RECORD NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM HENRY STEPHENS JR.,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 7, 2019

QUESTION PRESENTED

Whether a Court can Rightfully Accept a Defendant's Guilty Plea when Such Plea was Not Made Knowingly and Intelligently.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following are all of the parties before the United States Court of Appeals for the Fourth Circuit:

Petitioner (Defendant-Appellant below) is Troy N. Giatras.

Respondent (Plaintiff-Appellee below) are Michael B. Stuart, United States Attorney and Assistant United States Attorney, Joseph F. Adams.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Henry Stephens Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

On May 9, 2019, the United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of Petitioner's Motion to Withdraw his Plea due to Ineffective Assistance of Counsel and affirmed Petitioner's conviction and sentence on the grounds that there was no abuse of discretion by the district court. That decision can be found in the Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2011) as this Petition for Writ of Certiorari is filed within ninety (90) days of the May 9, 2019 judgment that affirmed Petitioner's conviction and sentence.

STATEMENT OF THE CASE

A criminal complaint was filed on June 29, 2017 in United States District Court for the Southern District of West Virginia at Huntington, and a warrant was executed on July 11, 2017 for Mr. Stephens' arrest. *JA:* 167[1]. Mr. Stephens appeared for his preliminary and detention hearing on July 18, 2017 before Magistrate Judge Cheryl A. Eifert in Huntington, West Virginia and pled not guilty.

[1] The citation "*JA:* ___" refers to the Joint Appendix.

On August 1, 2017, a federal grand jury in Huntington, West Virginia returned a four (4) count indictment against William Henry Stephens, Jr. *JA:* 18, 167. Count One and Count Two charged Petitioner with the possession with the intent to distribute heroin and cocaine, respectively, in violation of 21 U.S.C. § 841(a)(1). *JA:* 18-19. Count Three and Count Four charged Petitioner with the possession of firearm in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A) and with possession of a firearm in violation of 18 U.S.C. § 921(a)(20) due to his previous convictions in the State of Michigan. *JA:* 21-22.

On October 7, 2017, Mr. Stephens, the Petitioner, signed a plea agreement pleading guilty to only Count One of the Indictment against him. *JA:* 31, 33. All other counts of the indictment were dismissed as a part of the plea agreement. *JA:* 25.

Ultimately, on October 24, 2017, the Petitioner entered his plea with the court and the plea was accepted after the District Court conducted a Rule 11 hearing. *JA:* 34-66. Following this hearing, Mr. Stephens terminated his prior counsel and attempted to withdraw this plea agreement by a Motion. *JA:* 142. On February 22, 2018, United States District Court Judge Robert C. Chambers denied the Petitioner's motion to withdraw his guilty plea. *JA:* 95-106. Judgment as to Mr. Stephens was delivered on June 4, 2018. Mr. Stephens was sentenced to the highest possible term of months based upon the guideline range of eighty-seven (87) months. *JA:* 124, 131-132.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Incorrectly Adopted the Government's Position that the Petitioner's Plea was Knowing and Intelligent

The Fourth Circuit Court of Appeals in this case erroneously determined that even when unfairly induced, a Defendant's plea agreement can be held against him even before sentencing, simply as the result of a boilerplate Rule 11 colloquy which the Defendant was coached for prior to said colloquy. The Petitioner in this case, Mr. Stephens, asserts that the primary reason for withdrawing his plea was the ineffective assistance of his counsel. This conflation of ineffective assistance and plea withdrawal makes the former subject ripe for analysis on direct appeal, rather than in a motion brought pursuant to 28 U.S.C. § 2255 (2012), as the lower court suggested.

The lower court, after finding that motions for withdrawal of guilty pleas are reviewed under an abuse of discretion standard, simply concluded that none was extant based upon a review of the record. The court, after listing the six factors considered by district courts when deciding motions for withdrawal of a guilty plea from *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991), and noting those most important (whether the defendant provided credible evidence that his plea was not knowing or voluntary; whether he credibly asserted his legal innocence; and, whether the defendant had close assistance of competent counsel[2]), simply highlighted its review of the defendant's Rule 11 colloquy and sentencing hearing.

[2] This is effectively an ineffective assistance of counsel analysis *within* an appropriateness of withdrawing a plea of guilty analysis. This is also why the ineffective assistance of counsel analysis is appropriate on this direct appeal.

