NO. 19-1245

IN THE

SUPREME COURT OF THE UNITED STATES

Samuel Kwushue

PETITIONER

vs.

United States of America

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United State Court of Appeals for the Eleventh Circuit.

PETITION FOR WRIT OF CERTIORARI

Samuel Kwushue 67311-019
6001 Kahiti Trc.
Union City, GA 30291
404-477-9905

QUESTION(S) PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit erred in denying a Certificate of Appealability (COA) to review the denial of Petitioner's Constitutional claims pursuant to 28 USCS 2255?

PARTIES TO THE PROCEEDINGS

Samuel Kwushue, Petitioner

United States of America, Respondent

STATEMENT OF RELATED CASES

- United States of America v. Samuel Kwushue, No. 1-15-CR-398- SCJ-JFK U.S. District Court, Northern District of Georgia. Atlanta Division. Judgment entered August 19, 2016;
- United States of America v. Samuel Kwushue, Appeal Docket # 16-15683, U.S. Court of Appeals for the Eleventh Circuit. Opinion entered October, 2018
- Kwushue v. United States of America, U.S Supreme Court.Docket # 18-6279. *Certiorari* denied, November 5, 2018.
- Samuel Kwushue v. United States of America, No.1-18-CV-5591 SCJ-JFK, United States District Court Northern District of Georgia. Atlanta Division. Order denying motion to vacate pursuant to 28 USCS 2255 and application for Certificate of Appealability entered June 27, 2019.
- Samuel Kwushue v. United States of America, U.S Court of Appeals for the Eleventh Circuit, No.19-12579 Order denying Petition for Certificate of Appealability entered December 19,2019
- Samuel Kwushue v. United States of America No. 19-12579, U.S. Court of Appeals for the Eleventh Circuit, Order denying Motion for Reconsideration entered February 10, 2020.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER:

PETITION FOR WRIT OF CERTIORARI

Samuel Kwushue respectfully petitions this Court for a writ of certiorari to review the Order of the United States Court of Appeals for the Eleventh Circuit denying a Certificate of Appealability ("COA") to review the denial of motion to vacate, correct or set aside sentences pursuant to 28 USCS 2255.

OPINIONS BELOW

The Eleventh Circuit's Order are unreported but reproduced as Appendix A and B. The district court's order denying Petitioner's motion to vacate is unreported but reproduced as Appendix C.

JURISDICTION

The United State Court of Appeal for the Eleventh Circuit denied Reconsideration on February 10, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law...;" U.S. Const. amend. V.

The Sixth Amendment provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. amend. VI.

Under the Antiterrorism and Effective Death Penalty Act of 1996, there can be no appeal from a final order in a §2255 proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U. S. C. §2253(c) (1). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." §2253(c) (2). To merit a COA, the Court must determine "that reasonable jurists 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 further.'" *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). If a procedural ruling is involved, the petitioner must "demonstrate that the procedural ruling barring relief is itself debatable among

jurists of reason; otherwise, the appeal would not 'deserve encouragement to proceed further.'" *Buck v. Davis,* 137 S. Ct. 759, 777 (2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El v. Cockrell,* 537 U. S. 322, 337 (2003).

STATEMENT OF THE CASE

Petitioner was charged with eight (8) counts of substantive wire fraud offense in violation of 18 USCS 1343. Doc.1

Petitioner pleaded guilty, was convicted and sentenced to 51 Months confinement on August 19, 2016. Doc. 40-1-5.

Petitioner timely appealed his conviction and sentences at the United States Court of Appeals for the Eleventh Circuit. With the benefit of Oral Argument, the United States Court of Appeals for the Eleventh Circuit *Affirmed* in an unpublished opinion in *United States v Kwushue* 735 F. App'x 693, 694 (11th Cir. 2018)

On November 5, 2019, the United States Supreme Court denied *Certiorari* in *Kwushue v United States*_U.S._, 139 S.Ct.473 (2018).

Petitioner filed a timely post-conviction motion to vacate pursuant to 28 USCS 2255. Doc.106 The District Court denied petitioners motion for relief and denied

petitioner's request for Certificate of Appealability (COA) on June 27, 2019. Doc. 146 Appendix C.

Petitioner appealed the District court's denial of his 2255 Motion and COA and petitioned the Eleventh Circuit Court of Appeals for COA. The Eleventh Circuit Court of Appeal denied Petitioner's request for COA December 19, 2019. Appendix A. The Eleventh Circuit Court of Appeals denied petitioner's petition for reconsideration February 10, 2020. Appendix B

Petitioner's petition for Initial Hearing En Banc, though not favored, is pending at the Eleventh Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

The question to be resolved by this petition is whether the courts below erred in denying a certificate of appealability (COA) to review petitioner's constitutional claims pursuant 28 USCS 2255.

The Antiterrorism and Effective Death Penalty Act of 1996, provides " that an appeal may not be taken to a court of appeals from the final order in a § 2255 proceeding, § 2253(c) (1) (B), unless a circuit justice or judge issues a certificate of appealability, § 2253(c) (1), upon a substantial showing of the denial of a constitutional right, § 2253(c) (2).

