

19-5918

No. 18A1189

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.
FILED

JUL 18 2019

OFFICE OF THE CLERK

Brandon Kyle Thomas,
petitioner,

versus

United States of America,
respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Brandon Kyle Thomas #56300-018
Federal Correctional Complex
P O Box 1031 (Low custody)
Coleman, Florida 33521-1031

QUESTIONS PRESENTED

Question I

After trial and again after sentencing, Brandon Thomas requested that his attorney appeal the criminal judgment. Counsel's advice consisted of "if you appeal, you will get more time."

This court holds that attorney's failure to properly advise a criminal defendant concerning the benefits and detriments of filing an appeal constitutes deficient performance that is presumptively prejudicial. See *Idaho v. Garza*, 139 S.Ct. 738 (2019); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The Eleventh Circuit denied a certificate of appealability on the basis that Mr. Thomas could not show prejudice. Two questions emerge from the Eleventh Circuit's order:

1. Was counsel's single statement that "if you appeal you will get more time" adequate advice or deficient performance?
2. Does a single line from an attorney shift the presumption of prejudice from presumed to actual and injurious?

Question II

The Eleventh Circuit also concluded—without a certificate of appealability—that Mr. Thomas's otherwise valid (as alleged) § 2255 claims did not warrant a certificate of appealability because Mr. Thomas could not prove prejudice.

Did the Eleventh Circuit order violate the jurisdictional rule announced by this Court in *Buck v. Davis*, 137 S.Ct. 759 (2017)?

Question III

Mr. Thomas offered statements from witnesses that supported his claims of actual innocence, investigator misconduct, and a desire to appeal. The district court refused to permit the statements to be introduced into the record via Rule 7 or an evidentiary hearing.

Should the district court have conducted an evidentiary hearing before deciding the merits of Mr. Thomas's § 2255 motion?

LIST OF PARTIES INVOLVED

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

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is unreported, but has been fully reproduced in Appendix "1".

The opinion of the United States District Court for the Middle District of Florida Orlando Division denying the 28 U.S.C. § 2255 motion appears in Appendix "2"

JURISDICTION

The Eleventh Circuit Court of Appeals denied Mr. Thomas's application for a certificate of appealability on November 19, 2018. (Appendix "1").

The United States District Court for the Middle District of Florida, Orlando Division denied Mr. Thomas's 28 U.S.C. § 2255 motion on April 29, 2016. (Appendix "2").

This Court's grant of an extension of time up to and including July 21, 2019. (Appendix "3").

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(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 (Procedural History)

Brandon Kyle Thomas was charged with knowingly distributing or attempting to distribute images depicting child pornography and possession of images.

depicting child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(B) (a)(5)(B). After a jury trial, the district court sentenced Mr. Thomas to 120 month term of imprisonment. Mr. Thomas did not file a direct appeal.

In October 2013, Brandon Thomas filed a 28 U.S.C. § 2255 motion. The government responded on February 3, 2014. And on April 29, 2016, the Honorable John Antoon II, United States District Court Judge from the Middle District of Florida, Orlando Division denied Mr. Thomas's § 2255 motion.

On November 19, 2018, the United States Court of Appeals for the Eleventh Circuit issued an order "because Thomas has not made a substantial showing of the denial of a constitutional right, his motion for a COA is denied..." (Appendix "1", p.20).

STATEMENT OF THE FACTS

The crux of Mr. Thomas's argument is that "counsel did not asked him if he wanted to file an appeal until one day before the deadline to file an appeal" and "counsel advised against an appeal notably failing to explain the more favorable standards of review accorded a direct appeal." (Appendix "1", p.10).

Additionally, the district court failed to hold an evidentiary hearing to develop the record for appellate review, failed allow Mr. Thomas to expand the record pursuant to Rule 7 with affidavits, and failed order discovery by the government before denying Mr. Thomas's § 2255 motion. The Eleventh Circuit affirmed the district court's denial of the § 2255 motion by not granting the certificate of appealability only solidifying the district court's erroneous decision.

