RECORD NO. _____

IN THE
Supreme Court of the United States

AARON LEE SMILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a plea agreement need to pass constitutional muster before it waives a person's right to challenge on appeal the forfeiture of his or her home?

II. While a majority of circuits allow forfeiture of a house in a plea agreement, will the Supreme Court of the United States stand with the minority who require plea agreements to be unequivocally unambiguous in their forfeiture clauses?

III. Whether a defendant can briskly and broadly waive away his constitutional rights by signing a plea agreement especially when there is evidence that the plea was signed under coercion and without the trial court inquiring about the coercion?

IV. Whether the Court of Appeals erred in relying on *United States v. Faulls*, 821 F.3d 502, 507-08 (4th Cir. 2016) and dismissing Appellant's claims of ineffective assistance of counsel without a proper review in light of the overwhelming evidence of Appellant's trial attorney failing to conduct as a reasonably competent attorney and prejudice his client?

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IN THE

SUPREME COURT OF THE UNITED STATES

2018-2019 TERM, 2019

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit reflected in an unpublished opinion is provided in Appendix Volume 1 (A1).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit was entered on February 6, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved are the Due Process Clause of the Fifth and Fourteenth amendments, excessive fines clause of the Eighth amendment and the Sixth amendment right to competent counsel.

STATEMENT OF THE CASE

We adopt the Statement of the Case provided by the Court of Appeals in its opinion.

Aaron Lee Smiley pled guilty, pursuant to a written Fed. R. Crim. P. 11(c)(1)(C) plea agreement, to producing child pornography in violation of 18 U.S.C. § 2251(a) (2012). In the plea agreement, the parties stipulated to a sentencing range of 17 to 25 years. The district court imposed a 25-year sentence and ordered forfeiture of the residence owned by Smiley and his ex-wife. On appeal, Smiley contended that his plea was involuntary because the Government and his counsel withheld medical treatment until he pled guilty and because he did not know that the district court would order forfeiture of the residence. He also asserted that this trial counsel was ineffective, that the forfeiture of the residence was constituted an excessive fine in violation of the Eighth Amendment and that his sentence was unreasonable. The Government argued that Smiley's guilty plea was knowing and voluntary and that the remainder of the arguments are barred by the appeal waiver in his plea agreement.

The Appellate Court Panel ruled that Smiley's plea was knowing and voluntary. (Appendix I, p. A3). The Panel also held that Appellant's arguments about the forfeiture and 25-year sentence fell within the scope of the valid appeal waiver; and therefore, dismissed the arguments. (Appendix I, p. A3). Finally, the Panel ruled that "the record does not conclusively show that trial counsel was ineffective..." and denied Appellant's claim of ineffective assistance of counsel. (Appendix I, p. A4).

The Court of Appeals for the Fourth District affirmed Smiley's conviction and dismissed the remainder of his appeal. (Appendix I, p. A4).

REASONS FOR GRANTING THE PETITION

1. THE PLEA AGREEMENT, WHICH RELATED TO APPELLANT'S CONSTITUTIONALLY PROTECTED DUE PROCESS RIGHTS, WAS NOT KNOWING AND VOLUNTARY BECAUSE THE COLLOQUY WAS NOT CONDUCTED PROPERLY BY THE COURT AS IT FAILED TO ADDRESS THE GOVERNMENT'S LETTER TO THE COURT ABOUT THE COERCION OF APPELLANT

As the Court said in *Boykin v. Alabama* 395 (1969) U.S. 238, "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction." *Boykin v. Alabama* 395 (1969) U.S. 238, 242. Therefore, the U.S. Courts, Legislature and Administrative Agencies have fashioned protections to ensure that confessions are made voluntarily.

"A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." *Bram v. U.S.* (1897) 168 U.S. 532, 543. As stated previously, the right of a voluntary plea is protected by the Fifth and Fourteenth Amendments. *Malloy v. Hogan* (1964) 378 U.S 1, 6.

The Federal Rules of Criminal Procedure directs how the courts are to ensure the voluntary nature of a defendant's plea by explaining that judges should personally address defendants openly in court to clarify that the guilty plea is not tainted by force, threats or promises. F.R.C.P. Rule 11(b)(2).

Moreover, the method of examining plea agreements are rooted in contract law. Our "interpretation of plea agreements is rooted in contract law." *United States v. McLaughlin* (4th Cir. 2016) 813 F.3d 202, 204.

