No. 19-6208

ORIGINAL

In The
Supreme Court of the United States

DARRELL ALAN LUSSIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) When a District Court's denial of a §2255 motion is contrary to established precedent is the Court of Appeals required to grant a certificate of appealability?

2.) Does a defendant's constitutional right to be present extend to an in camera hearing where the U.S. Attorney, defense counsel, **and the judge** discuss what the judge will accept in a contemplated plea agreement?

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PETITION FOR A WRIT OF CERTIORARI

The pro se petitioner, Darrell Alan Lussier, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The Eighth Circuit denied Mr. Lussier's request for a certificate of appealability without explanation in an unpublished order. See Petition Appendix at pg. 1f.

JURISDICTION

The Eighth Circuit issued its order on May 20, 2019 (Pet. App'x. at pg. 1). The jursidiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY AUTHORITIES

Sixth Amendment in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defence.

Fifth Amendment in relevant part:

> No person shall be...deprived of life, liberty, or property, without due process of law;

28 U.S.C. § 2253 in relevant part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255...Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals...A certificate of appealability may issue [] only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Following a four day jury trial, Darrell Alan Lussier, a native American, was convicted of three counts of kidnapping in violation of 18 U.S.C. §§ 1151, 1153(a) and 1201(a)(2), and three counts of assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 113(a)(6), 1151 and 1153(a). See Petitioner's Direct Appeal reported at **United States v. Lussier**, 844 F.3d 1019, 1021 (8th Cir. 2017), cert. denied at 137 S.Ct. 2231 (2017).

Although this case was decided by a jury, the petitioner and the government initially reached a mutually agreeable plea agreement. See Appendix at pg. 19b. The plea agreement called for a U.S. Sentencing Gudeline (USSG) range of either 120-150 months or 100-125 months depending on how the Court resolved the contested two level enhancement under § 3A1.3 for physical restraint of the victims. App'x. at pg. 23b

At the change of plea hearing, the government walked Mr. Lussier through the plea colloquy. The Court then asked a few follow-up questions. When defense counsel was asked if he had any questions or comments he raised his concern that the plea was not capped at 150 months pursuant to Fed.R.Crim.P. 11(c)(1)(C) as had been orrally agreed to before the plea was drafted. Instead, the plea stated, "The foregoing stipulations are binding on the parties, but do not bind the Court." App'x. at pg. 24b.

Due to counsel's last minute objection to the wording of the plea agreement, the Court held an "off the record" discussion about the plea agreement with counsel for both parties, but without the presence of the defendant. See Change of Plea Hearing Trans. at

App'x. pg. 51b... When the Court returned to regular session with on the record proceedings defense counsel requested and was granted a 15 minute recess so he could confer with his client. When defense counsel and the defendant returned to the courtroom the judge was in chambers. Again, both counsels met with the judge, albeit in chambers. While this proceeding was "on the record" the defendant was once again excluded from the hearing. The transcript of that in chambers hearing was as follows:

THE COURT: Well, folks, where are we?

[AUSA] AANSTAD: Our office will agree to a 11(c)(1)(C) in this case now.

THE COURT: 11(c)(1)(C) innit?

MS. AANSTAD: With 120 to 150, or 100 to 125 if you don't find the 2-level enhancement for physical confinement. So I'll produce testimony at sentencing.

THE COURT: I don't think that's enough. The question I've got, can I get involved in this?

[DEFENSE] COUNSEL GRAY: What do you mean?

THE COURT: Normally the rule is the judge does not get involved in any negotiations on this stuff. You put one to me and I say yes or no. Isn't that what the rule says?

MR. BETINSKY: Yes, but I think the rule suggests that an agreed upon, that you can certainly consider.

THE COURT: I suppose I can say I don't agree to it.

MR. BETINSKY: Right.

MR. GRAY: It would save a lot of time.

THE COURT: Well, I won't agree to it.

MR. GRAY: You won't agree to 120 to 150?

THE COURT:.120 to what?

MR. GRAY: To 150.

THE COURT: What's 150 in years?

MS. AANSTAD: Twelve and a half.

THE COURT: No, I won't.

MR. GRAY: Well, then we're going to go to Duluth. Okay. All right. Thank you, Judge.