In the instant case, Petitioner's COA request presented six constitutional issues among others, backed by ample case law to show each issue was debatable by jurists of reason. The district court denied evidentiary hearing and COA on procedural ground, and on the ground that Petitioner "failed to make a substantial showing of the denial of a constitutional right" Doc 146-2-3.

The Supreme Court has held in *Murray v. Carrier,* 477 U.S.478 (1986), that "the rule of procedural default, i.e., that constitutional claims not raised on direct appeal cannot be considered on habeas review, must yield when failure to consider the claim would result in a fundamental miscarriage of justice.""[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause."

Petitioner's claims of 'Jurisdictional Error', 'Factual Innocence', and Ineffective Assistance of Trial and Appellate Counsels, though not briefed in Petitioner's direct appeal, could not have been procedurally barred in a 2255 motion in the light of precedents in the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit Court of Appeal denied COA because the panel believes that Petitioner "failed to satisfy the *Slack* test" See Appendix A; and because Petitioner "has offered no new evidence or argument of merit to warrant relief." Appendix B. A COA analysis requires debatability of claims not merit analysis.

In his amicus brief, in *Slack v, McDaniel*, Docket #98-6322, the Solicitor General (SG)asserted that "A COA may not issue unless Reasonable Jurists could conclude both that the habeas petition is not barred by abuse of the writ and that it present a constitutional claim on which petitioner could prevail." The requirement in Section 2253(c) (2) that the prisoner's showing be "substantial" the SG continued "means that the right to prevail on the claim must be "debatable among jurist of reasons" quoting *Barefoot,* 463 U.S. at 893, n.4. https://www.justice.gov/osg/brief/slack-v-mcdaniel-amicus-merits.

The SG further asserted that section 2253(c) requires a "substantial" showing of the denial of a constitutional right," and a prisoner makes that showing if he demonstrates that his conviction or sentences may have been imposed in violation of the Constitution and that the district court may have erred in refusing him relief." https://www.justice.gov/osg/brief/slack-v-mcdaniel-amicus-merits.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), the United States Supreme Court held "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 jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Petitioner believes that his 2255 motion and application for COA to the United States Court of Appeals

for the Eleventh Circuit should satisfy the requirements for a COA as established by law and for reasons discussed below.

BACKGROUND

Petitioner was charged with eight counts of substantive wire fraud offense in violation of 18 USCS 1343. Petitioner pleaded guilty and was sentenced to 51 months in confinement and three years of supervised release.

Petitioner timely filed an appeal at the United States Court of Appeals for the Eleventh Circuit in which Petitioner sought review of two sentencing issues and a Constitutional issue which states that "KWUSHUE'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT BECAUSE THERE WAS AN INSUFFICIENT FACTUAL BASIS TO SUPPORT IT, IN VIOLATION OF FED.R. CRIM.P 11(b) (3) AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT." Appellant Brief at 39. With the benefit of Oral Argument, the United States Court of Appeals for the Eleventh Circuit *affirmed.*

Petitioner's petition for Certiorari was denied November 5, 2018. Petitioner timely filed section 2255 motion to vacate his conviction on the following ground: (1) Jurisdictional Error,(2) Due Process Error, (3)Factual Innocence of (i) Wire Fraud Charge, (ii) Restitution Award and (iii) Leadership Role Enhancement, (4) Improper Forfeiture Procedure, (5) Inaccurate Pre-Sentence Report, (6) Ineffective Assistance of Trial Counsel, and (7) Ineffective Assistance of Appellate Counsel. Doc. 106-1 Pgs. 1-47

The Magistrate Judge's Report and Recommendation (R & R) adopted by the District Court erroneously agreed with the respondent that petitioner's constitutional claims are procedurally barred because they were decided against Petitioner in Petitioner's direct appeal. The district court concluded that "the motion and the files and records...conclusively show that the prisoner is entitled to no relief..." The district court denied petitioner's 2255 motion and denied COA. Doc. 146-3-4. Appendix C.

Petitioner appealed the denial of his 2255 Motion to vacate and the denial of a COA to the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeal denied Petitioner's request for COA on the ground that petitioner "failed to satisfy the *Slack* test" Appendix A

The Eleventh Circuit denied Petitioner's petition for reconsideration on the ground that Petitioner "has offered no new evidence or argument of merit to warrant relief." Appendix B.

Petitioner's Petition for Initial Hearing En Banc, though not favored because of Eleventh Circuit Rule, and is pending in the U.S Court of Appeal for the Eleventh Circuit.

ARGUMENT

Collateral review of a conviction and sentence is available to a federal prisoner through 28 U.S.C. § 2255.The statute was enacted to provide a remedy "exactly commensurate with that previously available through habeas." *United*

States v. Addonozio, 442U.S.178,185 (1979).4 "The statute states four grounds upon which such relief may be claimed: (1) 'that the sentence was imposed in violation of the Constitution or laws of the United States,'(2) 'that the court was without jurisdiction to impose such sentence,' (3)'that the sentence was in excess of the maximum authorized by law, 'and (4)that the sentence 'is otherwise subject to collateral attack.'" *Hill v. United States,* 368 U.S. 424, 426---27 (1962) (quoting 28 U.S.C. § 2255).

