DOCKET NO.: 18-9453

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

VINCENT PISCIOTTA, Petitioner,

v.

D.J. HARMON, WARDEN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No.: 18-10489

PETITION FOR WRIT OF CERTIORARI

Submitted by and for:

X Vincent Pisciotta
Vincent Pisciotta, Pro Se
Register No.: 23174-045
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

QUESTIONS PRESENTED

1) Did the Fifth Circuit Court of appeals err when it denied Mr. Pisciotta's appeal in violation of The Supreme Court decision in Buck v. Davis, 137 S.Ct. 759?

2) Does The Supreme Court decision in Buck v. Davis violate the equal protection of law, where it holds a different standard of review for state prisoners as compared to federal prisoners.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Vincent Pisciotta respectfully requests that the court grant a writ of certiorari to review the decision of The Fifth Circuit of the Court of Appeals affirming the denial of Habeas Corpus review.

Mr. Pisciotta is the petitioner and the petitioner-appellant in the courts below. The respondent is D.J. Harmon, the respondent and respondent-appellee in the courts below.

OPINIONS BELOW

The opinion of The Fifth Circuit Court of Appeals, affirming the denial of Mr. Pisciotta's petition for a writ of Habeas Corpus. is unpublished. A copy is provided in the Appendix A at App.-1.

JURISDICTION

Mr. Pisciotta invokes this Court's jurisdiction to grant the petition for a Writ of Certiorari to the Fifth Circuit Court of appeals on the basis of 28 U.S.C. §1254(1). The Fifth Circuit Court of Appeals denied Mr. Pisciotta's appeal on January 24, 2019. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

5th Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any crimal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State 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 the laws.

18 U.S.C. §371: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. §844(h): Whoever --- (1) uses fire or an explosive

to commit any felony which may be prosecuted in a court of the United States, or (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person conviced of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

18 U.S.C. §1341: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be

deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

28 U.S.C. §1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

28 U.S.C. §2241(a): Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the record of the district court of the district wherein the restraint complained of is had.

28 U.S.C. §2254(a): The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

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 to 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.

Supreme Court Rule, 13.1: Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the State court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

STATEMENT OF THE CASE

A. Introduction

In 2012, Mr. Pisciotta was convicted of violation under 18 U.S.C. §844 and §371, by jury verdict. He was then sentenced to 240 months imprisonment by The United States District Court of The Western District of Missouri. See United States v. Pisciotta, No.: 4:10-cr-174-02 (W.D. MO, 2013).

Mr. Pisciotta filed a timely notice of appeal which was denied. The root of his entire appeal was the ineffectiveness of counsel.

After the 8th Circuit denied his appeal, Mr. Pisciotta proceeded on to The Supreme court of The United States where his petition for Certiorari was denied. Pisciotta v. United States, ____ U.S. ____, 136 S.Ct. 199(2015).

Mr. Pisciotta filed for post conviction relief pursuant to 28 U.S.C. §2255 and was unsuccessful. Pisciotta v. United States, No.: 4:15-cv-1030 (2016).

Mr. Pisciotta continued his effort by filing for relief pursuant to 28 U.S.C. §2241, in the United States District Court for the Northen District of Texas, Dallas Division. Civil Case No.: 3:17-cv-2797-L-BK. The petition was dismissed without prejudice for a want of jurisdiction.

Mr. Pisciotta appealed the District Courts decision to the Fifth Circuit of The United States Court of Appeals. The District Courts decision was affirmed and this petition for a writ of Certiorari follows.

B. Factual background relevant to the questions.

Mr. Pisciotta was indicted under 18 U.S.C. §371, 18 U.S.C. §844, and 18 U.S.C. §1341 based on conduct that involved arson. Mr. Pisciotta advised his counsel that he had an alibi defense for every aspect of the alleged offense. Days later the government shifted its position and filed a superceeding indictment and proceeded to trial.