This petition for certiorari ensues:

REASONS FOR GRANTING THE WRIT

1. The district and appellate courts applied the wrong standard for prejudice in the context of the denial of the right-to-appeal claim.

This Court holds that a presumption of prejudice exists when an attorney fails to file a direct appeal even though the defendant's plea agreement contained an appeals waiver, *Idaho v. Garza*, 139 S Ct 738 (2019), and even though the defendant's chances of success are small. See *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). After trial and sentencing, Mr. Thomas asked his attorney to appeal the conviction. Defense counsel made a single declarative statement about the length of the sentence. Counsel's answer was unresponsive to the question and did not instruct Mr. Thomas on the benefits or detriments of appealing or not appealing. Yet, without an evidentiary hearing the district court denied Mr. Thomas's ineffective assistance for failing to file a direct appeal because "Petitioner has not shown how counsel's actions resulted in prejudice. Accordingly, this claim is denied." (Appx. "2" at 4). In addition to the previously discussed procedural mistake (no evidentiary hearing), the district court either applied the wrong legal standard (prejudice should have been presumed) or misapprehended the factual record (unresponsive nature of the attorney's answer).

On the verified record, Mr. Thomas states that his attorney's consultation concerning a direct appeal took no more than a few seconds and consists of the advice, "you do not want to appeal you could get more time." Counsel's perfunctory dismissal of Mr. Thomas's request for appeal—especially after a trial—is per se deficient performance. See *Roe v. Flores-Ortega* 528 U S 470 (2000). Further Mr. Thomas states that if he had been advised about the

consequences of not filing a direct appeal (e.g. procedural default, transcripts availability), then he would have insisted on an appeal. The government does not contravene these allegations, let alone conclusively refute them. Nonetheless, the district court denied by the § 2255 motion and the appeals court denied a certificate of appealability.

This Court recently pronounced that, an accused's subjective motives were salient to establishing prejudice. That is, even if the person's objective chances of success were minute, a subjective belief that the consequences of a guilty plea were too harsh. Sufficient to establish prejudice. *Lee v. United States*, 137 S. Ct. 1958 (2017). Applying this rule to trial context, in habeas context, it is irrelevant whether the district court agrees with the defendant's motive; the only relevant question is whether the defendant would have appealed if accurately informed. Correspondingly, jurists of reason would find debatable the district court's conclusion: Mr. Thomas's unrefuted allegations were insufficient to establish prejudice. (Appx. "2" at 4).

2. The Eleventh Circuit effectively conducted a merits analysis in order to deny a Certificate of Appealability

A federal court should grant a habeas petitioner a certificate of appealability when the petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000). A petitioner makes the substantial showing by demonstrating that reasonable jurists would find the district court's ruling on the merits debatable or wrong. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (citing *Slack*, 529 U.S. at 484). A petitioner can also make the substantial showing by demonstrating that jurists of reason would find that that "issues presented deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)).

The certificate of appealability stage involves only a threshold inquiry entailing a cursory examination of the factual or legal basis adduced in support of the questions to be certified. **Miller-El**, 537 U.S. at 336. In other words, a petitioner need not show that he would succeed on the merits, but only that the questions are worthy of debate. The Supreme Court emphasizes that a court "should not decline the application for a certificate of appealability merely because the application will not demonstrate an entitlement to relief." *Id.* at 338. If there is any doubt regarding whether to grant a certificate of appealability the matter should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making the determination. Cf. **Shinisday v. Quarterman**, 511 F.3d 514, 520 (5th Cir. 2007).

When a district court denies a § 2255 claim on procedural grounds, a petitioner must demonstrate not only that the substantive claim is valid, but also that reasonable jurists would find the procedural ruling debatable or wrong. **Slack**, 529 U.S. at 484.

Recently, the Supreme Court emphasized that "the COA statute sets forth a two-step process" for determining whether a certificate of appealability should be issued. Initially, the reviewing judge should determine "whether a claim is reasonably debatable, and if so an appeal in the normal course" ensues. **Buck v. Davis**, 137 S. Ct. 759 (2017) (citing 28 U.S.C. § 2253).