Petitioner's claims hinges on three of the above four grounds.

(1) Jurisdictional Error: Doc.106-1pg.1-4

Petitioner asserted in his 2255 motion that the district court should lack jurisdiction in deciding his case because the indictment charged conduct which should not fall within the sweep of the charging statute -18 USCS 1343.

The indictment alleged that "Contrary to SNAP rules and regulations, KWUSHUE provided cash to food stamp recipients in exchange for EBT card payments..., caused the following wire communications to be transmitted in interstate commerce: ... All in violation of Title 18, United States Code, Section 1343." Doc. 1.

The *Slack* test requires that the matter be not procedurally barred. The Eleventh Circuit has held in *United States v Peter*, 310 F.3d 709 (11th Cir.2002) that; 'Since jurisdictional error implicates a court's power to adjudicate the matter before

it, such error can never be waived by parties to litigation." quoting *Louisville Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908) (ordering case dismissed for lack of jurisdiction despite absence of objection from either party to trial court's previous adjudication of merits). "In other words, the doctrine of procedural default does not apply." The Eleventh Circuit concluded. See Movant's Reply at Page 2. Petitioner's 'Jurisdictional Error' claim, though not a claim in Petitioner's direct appeal; could not have been decided as concluded by the district court. The district court's reliance on *Stoufflet v. United States,* 757 F.3d 1236, 1239(11thCir, 2014) as basis for denial of COA, Doc.146-2, should be misplaced because *Stoufflet* did not brief 'Jurisdictional Error'. Jurist of reasons could debate that the district court was wrong in its procedural ruling because Petitioner's claim is not procedurally barred in a 2255 motion. Petitioner should be encouraged to proceed further.

The *Slack* test also require that jurist of reasons would find it debatable whether the petition states a valid claim of the denial of a constitutional right.

As a general rule, an indictment passes constitutional muster if it (1) "contains all the elements of the offense charged and (2) fairly informs a defendant of the charge against which he must defend, and enables him to plead an acquittal or conviction ...." *Haniling v. United States*, 418 U.S. 87, 117 (1974). The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. Fed.R. Crim. P. 7(c) (1).

Petitioner believes that the indictment upon which he was convicted stated facts not constituting the offense charged. Petitioner's contention is that the charging statute-18 USCS 1343 neither regulate the SNAP program nor govern its payment process as alleged. Doc.106-1 page1-2.

A layman interpretation of the indictment would be that KWUSHUE (Petitioner) violated the rules and regulations established by 18 USCS 1343 by providing cash to food stamp recipients in exchange for EBT card payments. 18 USCS 1343 is not a regulatory statute. 18 USCS 1343 "forbids only schemes to defraud, and not schemes to do other wicked things." *United States v Takhalov,* 827 F.3d 1307(11th Cir. 2016).

The Eleventh Circuit held in *United States v. Peter,* 310 F.3d 709 (11th Cir.2002) that 'Jurisdictional error' exists where the indictment affirmatively charged conduct not proscribed by the charging statute.

In *United States v Tomeny;* 144 F.3d 749 (11th Cir 1998) the Eleventh Circuit held that a claim is "Jurisdictional" if it can be resolved by examining the face of the indictment or the record at the time of the plea without requiring further proceeding." Petitioner's believes that his 'Jurisdictional Error' claim can be resolved by examining the face of the indictment.

The Supreme Court held that " there are no constructive offenses: and before a person can be punished, it must be shown that his case is plainly within the statute." *Fasulo v United States,* 272 U.S. 620: 71 L. Ed. 443 (1926).

If this court finds that the wire fraud statute-18 USCS 1343 regulate not the SNAP program and SNAP/EBT payment process as charged, the district court should lack Jurisdiction to convict petitioner, then petitioner was denied a constitutional right.

From the fore goings, jurist of reasons could debate that Petitioner's petition states a valid claim of the denial of a constitutional right. Petitioner should be encouraged to proceed further.

(2)Factual Innocence: Doc 106-1 pg. 6-11

Petitioner is contending that he is 'factually' innocent of wire fraud charge. Petitioner's factual innocence claim was not a claim in his direct appeal, so it could not have been decided on direct review as suggested by the Magistrate Judge's R&R. The District Court's reliance on *Stoufflet,* 757 F.3d 1236, 1239(11thCir, 2014) supra should be misplaced because *Stoufflet* did not brief 'factual innocence'.
The *Slack* test requires that this claim be not procedurally barred.

