

RECORD NO. 19-5606

IN THE
SUPREME COURT OF THE UNITED STATES

NDOKLEY PETER ENOW,

Petitioner,

v.

RICKEY FOXWELL, WARDEN, *ET AL.*,

Respondents.

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

MOTION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

Dr. Ndokey P. Enow, *Pro se*
DOC ID. No. 435-845/SID No. 1990859
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QUESTIONS OF LAW PRESENTED

1. Whether the United States District Court and the United States Court of Appeals for the Fourth Circuit erred in denying the Petitioner a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)?
2. Whether the government may compound the invasion of privacy by using hidden recording devices to record incriminating statements made by the unwary suspect to a secret state agent in violation of 18 U.S.C. § 2511(2)(c)?
3. Whether the indictment was based on illegal wiretap and false evidence in violation of 18 U.S.C. § 2515?
4. Whether the guilty plea was unknowing and involuntary?
5. Whether counsels rendered ineffective assistance under the Sixth Amendment when both attorneys failed to move to suppress highly incriminating evidence even though a colorable argument exists to support suppression?
6. Whether the state court erred in depriving the Defendant of his constitutional rights to all post-conviction rights, including the right to file a motion for reconsideration of sentence pursuant to Md. Rule 4-345(e), motion for 3-judge panel sentence review pursuant to Md. Rule 4-344, or application for leave to appeal pursuant to Md. Rule 8-204?
7. Whether the Defendant's Sixth Amendment right to the Maryland Speedy Trial Act was violated?
8. Whether the indictment was based on the violation of the Double Jeopardy Clause of the Fifth Amendment, made applicable to the state through the Fourteenth Amendment?
9. Whether the sentence was illegal and excessive in violation of the Eighth Amendment of the United States Constitution?
10. Whether the state trial court lacked subject matter jurisdiction pursuant to 18 U.S.C. §§ 2510(9)(a)(b) and 2516?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINION BELOW

On December 4, 2018 the United States Court of Appeals for the Fourth Circuit denied Petitioner's appeal on the issues presented herein for lack of showing the denial of constitutional rights.

On January 2, 2019 the United States Court of Appeals for the Fourth Circuit denied Petitioner's request for en banc rehearing.

On July 23, 2018 the United States District Court for Maryland denied Petitioner's writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the issues presented herein for lack of showing the denial of constitutional rights.

On June 23, 2017 the Maryland Court of Special Appeals denied Petitioner's application for leave to appeal from the denial of post-conviction relief without opinion.

On December 28, 2016 the Circuit Court for Montgomery County, Maryland denied Petitioner's Petition for Post-Conviction Relief.

On August 12, 2015 the Maryland Court of Special Appeals denied Petitioner's application for leave to appeal from guilty plea.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) and Supreme Court Rule 44(2). This Honorable Court denied Petitioner's writ of certiorari to the United States Court of Appeals for the Fourth Circuit on October 15, 2019.

STATUTES INVOLVED IN THIS CASE

This case involves Amendment XIV to the United States Constitution which provides:

Section 1: A person born or naturalized in the United States and subject to the jurisdiction thereof, or citizens of the United States and of the state wherein they reside, no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of laws; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article. United States Constitutional Amendment XIV is enforced by Title 28 U.S.C. §§ 2253(c) and 2254.

INTRODUCTION

COMES NOW the Petitioner, Ndokley Peter Enow, *pro se* pursuant to Supreme Court Rule 44(2) and Title 28 U.S.C. §§ 2253 and 2254, hereby moves this Honorable Court to grant Petitioner's Motion for Rehearing from the denial of writ of certiorari. This petition is filed in good faith and not for delay. It is in Petitioner's judgment one or more of the following situations exist:

- (1) a material factual or legal matter was overlooked;
- (2) the opinion of the United States Court of Appeals for the Fourth Circuit conflicts with a decision of this Court or other Courts of Appeals, and the conflict was not addressed; or
- (3) the case involves one or more questions of exceptional importance that is of public import for citizens of the United States.