At trial Mr. Pisciotta discovered that his trial counsel did not file the notice of alibi defense as he said he had, nor had he interviewed the available witnesses prior to trial. Mr. Pisciotta was ultimately found guilty at trial because his counsel was woefully ineffective. He was later sentenced to a collective 240 months to be served in a federal prison.

At appeal Mr. Pisciotta advised his counsel that he had been deprived of his right to obtain alibi witnesses for his defense. Appellate counsel advised that Pisciotta was required to preserve the claim for a collateral proceeding under an ineffective assistance of counsel claim. Thus, appellate counsel was ineffective as well.

In Mr. Pisciotta's first tier collateral proceeding (2255) he discovered that he would not be provided with court appointed counsel. Notwithstanding, Mr. Pisciotta claimed that, "Counsel's failure to meet with the defendant and investigate or interview alibi defense, and, or witnesses demonstrates professionally unreasonable assistance and deprived defendant's right to fully and fairly litigate his case."

Mr. Pisciotta's §2255 proceeding resulted in a hearing. At the hearing the court appointed inexperienced counsel, who was

confused as to his responsibilities, and failed to object to the presiding judge's finding that the alibi witnesses were incredible. At the discovery hearing the court made a determination as to the credibility of the witnesses rather than determining that witnesses had been available and that trial counsel had overlooked their existance.

Compounding Mr. Pisciotta's troubles his appointed §2255 counsel was also ineffective for failing to interview the very same alibi witnesses.

Mr. Pisciotta filed a writ of Habeas Corpus which was summarily dismissed without prejudice. Mr. Pisciotta appealed.

The Fifth Circuit Court of Appeals affirmed the district courts dismissal, based on the merits of the initial claim of actual innocence, turning the review analysis on its head. The Fifth Circuit Court of Appeals has disregarded The Supreme Courts holdings in Buck v. Davis, 137 S.Ct. 759; Martinez v. Ryan, 566 U.S. 1; and Trevino v. Thaler, 133 S.Ct. 1911.

REASONS TO GRANT THE WRIT

I. [Question One] Did the Fifth Circuit Court of Appeals err when it denied Mr. Pisciotta's appeal in violation of The Supreme Courts decision in Buck v. Davis, 137 S.Ct. 759 (2017)?

A. The Fifth Circuit of the U.S. Court of Appeals held that, "A prisoner may use Section 2241 to challenge his sentence only if it 'appears that the remedy [under Section 2255] is inadequate or ineffective to test the legality of his detention'."

The Fifth Circuit held that a §2241 petition is not a substitute for a §2255 Motion. The court went on to say that Pisciotta must establish the inadequacy or ineffectiveness of a §2255 Motion by meeting The Savings Clause of §2255. In Making this determination the Fifth Circuit failed to consider what this court said on Buck v. Davis.

In the Fifth Circuit De Novo review the court found that Mr. Pisciotta was barred by the procedure of §2255(e). The Fifth Circuit however, disregarded what the Supreme Court said in Buck, in "Martinez, 566 U.S., at 9, 132 S.Ct 1309, 182 L.Ed. 2d 272. We held that when a state formally limits the adjudication of claims of ineffective assistance of trial counsel to collateral review, a prisoner may establish cause for procedural default if (1) 'The State Courts did not appoint counsel in the initial-review collateral proceeding', or 'appointed counsel in [that] proceeding... was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); and (2) 'the underlying... claim is a substantial one,

which is to say that... the claim has some merit'. Id., at 14 132 S.Ct. 1309, 182 L.Ed. 2d 272.

The merit in Mr. Pisciotta's §2255 is self-evident. He presented alibi witnesses that counsel did not even speak to. counsels' failure not only violated Mr. Pisciotta's right to counsel but also his due process right to a fair trial where he could present his alibi witnesses.

B. The Supreme court has not addressed the issue of whether the lack of counsel at the initial review collateral proceeding can qualify as cause for procedural default, in the federal context, concerning claims of ineffective assistance of counsel.