In *United States v. Bousley:* 523 U.S 614, 622, 118 S.ct1604.1610, 140 L.ED. 2d 828 (1998) the Supreme Court held "Consequently, where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate 'cause' and actual 'prejudice,'... or that he is actually innocent." *id* at 622, *citing, inter alia, Murray v. Carrier,* 477 U.S. 478, 485, 106 S.Ct 2639, 2643, 91 L.Ed. 2d 397(1986)

Petitioner's factual innocence claim should not be foreclosed in a 2255 motion by his failure to raise the claim on direct review in the light of *Bousley:* 523 U.S 614, 622, 118 S.ct1604.1610, 140 L.ED. 2d 828 (1998).

In *Murray v. Carrier,* 477 U.S.478 (1986), the Supreme Court held that the rule of procedural default, i.e., that constitutional claims not raised on direct appeal cannot be considered on habeas review, must yield when failure to consider the claim would result in a fundamental miscarriage of justice. "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ."

Jurist of reasons could debate that the district court was wrong in its procedural ruling because Petitioner's claim of 'factual innocence' should not be procedurally barred. Petitioner should be encouraged to proceed further because failure to consider Petitioner's claim could result in a fundamental miscarriage of justice.

The *Slack* test also requires that Petitioner state a valid claim of the denial of a constitutional right.

In *Mckay v United States,* 657 F.3d 1190, 1196-97 (11th Cir. 2011) the panel held; "The actual innocence exception has been applied to actual innocence for the crime of conviction and actual innocence of a capital sentence." Petitioner's contention is that he is 'factually innocent' of the crime of conviction – wire fraud 18 USCS 1343.

Petitioner believes that the finding at the guilty plea hearing Doc.49, that Petitioner violated the wire fraud statute -18 USCS 1343 is an error for the following reasons:

(i)The statute of conviction 18 USCS 1343 regulate not the SNAP/EBT program as alleged,

(ii) The conduct described in the indictment as "provided cash to food stamp recipients in exchange for EBT card payments....." should not be within the sweep of the statute of conviction 18 USCS 1343, and

(iii) The EBT wire transmission is an integral part, and a legally approved EBT payment process, regulated by Code of Federal Regulation, 7 CFR, 274.8(10)(i), and is entirely intra state. Doc. 106-2 Pg. 15

The statute of conviction- 18 USCS 1343 "forbids only scheme to defraud, not schemes to do other wicked things, *United States v Takhalov,* 827 F.3d 1307(11th Cir. 2016). 18 USCS 1343 does not regulate the Supplementary Nutritional Administration Program (SNAP). Defendant's conduct which the government described as "Contrary to SNAP rules and regulation" should not offend the wire fraud statute because 18 USCS 1343 does not govern the SNAP program. Petitioner believes that his factual conduct of "cash exchange for food stamp" which the government described as 'Trafficking,' Doc.50-80 (not as wire fraud) should not constitute facts that supports a wire fraud charge.

The Eleventh Circuit held in *United States v Maxwell,* 579 F.3d 1282(11th Cir. 2009) that "the specific intent required under the wire fraud statute is the intent to

defraud, not the intent to violate a particular statute or regulation." Quoting Paradies 98 F.3d 1266(11th Cir. 1996). This holding shows that the wire fraud statute should not reach the violation of a regulation as the indictment alleged.

The government hinged its wire fraud charge on the wire transmission which occurred at KD Metro Store. Doc.1

The SNAP/Electronic Benefit Transfer (EBT) payment system is a legally approved Federal payment process governed by Code of Federal Regulation 7 CFR, 274.8(10) (i). Doc 106-2 pg.15. Its use in the execution of the SNAP/EBT transaction should not offend the elements of the wire fraud statute. See *Parr v United States,* 363 U.S 370 (1960) which held that "It cannot be said that mailings made or caused to be made under the imperative command of duty imposed by Federal law are criminal under the federal mail fraud statute." Petitioner's conduct described as 'Trafficking' and the use of a legally compelled wire in the federal program are not facts that should support a wire fraud charge. Petitioner's innocence of the crime charged should be clear and obvious on the face of the charging instrument. Doc.1.

The district court erred because it concluded that the matter was "decided adversely to petitioner by the Eleventh Circuit" Doc. 146-2, when the claim was not even briefed in petitioner's direct appeal. Appellant Brief Docket #16-15683

If this court finds that Petitioner's conduct described as 'Trafficking', and the use of a 'legally compelled' wire in the SNAP/ EBT program are not facts that supports a wire fraud charge, then petitioner was denied a constitutional right.

From the fore goings, jurist of reasons could debate that the district court was wrong in finding that petitioner's 'factual innocence' claim is procedurally barred. Jurist of reasons could also debate that petitioner stated a valid claim of the denial of a Constitutional right and should be encouraged to proceed further.

(3) Inaccurate Pre- Sentence Report. Doc.106-1 pg. 24-28

Petitioner did not raise the Inaccurate Pre-Sentence Report (PSR} claim in his direct appeal because petitioner's trial counsel provided ineffective assistance of counsel and because the district court violated petitioner's due process right.

