual errors (like "Jessica") when challenged were responded resulted in being told to "bring it up on appeal."

At sentencing, Petitioner was subject to a military hearing in a civilian court. A uniformed Coast Guard officer, a co-worker and the former supervisor of Petitioner's spouse, presented unsubstantiated allegations of adultery, rape, and other UCMJ violations. Pleas for counsel to object to the lies were dismissed. At one point Koukoutas said Gullo's allocution is "boring the judge". The court, after berating the Petitioner for a lack of honor, stating his life centered around child pornography, and was responsible for single handedly destroying the public's trust in government servants, awarded 180 months and a lifetime supervised release. When asked by the government, the court responded the sentence "is based on his history and characteristis which the court has gone over extensively and his position as a lieutenant in the United States Coast

Guard. This is necessary to protect the public. [ ] The same thing applies to life for supervised release." (Sentencing proceeding, October 30, 2015, 11:26AM, transcript Pg 52 Ln 32 thru Pg 53 Ln 2).

On direct appeal, Petitioner addressed numerous issues with the sentence, the procedure, the lack of evidence to court appointed counsel. Due to issues with the BOP preventing phone calls and meetings with counsel, including a 30 day SHU placement "for investigation", the legal concerns were not adequately communicated. Appellate counsel did apprise Petitioner of LCDR Gullo's career change from the Coast Guard to the N.D. of Ohio US Attorney's office approximately 45 days after sentencing. Then a change back almost 18 months later.

After the appeal was dismissed, Petitioner submitted a pro se timely Nine Ground § 2255, supported with law, evidence, and affidavit. The claims, summarized in Appendix G, address all the issues which were neglected in the criminal proceeding. A claim was not made which either evidence or law could not back up. However, because of the bare bones record, allowed by trial counsel, the factual truths were dismissed by the District Court as lies.

Petitioner submitted his COA, streamling the § 2255 grounds into Six grounds of factual allegations which were constitutionally signficant. Being pro se, and advised by 'jailhouse lawyers', he did not submit evidence or law, believing it was not needed. The Appellate court

disagreed, analyzing the merits of the § 2255 grounds and noting in six rejected claims that evidence, law, or support was needed. The COA was denied as being meritless.

Petitioner petitioned for a rehearing with a suggestion for En Banc, following the FRAP 35 and 40 requirements. In the petition he did not have the page space to argue every misapprehension of law or fact. It was limited to the constitutionality of the plea, attorney's failure to investigate, and 4th and 5th Amendment violations. Both were denied.

SUMMARY OF ARGUMENT

The purpose of the Certificate of Appealability (COA) is one of gate-keeping. It's function is to screen submissions to ascertain whether the raised issues are in need of further judicial time and resources. In doing so, it offers a stop-gap for unnecessary burdens in an already overburdened justice system. It is not to prevent a pro se applicant with legitimate concerns from proceeding forward. Congress intended the COA to reduce the work-load of the judiciary, not as a means to dismiss valid constitutional pleadings brought in it.

Over at least 20 years, this Court has established carefully worded precedent to ensure the function of the COA is not abused by the applicant or used in error by the judiciary. In the instant case, the Appellate court went outside the established precedent, turning the COA from a gate-keeper into a inquisistion.

Throughout Petitioner's case, there have been numerous deviations from the accepted an dusual course of proceedings, as well as conflicts with relevant decisions from this Court. The Appellate court conflated the language and requirements of this Court's holdings for a COA. An in depth merits analysis of the COA request was conducted in contrast to a holding from this Court. The Circuit Court created a rule of law by instituting requirements for a COA not defined by statute or this Court's precedent.

Finally, the lower courts disregarded the statutes and rules for a § 2255, and denied an evidentiary hearing. As a result, a claim for innocence went unanswered after the District Court allowed the government to respond.

The only remedy to uphold the Constitutional Due Process rights of the petitioner, which have been numerous since this case's onset, is for this Court to remand, grant a COA, instruct the lower court to conduct an evidentiary hearing to correct the incomplete and inaccurate record, and any other appropriate relief this Court deems necessary.

ARGUMENT ONE

The Sixth Circuit erred by exceeding The scope of the COA analysis when it Re-adjudicated the merits of pro se Petitioner's § 2255 and then denied The COA request after determining that Reasonable jurists either "would not disagree" with or "would not debate" The District Courts conclusions.