Under the procedural default doctrine, if a state prisoner "defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law..." Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed 2d 640 (1991). In general, lack of an attorney and attorney error in state post-conviction procedings do not establish cause to excuse a procedural default. Id. at 757, 111 S.Ct. at 2568.

In Martinez, The Supreme Court announced a narrow, equitable, and non-constitutional exception to Coleman's holding (that ineffective assistance of collateral counsel cannot serve as cause to excuse a procedural default) in the limited circumstances where (1) a state requires a prisoner to raise ineffective-trial-

counsel claims at an initial-review collateral proceeding; (2) the prisoner failed properly to raise ineffective-trial-counsel claims in his state initial-review collateral proceeding; (3) the prisoner did not have collateral counsel or his counsel was ineffecitive; and (4) failing to excuse the prisoner's procedural default would cause the prisoner to lose a "substantial" ineffective-trial-counsel claim. In such a case, the Supreme Court explained that there may be "cause" to excuse the procedural default of the ineffecitve-trial-counsel claim. Martinez, 132 S.Ct. at 1319. Subsequently, this court extended Martinez's rule to cases where state law technically permits ineffective-trial-counsel claims on direct appeal but state procedures make it "virtually impossible" to actually raise ineffective-trial-counsel claims on direct appeal. See Trevino, 133 S.Ct. at 1915, 1918-21.

There can be no question that the federal criminal court system requires that, ineffective assistance of counsel claims should be brought in collateral proceddings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed. The reasons for this rule are self-evident. A factual record must be developed in and addressed by the district court in the first instance for effective review. Even if evidence is not necessary, at the very least counsel accused of deficient performance can explain their reasonings and actions, and the district court can render its opinion on the merits of the claim. An opinion by a district court is a valuable aid to appellate review for many reasons, not the least of which is that in most cases the district court is familiar

with the proceedings and has observed counsel's performance, in context, first hand. Thus, even if the record appears to need no further development, the claim will still be presented first to the district court in collateral proceedings, which should be instituted without delay, so the reviewing court can have the benefit of the district court's views. Therefore, the statutory right to appeal, that is a part of todays due process in the federal system, has been reduced to a right that no longer includes a right to appeal from sixth amendment I.A.C. claims.

Indigent defendants pursuing first-tier review in a §2255 proceeding are generally ill equipped to represent themselves, for (a) a first-tier review applicant, forced to act in Pro Se, would face a record unreviewed by appellate counsel; and (b) without guides keyed to a court of review, a Pro Se movant's entitlement to seek relief from ineffective assistance of trial counsel might be more a formality than a right, for (i) navigating the criminal, appeal, and collateral processes without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals afforded only twelve months to learn the federal process involved. Moreover, due process requires the appointment of counsel for federal defendants on direct appeal. In the average case however, the most common claim of Constitutional error is ineffective assistance of counsel. In Mr. Pisciotta's case the Fifth Circuit court of appeals would have the public believe that The Supreme Court Held a disparity between a state and a federal inmate.

II. [Question Two] Does The Supreme Court decision in Buck v. Davis violate the equal protection of law, where it allows a different standard of review for state prisoners as compared to federal prisoners.

A. The Fifth Circuit, of the U.S. Court of Appeals, failed to consider the construction of the federal review process as it is compared to the state process in Martinez, Trevino, and Buck.

Mr. Pisciotta claims that it is because he had no counsel during the preparation period in his collateral (§2255) proceeding that serves as cause for his procedural default. Although he did make a claim of ineffective assistance of counsel in his §2255; the claim was weak and poorly presented because he was forced, by procedure, to rely on a jail-house-lawyer to draft his claim. Thus, it is lack of counsel and/or the ineffectiveness of §2255 counsel that caused Mr. Pisciotta's claim, of ineffective trial counsel, to fail.