Prior to Petitioner's sentence hearing, petitioner sent a letter to trial counsel in which Petitioner requested that inaccurate information in the PSR be corrected, and that relevant document be filed to (i) preserve issues for appeal, (ii) rebut inaccurate information in the PSR and (iii) as mitigating documents. Doc. 106-2 pg. 10-11. Trial counsel failed to file the requested documents in the district court, so the documents were not available in the record below for appellate counsel's use. Petitioner could not include the 'Inaccurate Presentence Report' Claim on direct review because of trial counsel's deficient performance. Petitioner was prejudiced because the district court relied on the inaccurate information in the PSR to convict and sentence Petitioner. Prejudice should exist because counsel failed to preserve this issue for appeal.

Petitioner filed a timely objection to the Pre-Sentence Report with the probation officer before sentence hearing pursuant to FRCP Rule 32. Doc. 106-2 pg.

7-8. Petitioner's objections were ignored by the district court. Federal Rules of Criminal Procedure Rule 32; under Sentencing and Judgment, provides that: 'After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate." The Probation officer acknowledged the receipt of Petitioner's objections to Pre-Sentence report. Doc. 106 -2 pg. 9, but failed to revise the PSR as requested. Facts necessary to be considered during sentence hearing were omitted from the PSR. Petitioner was denied due process of law.

The District Court erred when it asserted that; " The court agrees with Respondent that ground six is procedurally default....The exhibits to which Movant refers are documents that are dated prior to sentencing..." Movant show's no reason why he could not have submitted these materials to appellate counsel and fails to show cause for his procedural default." Doc.141 Pg. 14

The district court overlooked the fact that the appellate court is a record reviewing court. The United State Court of Appeals is not a court of first instance which deals with physical evidence. However, petitioner's 2255 motion explained the 'cause' of the procedural default. Doc.106-1 pg. 27-28

Petitioner did not brief Inaccurate Presentence Report because document's necessary to support it were not available in the record below for appellate counsel's use for the following reasons (1) petitioner was denied 'due process' by the probation officer's failure to revise the PSR after petitioner's objections was received, Doc. 106-

officer's failure to revise the PSR after petitioner's objections was received, Doc. 106-2 Pg. 9, and (2) because of the ineffectiveness of petitioner's trial counsel. Counsel failed to file supporting and related documents needed to rebut erroneous information in the PSR and to preserve the issue for appeal. Doc. 106-2 pg. 10-11 and Doc.106-2 pg. 1

Petitioner could not object to the inaccurate pre-sentence report at sentence hearing because of trial counsel's threat of 'a longer sentence' Doc 106-2 pg.1

Reasonable jurist could debate that Petitioner has shown 'cause' for his procedural default of the claim.

Turning to the second prong of the *Slack* test, the Supreme Court has held that "convicted defendants have a due process right to be sentenced on the basis of accurate and reliable information" *United States v Tucker,* 404 U.S 443, 477. 92 S.Ct. 589, 591, 30 L.Ed. 2d 592 (1972).

The Eleventh Circuit held in *United States v Boatner,* 966 F.2d 1575 (11th Cir, 1992) "To demonstrate a technical transgression of Rule 32(c) (3) (D), all that is necessary is that an allegation of a specific factual error in the presentence investigation report was before the district court and that the sentencing judge did not make either of the alternative findings. See *United States v. O'Neill,* 767 F.2d 780, 787 (11th Cir.1985).In *United States v Aleman* 832 F. 2d 142 (11th Cir. 1987) the Eleventh Circuit held "The district court must take specific action only if the defense alleges that there are "factual inaccuracies" in the report." The Pre-Sentence

contains inaccurate information and omission of material facts. Doc. 106-1pg 24-28. The inaccurate information are:

i) That 18 USCS 1343 regulates the SNAP/ EBT program.

ii) That 'KD Metro' is a 'Sole Proprietorship'. PSR Paragraph 28

iii) That "willing participants had to present their EBT card and PIN number to the defendant." PSR paragraph 28.

iv) The omitted fact in the PSR is the Seizure of KD Metro's Bank balance of $2,695.94 under the forfeiture amount. PSR paragraph 17. See Doc.106-1 pg.26 Doc. 50-86. The omission is material.

In Petitioner's 2255 motion, Petitioner has shown that: (i) it is inaccurate that the Charging Statute 18 USCS 1343 regulates the SNAP/EBT program,

(ii) demonstrated in his section 2255 motion that Kuriof Daleth Enterprises LLc d/b/a 'KD Metro' in court record is a 'S' Corporation.Doc. 106-2 pgs. 12, 16 and 17.

(iii) Paragraph 15 (b), of the PSR.Doc.50 pg. 13 "I entered my PIN" shows that the recital that " "willing participants had to present their EBT card and PIN number to the defendant" is false.