On July 13, 2017, Mr. Smiley made a call from jail to his wife in which he discussed the plea with his wife, and he indicated that if he took the plea, he would have to "perjure" himself: "[t]he plea agreement, in order for me to plead guilty to it, I have to perjure myself because half of it is not true . . . it's lies." (Phone Call at 2:22-2:31). More importantly, Mr. Smiley stated: "they're withholding medical treatment unless I plead guilty." (Phone Call at 2:43-2:47). He provided further detail about his complaint:

> I had a, a teleconference scheduled last Tuesday at 11 a.m. to go over a doctor about my . . . [condition]. At 6:45 they came to me and told me that was cancelled because they cannot treat me because I am not a convict. The lawyer told me, well the faster you plead guilty, then the faster we can work on getting you treatment. So, so I am being forced to, I have no choice, either I get no medical . . . it's, it's under duress for me to plead guilty. Besides the fact that I have to perjure myself to plead guilty. (Phone Call at 2:49-3:26).

Later in the call, the defendant also said, "I am under coercion to sign it because they refuse to treat me until I sign it, and in order to sign it I have got to perjure myself because there is a bunch of lies in there." (Phone Call at 15:45-15:55).

On July 14, the Government delivered a letter to the Court informing the court of Mr. Smiley's July 13, 2017 phone call to his wife. (Appendix II, p. A29). In the letter, the Government petitioned: "Given the implications of

these statements, the Government wanted to make the Court aware of them prior to Monday's hearing. In addition, the Government respectfully requested that the Court address these statements during the Rule 11 colloquy on Monday, in order to assess the voluntariness of the plea." (Appendix II, p. A29).

During the Hearing of July 17, 2017, Appellant announced his plea of guilty to Count One of the Third Superseding Indictment. (Appendix II, p. A32). At the July 17, 2017 Hearing, pursuant to Federal Rules of Criminal Procedure Rule 11(b)(2) the Court attempted to ensure that Mr. Smiley's plea was voluntary and intelligent. The Court asked Appellant if he was under the influence of any drug, medication or alcohol and Appellant answered negatively. (Appendix II, p. A33). Judge Robert W. Titus then asked if there is nothing affective Appellant's ability to understand the proceedings in court; and Appellant answered, "No." (Appendix II, p. A33). Afterwards the Court confirmed that Appellant is satisfied with his legal representation. (Appendix II, p. A34).

Judge Titus continued to conduct a standard, run-of-the-mill colloquy (Appendix II, A 35, A36, A37). Not once did Judge Titus inquire about the phone call and the claims of coercion that were raised in the phone call. The Court completely ignored the government's request.

At the Sentencing Hearing, Mr. Smiley revealed that he did not understand that as part of the plea agreement, his house was being forfeited.

(Appendix I, p A23). Appellant declared to the Judge, "I specifically questioned her [his attorney] about that in this plea agreement. She told me it was not part of the plea agreement. If I had known that was part of the plea agreement, I would not have pled guilty." (Appendix I, p A23). Mr. Smiley continued, "I was coerced. I was forced to plead guilty. Medical treatment was withheld from me. I was told I would not get medical treatment unless I pled guilty. She told me plead guilty, we'll get you medical treatment. She told me that [the] house would not be taken from my ex-wife. And now everything is changed in here today." (Appendix I, p A23-24). Judge Titus answered that he did not agree and that he will proceed to announce the sentence at this time. (Appendix I, p A24). After Judge Titus explained the details of sentence, Mr. Smiley blurted out, "Actually, I want a jury trial." (Appendix I, p A25). Again, at the end of the hearing, Appellant interjected, "I will be appealing. I want a jury trial." (Appendix I, p A26).

According to F.R.C.P. Rule 11 (b)(2), the Court has an affirmative obligation to actively inquire whether the Appellant's plea is truly voluntary. Here, once Mr. Smiley revealed that he would not have signed the plea agreement if he knew his home would be forfeited and that his attorney influenced him medical treatment, the Court needed to investigate whether the plea was truly intelligent, voluntary and without influence.

With the government's letter in hand informing the Court of Appellant's claims of coercion, the Court did not fulfill its affirmative

obligation to actively inquire whether the plea was truly voluntary. In so doing, the Court seemed to brush aside Appellant's Due Process rights. Yes, the court conducted a colloquy, but the Court failed to conduct a *proper colloquy* that inquired about the phone call, and the details of coercion raised in the phone call and subsequently in the People's letter to the Court.