Mr. Pisciotta's claim is not only beyond the reach of the §2255 proceeding, but it is also unreasonable to believe that the American Criminal Justice System would require a criminal defendant to rely on a layperson-of-law to perfect a federal criminal appeal. This however, is exactly what the procedure requires when making the Constitutional claim that a federal defendant is deprived of the effective assistance of trial counsel.

This court in Martinez held that the procedural default

that occured when Martinez's postconviction counsel did not raise a claim of ineffective assistance of counsel in his state collateral proceeding would not bar his petition under 28 U.S.C. §2254, where "the state collateral proceeding was the first place to challenge his conviction on grounds of ineffective assistance", 132 S.Ct. at 1313. This court explained that "if, in the [state's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective," procedural default waould not "bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial." Id. at 1320 (emphasis added). In Martinez, state law required the petitioner to wait until the initial-review collateral proceeding before raising such a claim. A year later, in Travino, this court extended Martinez's holding to cases in which the state did not require defendants to wait until the postconviction stage, but "[t]he structure and design of the [state] system in actual operation... [made] it virtually impossible for an ineffective assistance claim to be presented on direct review." 133 S.Ct. at 1915. The question is whether these holdings apply to some or all federal prisoners who bring motions for postconviction relief under 28 U.S.C. §2255. The Seventh Circuit has already answered this question in the affirmative, in Choice Hotels Intern., Inc. v. Grover, 792 F.3d. 753 (7th Cir., 2015), where the panel wrote that "[a]lthough Maples and Holland [v. Florida, 560 U.S. 631]... were capital cases, we do not doubt that their holdings apply to all collateral litigation under 28 U.S.C. §2254 and §2255." Id. at 755 (citations ommitted). A closer look at the issue should convince us that the Seventh

Circuit's position is correct.

In Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed. 2d 714 (2003), this court considered the case of a man who did not raise any claim relating to ineffectiveness of trial counsel on his direct appeal, and so was trying to raise such an argument in a motion under 28 U.S.C. §2255. The United States argued that the ineffectiveness claim was procedurally defaulted, because Massaro could have raised it on direct appeal. This court however, rejected that position and held instead that there is no procedural default for failure to raise an ineffecitve-assistance claim on direct appeal, even if new counsel handles the direct appeal and even if the basis for the claim is apparent from the trial record. Id. at 503-04. Indeed, the court criticized the practice of bringing these claims on direct appeal, because "the issue would be raised for the first time in a forum not best suited to assess those fact." Id. at 504. All appeals courts have been critical of the practice of trying to raise claims of ineffective assistance of counsel on direct appeal, where the appointment of counsel is a statutory guarantee.

Because the federal courts have no established procedure to develop ineffective assistance claims for direct appeal, the situation of a federal petitioner is the same as the one this court described in Trevino. As a practical matter, the first opportunity to present a claim of ineffective assistance of trial or direct appellate counsel is almost always on collateral review, in a motion under 28 U.S.C. §2255. Although there may be rare exceptions, as Massaro acknowledged, for a case

in which trial counsel's ineffectiveness "is so apparent from the record" that it can be raised on direct appeal; Mr. Pisciotta's case is not one of those.

Neither Martinez nor Trevino suggested that, for these purposes, the difference between sections 2254 and 2255 was material. What does matter is the way in which ineffective assistance of counsel claims must be presented in the particular procedural system. This varies among the states, and between the states and the federal system, but Mr. Pisciotta has already explained why in the great majority of federal cases, ineffectiveness claims must await the first round of collateral review. Moreover, if review were to be more restricted on either the state or the federal side, federalism concerns suggest that it would be the state side. Most of the rules that govern petition under Section 2254 are mirrored in Section 2255, including importantly the procedure for handling second or successive petitions. Mr. Pisciotta can think of no reason why Martinez, Trevino, and Buck should be read in a way that would provide different results between federal and state procedings.

This court should intervene now to correct an egregious misapplication of settled law in an area of great public concern.

CONCLUSION

Mr. Pisciotta respectfully pleads that this court grant his writ of certiorari and permit briefing and argument on the issues contained herein.