

19-5669

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

TERM, _____

Supreme Court, U.S.

MATTHEW DAVIS

AUG 08 2019

Petitioner,

OFFICE OF THE CLERK

v.

UNITED STATES OF AMERICA

Respondent.

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

Matthew Davis
Fed. Reg. No. 24323-045
Petitioner Pro Se
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QUESTION PRESENTED

Petitioner is serving a 360-month sentence for a charge of Conspiracy to Distribute 1000 grams or more of heroin and same amount of cocaine, in violation of 21 U.S.C. 841 (a)(1), (b)(1)(A), 846, and 851. The jury was improperly instructed to convict Petitioner if they found him guilty of the lesser substantive-charge of Distribution of Drugs; a crime that he was never charged with which does not encompass the laws and elements of 21 U.S.C. 846 conspiracy; directly violating his Fifth Amendment right that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury." U.S. Const. Amend. V.

The district court determined, in response to Petitioner's initial motion under 28 U.S.C. 2255, that the Government's instruction to the jury that "we are charging him with Distribution of Drugs, and that's what the law requires." (TR 30) "[a]s well as other similar statements made to the jury... Davis was charged with Conspiracy to Distribute and the quoted-statement accurately reflects the charge." (See Dist. Ct. Order p. 3-4)(Case 4:17-cv-01035-GAF; Doc. #9, filed 08/28/18 p.3 of 10).

Petitioner respectfully submits that it is reasonably debatable among jurist of reason that the Jury Instructions given in this case make it clear that the "[e]lements of the crime of Distribution of a controlled substance are:" (See Jury Instruction No. 18)(Case 4:12-cr-00063-GAF; Doc. #447 filed 04/01/14, p. 29 of 55) a distinct and substantive crime that shares none of the same elements as 21 U.S.C. 846 "The crime of conspiracy to Distribute a controlled substance..." as defined in Jury Instruction No. 16. (Id. Doc. #447, p. 25 of 55).

The Question Presented is:

Whether it is reasonably debatable among jurist of reason that Petitioner is entitled to further consideration on his initial motion under 28 U.S.C. 2255 that his trial counsel was ineffective for failing to object to the Government's repeated Constructive Amendment when it instructed the jury to convict the Petitioner of a crime he was never charged with and the District Court's denial of the motion was based on its erroneous determination that the Government's assertion of the wrong charge as being "Distribution of Drugs" accurately reflected the correct charge of "Conspiracy to Distribute Drugs" when none of their elements are the same.

TABLE OF CONTENTS

QUESTION PRESENTED	i,ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv,v
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED	2-4
STATEMENT OF THE CASE	5
REASONS FOR GRATING THE WRIT	6-12
I. It is at least debatable among jurist of reason whether Petitioner is entitled to further consideration on this initial motion under 28 U.S.C. 2255 and Movants Supplemental Reply Suggestions in Support of Section 111(c) of his motion under 28 U.S.C. 2255 that trial counsel was ineffective, when the district courts denial of the motion was based on its erroneous determination that the Governments assertion of the wrong charge as being "Distribution of Drugs" accurately reflects the correct charge "Conspiracy to Distribute Drugs" when none of their Elements are the same.	
CONCLUSION	12,13

TABLE OF AUTHORITIES CONT.

Statutes

21 U.S.C. 841(1)(1), (b)(1)(A).....	i,5
21 U.S.C. 846.....	i,2,3,5
28 U.S.C. 1254(1).....	2
28 U.S.C. 2253.....	3,6
28 U.S.C. 2253(c).....	3,4,6,12
28 U.S.C. 2255.....	1,2,5,6,12
28 U.S.C. 2255(a).....	3,5

Black's Law Dictionary 10th Ed.