Mr. Smiley's plea was given involuntarily in violation of the Fifth Amendment of the U.S. Constitution, therefore, a new trial must be ordered.

2. AN IMPORTANT SPLIT IN CIRCUITS NEEDS TO BE RESOLVED ON WHETHER A PLEA AGREEMENT CAN WAIVE AWAY AN APPELLANT'S CONSTITUTIONAL RIGHTS. IN OUR CASE, WHERE THERE IS EVIDENCE THAT THE PLEA AGREEMENT WAS SIGNED UNDER COERCION, THE COURT OF APPEALS ERRED IN DECLINING TO CONSIDER THE ISSUE OF FORFEITURE OF APPELLANT'S HOME

The Panel held that Appellant's arguments about the forfeiture and 25-year sentence fell within the scope of the valid appeal waiver; and therefore, dismissed the arguments. (Appendix I, p A3). The Eighth Amendment provides: "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense." *U.S. v. Austin*, 509 U.S. 602, 609-610. (1993).

Thomas Jefferson, one of our Founding Fathers said, "On every question of Construction (of the Constitution) lets us carry ourselves back to

the time when the Constitution was adopted, recollect the spirit manifested in the debates, instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." (Extract from Thomas Jefferson to William Johnson, June 12, 1823.)

The fundamental rights of democracy, justice and equity that are manifested in the U.S. Constitution and its Amendments are the very pillars of our society and the courts strive to protect them tenaciously.

The question raised in this petition for rehearing is whether the signing of a plea agreement may briskly waive away the Appellant's 8th Amendment Constitutional Rights? The Panel held that Appellant's arguments about the forfeiture and 25-year sentence fell within the scope of the valid appeal waiver; and therefore, dismissed the Appellant's arguments about the forfeiture. (Appendix I, p A3). There is a split in the circuits on this question and we ask the Supreme Court of the United States to resolve this issue.

In *U.S. v. Powell* (2014) 574 Fed.Appx. 390 (5th Cir.), Courtney Powell was arrested during a traffic stop pursuant to a parole warrant and was found with 37.74 grams of methamphetamines and $2,471 in cash and other paraphernalia. *U.S. v. Powell* (2014) 574 Fed.Appx. 390, 392 (5th Cir.). Powell signed a written plea agreement to plead guilty; and in the agreement contained a waiver of Powell's right to appeal his conviction or sentence except to challenge a sentence above the maximum authorized by the U.S.

Sentencing Guidelines range. Powell later appealed challenging his convictions and corresponding sentences. *Id.* at 393. When addressing Powell's claim that the Second Amendment to the U.S. Constitution protects the right of a convicted felon to keep a firearm if he has never been convicted of a firearm offense or of physical violence, the 5th Circuit Court of Appeals considered the government's argument that Powell's claim of error is barred by his appeal-waiver clause. The Court concluded, "We are hesitant to conclude that appeal-waiver clauses in plea agreements would prevent a defendant from making certain challenges that his conviction or sentence is unconstitutional or otherwise illegal." *Id.* at 397.

On the other hand, also in 2014, the same 5th Circuit Court of Appeals, albeit a different court, said, "Generally, constitutional rights can be waived as part of a plea agreement. *U.S. v. Keele* (2014) 755 F.3d 752, 756 (5th Cir.) It is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights" *Id.* quoting *Town of Newton v. Rumery* (1987) 480 U.S. 386, 393.

In a Fifth Circuit case from 2006, *U.S. v. Rivera* (2006) 191 Fed.Appx. 309, Appellant Alfredo Rios Rivera challenged the forfeiture of the Lamesa Road property. The Court of Appeals held that Rivera's challenge to the forfeiture is foreclosed by his waiver of his right to appeal his sentence and by his concession in the plea agreement that the property was subject to forfeiture. *U.S. v. Rivera* (2006) 191 Fed.Appx. 309, 311-312.