A Petition for Rehearing of the denial for writ of certiorari was part of the appellate procedure authorized by Rules of the Supreme Court, subject to the requirements of S. Ct. R. 44(2) on rehearing; right to such consideration was not

to be deemed on empty formality as though such petitions would as a matter of course be denied; denial of petition for writ of certiorari should be treated as definitive determination in the Supreme Court, subject to the consequences of such an interpretation. *See Flynn v. United States*, 75 S. Ct. 285 (1955); *Bell v. Ohio*, 433 U.S. 907 (1977).

STATEMENT OF THE CASE

1. That on June 6, 2014 the Petitioner was entrapped by a Montgomery County, Maryland Police (MCP) undercover informant (UI), Michael Faison, and was illegally wiretapped by the MCP undercover agent, Detective Bullock, ID #1426, at the 100 Block University Boulevard, West, in Silver Spring, Maryland without probable cause or a court order, or the Petitioner's consent in violation of Federal Title III of the Omnibus Crime Control and Safe Streets Act of 1968, pursuant to 18 U.S.C. §§ 2510 *et seq.* See Petitioner's Guilty Plea Transcript, pp. 7, 21-27.

2. That on June 6, 2014, after the illegal wiretapped sting operation, the Petitioner was arrested without probable cause or warrant in violation of Title 18 U.S.C. §§ 2510(7) and 2516, and in violation of U.S. Const. Fourth Amendment and Article 26 of the Maryland Declaration of Rights near University Boulevard East and Piney Branch Road while driving his vehicle. See Montgomery County District Court Case information under no. 3D0031831 and police report no. 14026856.

3. That on June 7, 2014 the self-imposed complainant, Detective Michael Carin, ID #9448, filed unfounded criminal charges against the Petitioner in District Court for Montgomery County, Maryland under case no. 3D00318321 without probable cause and charged Petitioner with two felony counts: (1) common law charge: solicitation to commit first-degree murder, and (2) Md. Code Ann., Criminal Law Art. § 2-205:

attempted first-degree murder without a weapon or a victim at the alleged crime scene. See District Court case no. 3D00318321 and MCP Report no. 14026856.

4. On June 11, 2014 the Petitioner retained defense counsels, Howard R. Cheris, MSB ID# 14189 and Philip H. Armstrong, MSB ID #1531 in District Court case no. 3D00318321. Mr. Cheris entered his appearance in the aforementioned case.

5. The Petitioner never had pretrial or trial proceedings in the Maryland District Court and the case was forwarded to the Circuit Court for Montgomery County on August 1, 2014, and assigned case no. 125462C.

6. On July 31, 2014, Petitioner was illegally indicted under indictment no. 125462C by the Montgomery County Grand Jury pursuant to Maryland Rule 16-107 as it relates to the aforementioned felony charges without probable cause using illegally obtained wiretapped evidence and false testimony in violation of Title 18 U.S.C. §§ 2515 and 2517(3), Maryland Rule 4-202(a), Md. Code Ann., Crim. Law. Art. §§ 2-201 and 2-208, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner was indicted using a fabricated name known as Ndokley Peter Enow with a date of birth 9/22/74, and the prosecution knew was only supported by false evidence and bind to the Petitioner's natural body, when in fact, his true identity is Ndokey Peter Enow with a date of birth 9/22/76. See Plea Proceeding Transcript pp. 7, 21-27; Circuit Court Docket Entries #'s 1-7; District Court Case information no. 3D00318321; MCP Police Report # 14026856.

7. On August 14, 2014 defense counsel Howard R. Cheris entered his appearance in the Circuit Court for Montgomery County, Maryland in case no. 125462C and requested discovery material pursuant to Maryland Rule 4-263, request for speedy trial pursuant to Maryland Rule 4-271, and filed defendant's pretrial motion pursuant to Maryland Rule 4-252 (including points and authorities).