In Buck v. Davis, 137 S. Ct 759 (2017) this Court identified a two-step process set forth by the COA statute, 28 U.S.C. § 2253, and held that at "the first stage, the only question is whether the applicant has shown that 'jurists 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 further.'" Id at 773. (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

The Circuit Court cited Slack v. McDaniel, 529 U.S. 473 (2000) providing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the claims debatable or wrong" Id at 484. Their denying opinion, however, merged this language of Slack with that of Buck's reiterating the first step of the two-step process. Their merger of terms resulted in an incorrect determination of the COA request contrary to established law and this Court's supervisory powers is necessary.

Petitioner submitted a pro se request to the Sixth Circuit for a COA with Six grounds for relief. In the clerk's order denying the COA request, an analysis exceeding that of a threshold inquiry is described. The Circuit analyzed the § 2255 and re-adjudicated each ground submitted to the District court. Grounds 1, 2(b)-(d), 3, & 5 were denied stating "reasonable jurists would not disagree" with the district court's analysis of the claim. For grounds 2(a), 4, 6(a), 6(c), 7, 8, & 9 the Circuit states "reasonable jurists would not debate" the conclusions of the district court. The court did adjudicate Ground 1 from the COA request, determing the failure to conduct an evidentiary hearing pursuant to Rule 7 of the Rules for § 2255 lacked merit. There was no reference to Buck, this Court's most recent and relevant precedent on COA, in the 2018 denial.

A) "Would" v. "Could"

The issue at hand is the contextual variation between a determination that reasonable jurists "would" find (per Slack) and whether a "jurists of reason 'could' disagree/debate" (per Buck). In the two holdings, there is a contextual difference between the usage of the verbs "would" and "could". This Court intentionally used the specific verb "would" in Slack, and "could" in Buck. To make an arbitrary substitution of the two verbs changes the expectations of the Court and the requirements of the law as intended by the Congress.

The Court used "would" in Slack, which infers a determination based on factors extrinsic to the reasonable jurists. "Would" has a sense of finality, the choice has been made so they have no need to. In Slack, the extrinsic influence is the Petitioner, who has to show to the jurists that a debatable issue exists. So in drafting a COA request, the drafter must ensure those issues presented are debatable. Thereby ensuring the jurists agreeing with the Petitioner.

In Buck, "could" infers a choice based on factors intrinsic to the jurists. The option is solely on the jurists. The reviewing court then, a neutral third-party, is looking into the process to see if the jurists have been provided enough information, by the petitioner, to determine if the issues are, or are not, debatable. In essence, the court is reviewing the petitioner's submission then inserting themselves into the role of the jury, and looking to see if the COA request, with a look at the § 2255, contains sufficient information for them to determine debatability of the District courts conclusions, and if it does, grant the request.

The '"could", "would" usage is a matter of perspective. Slack looks at the COA request from the petitioner's perspective. Buck does so from the jurists perspective. The context of these two verbs are critical to the reviewer to know which perspective to review from. In the instant case, the merger of Buck and Slack resulted in a review from the standard of Slack when the decision in Buck clarifies the review by the court is from the jurists.

Buck and Slack are not contrary or conflicting. The two cases work in compliment to one another, based on the two perspectives, one to prepare and one to review a COA request. The Court's 2017 holding in Buck differientiated this perspective and clarified it. For the Sixth Circuit to change the "could" to "would" shifts the perspective of how the court reviewed the COA request. It removes the jurists from making an uninfluenced nonbiased determination into the issues debatability and replaces it with a choice to agree with the Appellate Courts determination of the debatablity of the District Court's conclusions.

This substitution of verbs in the context is not harmless. "Would", in Slack provides a statement of intent not bound by conditions, i.e. "I would eat the pizza." Whereas in Buck, "could" provides a statement of potentiality, i.e. "I could eat the pizza." The outcome of the pizza is significantly different, as is the review of the COA request. The current law is Buck as the method of review being could jurists debate or disagree with the district court. The Appellate Court, however, after analyzing the merits, determined jurists would not disagree (or debate) the District Court's conclusions. This is a conflict with the current law established in Buck's holding by this Court.

B) Exceeding the Scope

The COA process is one of gatekeeping. Its function is to "screen out issues unworthy of judicial time and attention," Gonzalez v. Thaler, 565 U.S. 134, 145 (2012). This is to "eliminate delays in the federal habeas review process," Holland v. Florida, 560 U.S. __, __ (2010). The COA statute limits the COA inquiry to a threshold inquiry, which is "decided 'without full consideration of the factual or legal bases adduced in support of the claims,'" Buck 137 S. Ct at 773 (quoting Miller-El 537 U.S. at 336). In the review of Petitioner's COA the Sixth Circuit when beyond the threshold inquiry, evaluated the merits, and "in essence decid[ed] an appeal without jurisdiction," Id.

