No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARQUIS EDWARDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals should have granted a certificate of appealability (COA) because reasonable jurists would disagree whether Petitioner was entitled to discovery to prove his claim that the government's failure to indict him for racketeering offenses until he was 21 years old -- for offenses that took place when he was only 16 and 17 years old -- was to gain an improper tactical advantage, thus requiring dismissal of the charges for preindictment delay?

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Petitioner Marquis Edwards respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on April 24, 2019. The decision is unpublished.

OPINION BELOW

On April 24, 2019, the Court of Appeals entered its decision affirming the denial of petitioner's 2255 motion. (Appendix A [memorandum decision].)

JURISDICTION

On April 24, 2019, the Court of Appeals affirmed the denial of petitioner's 2255 motion. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on July 23, 2019. Supreme Court Rules 13(3). Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment (pertinent part)

"No person shall ... be deprived of life, liberty, or property without due process of law ...."

28 U.S.C. § 2253(c)(2)

(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].
>
> > (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Trial Proceedings

Petitioner was born on September 17, 1989. He turned 18 years old on September 17, 2007, and 21 years old on September 17, 2010.

In 2007, the Los Angeles County Superior Court tried four members of the street gang Pueblo Bishop Bloods for the murder L.S. and attempted murder of J.B. Although Petitioner was identified by gang member J.K. Gray during the preliminary hearing as being involved in the crimes, Petitioner was never charged in state court. *See People v. Sorrels*, 208 Cal.App.4th 155 (2012). This murder and attempted murder would later be charged in a federal RICO superseding indictment against Petitioner as an overt act in count one and substantively as count seven.

On August 18, 2010, an indictment was filed in the Central District of California charging various members of the Pueblo Bishop Bloods with numerous crimes, including a conspiracy to engage in racketeering. *U.S. v. White, et al,* CR 10-923-SJO (Central District of

California). Petitioner was 20 years old when this indictment was filed, but the government chose not to charge him.

On May 25, 2011, a superseding indictment was returned in the *White, et al,* case, charging Petitioner with conspiracy to engage in racketeering, in violation of 18 U.S.C. § 1962(d) (count one). This superseding indictment alleged a conspiracy that ended September 14, 2010, just three days shy of Petitioner's 21st birthday. By the time the superseding indictment was returned, however, Petitioner was now 21 years old.

An overt act in count one charged Petitioner with shooting at rival gang members on September 4, 2006, when Petitioner would have been 16 years old. (ER 112.) A second overt act in count one charged Petitioner with killing L.S. and attempting to kill J.B. on March 18, 2007, when Petitioner would have been 17 years old. (ER 113.)

The superseding indictment also charged Petitioner in counts four through nine with various other gang related crimes including the murders of J.B. ad L.S.

On April 19, 2012, Petitioner pled guilty to count one. He was 22 years old. In the factual basis of the plea agreement, Petitioner admitted that the Pueblo Bishops Bloods was a criminal enterprise with a common purpose of drug trafficking and murder in violation of California Penal Code sections 187 and 189. Petitioner also admitted to selling crack cocaine in January 2005; to a drive-by shooting on September 4, 2006, when J.S. was killed; a drive-by shooting on September 5, 2006, when another person was shot; and a third drive-by shooting on March 18, 2007, where one person was killed and another wounded. The factual basis also noted that at the time of these offenses, Petitioner was not yet 18 years of age.

The plea agreement specified that the government would recommend no more than 30 years in prison. Petitioner was required not to seek a sentence below 18 years in prison. If the court sentenced Petitioner to 40 years or less, he agreed to waive his right to appeal. In exchange for the guilty plea, the government would move to dismiss the remaining counts, two of which carried a mandatory life sentence (counts six and nine).

On September 17, 2012, Petitioner's counsel moved to withdraw from the case because he had been suspended by the California State Bar. He was thus disqualified to represent anyone. (CR 1656.) On October 29, 2012, new counsel was appointed. (CR 1794.)

Counsel's sentencing memorandum and the PSR noted that Petitioner was born to a teenage mother who already had one son. Petitioner's father did not live with the family but Petitioner would visit him in the projects where he was living. Petitioner's mother had two more sons after him and struggled to provide for her family. Petitioner's older brother and one of his younger brothers were both victims of drive-by shootings. Petitioner himself had two sons by the time he was arrested in this case. The oldest child lives with his mother and grandmother.

The PSR calculated the guideline range as 360 months to life. As agreed, the government recommended a 30 year sentence. Petitioner did not deny committing the crimes but asked for a sentence of 20 years. Relying on *Miller v. Alabama*, 567 U.S. 460 (2012) his counsel emphasized that juveniles are immature, suffer impaired

decision making, poor impulse control, and vulnerability to peer pressure. The court sentenced Petitioner to 40 years in prison.