Legal Definition of: CHARGE.....	8
Legal Definition of: CONSTRUCTIVE AMENDMENT.....	7

Jury Instructions

Instruction No. 16: Crime of Conspiracy to Distribute a Controlled Substance.....	i,4,8
Instruction No. 18: Crime of Distribution of a Controlled Substance...	i,4,5,8

Constitutional Provisions

Fifth Amendment Due Process of Law.....	2,12
Sixth Amendment Assistance of Counsel.....	2,12

TABLE OF AUTHORITIES

Cases

Barefoot v. Estelle, 463 U.S. 880, 893 n.4.....	6
Davis v. United States, No. 17-01035-CV-W-GAF (W.D.MO. AUG. 28, 2018).....	2
Davis v. United States, No. 18-3283 (8th Cir. March 8, 2019).....	2
Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992).....	11
Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995).....	11
Miller-El v. Cockrell, 537 U.S. 322, 327, 336-38 (2003).....	6, 12
McMann v. Richardson, 397 U.S. 759, 761 n.14 (1970).....	11
Slack v. McDaniel, 529 U.S. 473, 481 (2000).....	6, 12
Strickland v. Washington, 466 U.S. 668 (1984).....	11
United States v. Begnaud, 783 F.2d 144, 147 (8th Cir. 1986).....	10
United States v. Davis, Crim No. 12-00063-09-CR-W-GAF (8th Cir. Sept. 26, 2016).....	2
United States v. Holder, 721 F.3d at 986-87.....	11
United States v. Johnson, 719 F.3d 660, 668 (8th Cir. 2013).....	7
United States v. Johnston, 227 F. Supp. 2d 1051 (8th Cir. 2002).....	7
United States v. Whirlwind Soldier, 499 F.3d 862, 870 (8th Cir. 2007).....	10

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Matthew Davis PRO SE, respectfully petitions for a Writ of Certiorari to the United States Court of appeals for the Eighth Circuit.

OPINION BELOW

On August 28, 2018, the district court denied Petitioner's initial 28 U.S.C. 2255 motion and Movant's Supplemental Reply Suggestions in Support of Section 111(c) of his motion under 28 U.S.C. 2255 and declined to issue a certificate of appealability ("COA"). Davis v. United States, Nos. 17-01035-cv-w-GAF, 12-00063-09-cr-w-GAF (W.D. Mo. Aug. 28, 2018). On March 8, 2019, Petitioner's COA application was denied and his appeal dismissed. Davis v. United States, No. 18-3283 (8th Cir. Mar. 8, 2019). On May 31, 2019, Petitioner filed a petition for Rehearing and Rehearing En Banc. On June 26, 2019 the Eighth Circuit entered a MANDATE in accordance with the judgment of March 8, 2019. These decisions are included in Appendix A.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit was entered on March 8, 2019. On June 26, 2019 the Eighth Circuit entered a MANDATE in accordance with the judgment of March 8, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall... be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, "in all criminal prosecutions, the accused shall enjoy the right... to have Assistance of Counsel for his defense."

* * *

21 U.S.C. 846, Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for

the offense, the commission of which was subject of the attempt or conspiracy.

Sections 801 to 971 of Title 21 of U.S.C. is part of the Controlled Substance Act therefore a conspiracy to distribute heroin in violation of 846 is a felony punishable under the Controlled Substance Act.

28 U.S.C. 2255(a)

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. 2253:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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 -

- (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
- (B) the final order in a proceeding under section 2255.

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

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

* * *

Jury Instruction No. 16: Id. (in pertinent part)

The crime of conspiracy to distribute a controlled substance has four (4) elements, which are:

- One, two (2) or more persons reached an agreement, or came to an understanding, to distribute a controlled substance
- Two, the Defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;
- Three, at the time the Defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and
- Four, the agreement or understanding involved one-thousand (1000) grams or more of heroin and some amount of cocaine.

Jury Instruction No. 18: Id. (in pertinent part)

The crime of distribution of a controlled substance has two (2) elements, which are:

One, the Defendant intentionally transferred a controlled substance to another person; and

Two, at the time of the transfer, the Defendant knew that the substance transferred was a controlled substance.

STATEMENT OF THE CASE

On April 1, 2014, following a jury trial, Petitioner was convicted of conspiracy to distribute 1000 grams or more of heroin and some amount of cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), 846, and 851. On November 24, 2014, the Court entered judgment, sentencing Petitioner to 360-months followed by 5 years supervised release.