Petitioner filed his request for COA without evidence or case law. The Sixth Circut standard to show the "substantial showing of the denial of a constitutional right" (Miller-El, 537 U.S. at 336) provides "it is enough for a petitioner to allege claims that are arguable constitutional," Dufresne v. Palmer, 867 F.3d 248, 254 (6th Cir. 2017). In the request Petitioner provided he was "ready to present" the grounds upon granting the COA (Appendix F, Pg 2). The Circuit Court in determining whether "jurists would debate/disagree" with the District Court went beyond the gatekeeping, threshold inquiry required by § 2253.

Their evaluation of the District Court's conclusions being debatable, came after a thorough look into the submitted § 225 claims. In fact,

the "threshold inquiry" into the § 2255 was more indepth than the District Court's. For instance, the District's analysis grouped grounds and sub-grounds together in its denial, e.g. Grounds 2, 3, 4, 6, & 9 were denied together as meritless (Appendix B, pg 7). The same five grounds were addressed by the Circuit in there parts while the District's conclusions were reiterated to justify the debatability of the ground. Their merits determination to justify the COA denial went against the procedure prohibited in § 2253 (See Buck, 137 S. Ct. at 774).

To further illustrate the error, the Appellate Court cited 19 cases without any United States opposition to the COA request submitted. The District only cited 14 to deny the entire § 2255 and there was government opposition. Not only did the Circuit "decide an appeal without jurisdiction," (Buck, 137 S.Ct. at 773) but it inserted law and facts not presented or absent from the record.

Ground One argued District Court error for accepting a guilty plea without a sufficient factual basis. To being the analysis (Appendix A, Pg 3), the Appellate Court stepped through Fed. R. Crim. P. 11(h)(3), supporting Sixth Circuit precedent, and actually argued precisely what Petitioner argued the § 2255 as reason to withdraw the plea. The Circuit went beyond what the District evaluated for the grounds arguing the unknowing and involuntary guilty plea. To conclude its nearly full page analysis of Ground 1, the Appellate Court found that "[b]ecause the government's factual basis tracked the elements of the offense," (Id.) "the claim

does not deserve encouragement to proceed further," (Id.) The District's denail made no mention of tracking the elements. In fact, the elements of the offense were not placed on the record during the plea hearing, nor was the indictment read, so how could the government's factual basis track them? Furthermore, that determination is beyond what the Circuit should be looking for in a COA request.

The COA denial is filled with analysis as in the above. With each one it more definitely verifies the Circuit Court made "ultimate merits determination the panel should not have reached," Buck, 137 S. Ct. at 774.

C) Closing

The Appellate Court transformed the requirement of a COA analysis by substituting "would" for "could". To compound the error, the analysis exceed the scope of a threshold inquiry of a § 2255 by evaluating the merits, comparing their conclusions to that of the District Courts and ruling that as a result, "jurists would not debate/disagree" with them. This unreasonable application conflicts with Buck and per Supreme Court Rule 10(a) and (c) this Court's supervisory role is need to correct the errors.

ARGUMENT TWO

The Sixth Circuit created a new rule Of law, not supported by statute or This Court's precedent, by requiring Evidentiary and/or case law support For a COA request.

A pro se petitioner's complaint is not held to the same standard as an attorney. Haines v. Kerner, 404 U.S. 519, 521 (1972). The Sixth Circuit determined, in order to meet the substantial showing of the denial of a constitutional right (See Slack, 529 U.S. 472), "it is enough for a Petitioner to allege claims that are arguable constitutional," Dufresne at 254. As we learned in Miller-El, the "threshold inquiry does not require full consideration of the factual or legal bases adduced in the claims." (Id at 336). Nothing in the current legal standard mentions that a COA needs evidence, law or other support other than alleging factual claims. See Erickson v. Pardus, 551 U.S. 89 (2007).

The Form AO 243, "Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence By A Person in Federal Custody" is required for a filing by an incarcerated pro se petitioner. Under each ground of the form it states under (a): "Supporting facts (Do not argue or cite law. Just state the specifics that support your claim). This is in line with Fed. R. Civ. P. 8(a) which prescribes what claims of relief must contain.

Since law and arguments are not required by a pro se petitioner to submit a § 2255 Motion who is incarcerated, why should they be required in a request the appeal of the decision of one?