(iv)The seizure of $2,695.94, the 'S' Corporation's bank account balance was omitted from the PSR. See PSR paragraph 17. Doc.106-1pg. 25 and Doc.106-2 pg.2, see Movant Objection to R&R pg.16

The inaccurate information in the PSR impacted Petitioners rights. Petitioner was prejudiced because the District Court relied on the inaccurate recitals in the PSR to convict Petitioner of Wire fraud, Doc. 40-1, enhance petitioner's sentence as a 'leader', without a finding that petitioner exercised control or authority over another 'participant', Doc.106-1 pg. 15, awarded restitution against petitioner instead of the corporation which received the proceeds of the food stamp transactions,Doc.106-1 pg.11-14 and ordered forfeiture of fund belonging to unindicted Corporations.Doc.106-1 pg.21-24

Petitioner was prejudiced by the inaccurate information and omission in the PSR.

Jurist of reasons could debate that petitioner stated valid claim of the denial of a constitutional right and should be encouraged to proceed further.

(4)Due Process Error: Doc.106-1 pg. 5-6.

Petitioner believes he was denied due process of law which caused him to be convicted and "sentenced in violation of the Constitution and the laws of the United States."

In *Murray v. Carrier*, 477 U.S.478 (1986), the Supreme Court held that the rule of procedural default, i.e., that constitutional claims not raised on direct appeal cannot be considered on habeas review, must yield when failure to consider the claim would result in a fundamental miscarriage of justice. " [I]n an

extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ. In the light of *Murray v Carrier,* 477 U.S.478 (1986), failure to consider petitioner's due process error claim would result in a fundamental miscarriage of justice.

The Due Process Clause protects a person from conviction except the indictment contains facts necessary to constitute the crime with which he is charged. The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. Fed.R. Crim. P. 7(c) (1).

In order to determine that the indictment contain facts that constitute the crime charged, the Supreme Court has mandated that the district courts compare: (1) the conduct to which the defendant admits with; and (2) the elements of the offense charged in the indictment or information. This is to determine "that the conduct which the defendant admits constitutes the offense charged." *McCarthy v. United States, 394* US at 467, 89 S.Ct at 1171. Quoting from Advisory Committee for Criminal Rules.

The indictment upon which petitioner was convicted contains facts which should not offend the charging statute-18 USCS 1343. If the District court had complied with the mandate of the Supreme Court and the requirements of FRCP Rule 11, the District court would have found that petitioner's conduct described as

'Trafficking' would not satisfy the elements of a wire fraud charge. The district court denied petitioner the right to due process of law.

In *Henderson v Morgan* 426 US 637 (1976) the supreme court held "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, see, *e. g., Johnson v. Zerbst,* 304 U. S. 458, 464-465, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense. *Smith v. O'Grady,* 312 U. S. 329.

The Supreme Court held in *McCarthy v United States,* 394 U.S 459 (1969). "Moreover, because a guilty plea is an admission of all the elements of a formal Criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." At Petitioner's plea colloquy proceeding, the following exchange occurred:

COURT: DO YOU AGREE WITH THE PROSECUTOR'S SUMMARY OF WHAT YOU DID?

PETITIONER... I TRULY EXCHANGED CASH FOR FOOD STAMPS

MS KAPLAN: (Trial Counsel)... MR KWUSHUE... DID NOT KNOW THAT WHAT HE WAS DOING WAS WIRE FRAUD, HE DID UNDERSTAND THAT HE WAS BREAKING THE RULES AND VIOLATING THE CONSTRAINTS OF THE PROGRAM WHICH WAS IMPROPER.

COURT: IS THAT YOUR UNDERSTANDING, MR. KWUSHUE?

PETITIONER: YES MA'AM. Doc. 49-24-25

This exchange between the Court, Petitioner and Petitioner's trial counsel, should show that Petitioner lacked an understanding of the "law in relation to the facts" of the charge. Petitioner's response should not be an intelligent admission of guilt. In the light of record facts, no juror would have convicted petitioner of wire fraud.

A reasonable juror could debate that petitioner had no understanding of the charges against him because 'cash exchange for food stamp' should not be a "factual basis" for a wire fraud charge.

Jurist of reasons could debate that the petition states a valid claim of the denial of a constitutional right and that petitioner should be encouraged to proceed further.

(5) Ineffective Assistance of Trial Counsel. Doc 106-1Pg 31-45

The Sixth Amendment guarantees the defendant in a criminal case the right to effective assistance of counsel to help ensure that our adversarial system produces just results. *Strickland v Washington,* 466 U.S. at 685. Consequently, the Sixth Amendment requires that "counsel act in the role of an advocate." United States v. Cronic, 466 U.S. 648, 656 (1984).

In line with *Slack* test, ineffective assistance of counsel claim is not procedurally barred in a 2255 motion because the record is usually not fully developed in the courts below to facilitate such review on direct appeal. See *United States v. Scott,* 136 F. App'x 273 (11th Cir. 2005).

To show constitutionally ineffective assistance of counsel, petitioner must establish deficient representation by counsel and prejudice. *Strickland v Washington,* 466 U.S 668, 690-92, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). In any case presenting an ineffectiveness claim, "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Padilla v Kentucky,* at 366, 130 S.Ct. 1473 (quoting *Strickland v Washington,* at 688, 104 S.Ct. 2052). The performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Strickland,* supra, at 688, 104 S.Ct. 2052.