8. On October 14, 2014 the State's Attorney filed the State's Opposition to Defendant's Omnibus pretrial motions and failed to comply with the Defendant's discovery request.

9. On December 5, 2014 defense counsel Philip H. Armstrong withdrew the defendant's pretrial motion pursuant to Maryland Rule 4-252 (see Circuit Court Docket Entry #12) without consulting with the defendant nor having him present in court during pretrial motion hearing, nor a status hearing scheduled for that same day in violation of Maryland Rules 4-231 and 19-301.1 *et seq.*, and the Sixth and Fourteenth Amendments to the U.S. Constitution. (See Circuit Court Docket Entries # 22-29, and Circuit Court Scheduling Order dated July 31, 2014).

10. From July 15, 2014 through January 9, 2015, defense attorneys for Petitioner induced and coerced the defendant through deception of extrinsic fraud to plead guilty to solicitation to commit first-degree murder or risk the possibility of a life sentence if the defendant insisted on going to trial with the charges against him. This was mental coercion overbearing the defendant's will to plead guilty involuntarily and unintelligently in order to avoid a greater sentence or punishment when in fact, there was no crime actually committed. See Attorney-Client Correspondences: 7/15/14; 7/18/14; 11/26/14; 12/5/14 and 1/9/15; and MCP Police Report #14026856.

11. On January 9, 2015 the defendant was coerced and induced under duress by the prosecution, defense counsels, and the trial court to plead guilty involuntarily and unintelligently by deception in violation of Maryland Rule 4-242(c); Title 18 U.S.C. §§ 2515 and 2517(3) of the Federal Wiretap Statute, and the Sixth and Fourteenth Amendments of the U.S. Constitution. See Plea Proceeding Transcript, pp. 7-20; 21-33. See also MCP Police Report #14026856 and Prosecution Plea Offer Letter dated December 5, 2014.

12. On February 27, 2015 the Circuit Court, the Honorable Judge Steven A. Salant, sentenced the defendant without subject matter jurisdiction to forty (40) years all suspended but twenty (20) year term imprisonment with five (5) years of supervised probation above bar to the Maryland Division of Correction (DOC) commencing from June 7, 2014. This was in violation of the Maryland Sentencing Guidelines pursuant to Maryland Rule 4-345(a) and Md. Code Ann., Crim. Proc. § 6-216; Title 18 U.S.C. §§ 2510(9)(a)(b) and 2516; and the Due Process and Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. See Circuit Court Docket Entry #45, and Sentencing Transcript, pp. 3-11.

REASONS FOR GRANTING THE WRIT

A. IMPORTANCE OF THE QUESTIONS PRESENTED

This case presents a fundamental question of the interpretation of this Court's decision in *Katz v. United States*, 389 U.S. 347, 359 (1967) and *Berger v. New York*, 388 U.S. 41, 63 (1967). The questions presented in the context of illegal wiretapping are of great public importance because of their effects on privacy issues in all the states and the District of Columbia. That in 1966, in the wake of prominent Congressional hearings on the government invasion of privacy, Justice Douglas dissented in *Oshorn v. United States* and *Lewis v. United States*, where he observed:

"We are rapidly entering the age of no privacy where everyone is open to electronic surveillance at all times; where there are no secrets from the government. The aggressive breaches of privacy by the government have increased by geometric proportions. Wiretapping and bugging run rampant without effective judicial or legislative control. Taken individually, each step may be of little consequence but when viewed as a whole, we see a society which the government may intrude into the secret aspects of man's life at will." *Oshorn*, 385 U.S. at 340-43.