As a starting point, the Fourth Circuit's blunt analysis of the issue as to whether the District Court abused its discretion in disallowing the Petitioner to withdraw his guilty plea two (2) weeks after entering it (and *six (6) weeks* prior to sentencing). This issue is not uncontroversial or obvious. Plea agreements account for nearly all resolutions in criminal cases, and must be given the utmost scrutiny in their entry, and should never be considered a routine proceeding. The Fourth Circuit Court of Appeal's per curiam opinion features scant analysis as to why it believed the District Court did not abuse its discretion. This lack of examination goes against the notions of judicial accountability, and hinders development of stare decisis.

The Petitioner's reasons for withdrawing his guilty plea are numerous. Petitioner asserts that his trial counsel a) refused to procure valuable, potentially exculpatory evidence;[3] b) refused to participate in a trial on the Petitioner's behalf despite being retained to do so; c) represented to the Petitioner in no uncertain terms that, as a black man in a traditionally conservative venue, he would likely receive a sentence tantamount to live imprisonment if he went to trial;[4] and, d)

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[3] In fact, new evidence has been uncovered even since the Petitioner's conviction – which should have been provided to the Petitioner prior to trial – which establishes that his defense was prejudiced and the prosecution of his case was flawed. The lack of this evidence was substantial to his conviction, was more than mere impeachment evidence, and likely would have resulted in an acquittal if presented to the jury.

[4] Petitioner asserts that his trial counsel went so far as to highlight that, somehow, the prosecution would make it known to the jury that he, a black man, was romantically involved with a white woman, and would decide his fate thusly.

"coached" him in a misrepresenting manner for his colloquy, expressing upon him again the dire ramifications of the court's refusal to accept his plea of guilty.

Individuals who are accused retain attorneys often for fear that their chances of a favorable outcome drop significantly if they are to be represented by appointed counsel by virtue of a lack of funds. The fact that Petitioner's retained trial counsel had negotiated a plea agreement which could be rescinded if the Petitioner changed attorneys greatly diminished any notion of voluntariness of the Petitioner's acceptance when his trial counsel informed him essentially his choices were to accept or seek new counsel but under no circumstances would he be participating in a trial. Attorney retention should not be a *caveat emptor* scenario. Like any of his trial counsel's missteps, this, alone, should be enough to find that the Petitioner did not have competent counsel assisting him in taking his guilty plea, and, even more, actually had counsel working against him for it.

Importantly, any attorney practicing criminal defense knows (or should know) the typical procedure of a Rule 11 colloquy. Any attorney practicing criminal defense (and especially one, as Petitioner asserts regarding his counsel, who wants to avoid a trial) is aware of what a judge will ask of a defendant in a Rule 11 colloquy, and what responses would cause him or her to accept or reject the guilty plea. Therefore, it is unreasonable to use the Rule 11 colloquy as the dispositive proceeding leading the lower court to find that the Defendant's plea was made knowingly and intelligently such that it could not be withdrawn after it was given but before sentencing.

A guilty plea made by a defendant is not knowing and voluntary if that defendant was denied effective assistance of competent counsel in accord with the standards in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (applying *Strickland* standard to guilty pleas).

The *Moore* factors are non-exclusive. *Moore*, at 248. Therefore, the obvious and egregious presence or absence of one of them, and especially the absence of a knowing and voluntary plea, should grant a heavy presumption that withdrawal of a plea is not only allowable, but mandatory. The other factors cannot be given any importance when the first factor is so severely lacking. For instance, any concern over a four-month *inconvenience* to the Government or the *waste* of having had one or two now-unnecessary hearings in court, when weighed against a United States' citizen's inalienable right to liberty, is misguided. The Fourth Circuit clearly erred in affirming the District Court's disallowance of Mr. Stephens' withdrawal of his plea of guilty.

To establish ineffective assistance of counsel, a defendant must establish not only that his counsel's performance was deficient, but also that it is reasonably probable he would not have pleaded guilty but for that deficiency. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *U.S. v. Dyess*, 730 F.3d 354, 361 (4th Cir. 2013) (quoting *United States v. Fugit*, 703 F.3d 248, 259 (4th Cir. 2012) (in turn quoting *Strickland*)). Courts must weigh whether counsel was reasonably effective "based on the facts of the particular case, viewed as of the time of counsel's conduct." *United*

States v. Lough, 203 F. Supp. 3d 747, 752 (N.D.W. Va. 2016)(quoting *Roe v. Flores–Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)).