Petitioner, through counsel, timely filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence and dismiss the charges against him, or, alternatively, grant him a new trial. On August 28, 2018 the district court denied Petitioner's 2255 motion and declined to issue a certificate of appealability ("COA").

Petitioner, pro se, appealed the denial of his 2255 motion and requested a COA as to his Fifth Amendment right to due process of law and Sixth Amendment right to effective assistance of counsel.

On March 8, 2019, the Eighth Circuit denied Petitioner's COA application and dismissed his appeal. On May 31, 2019, Petitioner filed a Petition for Rehearing and Rehearing En Banc. On June 26, 2019, the Eighth Circuit entered a MANDATE in accordance with the judgment of March 8, 2019.

Petitioner now seeks a writ of certiorari as to only the issue of his ineffective assistance of counsel claim that violated his Fifth and Sixth Amendment rights as outlined in his initial motion under 28 U.S.C. 2255 and Movant's Supplemental Reply Suggestions in Support of Section 111(c) of his 2255 Motion.

REASONS FOR GRANTING THE WRIT

- I. It is at least debatable among jurist of reason whether Petitioner is entitled to further consideration on his initial motion under 28 USC 2255 and Movant's Supplemental Reply Suggestions in Support of Section 111(c) of his motion under 28 USC 2255, that trial counsel was ineffective when the district court's denial of the motion was based on its erroneous determination that the Governments' assertion of the wrong charge as being "Distribution of Drugs" accurately reflects the correct charge "Conspiracy to Distribute Drugs" when none of their elements are the same.

The standard for the issuance of a COA is set out in 28 U.S.C. 2253, which provides, in pertinent part, that the movant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). A movant satisfies this standard by "demonstrating that jurist of reason would disagree with the district court's resolution of his constitutional claims or that jurist could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see also Slack v. McDaniel, 529 U.S. 473, 481 (2000)(same).

It is important to emphasize that a petitioner need not establish that he will eventually prevail on the merits of his claims in order to demonstrate his entitlement to a COA. In Miller-El, this Court specifically noted that "a COA does not require a showing that the appeal will succeed," and neither should a Court deny

the application for a COA merely because it believes the applicant 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. It is consistent with 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), we do not require petitioner to prove, before the issuance of a COA, that some jurist would grant the petition for habeas corpus. Indeed, a claim can be debatable even thought every jurist might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail.

Miller-El, 537 U.S. at 336-38.

It is at least debatable among jurist of reason whether a constructive amendment occurred at Petitioner's trial by the Government's instruction to the jury to convict the Petitioner of a crime he was never charged.

The district court denied Petitioner's initial 2255 motion based on its erroneous determination that the Government's instruction to the jury that "we are charging him with Distribution of Drugs, and that's what the law requires." (TR 30) "[a]s well as other similar statements made to the jury... Davis was charged with conspiracy to distribute and the quoted-statement accurately reflects the charge." Id. (Quoting Dist. Ct. Order p. 3-4). This determination necessarily requires a determination as to the definition of a constructive amendment.

It is well settled principle of constitutional law that an indictment may not be broadened through amendment except by grand jury. The basic difference between a constructive amendment and a variance is this: a constructive amendment changes the charge, while the evidence stays the same, and a variance changes the evidence while the charge remains the same. The difference is significant. A constructive amendment is reversible error *per se* but a variance is subject to the harmless error rule. United States v. Johnston, 227 F.Supp.2d 1051 (8th Cir. 2002). That difference stems from the underlying constitutional right affected. A constructive amendment directly violates the Fifth Amendment right not to be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury. United States v. Johnson, 719 F13d 660, 668 (8th Cir. 2013).

Petitioner submits that his initial 2255 motion as well as Movant's Supplemental Reply suggestions in Support of Section 111(c) of his 2255 motion did raise the issue of trial counsel failing to object to the Government's repeated Mischaracterizations of the charge against Petitioner as being "we are

charging him with Distribution of Drugs, and that's what the law requires."