First Appeal

Petitioner filed a notice of appeal and new counsel was appointed. Counsel filed an appeal which argued, inter alia, that the district court lacked jurisdiction over Petitioner's case since the charged acts were committed when he was a juvenile but those offenses were not ratified for prosecution as an adult under the Juvenile Delinquency Act ("JDA"). 18 U.S.C. § 5031, et seq. In light of the appeal waiver and *United States v. Araiza-Valdez*, 713 F.2d 430, 432 (9th Cir. 1980) (JDA does not apply if defendant indicted after age 21), the Ninth Circuit granted the government's request for summary affirmance. (Appendix E).

2255 Motion

Petitioner pro se filed a 2255 motion, subsequently amended, that argued, inter alia, his trial counsel was ineffective for failing to file a motion to dismiss the case for preindictment delay. Under *Strickland v. Washington*, 466 U.S. 668, 692 (1985), in addition

to showing prejudice, when a defendant pleads guilty upon advice of counsel, the question is whether that advice was "within the range of competency demanded of attorneys in criminal cases."

The Fifth Amendment guarantees that defendants will not be denied due process as a result of excessive pre-indictment delay. *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989) The Due Process Clause can require dismissal of an indictment even when brought during the statute of limitations. *United States v. Huntley,* 975 F.2d 1287, 1290 (9th Cir. 1992). The defendant must prove two things: (1) actual, non-speculative prejudice; and (2) the length of the delay, when balanced against the reason for the delay, must offend those "fundamental conceptions of justice which lie at the base of our civil and political institutions."*United States v. Lovasco*, 431 U.S. 783, 795 (1977).

In order to find a due process violation, Petitioner was required to show the delay was caused by the government's culpability. In *Sherlock*, 962 F.2d at 1353-1354, the court examined whether the government's delay was undertaken solely to "gain tactical advantage

over the accused." *See United States v. Marion*, 404 U.S. 307, 324 (1971) (Due Process Clause would require dismissal of the indictment if it were shown that the pre-indictment delay caused prejudice to the appellee's rights to a fair trial and the delay was an intentional device to gain tactical advantage over the accused).

Petitioner argued that the government had for "for years" all the information it needed to charge him with these crimes when he was still a juvenile and that it had no good reason to delay charging him until he was over 21 years of age.

Petitioner also requested discovery and the appointment of counsel. Rule 6, Rules Governing 2255 Motions. Good cause for discovery exists when the Petitioner needs evidence to fully develop his entitlement to the writ. Specifically, Petitioner needed discovery in order to determine why the government chose not to charge him prior to turning 21 years and whether the excessive delay was to gain some improper tactical advantage. But for preindictment delay, Petitioner would have fallen under the protections of the JDA, affording him a much more lenient sentence.

The district court denied the 2255 motion without ordering discovery. The district court held that Petitioner failed to demonstrate prejudice. It deemed it highly speculative that Petitioner would have been protected by the JDA had charges been filed before he turned 21. This is because the government could have sought certification from the Attorney General to charge him as an adult if the alleged offenses were crimes of violence and the district court determined it would be in the interest of justice to do so. 18 U.S.C. § 5032; *United States v. Juvenile Male*, 492 F.3d 1046, 1048 (9th Cir. 2007).

The district court held:

> To determine if the transfer to adult status is "in the interests of justice," courts must consider six factors: (1)"the age and social background of the juvenile;" (2) "the nature of the alleged offense;"(3) "the extent and nature of the juvenile's prior delinquency record;" (4) “the juvenile's present intellectual development and psychological maturity;" (5) "the nature of past treatment efforts and the juvenile's response to such efforts;" and (6) " the availability of programs designed to treat the juvenile's behavioral problems." 18 U.S.C. § 5032; *United States v. Brandon*, 387 F.3d 969, 975 (9th Cir. 2004). "The []JDA does not instruct courts to weigh one factor more heavily than another, and the weight a court assigns each factor is within its discretion," so "[t]he district court may balance the factors as it deems appropriate." *United States v. Doe*, 94 F.3d 532, 536 (9th Cir. 1996).

Petitioner argues in his Supplement that if he been indicted earlier he "would have had to be certified in order to be tried as an adult." (Suppl. 6.) Assuming the Government had no evidence of post-majority ratification, this may be true. However, Petitioner has not alleged, much less provided definitive proof, that the Government would not or could not have obtained certification to try him as an adult. Indeed, given Petitioner's circumstances, it appears that the Government would have had little difficulty obtaining such certification. (*See* Government's Response to Defendant's Motion for Reconsideration 8 n.3, CR 2774-4.). Petitioner was indicted for violations of 18 U.S.C. sections 1959(a)(1), 1959(a)(3), and 1959(a)(5), all of which are violent felonies. (Superseding Indictment 32.)