In *U.S. v. Michelsen* (1998) 141 F.3d 867 (8th Cir.), the U.S. Court of Appeals concluded that Michelson preserved his right to appeal on grounds that his sentence was illegal or imposed in violation of the plea agreement." *U.S. v. Michelson* (1998) 141 F.3d 867, 872 (8th Cir.) In footnote 3, The Court of Appeals explained further, "...a waiver of the right to appeal one's sentence 'would not prevent an appeal where the sentence imposed is not in accordance with the negotiated agreement. Nor would it prevent a challenge under 28 U.S.C. § 2255 to an 'illegal sentence,' such as a sentence imposed in excess of the maximum penalty provided by statute or based upon a constitutionally impermissible factor such as race." *Michelson* at 872 fn. 3 citing *United States v. Rutan,* 956 F.2d 827, 829 (8th Cir.1992).

United States v. Elbeblawy (2018)899 F.3d 925 is an 11th Circuit Court of Appeals case involving forfeiture, plea agreement and constitutional rights. The Court held:

> We construe plea agreements "in a manner that is sometimes likened to contractual interpretation." *United States v. Harris*, 376 F.3d 1282, 1287 (11th Cir. 2004) (quoting *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990)); see also *United States v. Hunter*, 835 F.3d 1320, 1326 (11th Cir. 2016). "This analogy, however, should not be taken too far." *Jefferies*, 908 F.2d at 1523. We have explained that "a plea agreement must be construed in light of the fact that it constitutes a waiver of 'substantial constitutional rights' requiring that the defendant be adequately warned of the consequences of the plea." *United States v. Copeland*, 381 F.3d 1101, 1106 (11th Cir. 2004) (quoting *935 Jefferies, 908 F.2d at 1523). So "[w]hen a plea agreement is ambiguous, it 'must be read against the government.' " Id. at 1105–06 (quoting *Raulerson v. United*

States, 901 F.2d 1009, 1012 (11th Cir. 1990)). *United States v. Elbeblawy* (2018) 899 F.3d 925, 934-935.

Finally, in a Sixth Circuit case, *U.S. v. Droganes* (2013), the U.S. Court of Appeals stated that it is established that a defendant may waive his appeal rights by an expressed appellate-waiver in a plea agreement. The Court continued to say that such a waiver if the defendant will be enforced only if the defendant entered into it knowingly and voluntarily, and if the scope of the waiver extends to the issues raised on appeal. *U.S. v. Droganes* (2013) Nos. 12–6043, 12–6144. The Court then examined whether Droganes's plea agreement covered his challenge to the forfeiture order as argued by the government.

At first glance, the Sixth Circuit Court of Appeals said that it would appear that the forfeiture was part of the sentence which was within the guidelines; therefore, the appellate-waiver appeared to apply to exclude the appeal. The Court then directed its attention to Droganes' argument that the exact meaning of the forfeiture provision was not clear and was difficult to understand. The Court also emphasized that the appellate-waiver provision was silent regarding forfeiture. The Court concludes: "Because '[p]lea agreements are to be interpreted strictly, with ambiguities construed against the government,' *United States v. Jones* (2009) 569 F.3d 569, 572 (6th Cir.), we decline to apply the appellate-waiver provision in this instance. *U.S. v. Droganes* (2013) Nos. 12–6043, 12–6144.

Our case is similar to *Droganes*. The forfeiture provisions in the plea agreement signed by the Appellant Mr. Smiley are ambiguous, vague and unclear on what exactly is being forfeited. An objective reader of the plea agreement can justifiably declare that he/she would not know that Mr. Smiley's family home was being forfeited.

Under the forfeiture heading of the plea agreement, clause 18(b) lists "Any property, real or person, constituting or traceable to gross profits or other proceeds obtained from the offenses; and..." — Smiley's house does not fit in this clause because his family house was not "a gross profit" of the offense and it was not "traceable to gross profits or proceeds obtained from the offense." (Appendix I, p. A21).

Clause 18(c) of the forfeiture section of the Plea Agreement adds to the confusion as it says: "Any property, real or personal, used or intended to be used to commit or to promote the commission of the offenses, including, without limitation: a dell OptiPlex, model GX520 desktop computer, and a Seagate Barracuda 250 gigabyte hard drive." (Appendix I, A21).

In addition, just like in *Droganes*, supra, the waiver provisions in the plea agreement signed by Mr. Smiley are silent about the forfeiture of his family. In fact, there is no mention about any forfeiture in the waiver section of Appellant's plea agreement. (Plea Agreement 7/17/17, p. A2-3).