Note Petitioner's COA denial by the Sixth Circuit (Appendix A)

Ground 2(a) - "Barnhill's unsupported allegations...are insufficient to establish trial counsel was ineffective." (Pg 6)

2(b) - "First, Barnhill cites no legal authority requiring a search warrant." (Pg 7)

3 - "Barnhill's speculative arguments..." (Pg 8)

5/7(a)- "Although Barnhill argues...he has offered no such evidence." (Pg 4)

6(e) - "Barnhill has failed to explain how he was prejudiced" (Pg 9)

4 & 9 - "Barnhill has not demonstrated that he was prejudiced..." (Pg 9)

In these grounds, the Appellate Court implies that had the COA requst included supporting evidence or law, the District Court's conclusions could be debatable by jurists of reasons. Confusingly, the Circuit is analysizing the § 2255, which was supported with evidence and law, but denied the COA because it wasn't. Despite this anomoly, Miller-El and Buck do not support their conclusions. Rule 8(a) of the Civil Rules do not support their decision. The only thing that does support their

decision is the "consideration of the factual or legal bases adduced," but this is contrary to what the COA statute requires.

Petitioner's submission was tailored to meet the Sixth Circuit's precedent for a COA. He made six claims with multiple sub-claims in Three and Four. His factual assertions alleged claims that were constitutional in nature. The current law and rules do not require law or arguments for a pro se prisoner's submission of a § 2255. So it is reasonable to believe that a request to appeal its denial should not either. Having me the submission requirements pursuant to applicable law, denying these grounds for failing to provids something not required is error. This Court must remand the proceeding to correct the errors, instruct the lower courts to conduct an evidentiary hearing to expand and correct the record pursuant to § 2255 and the Rules Governing it. This supervisory power is allowed by Rule 10(a) of this Court.

ARGUMENT THREE

The Court circumvented the law by Failing to conduct an evidentiary Hearing preventing the record from Being reopened.

In the § 2255 petition, the Petitioner alleged facts, supported by law and evidence that "it [was] more likely than not no reasonable juror would have convicted him," Bousley v. United States, 523 U.S. 614, 623 (1998). This claim of innocence went unanswered, and its factual certainity could only have been determined by correcting the record by way of an evideniary hearing. Whether the governments case presented accurate factual information to satisfy the elements for the plead to offense is an important question. "This Court has not in the past hesitated to vacate and remand when a court has failed to address" important questions. (Truehill v. Florida, 198 L.Ed 2d 272 (2017) (Dissenting opinion by Justices Sotomayor, Ginsburg, and Breyer).

The Notes of Advisory Committee on Rules for Rule 8 of the Rules Governing Section 2254 Proceedings states: "The standards for § 2255 hearings are essentially the same as for evidentiary hearings under a habeas petition." There have been no new updates or amendments to the Rule which affect this petition. The exception noted does not apply or affect the instant case.

Taking the applicability of Rule 8 under § 2254 for § 2255 proceedings, the Advisory Committee for § 2254 notes: "If dismissal has not been ordered, the court must determine an evidentiary hearing is required." (See Notes of Advisory Committee on Rules for Rule 8 Governing Section 2254 Proceedings) In Townsend v. Sain, 372 U.S. 293, 319 (1963), this Court determined the appropriate standard for a hearing is "Where the facts are in dispute [...]" Townsend, 372 U.S. at 312.

28 U.S.C. § 2255(b) acknowledges for motions not dismissed on their face, the United States shall answer in response, the court shall grant a prompt hearing, the court shall determine the issue and make findings. In the statute, Congress included a list, not to be seperated. The Notes of the Rules confirm this requirement.

In the instant case, the District Court did not dismiss the motion on its face, but allowed the development of the record by ordering the government to respond. In the the denying opinion, the court did not address and rule on whether an evidentiary hearing was required. Instead, the court took the government's rebuttal of the facts on there face and denied the entire § 2255 petition. In the closing of the denial, the court stated Petitioner provided claims that were untrue, misrepresent the facts, and he has consistently tried to mislead the court about the facts of the case. (See Appendix B, Pg 10)

The claim of innocence was made based on facts and is constitutional. The evidence to support the claims was provided by the government and contradicts what they presented to the court. This evidentiary support was added to the docket by the government during this proceeding and prior to the court's denial. It was for these reasons, Ground 1 of the COA request presented the need for an evidentiary hearing and the District Court's error in addressing or ordering one, and the need for an appeal. However, the courts have circumvented the law and failed to follow Congress' intent and the precedent by this Court. As a result, the record remains closed, and the claim of innocence went unanswered.

The law and the rules governing them require an evidentiary hearing to prevent precisely what has occured in the instant case. The current record does not support the elements of the offense. The evidence on the docket proves the petitioner's claims are true, but the constitutional rights under the 5th and 14th Amendment have not been addressed in the lower court. This Court's supervisory power must be utilized to, minimum,follow procedure to deterimine the truth of these claims and ensure the "Blessings of Liberty to ourselves and our Posterity" does not become tarnished.