Electronic devices enable law enforcement officials to monitor and record conversations; to monitor movements of persons and objects, and to trace or record telephone calls. Recognizing these threats to privacy rights that would result from unrestricted use of these devices, the U.S. Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (codified at Title 18 U.S.C. §§ 2510-2522) to regulate the interception of wire, oral, and electronic communications (18 U.S.C. § 2511), and established rigorous standards governing the applications for a wiretap. Title III mandates that certain procedural due process be followed when law enforcement officials conduct electronic surveillance. Law enforcement officials must first receive authorization to apply for a court order authorizing the interception of wire, oral, or electronic communications in connection with the investigation of certain enumerated crimes. See 18 U.S.C. §§ 2516 and 2518; see also *United States v. Giordana*, 416 U.S. 505 (1974).

Only federal or state investigative or law enforcement officials or government attorneys are statutorily authorized to arrest or prosecute offenses enumerated in Title 18 U.S.C. § 2516, may apply for authorization to conduct electronic surveillance investigations. See 18 U.S.C. § 2510(7) (citing *Smith v. U.S. Dep't of Justice*, 251 F.3d 1047, 1050 (D.C. Cir. 2001); *United States v. Lewis*, 406 F.3d 11, 16 (1st Cir. 2005); *United States v. Amen*, 831 F.2d 373, 378 (2nd Cir. 1987).

Emergency situations involving immediate danger of death or physical injury (hostage and barricade), conspiratorial threats to national security, or conspiratorial activities characteristic of organized crime may justify electronic surveillance for a maximum of 48 hours without judicial authorization if grounds for such surveillance otherwise satisfied the requirements of Title III. See 18 U.S.C. § 2518(7); see also *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009) (quoting *Nabozny v.*

Marshall, 781 F.2d 83, 85 (6th Cir. 1986); *United States v. Frederickson*, 581 F.2d at 715 (1978)).

Fifty (50) years later, we are facing the same legislative concerns to what extent the advances in technology have created an age of no privacy also known as the surveillance age. See *United States v. Jones*, 565 U.S. 400 (2012) (quoting *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 760 (2010)). Cell phones and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression and even self-identification. See *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). The question presented in *Osborn*, as casted by Justice Douglas, was "whether the government may compound the invasion of privacy by using hidden recording devices to record incriminating statements made by the unwary suspect to a secret federal agent?" *Osborn*, 385 U.S. at 340.

The Federal Wiretap Act provides no support for recognizing an exception for the common law privilege protecting statements made to law enforcement agents in the furtherance of criminal investigations. See *Gelbard v. United States*, 408 U.S. 41, 48 (1972); *United States v. Crabtree*, 565 F.3d 887, 888 (4th Cir. 2009). The very nature of the federal Title III is to impose limitations on the effectiveness of law enforcement agents in the interests of protecting the privacy of the citizens of the United States and the freedom of speech or expression. *Katz v. United States*, 389 U.S. 347, 359 (1967). Title III represents Congress' careful balancing between the interests of the enforcement of the criminal laws and the assurance of privacy in oral and wire communications. *Crabtree*, 565 F.3d at 888 (quoting *United States v. Nerbar*, 222 F.3d 597, 603-04 (9th Cir. 2000)). To recognize a common law privilege would upset that balance. *Id.*; §§ 2516 & 2518; *Katz*, 389 U.S. at 359.

One of the dual purposes of federal Title III Wiretap Act is protecting the privacy of covered communications. It does so by proscribing not only unauthorized interception (18 U.S.C. § 2511(1)(a)), but also the intentional use and disclosure of illegally obtained intercepted communications. See 18 U.S.C. § 2511(c), (d). The purpose of the use and disclosure proscriptions is to reinforce the interception by denying the wrongdoer the fruits of his or her conduct, and eliminating the demand for those fruits by third parties. See 18 U.S.C. §§ 2515 and 2517(3); *Craiktree*, 565 F.3d at 888 (citing *Nerher*, 222 F.3d at 604 (quoting *Gelbard*, 408 U.S. at 50)).