If the government wanted to state unequivocally that Appellant Smiley's house was being forfeited as "real property" it should have listed it

along with the computer and hard drive; but it did not. This is why it was not clear to Appellant that his house was being forfeited. If the government was to be clear and exacting, it should have included the forfeiture clauses in the waiver of rights provisions of the plea agreement.

At the December 19, 2017 Sentencing Hearing, Mr. Smiley revealed that he never knew that his house was being forfeited as part of his plea agreement. He said, "I specifically questioned my lawyer about that asset [his house]. That is my ex-wife's house. She got it in a divorce. I specifically question her about it in this plea agreement. She told me that was not part of the plea agreement. If I had known that was part of the plea agreement, I would not have pled guilty." (Appendix I, p 23).

In summary, *U.S. v. Powell*, supra, is a Fifth Circuit case that held "We are hesitant to conclude that appeal-waiver clauses in plea agreements would prevent a defendant from making certain challenges that his conviction or sentence is unconstitutional or otherwise illegal." *Powell*, supra at 397. The Fifth Circuit holds differently and holds that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights. *U.S. v. Keele* (2014) 755 F.3d 752, 756 (5th Cir.) The Eleventh Circuit says that plea agreements, because they constitute a waiver of "substantial constitutional rights", require that the defendant be clearly and adequately warned of the consequences of the plea. "So "[w]hen a plea agreement is ambiguous, it 'must be read against the government." *United*

States v. Elbeblawy (2018) 899 F.3d 925, 934-935, quoting *United States v. Copeland*, 381 F.3d 1101, 1105-1106 (11th Cir. 2004). Finally, *U.S. v. Droganes*, a 2013 Sixth Circuit case, declined to apply an appellate-waiver clause in a plea agreement involving forfeiture because the forfeiture provision was vague and the express terms of the appellate waiver provision were silent. *U.S. v. Droganes* (2013) Nos. 12–6043, 12–6144.

According to the conclusion by the Sixth Circuit in *U.S. v. Droganes* (2013) Nos. 12–6043, 12–6144, the plea agreement signed by Mr. Smiley would not pass constitutional muster. A person's home is his castle and in the taking of a person's home invokes constitutional clauses. According to Droganes, supra, Mr. Smiley's plea agreement should have clearly identified Mr. Smiley's home and its address as part of the items being forfeited — just stating "real property" does not satisfy the U.S. Constitution. Moreover, in the waiver of rights section of the plea agreement, it should have clearly stated that by signing this plea agreement, Mr. Smiley waives his right to challenge the forfeiture of his family home.

Appellant claims that his rights under the 8th Amendment of the U.S. Constitution were violated by the forfeiture of his house and the sentence — both exceptionally important issues. We have presented a split in circuits and ask the Supreme Court of the United States to follow the conclusion of the Sixth Circuit in *Droganes* and resolve the issue.

3. APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL WAS VIOLATED BY THE TRIAL COUNSEL'S FAILURE TO PROVIDE REASONABLY COMPETENT REPRESENTATION THAT PREJUDICED APPELLANT

To establish ineffective assistance of counsel on direct appeal, a defendant must establish deficient performance by counsel and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). A claim of ineffective assistance of counsel is not cognizable on direct appeal unless "the lawyer's ineffectiveness conclusively appears from the record." *United States v. Baldovinos*, 434 F.3d 233, 239 (4th Cir. 2006). Rather, to allow for adequate development of the record, a defendant ordinarily must bring an ineffectiveness claim in a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. *United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010).

The Sixth Amendment to the United States Constitution affords individuals, among other things, the right to "have the Assistance of Counsel for his defense". In this regard, "The sixth amendment guarantees a criminal defendant the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64, 80 L. Ed. 2d 674 (1984). This right applies both at trial and at sentencing. See *Jones v. United States*, 783 F.2d 1477, 1482 (9th Cir. 1986). The appellant must show that the attorney's performance was not in accord with prevailing professional norms,

and that the attorney's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

"A defendant can raise the claim of ineffective assistance of counsel on direct appeal if and only if it conclusively appears from the record that his counsel did not provide effective assistance . . . ." *United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998).