Substance Over Form

In **Buck**, the Supreme Court stated "the Fifth Circuit phrased its determination in proper terms. But it reached its conclusion only after essentially deciding the case on the merits", that is, "repeatedly faulting Buck for having failed to demonstrate extraordinary circumstance." After which the Supreme Court held, "[t]he question for the Court of Appeals was not whether Buck had shown that his case was extraordinary; it was whether jurists of reason would debate the issue." **Buck**, 580 U.S. at 774.

More emphatically, the Supreme Court pronounced "[w]hen a Court of Appeals sidesteps [the COA] process by first deciding the merits of the appeal, and then justifying its denial of a COA based on adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. **Buck**, 580 U.S. at 773 (citing **Miller-El v. Cockrell**, 537 U.S. 322, 326 (2003)).

Here the district court's decisions to truncate the record and not conduct an evidentiary hearing prevented a fair adjudication of the ineffective assistance grounds. The district court's procedural rulings were debatable the substantive grounds were valid.

3. The district court refused to conduct an evidentiary hearing and refused to allow third-party witness statements into the record. These rulings were wrong and they prevented Mr. Thomas from proving his ineffective assistance grounds.

Governing decisional and statutory authority entitled a § 2255 movant to an appointed attorney and an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief." 28 U.S.C. § 2255(b); see **Townsend v. Sain**, 372 U.S. 293 (1963). Stated otherwise, a petitioner need only allege—not prove—reasonably specific non-conclusory facts that if true, would entitle him to § 2255 relief in order to receive an evidentiary hearing. **Schriro v. Landrigan**, 550 U.S. 464, 473-75 (2007).

Operatively, this requires the reviewing court to presume the movant's allegations are true unless conclusively refuted by the record, or scientifically impossible, or merely unsupported conclusory generalization. See **Fontaine v. United States**, 411 U.S. 213, 215 (1973).

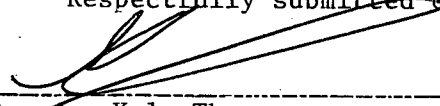
The district court did not apply this presumption; it did not presume Mr. Thomas's allegations to be true. For example, Mr. Thomas stated that if he had known that he could appeal his conviction and not his sentence, then

he would have appealed. (Appx. "2" at 4). Also, Mr. Thomas alleged that his counsel did not inform him that failing to appeal placed difficult, and sometimes insurmountable barriers to subsequent challenges to the conviction or sentence. Further, Mr. Thomas declared that if he had known about the procedural default or non-retroactivity effects of not appealing, then he would have appealed. (See Appx. "2" at 4). If these allegations are presume true, then Mr. Thomas is entitled to relief. Should the district court not, presume the allegations true, then the law requires the district court to afford Mr. Thomas the opportunity to adduce proof, that is, an evidentiary hearing. **28 U.S.C. § 2255**. Nonetheless, the district court summarily denies Mr. Thomas's § 2255 motion; even though neither the government nor former counsel disputed Mr. Thomas's allegations. The district court departed from established law when it failed to conduct evidentiary proceedings. See **28 U.S.C. § 2255(b); Rules Governing § 2255 Proceedings Rule 8**. Jurists of reason would find the district court departure debatable, and the Eleventh Circuit's refusal to grant a COA was wrong. This Court should grant the writ and direct the Eleventh Circuit to grant a COA in order to realign the Eleventh Circuit with the rest of the Court of Appeals, this Court's precedent, and Congress's statute. See also, S.Ct. Rule 10(a)(court of appeals "standard...a lower court departure" from the "accepted and usual course of judicial proceedings.").

CONCLUSION

This Court should grant the writ and remand the cause to the Eleventh Circuit Court of Appeals to consider whether a certificate of appealability should issue in the light of this Court's ruling in **Idaho v. Garza**, 139 S. Ct. 738 (2019).

Respectfully submitted on this 18 day of July, 2019, by:



Brandon Kyle Thomas