(Id) Being an independent constitutional violation, a constructive amendment; in the proper context to tell a jury of a charge as defined by Black's Law Dictionary, 10th Ed., as being (1) "a formal accusation of an offense as a preliminary step to prosecution. (2) to "Instruct a jury as to Matters of Law," is by its very definition a Constructive Amendment as Petitioner was not charged with Distribution of Drugs nor was Distribution an element of the crime he was charged with. Id. (See Jury Instructions No. 16 and No. 18)

This broadening of the possible bases for conviction was further being emphasized in the Government's case-in-chief by the direct testimony of the lead Detective who told the jury "they're being charged with Distribution of Drugs. And Distribution --- I can give you a drug. I can give you anything." (TR 975).

In the Government's case against Petitioner the prosecutor repeatedly argued and elicited testimony from its lead Detective that Petitioner was actually being charged with Distribution of Drugs. To prove this crime the Prosecutor during direct-examination of their key witness, Spencer Woodard, asked the following questions:

Q. Now, I want to address matters only within your personal knowledge or that Mr. Davis may have told you about. How many people, and if you can name them, were there that you saw Mr. Davis give cocaine to?

A. Well, I saw him give cocaine to Fran, of course. There was a couple by the name Aaron and Georgia, and he gave them cocaine and heroin. Daniel Yousef. Really anybody that was around Matt then he was partying or had people at his house or wherever he lived would get drugs from him, and that was one of the attractions that all of these drug users had was that he had a lot of money and had a lot of drugs and he was willing to share them. (TR 303-304).

Q. Did you know someone named Greg Champion?

A. Yes, I did.

Q. Did you see Mat give him anything?

A. Yes, I did.

Q. What was that?

A. Cocaine. (TR 304).

This is significant because not only was Petitioner not charged with Distribution of Drugs, none of these people testified or were made available for trial and Davis' defense attorneys were unprepared to defend against any uncharged substantive Distribution claims violating his Fifth Amendment right to due process of law by being held to answer for a capital or otherwise infamous crime.

It is also highly significant and fatal to Petitioner that his trial counsel, as alleged, also failed to object to the Government's continued amendment to the charge of Conspiracy by exclusively arguing only the two elements of the lesser substantive-charge of Distribution to convict. The following examples of the Governments' closing argument demonstrate the constructive amendment in its progress:

And remember, again, that what is required here for a Distribution or a Conspiracy to Distribute is a transfer, not a sale. A Distribution. (TR 1253)

Did Mr. Davis sell the stuff? It's not required that he have done so. Again, he lost money. He was giving it away for his own purposes, but any Distribution, any transfer from one person to another is sufficient and that's what the evidence showed. (TR 1258).

We charged a specific code section under the law and that's Distribution and Conspiracy to Distribute. (TR 1295).

Yes, the instruction says without more a Buyer-seller relationship isn't enough, but we have more. We have evidence Mr. Davis made Distributions himself. (TR 1296).

If you believe any of them, those who talked about Davis' Distributions then he is at least guilty of the conspiracy count. (TR 1299).

SEE: Movant's Supplemental Reply Suggestions in Support of Section 111(c) of his 2255 (Case No. 4:17-cv-01035-GAF, Document 7-1, filed 04/05/18, p. 3-4 of 7)

"A constructive amendment occurs when essential elements of the offense as charged in the indictment are altered, either actually or in effect by the prosecutor or court, often through the evidence presented at trial that the jury's

allowed to convict the defendant of an offense different from or in addition to (in this case less-than) his offense charged." Quoting United States v. Begnaud, 783 F.2d 144, 147 (8th Cir. 1986).

The jury was repeatedly told (TR 30); the Government elicited testimony from its lead Detective (TR 975); and it was exclusively argued to convict (TR 1253) (TR 1258) (TR 1295) (TR 1296) (TR 1299); that Petitioner was "being charged with Distribution of Drugs, and that's what the law requires." Id. This crime has only two elements: (1) that there was an intentional transfer; and (2) the defendant knew the substance transferred was controlled. None of this was Petitioner actually charged with which had to be confusing to a jury.