ARGUMENT FOUR

This Court should grant Petitioner A Certificate of Appealability

Under 28 U.S.C. § 2253(c)(1) a Justice on this Court can grant a COA. In Arguments One thru Three of this petition, Petitioner has shown erroneous opinions not grounded in statute, law, or fact. The Appeallate Court violated this Court's precedent in its COA denial, despite the constitutional claims submitted in the request.

From its inception, the constitution and laws "have laid great emphasis on procedural and substantial safeguards to assure fair trials before impartial tribunals in which every defendant stands equal before the law." Gideon v. Wainwright, 372 U.S. 335 (1963). In Faretta v. California, 422 U.S. 806 (1975), Justices Burger, Blackman, and Rehnquist, reminds us in a dissenting opinion that the Prosecution and Trial Judge "are charged with the duty of insuring justice, in the broadest sense of that term, is achieved in every criminal trial. See Brady v. Maryland, 372 U.S. 83, 87 (1963); Berger v. United States, 298 U.S. 78, 88 (1935)."

Petitioner was encourgaged to plead guilty by a constitutionally ineffective trial counsel. In the § 2255, facts were alleged to show a lack of evidence to satisfy all elements of the offense. The courts ignored these claims. This Court's precedent requires the lower courts to uphold the safeguards

to ensure a fair hearing. The COA request is part of that process.

In the COA request, Petitioner presented, substantiated in the § 2255, a showing for "the only question" the lower courts, and this Court, need to answer at the COA stage. (See Buck, 137 S. Ct. at 773). This petition has provided numerous errors in the COA process which require this Court's supervisory power to be enacted to correct.

The District Court denied, without a hearing, the § 2255 stating the claims presented were untrue; misrepresent the facts, and Petitioner has consistently tried to mislead the court about the facts of the case (See Appendix B, Pg 10). An effort to appeal to the Circuit resulted in more errors. Included in the Appendices is the original COA request (Appendix F), the petition or rehearing (Appendix E), the Response to the Government's 2255 Opposition (Appendix H), a summary of the 2255 grounds submitted (Appendix G), and provided allegations throughout this petition to warrant this Court's providing a COA to ensure Due Process in a fair and impartial tribunal.

REASONS FOR GRANTING THE WRIT

The Petitioner was an active duty Coast Guard officer with 18+ years of service to this country. Throughout his career, he took the oath to support and defend the Constitution. As an officer, he was privileged to offer the oath to re-enlisting members. Now, Petitioner finds himself in need of the Constitution to defend him.

While the choice of jurisdiction hsa not been debated by Petitioner, the outcome of the choice adds to the constitutional signifigance of the case. Based on comparable cases of military officers in a General Court Martial, the petitioner's prison sentence is 400% greater than those officers. Adding in the lifetime supervised release, the number is upwards of 1200%. By being tried in civilian court vs military court, he was not dismissed and therefore did not receive a DD-214 or discharge status. Instead,.he was removed from the rolls, his record expunged - as if his career never existed. He lost retirement, VA benefits, and his children not only lost their father, but the GI Bill given to them. This is truly much greater punishment than fits the crime.

The proceeding from its inception in 2014, until today, is replete with errors. Had Petitioner known the facts, the law, the lack of evidence, and the consequences to his career, he would have insisted in going to trial. Today, the claim of innocence has been ignored. The opportunity

to appeal has been denied. It is in the public's interest for the judicial system to operate within the confines of the Constitution, not on the bias and prejudices of an offense or the career of the offender. Had the case been tried under military jurisdiction, the public/media influence would have been minimal. Instead, an example had to be set.

This Court must act to remedy the violations of Due Process. The Appellate Court ruled contrary to Buck. Duane Buck's proceeding in the Fifth Circuit, and this Petitioner's in the Sixth, are almost identical in error. As a result, Buck became the current law for COA review. Despite this relevance, it was not cited and was ignored by the Court. The Appellate Court, similarly to Erickson instituted requirements not in law or statute to justify the COA denial. The lower courts circumvented the law and rules to ignore the requirements for a hearing needed to correct the record. These are not insignifigant errors. This Court's supervisory power must remand the decision, grant the COA, instruct the lower court to conduct a hearing without bias or prejudice, and/or any other action this court deems appropriate in light of the gravity of the errors and ignored claim of innocence.

Petitioner prays for the relief requested in the writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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#60726-060
Date: May 9, 2019