The government bears the burden of proving that the defendant's consent was voluntary and it may do so by showing that the defendant proceeded with conversations knowing that law enforcement officials were monitoring and recording the conversations. See *United States v. Staves*, 383 F.3d 977, 981 (9th Cir. 2004) (quoting *United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002)). See also Plea Proceeding Transcript, pp. 7, 21-27; 18 U.S.C. § 2511(2)(c); MCP Police Report #14026856.

The issue importance is enhanced by the fact that the lower courts decisions in this case at bar have seriously misinterpreted the Supreme Court's factual findings to the test pronounced in *Katz*, *supra*, in regard to invasions of privacy by the government. The Katz Test requires a two-fold analysis of privacy violation under the federal wiretap statute: (1) that a person have exhibited a subjective expectation of privacy, and (2) the expectation of privacy be one that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J. concurring).

The legislative history behind 18 U.S.C. § 2510(2) reflects Congress' intent that *Katz* serve as a guide to define communications that are uttered under circumstances justifying an expectation of privacy. See S. Rep No. 1097, 90th Cong. & Admin. News pp. 2112, 2178; *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978). A

person's reasonable expectation of privacy is a matter to be considered on a case-by-case basis, taken into consideration its unique facts and circumstances. *Gelbard*, 408 U.S. at 48. Generally, the test applied in *Katz* is in two part: (1) did the unwary suspect involved have a subjective expectation of privacy, and (2) was that expectation objectively reasonable. *McIntyre*, 582 F.2d at 1223 (quoting *Katz*, 389 U.S. at 361).

As in this case at bar, both parts of the *Katz* standard or inquiry must be answered in the affirmative. Yes, the Petitioner met with Montgomery County Police Undercover Agent, Detective Bullock, ID #1426, who had represented himself, albeit falsely as a friend to both Petitioner's friends, Onana Vincent and Michael Faison, the MCP Confidential Informant (CI), and that, he lives in New York and had child support dispute in Philadelphia court on that same day of June 6, 2014 with his "baby mother." The Petitioner also shared his own frustration over a custody dispute and child support issues with his own child's mother. The Petitioner never paid the police undercover \$300 to kill his ex-wife. The Petitioner did not personally expect, nor did he consent, for his conversations to be recorded without a court order by the MCP undercover agent, Detective Bullock, in his private car. See 18 U.S.C. § 2518(11). Certainly, no reasonable person entering a private car under similar circumstances would have anticipated his or her oral conversations would be electronically monitored and recorded by a government agent without a court order or his or her consent. See 18 U.S.C. § 2518(11) (citing Plea Proceeding Transcript, p. 7; MCP Police Report #14026856).

The Petitioner, therefore, did partake in an oral communication under Title 18 U.S.C. § 2510(2), a term whose meaning this Court finds was clearly established federal law as determined by the Supreme Court within the context of *Katz*, in 1967.

As here, the state post-conviction court's factual findings in light of the evidence presented on 10/19/16 was contrary to the clearly established federal law as determined by the Supreme Court. *Bell v. Cone*, 535 U.S. 685, 694 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)). See also Plea Proceeding Transcript, pp. 7, 21-27; MCP Police Report #14026856; Case 8:17-cv-01912-PWG, Document 7, filed 9/18/17.

The state court's decision that the illegally obtained evidence may be considered by a grand jury, see *United States v. Calandra*, 414 U.S. 338 (1974) (evidence obtained in violation of the Fourth Amendment is admissible in a grand jury proceeding), and thus illegally obtained wiretap evidence should not be precluded from its consideration under the wiretapping statutory exclusionary rule under Title III, § 2515. The state court adds further that no need, for prior judicial approval for grand jury use of wiretap evidence of unspecified offense, is mandated by federal law. Therefore, dismissal of the indictment so obtained was improper. The state court reads Title 18 U.S.C. § 2515 of federal Title III differently, but § 2515 bars against the use of such evidence before a grand jury. *Craiktree*, 565 F.3d at 888 (quoting *Gelbard*, 408 U.S. at 50).