(i)**Counsel Misadvise:** A Counsel's "ignorance" of a point of law that is fundamental to his case combined with counsel's failure to perform basic research on the element of petitioner's conduct and the charging statute should be an example of unreasonable performance. See *Hinton v. Alabama,* 134 S. Ct. 1081, 1089 (2014). Petitioner's trial counsel representation on the record at the plea colloquy that; " I HAVE DISCUSSED WITH MR KWUSHUE. MR KWUSHUE DOES NOT KNOW THAT WHAT HE WAS DOING WAS WIRE FRAUD, HE DID UNDERSTAND THAT HE WAS BREAKING THE RULES AND VIOLATING THE CONSTRAINTS OF THE PROGRAM WHICH WAS IMPROPER."

" Breaking the rules and violating the constraints of the program " should not offend the elements of wire fraud-18 USCS 1343. The wire fraud statute is not a regulatory statute. Counsels misadvise made petitioner to plead guilty to wire fraud charges. Counsel's assertion at the plea colloquy demonstrates that counsel did not research the elements of the crime charged before advising petitioner to plead guilty to wire

fraud charges. Counsel's performance should be unreasonable under prevailing professional standard. There is a probability that the outcome of the proceeding would have been different but for counsel's misadvise. Petitioner would not have pleaded guilty but would have insisted on going to trial.

The district court erred when it concluded that " there is no error in regard to the application of section 1343 to Movant's conduct and, thus, there is no deficiency by counsel on the matter that affected the validity of Movant's guilty plea" Doc.141 pg.21.The district court overlooked the fact that the wire fraud statute 18 USCS 1343 is not a regulatory statute. 18 USCS 1343 regulate not the SNAP/EBT program and payment process. The Eleventh Circuit has held that "the specific intent required under the wire fraud statute is the intent to defraud, not the intent to violate a particular statute or regulation" *United States v Maxwell* 579 F.3d 1282(11th Cir.2009) quoting *Paradies,* 98 F.3d 1266 (11th Cir. 1996). Jurist of reason could debate that 18 USCS 1343 should not reach petitioner's conduct which the indictment described as "Contrary to SNAP rules and regulation."

Petitioner was prejudiced because petitioner plead guilty to wire fraud charge and was convicted for a crime which petitioner believes he did not commit. Petitioner would have insisted on going to trial.

The outcome of the proceeding would have been different but for counsel's deficient performance.

In addition to counsel's misadvise, counsel expressly threatened petitioner and his family with 'a longer sentence' Doc, 106-2 Pg. 1. Counsel also failed to: (1) file supporting documents to preserve issues for appeal Doc.106-2 pg. 10-11, (2) contest the jurisdiction of the court, (3) violated petitioners due process right by failing to present Petitioner with PSR on time, (4) contest improper forfeiture procedure, (5) argue Loss Amount using "Government Benefit Rule",(6) request the revision of Pre-Sentence report. Doc. 106-1 pg. 29-45.

(ii) Failure to file Mitigating Documents: Petitioner requested that trial Counsel file related documents to (a) preserve issues for appeal, (b) as mitigating documents, (c) to rebut erroneous information and to show that the PSR is inaccurate. Doc 106-2 pg.10-11.The documents requested to be filed comprises of: seized bank account balance omitted from the PSR, corporation bank statement of account showing the account that received the proceeds of food stamp transaction, corporation tax document to show that the recital that KD Metro is a 'Sole Proprietorship' in PSR is inaccurate. Counsel's failure to file relevant documents requested by petitioner should be deficient under prevailing professional standard.

Petitioner was prejudiced because (i) restitution was awarded against petitioner (instead of the Corporation) without a finding that Petitioner possessed the restitution amount, (ii) issues were not preserved for appeal, and (iii) the court ordered the forfeiture of unindicted corporation's fund. The outcome of the proceeding would have been different but for counsel's deficient performance.

(iii) Failure to argue Loss Amount with 'Government Benefit Rule' - Petitioner specifically requested that counsel argue 'Estimated Loss Amount using the 'Government Benefit Rule' in the United States Sentencing Guideline USSG 3B1.1 n.3 (F) (ii) which provides that "In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be." Doc.106-2 pg. 10. If estimated loss amount was argued under the "Government Benefits" rule, the following questions would have been raised and determined: (a) whether petitioner qualify as a recipient or an unintended recipient? Whether petitioner diverted funds which he did not receive, and how much food item was purchased by the KD Metro store? If these questions are raised and determined, petitioner's increased sentence exposure under loss amount would have been eliminated. Prejudice exists because the loss amount generated by counsel's strategy increased petitioner's sentence exposure.

(iv) Counsel's Express Threat-Counsel's express threat of "a longer sentence" Doc.106-2 pg.1, in response to petitioner's request that the probation office revise inaccurate information in the PSR should be below the standard of performance expected of a counsel guaranteed by the Constitution.