The conspiracy charge Petitioner eventually plead guilty to incorporated those violent crimes, and therefore likewise constituted a violent felony. (Superseding Indictment 10.) Further, the record indicates Petitioner was close to majority when the most heinous of these offenses were committed, as he was sixteen at the time of the first charged murder and seventeen at the time of the second. (Superseding Indictment 14-15.)

While this Court cannot know for certain that it would have granted a certified request to try Petitioner as an adult, such guesswork is not required. Instead, the burden is on the Petitioner to demonstrate by "definite proof" that either the United States Attorney's Office would not have or could not have obtained certification from the Attorney General, or that this Court would have denied a certified request to deny transfer to the Juvenile Court had it been properly submitted. This Petitioner has not done.

Because Petitioner has offered nothing beyond a bare assertion that had he been indicted at the age of twenty he would have been protected by the JDA, Petitioner has failed to show actual, nonspeculative prejudice. Consequently, Petitioner has not shown that any pre-indictment delay he allegedly endured was excessive, and accordingly, Mr. Little could not have prejudiced Petitioner's defense by not bringing such an argument to the

> Court's attention. Petitioner's third claim for relief pursuant to Section 2255 is therefore **DENIED**.

(Appendix D at 13-14.)

The district court denied discovery as moot and denied a COA. (Appendix C.)

2255 Appeal

The Ninth Circuit granted a COA on the following question: whether trial counsel was ineffective for failing to file a motion to dismiss the indictment due to for pre-indictment delay? (Appendix B.)

The Ninth Circuit held that trial counsel was not ineffective for failing to move to dismiss the indictment for pre-indictment delay. This is a motion that is very rarely granted and in any event, Petitioner could not show prejudice. He was charged with crimes of violence when he was 16 and 17 years of age, which is close to the age of majority, factors that weighed against denying certification. The Ninth Circuit held:

> While it would have been the Government's burden to establish that transfer to adult status was warranted under the JDA, it would have been Edwards' burden to show that he was actually prejudiced by the delay and, given the likelihood of certification, Edwards appears unable to make this showing. Moreover, beyond summary statements that the Government delayed indictment to

> gain a tactical advantage, Edwards has offered nothing to suggest that the delay in his indictment is attributable to anything beyond the time required to investigate and establish a large-scale, wide-ranging racketeering case.

(Appendix A at 4.)

The Ninth Circuit also denied a request to expand the COA to include the issue of whether the district court should have granted discovery. (Appendix A at 5.) The Court held that a habeas petitioner is not entitled to discovery as a matter of ordinary course but only where specific allegations show reason to believe the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. (Appendix A at 5, citing *Bracy v. Gramley*, 520 U.S. 899, 904, 908-909 (1997). The district court properly denied Petitioner's request for "discovery as to the cause of the Government's pre-indictment delay as moot because it found that Edwards could not make the requisite showing that he suffered actual prejudice due to the delay." (Appendix A at 5.)

REASONS FOR GRANTING THE WRIT

GIVEN THAT OTHER COURTS HAVE CONDUCTED DISCOVERY AS TO WHY THE GOVERNMENT DELAYED FILING CHARGES UNTIL A DEFENDANT WAS OVER 21, REASONABLE JURISTS WOULD DISAGREE WITH THE NINTH CIRCUIT, WARRANTING THE ISSUANCE OF A COA

A. To Obtain a COA a habeas petitioner does not have to show he will win his case, but only that reasonable jurists would resolve the matter differently

This Court has consistently and repeatedly held that a Circuit Court cannot deny a COA because it thinks the applicant will ultimately lose on the merits:

> [T]o obtain a COA under § 2253(c), a habeas petitioner must make a substantial showing of a denial of a constitutional right, a demonstration that, under *Barefoot [v. Estelle*, 463 U.S. 880, 893 (1983)], includes showing 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.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court clarified that in order to obtain a COA the applicant does not have to show that he will win his appeal.

> The threshold inquiry does not require full consideration of the factual or legal bases adduced in support of his claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Milller-El at 336-337.

> [A] COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or for that matter, three judges, that he or she would prevail.

Miller-El at 337.

> A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of 'mere good faith' on his or her part. We do not require the petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for writ of habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail .... the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'

Miller-El at 338.

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis ....We reiterate what we have said before: A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'

Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759, 774, 197 L.Ed.2d 1, citing *Miller-El*, 537 U. S. at 327, 348 (2017).

> Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. *Miller-El*, 537 U. S., at 336-337, 123 S. Ct. 1029, 154 L. Ed. 2d 931. *Miller-El* flatly prohibits such a departure from the procedure prescribed by §2253.

Buck v. Davis, 137 S.Ct. at 775.

B. In a Second Circuit case, the district court held an evidentiary hearing as to why the government delayed filing charges until the defendant was over 21 years of age

In *United States v. Hoo*, 825 F.2d 667 (2d Cir. 1987) Hoo was indicted for numerous racketeering crimes ranging from gambling, extortion and robbery, to murder and attempted murder, all of which occurred when he was only a teenager. Hoo entered a conditional plea of guilty reserving his right to argue that the indictment should have been dismissed due to preindictment delay. The government conceded in the plea agreement that it had no evidence Hoo had participated in the racketeering enterprise between his 18th birthday and the end of the period covered by the indictment.

Therefore, if the indictment had been returned before Hoo reached the age of 21 he would have been entitled to the protection of the JDA. *Id.* at 668.

The district court found that Hoo did not have an absolute right to the protections of the JDA because the statute did not require that prosecutions for acts of juvenile delinquency be initiated before a defendant's 21st birthday. Nevertheless, the district court held that if it were established that the delay was due to "unjustifiable government conduct" or "illegitimate prosecutorial motives" this would be a violation of Hoo's due process rights. *Hoo*, 825 F.2d at 668.

The district court held an evidentiary hearing to determine the government's reasons for delay in filing the indictment. The Assistant U.S. Attorney testified that the government began its investigation some two years before the indictment was returned. It was also aware of Hoo's criminal activities. However, it had been unable to obtain the most important evidence against him, which was his participation in a murder, until December 13, 1984, the day before Hoo turned 21. And, the government did not realize until December 19, 1984, that Hoo had just reached the age of 21. The government counsel testified that it had not sought a tactical advantage by delaying filing the indictment. *Hoo*, 825 F.2d at 669.

The district court ruled that the government had engaged in entirely appropriate investigatory conduct. Hoo was an important part of the government's case and it had not obtained the detailed evidence of his crimes until the day before his 21st birthday when an important witness decided to cooperate and testify before the grand jury. *Hoo*, 825 F.2d at 669. Moreover, at no time before the indictment did the government engage in any discussions regarding Hoo's juvenile status. *Ibid*.

On appeal, Hoo argued that the government could have determined his juvenile status with minimal effort and he would have been prevented from suffering significant harm had the indictment been filed two weeks earlier. Here, however, Hoo did not show improper government motive and thus no deprivation of his due process rights. *Hoo*, 825 F.2d at 671. A rule requiring that the government bring charges as soon as possible would pressure the government to resolve doubtful cases in favor of early and possibly unwarranted prosecutions. *Id*. citing *Lovasco*, 431 U.S. at 793.

C. The failure of the district court to grant discovery as to why the government delayed in obtaining an indictment against Petitioner fuels speculation that the government's delay was indeed to gain an improper tactical advantage

The district court and the Ninth Circuit held that Petitioner's claim of prejudice was speculative because he failed to show that the government would have been unable to obtain certification to try him as an adult. However, it is also entirely speculative that the delay was due to nothing more than the time required to investigate and establish a large scale racketeering case. (Appendix A at 4.)

As the district court conceded, it could not say for certain that it would have certified a juvenile case against Petitioner for prosecution as an adult. (Appendix D at 13.) Discovery and a hearing would have fleshed out the reason for the government's delay in bringing the indictment as well as other evidence as to whether the government could indeed have satisfied all six factors justifying transfer of the case to adult court. *Hoo*, 825 F.2d at 669.

D. A COA should have been granted on the discovery issue

Given that the district court in the *Hoo* case held an evidentiary hearing at which the government prosecutor was required to testify, reasonable jurists would disagree as to how the matter should have been resolved. The issue was certainly deserving of further encouragement. As it was, the Ninth Circuit denied a COA after essentially finding that Petitioner could not win on the merits. Not only was that the wrong standard, but that conclusion is also speculative.

This Court should grant certiorari in this case which is yet another example of the lower courts' continued misapprehension of the standard requiring issuance of a COA.[1]

[1] More than 90 percent of COA applications are denied. See Margaret A. Upshaw, "The Unappealing State of Certificates of Appealability," University of Chicago Law Review 82 (2015) at 1610.

CONCLUSION

For the reasons expressed above, petitioner respectfully requests that a writ of certiorari issue to review the order of the Ninth Circuit Court of Appeals.

Date: July 23, 2019 Respectfully submitted,

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