Title 18 U.S.C. § 2515 reads as follows:

"Whenever any wire or oral communication ~~has been~~ intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." See also *In re Persico*, 491 F.2d 1156 (2nd Cir. 1974).

When the evidence of the offenses other than those specified in the order of authorization "was submitted to the grand jury without the prerequisite subsequent application required by Title 18 U.S.C. § 2517(5), it was done in violation of this

chapter as proscribed by Title 18 U.S.C. § 2515. That dismissal of the indictment obtained upon the disclosure to grand jury of communications intercepted beyond authorized limits was the only reasonable sanction available." *Crahtree*, 565 F.3d at 888 (quoting *Gelbard*, 408 U.S. at 48).

B. CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT

Under the current law, where a state court has adjudicated the merits of a federal claim, Title 28 U.S.C. § 2254(d) provides the appropriate analytical framework for assessment. Section 2254(d) reads:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in a state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In reviewing a habeas corpus challenge to a state court conviction under Title 28 U.S.C. § 2254(d), the review is limited to the record before the state courts at the time the relevant decisions were made. *Cullen v. Pinholster*, 563 U.S. 170, 181–182 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). The habeas corpus court presumes that the state court's factual determinations are correct and the petitioner bears the burden of proving otherwise by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

The state court's finding that trial counsel did not perform below the constitutional standard of reasonableness because the law was unsettled, conflicts with this Court's decision in *Strickland*, that have addressed the standard for judging effective assistance of counsel as it relates to the challenged evidence with a motion to suppress. See Circuit Court Docket Entries #'s 22–29; Police Report #14026856.

Under clearly established federal law, the Petitioner argues that the state courts erred by concluding his guilty plea was knowing, voluntary, and intelligent because he did not know at the time he entered his guilty plea the state prosecutor suppressed the post-surveillance notice of the illegally obtained wiretapped evidence. See MCP Police Report #14026856 and Plea Proceeding Transcript, pp. 7, 21-33. The Petitioner essentially contends that his guilty plea is constitutionally infirm for two distinct reasons: (1) the prosecutor's underlying pre-plea misconduct rendered his guilty plea involuntary under *Brady v. United States*, 397 U.S. 742, 748 (1970), and (2) the government failure to meet its evidentiary disclosure obligations under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), was contrary to clearly established federal law as determined by the Supreme Court. See also MCP Police Report #14026856.

Where a habeas petitioner seeks to initiate an appeal of the dismissal of his petition after the AEDPA's effective date, the right to appeal is governed by the requirements now found at 28 U.S.C. § 2253(c) which provides that, *inter alia*, that such an appeal may not be taken unless a circuit judge or justice issue a certificate of appealability (COA), pursuant to § 2253(c)(1), and the COA may be issued only if the applicant has made a substantial showing of denial of constitutional rights pursuant to § 2253(c)(2). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When the U.S. District Court and the U.S. Court of Appeals denies habeas relief on the merits, the petitioner satisfies the standard by demonstrating that reasonable jurists would find that the U.S. District Court's and U.S. Court of Appeals' assessment of the constitutional claims is debatable or wrong. *Id.* at 484. The standard for issuance of a COA was a substantial showing of denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). In *Slack v. McDaniel*, *supra*, the Supreme Court ruled that the language of Title 18 U.S.C. § 2253(c)(2) should be

given the meaning ascribed in *Barefoot* with due note for the substitution of the word constitutional. See *id.* at 483–84. For a COA to be issued, the petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Id.* The Supreme Court did not specify how courts should interpret the substitution of the word constitutional, which has led to differing interpretations among the U.S. circuits. Compare *Grotto v. Herbert*, 316 F.3d 198, 209 (2nd Cir. 2003); *United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997); *Byrd v. Henderson*, 119 F.3d 34, 36 n.3 (D.C. Cir. 1997). In *Miller-El v. Cockrell*, 537 U.S. 332, 336–37 (2003) this Court held that a COA determination should be a separate proceeding distinct from a determination of the merits of the petitioner's claims.