To prove ineffective assistance the defendant must satisfy two requirements: (1) "that counsel's representation fell below an objective standard of reasonableness;" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

The first requirement of Strickland is met many times over. A reasonably competent attorney would have formally moved that Appellant was not physically and mentally capable to sign a plea agreement. The medical records show that Mr. Smiley has a history of physical problems which affected his ability to work and function. (Appendix II, p. A27-28). At the June 1, 2017 Motions Hearing, Mr. Smiley was suffering from injuries to his arm and knee and from high blood pressure. (Appendix I, p. A17). Appellant's attorney admitted that she "had ongoing issues getting him appropriate medical care..." (Appendix I, p. A17). In fact, Appellant's attorney admitted to the Court that she was neglectful in arranging the

necessary meetings to secure proper care for Mr. Smiley. (Appendix I, p. A17). Mr. Smiley's blood pressure was not being monitored causing bouts of confusion and an inability to focus. (Appendix I, p. A19).

A reasonably competent attorney would not have neglected to inform Appellant of the details and consequences of the plea agreement. At the December 19, 2017 Sentencing Hearing, Mr. Smiley revealed that he never knew that his house was being forfeited as part of his plea agreement. He said, "I specifically questioned my lawyer about that asset [his house]. That is my ex-wife's house. She got it in a divorce. I specifically question her about it in this plea agreement. She told me that was not part of the plea agreement. If I had known that was part of the plea agreement, I would not have pled guilty." (Appendix I, p. A23).

Mr. Smiley also claims that his attorney coerced him to plead guilty. At the same sentencing hearing, Appellant declared, "I was coerced. I was forced to plead guilty. Medical treatment was withheld from me. I was told I would not get medical treatment unless I pled guilty. She [lawyer] told me plead guilty, we'll get you medical treatment." (Appendix I, p. A23-24). A reasonably competent attorney would never coerce his or her client to pleading guilty no matter what circumstances exist.

The second prong of Strickland requires the appellant to show that the trial attorney's shortcomings prejudiced him. Had Appellant's attorney formally filed a motion that Mr. Smiley was not fit to sign a plea agreement,

the outcome could have been quite different such as trial, no forfeiture, mistrial -- any number of scenarios could have occurred. Furthermore, had Mr. Smiley been fully advised of his rights and consequences under the plea agreement, he would have declined to sign and pursued to trial. In this scenario, nobody knows what would have been the outcome. Instead, the case was pushed into a plea agreement where Appellant waived his right to constitutional rights.

Furthermore, The Panel ruled that "the record does not conclusively show that trial counsel was ineffective..." and denied Appellant's claim of ineffective assistance of counsel. (Appendix I, p. A4). However, the Panel's own decision only strengthened Appellant's argument of ineffective assistance of counsel.

The Panel wrote, "Because Smiley did not move to withdraw his guilty plea in the district court, we review his challenge to the validity of his appeal for plain error." (Appendix I, p. A3). The Panel is essentially saying that because Smiley's trial attorney was negligent in failing to file a motion to withdraw his guilty plea in the district court, the Panel now must review the challenge to the validity of his appeal on a stricter, almost impossible to overcome, standard of review (plain error). As a result of Appellant's trial counsel's failure to provide legal services at a reasonable level, Appellant's legal opportunities at the appellate level were prejudiced. This violates the standard of review set forth in *Strickland v. Washington* (1984) 466 U.S. 668.

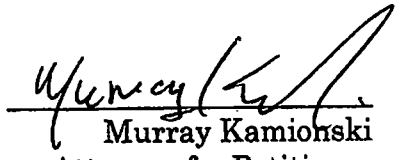
The Panel committed gross error by relying on *United States v. Faulls*, 821 F.3d 502, 507-08 (4th Cir. 2016) and concluding that Appellant did not show ineffective assistance of counsel on the face of the record. Appellant has provided sufficient evidence on the face of the record that his Sixth Amendment Rights to effective counsel were violated and that a rehearing is warranted.

CONCLUSION

Mr. Smiley's plea was given involuntarily in violation of the Fifth Amendment of the U.S. Constitution. The Court of Appeals, with one broad stroke of a pen, waived Appellant's Constitutional Rights by concluding that it would not even consider Appellant's claims that the forfeiture and sentence were outside the appeal waiver clause. We petition the Court to resolve the split in the circuits on this issue. Finally, Appellant's Sixth Amendment Rights were violated by the trial court attorney's representation that was below the standard of a reasonably competent attorney and that prejudiced Appellant.

WHEREFORE, PREMISES CONSIDERED, Appellant Mr. Smiley prays that this Court grant his petition for writ of certiorari, order full briefs and oral arguments, and reverse the court order of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,



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