"The question is whether the evidence, arguments, or instructions at issue created a substantial likelihood that the defendant was convicted of an uncharged offense." Quoting United States v. Whirlwind Soldier, 499 F.3d 862, 870 (8th Cir. 2007).

The actual crime Petitioner was charged with, Conspiracy to Distribute, all distributions would have been moot absent evidence of an agreement to do so, an actual element of the correct charged offense in the indictment. It is highly significant, that in a light most favorable to the government, Petitioner had no role in the conspiracy and all "Distributions" were done in the ocntext of sharing in a social-setting from average purchases of one-third of a gram, \$50.00 worth, to a gram, \$200.00 worth. (TR 294-95) and (1044). Not a single witness testified, and was conceded by the Government,¹. Petitioner was compensated in any or in agreement with anyone to share a portion of his personal use drugs.

1. "Again, he lost money. He was giving it away for his own purposes, but any Distribution, any transfer from one person to another is sufficient and that's what the evidence showed." (TR 1258) Quoting AUSA's Closing Argument.

The Sixth Amendment to the United States Constitution provides, "in all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. The Supreme Court has long recognized that the right to counsel includes "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). Ineffective assistance of counsel claims are governed by the two-pronged test in Strickland v. Washington, 466 U.S. 668 (1984):

For a claim to be cognizable, (1) counsel's performance must rise to the level of constitutional deficiency, and (2) the defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different, i.e., that the defendant was prejudiced by the deficiency. An attorney's performance is deficient when he makes errors so serious that counsel was not functioning as the counsel guaranteed... by the Sixth Amendment.

Holder, 721 F.3d at 986-87 (alteration in original)(internal quotation marks omitted).

Petitioner submits that it is reasonable debatable among jurist of reason, given the totality of the government's constructive amendment to the charge of Conspiracy, i.e., interchanging the elements with Distribution; and further directly asserting the charge as being Distribution and that's what the law requires; that his trial counsel's failure to object "[h]is performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense." Nave v. Delo, 62 F.3d j1024, 1035 (8th Cir. 1995)(quoting Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992)).

Further, it is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Holder. This is especially true in light of the only evidence presented at trial, and conceded by the government; "[h]e lost money. He was giving it away

for his own purposes, but any Distribution, any transfer from one person to another is sufficient and that's what the evidence showed" (TR 1258) was that Petitioner may have - on occasion - shared drugs in a social-setting. (TR 303-304). This, of course, would have been sufficient to convict Petitioner of "Distribution" the charge the government repeatedly told the jury he was facing and his attorney failed to object to.

CONCLUSION

The district court denied Petitioner's initial 2255 motion and Movant's Supplemental Reply suggestions in Support of Section 111(c) of his motion under 28 U.S.C. 2255, based on its erroneous determination that the Government's improper instructions and arguments made in furtherance to the jury that Petitioner was being charged with Distribution of Drugs and if found he had distributed any drugs, for profit or not, was guilty accurately reflected a charge for conspiracy to Distribute when the two crimes are distinct and share none of the same elements.

Petitioner respectfully submits that he has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). As to his Sixth Amendment right to effective assistance of counsel for failing to object to the Government's repeated mischaracterizations of the charge and elements against him (constructive amendment); and his Fifth amendment right that "[n]o person shall... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. A Petitioner satisfies this standard by "demonstrating that jurist of reason would disagree with the district court's resolution of his constitutional claims or that jurist could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see also Slack v. McDaniel, 529 U.S. 473, 481 (2000).

As a lay person, unskilled in the matters of researching Federal case law, I pray this Honorable Court review Petitioner's Pro Se motion on the true merits of the issues - supported by law - and not Petitioner's rudimentary application of Federal Procedure.

WHEREFORE, based on the foregoing arguments, authorities and jury instructions, which support Petitioners' claim of two distinct crimes being argued to convict which share none of the same elements, which by that very definition are not reflective of each other; for the reasons set forth herein the Petition for Writ of Certiorari should be granted.

Respectfully submitted by

Date: August, 7th, 2019

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