In *Slack*, the Court also ruled that a dismissal of habeas petition on procedural grounds does not bar issuance of a COA. *Slack*, 529 U.S. at 484–85. When the U.S. District Court and the U.S. Court of Appeals denies habeas corpus relief on procedural grounds, without reaching the petitioner's underlying constitutional claims, a COA should issue when the petitioner shows that (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right, and (2) jurists of reason would find it debatable whether the U.S. District Court and U.S. Court of Appeals was correct in its procedural ruling. *Id.*

While an appeal is a continuation of the litigation started in the trial court, it is a distinct step in the criminal proceedings. *Hohn v. United States*, 524 U.S. 236, 241 (1998). In setting forth the preconditions for the issuance of a COA under 28 U.S.C. § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal. This conclusion follows from the AEDPA's present provisions which incorporated earlier

habeas corpus principles. *Lindh v. Murphy*, 521 U.S. 320 (1997).

As in this case at bar, the issues presented on appeal to the U.S. Court of Appeals for the Fourth Circuit were as follows:

- (1) whether the guilty plea was unknowing and involuntary;
- (2) whether the indictment was based upon an illegal wiretapped and false evidence;
- (3) whether the defendant received ineffective assistance of trial counsel;
- (4) whether the defendant's Sixth Amendment right to a speedy trial was violated, etc.

On December 4, 2018 the U.S. Court of Appeals for the Fourth Circuit summarily dismissed the appeal without a review of the transcripts including other discovery evidence. The Petitioner's Motion for Rehearing With Suggestion For Rehearing En Banc was also summarily denied without any opinion of the court. The Petitioner did satisfy the standard set forth in Title 28 U.S.C. § 2253(c)(2) by demonstrating that reasonable jurists would find that the U.S. District Court and U.S. Court of Appeals' assessment of his constitutional claims were debatable in the context of *Slack* and *Barefoot* but was overlooked by the U.S. Court of Appeals for the Fourth Circuit. See *Slack*, 529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893).


CONCLUSION

For the reasons stated herein above, the Petitioner respectfully requests this Honorable Court en banc grant his petition for writ of certiorari as the Court is presented with questions of exceptional importance that underscore the unsettled nature of the law and conflicts with the authoritative decisions of the Supreme Court of the United States that have addressed these issues.

Pursuant to Title 28 U.S.C. § 1746, I solemnly declare and affirm under penalty of perjury, and upon personal knowledge, that the foregoing is true and correct. I also certify that the grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

Respectfully submitted,

11/24/2019
Date


Dr. Ndokey P. Enow, *pro se*

Dr. Ndokey P. Enow
DOC ID No. 435-845/SID No. 1990859
Roxbury Correctional Institution
18701 Roxbury Road
Hagerstown, Maryland 21746

November 24, 2019

United States Supreme Court
c/o-Clerk of the Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Record No. 19-5606

Dear Clerk:

Per your instruction the enclosed Motion for Rehearing is being refiled in accordance with S. Ct. R. 44(2). The petition briefly and distinctly states its grounds and is accompanied by a certificate stating the grounds are limited to intervening circumstances of substantial or controlling effect or to other grounds not previously presented. In addition, the petition for rehearing has been submitted in good faith and not for delay.

If you have have any further questions please do not hesitate to contact me at the address provided above. In advance, please allow me to express my sincere appreciation for all your time and consideration. Thank you.

Sincerely,

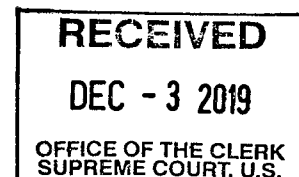
 11/24/2019

Dr. Ndokey P. Enow

cc:



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**Additional material
from this filing is
available in the
Clerk's Office.**