The district court erred when it suggested that Counsel's threat was a 'rebuke.' Doc.141 pg. 7 *footnote 4.*Under prevailing professional standard, no competent counsel would 'rebuke' a client for requesting counsel's compliance with the provision of the

law. Petitioner was prejudiced because Petitioner could not object to the denial of his Constitutional rights at the sentence proceeding for fear of 'a longer sentence'

In the light of the above facts jurist of reasons could debate that petitioner's petition states a valid claim of the denial of a constitutional right.

(6) Ineffective Assistance Appellate Counsel. Doc. 106-1 pg. 45-47

The Sixth Amendment guarantees the defendant in a criminal case the right to effective assistance of counsel to help ensure that our adversarial system produces just results. *Strickland v Washington*, 466 U.S. at 685. Consequently, the Sixth Amendment requires that "counsel act in the role of an advocate." *United States v. Cronic*, 466 U.S. 648, 656 (1984). A criminal appellant is constitutionally entitled to the effective assistance of counsel in his direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985);

The *American Bar Associations Standard (ABA) 4-9.2 (g)* provides that " Appellate counsel should discuss with the client the arguments to present in appellate briefing and at argument, and should diligently attempt to accommodate the client's wishes."

Petitioner and appellate counsel carefully selected and agreed on the issues presented in Petitioner's brief and for argument. The selected issues were notarized by counsel. In Petitioner's direct appeal, petitioner presented three claims comprising of two sentencing claims- Improper Loss Amount Calculation and Improper Leadership Role Enhancement and a Constitutional claim which states that

"KWUSHUE'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT BECAUSE THERE WAS AN INSUFFICIENT FACTUAL BASIS TO SUPPORT IT, IN VIOLATION OF FED.R. CRIM.P 11(b) (3) AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT" Appellant Brief at 39.

The Eleventh Circuit Court of Appeal granted Petitioner the rear opportunity to present his case and to argue his constitutional claim at Oral Argument. Petitioner's appellate counsel chose to abandon Petitioner's Constitutional claim at Oral Argument against petitioner's express wishes that counsel should treat issue #3 (the Constitutional claim) as "the most important issue in the appeal". Doc.106-2 pg.41. See Eleventh Circuit Oral Argument Recording of 08/17/2018 at www.Ca11.uscourts.gov . Oral Argument Audio Recording-Docket #16-15683.

In *Cross v United States,* 893 F.2d 1287(11th Cir. 1990), this court held that "Deficient performance is that which is objectively unreasonable and falls below the wide range of competence demanded of attorneys in criminal cases, quoting *Strickland,* 466 U.S at 688; 104 S.Ct. at 2064; *Boschen,* 845 F.2d at 922; *Matire v Wainwright,* 811 F.2d 1430. 1435 (11th Cir, 1987)

The fact that the abandoned issue #3 is a briefed constitutional issue for which petitioner specifically wrote that counsel should treat as "the most important issue in his appeal" Doc.106-2 pg.41 should establish that counsel's performance is deficient under ABA standard and under prevailing professional norm.

To establish prejudice, this court in *Cross*, 893 F.2d 1287(11Cir.1990) supra, held "In the context of an ineffective assistance on appeal claim, that in order to determine prejudice the court must first perform "a review of the merits of the [omitted or poorly presented] claim." Id. at 1290. If the Court finds that the neglected claim would have a reasonable probability of success on appeal, then according to *Cross* it is necessary to find "appellate counsel's performance prejudicial because it affected the outcome of the appeal." Petitioner's appellate counsel denied petitioner the opportunity of the Oral Argument panel's consideration of his only Constitutional and strongest claim in his direct appeal. The abandoned Constitutional claim at oral argument should be a 'stronger' claim and should have the highest probability of success on appeal. Petitioner was prejudiced because the abandoned constitutional claim affected the outcome of the appeal. Petitioner would have prevailed on appeal but for appellate counsel's error.

From the foregoing, jurist of reason could debate that the petition states a valid claim of the denial of a constitutional right.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted because petitioner has shown: (1) that the sentence was imposed in violation of the Constitution or laws of the United States,' (2) 'that the court was without jurisdiction to impose such sentence,'...and (3) that the sentence 'is otherwise subject to collateral attack.' Hill v. United States, 368 U.S. 424, 426---27 (1962) (quoting 28 U.S.C. § 2255).

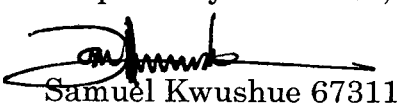
Certiorari should be granted because Petitioner has shown that "jurists of reason could disagree with the district court's resolution of petitioner's constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003)

CONCLUSION

Without a COA, Petitioner cannot obtain appellate review on the merits of his constitutional claims. The record standing alone should conclusively demonstrate that petitioner is entitled to relief.

For the foregoing reasons, the Court should grant the petition for a Writ of Certiorari.

Respectfully submitted,



Samuel Kwushue 67311-019

6001 Kahiti Trc.

Union City, GA 30291