In *United States v. Lough*, 203 F. Supp. 3d 747, the Northern District of West Virginia allowed a defendant to withdraw a plea based upon ineffective assistance of counsel when such counsel did not inform him that a network investigative technique warrant which was used to perform a search of his computer data was found invalid. *Id.* at 755.[5] Like the instant case, the defendant in *Lough* could not argue that he did not understand the terms of the plea, or the rights which he was waiving. *Id.* at 754. The court ultimately determined that, as the *Moore* factors regarding voluntary and knowing plea deals and that regarding close assistance of competent counsel are inextricably linked, "a defendant cannot knowingly enter a guilty plea premised on a lack of understanding as to how the law applies to the facts of his case." *Id*. at 753-754.

In this case, the Petitioner's dissatisfaction with his attorney is well documented. Both the Petitioner himself as well as his newly appointed counsel filed motions and even a memorandum detailing Petitioner's dissatisfaction with his counsel. Thus, Petitioner's ineffective assistance of counsel claim appears **conclusively** on the record below because his initial trial counsel was removed and Petitioner's dissatisfaction with his attorney is well documented in motions before the district court. The Fourth Circuit Court of Appeals erred in dismissing the Petitioner's rightful ineffective assistance of counsel claim by simply alluding that it

[5] Note that, similarly in the Petitioner's case, the Petitioner asserts that he instructed his attorney on multiple occasions that he wished to view all of the discovery available to him from both the State and Federal prosecutors' offices. His trial counsel failed to procure these materials.

is more properly brought under 28 U.S.C. § 2255 (2012). It is not. Because it is inextricably linked to his acceptance of a plea agreement, and because it was part and parcel to his decision to withdraw his plea, which the District Court erroneously denied and the Fourth Circuit Court of Appeals erroneously affirmed, the Petitioner's ineffective assistance of counsel claim is rightfully brought here on direct appeal.

To establish a Sixth Amendment claim for ineffective assistance of counsel, a defendant must show (1) objectively unreasonable performance and (2) prejudice stemming from that performance. See *Strickland v. Washington*, 466 U.S. 668, 687–688 (1984). The first prong of the *Strickland* test relates to professional competence and the defendant must be shown that the counsel's representation fell below "an objective standard of reasonableness." *Id.* at 687-691. To satisfy the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

If the defendant challenges a conviction after entering a guilty plea, the "prejudice" prong of the *Strickland* test is slightly modified. *Hopper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988). Under this modified test, the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

According to Petitioner, Attorney Craig pressured him into pleading guilty by refusing to participate in a jury trial, failing to provide him discovery he requested to review before pleading guilty, failing to file proper pretrial motions, and misleading him as to his constitutional rights. *JA*: 149. In addition, the Petitioner asserts that there are constitutional concerns regarding his arrest, his treatment post-arrest, and the indictment, which his trial counsel would have easily discovered with cursory investigation, and which would have certainly affected Mr. Stephens' decision to accept the plea agreement. Furthermore, the Petitioner reports that his attorney strongly advised him against going to trial because of racial and anti-miscegenation prejudices. *JA*: 150-151. Mr. Stephens felt he had no choice to plead because "he would be convicted in a jury trial because of racial stereotyping." *JA*: 150-151.

Based on his trial counsel's ineffectiveness, the Petitioner felt he had no choice but to agree to the plea agreement, and – having been advised prior to his plea hearing – answered the District Judge's colloquy inquiries in a manner which would ensure such agreement was accepted. While he voluntarily accepted the plea agreement, his ignorance as to certain evidence which would assist in dispositive motions or a trial, coupled with his attorney giving him information which detracted from his focus on the real issues, led to a plea of guilty that cannot be said to be "knowing." The Fourth Circuit Court of Appeals, based seemingly entirely on the Petitioner's colloquy, affirmed the disallowance of a withdraw of that plea a mere two (2) weeks subsequently (and still six (6) weeks prior to scheduled sentencing).

JA: 106. Consequently, the Petitioner was sentenced to the highest maximum term of months for the charge to which he pled guilty. *JA*: 124.

Therefore, the District Court erred in disallowing the Petitioner's guilty plea to be timely withdrawn, and the Fourth Circuit Court of Appeals erred in affirming that decision, because his retained counsel acted objectively unreasonable and, absent these failures, the result would have been different. *Strickland v. Washington*, 466 U.S. 668.

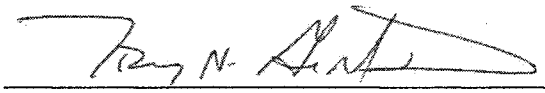
CONCLUSION

The Petitioner respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

William Henry Stephens, Jr., Petitioner

By Counsel of Record:



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