THE COURT: Thank you, all. Have a good weekend. We'll see you in Duluth. Bring your long underwear.

Defense counsel then met with Mr. Lussier just long enough to tell him that they were going to trial. Left with no explanation and no alternatives, at least none that were explained to Mr. Lussier at the time, the case proceeded to trial where the petitioner was convicted on all counts. The Court then imposed a sentence of 360 months for each of the kidnapping counts and 120 for each of the assault counts with each of the sentences to run concurrent to all other counts. See Sentencing Judgment, **United States v. Lussier**, case no. 15-cr-79 (D.Minn.), docket entry 68.

Defense counsel then filed a direct appeal in which he argued, inter alia, (1) the District Court improperly instructed the jury on the elements of kidnapping; (2) the Court erred when it held the defendant's prior assault conviction would be admissable if he testified; and (3) the evidence was insufficient to support the kidnapping convictions. **Lussier**, 844 F.3d at 1021-23. The Eighth Circuit denied the appeal, the motion to rehear the appeal en banc and this Court denied certiorari.

Within a year of the conviction becoming final, the petitioner filed an amended motion in the District Court pursuant to 28 U.S.C. § 2255 ("2255"). See App'x. at pg. 1a . The 2255 argued Mr. Lussier received ineffective assistance when counsel failed to object at the change of plea hearing to the following errors: (1) the defendant has a right to be present at every critical stage of the prosecution; (2) the District Court erred when it held "off the record" discussions concerning the negotiation of the plea agreement; and (3) the Court was required to address the defendant when it rejected the terms of the signed plea agreement. App'x. pg. 5a-7a.

The petitioner also argued he received ineffective assistance when counsel "Failed To Inform The Movant Of His Right To Plead Guilty Pursuant To An Open Plea In Exchange For A Reduced Sentence For Acceptance Of Responsibility." App'x. at pg. 7a-8a.

Next, the petitioner argued counsel was ineffective for failing to object when the Court inserted itself into the plea negotiation process. App'x. at pg. 8a-10a.

Finally, the petitioner contended counsel was ineffective on direct appeal for failing to raise the preceeding issues, which were stronger than the arguments counsel did raise. App'x. at pg. 11a.

Without the benefit of an evidentiary hearing, the District Court rejected each of the petitioner's claims in an unpublished opinion. See App'x. at pg. 1d.. The District Court also declined to issue the requested certificate of appealability (COA). **Id.**

As a result of the transfer of the "jailhouse lawyer" who assisted Mr. Lussier in the preparation of his 2255 a comprehensive application for a COA was not filed. Rather, the Eighth Circuit,

in accord with long standing precedent, construed the petitioner's notice of appeal as the application for COA. App'x. at pg. lf. Based on this limited record, the Eighth Circuit declined to grant a COA. App'x. at pg. lf., With the assistance of a new "lawyer," this timely petition for a writ of certiorari now follows.

REASON FOR GRANTING THE WRIT

I.) ROUTINE DENIALS OF CERTIFICATES OF APPEALABILITY

The Court should grant review because every year thousands of defendants are routinely denied COAs despite this Court's repeated admonishment that "The COA inquiry [] is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" **Buck v. Davis**, 192 L.Ed.2d 1, 16, 137 S.Ct. 759, 580 U.S. ___ (2017)(quoting **Miller-El v. Cockrell**, 154 L.Ed.2d 931, 944 (2003)).

This Court's reasoning is even more vital when it comes to federal prosecutions. Unlike State defendants, federal defendants are at a decided disadvantage when it comes to appellate review of their convictions. In State prosecutions, defendants are afforded the opportunity to appeal to the State Court of Appeals. That decision is then appealable to the State Supreme Court, which is then appealable to this Court. If the defendant does not obtain relief, he or she is free to pursue a collateral relief back before the original State Court. That decision is then appealable to the State Court of Appeals; the State Supreme Court; the U.S. District Court; the U.S. Court of Appeals; and finally back before this Court.

On the other hand, a federal defendant's direct appeal is limited to an appeal to the U.S. Court of Appeals and a petition for a writ of certiorari with this Court, which generally grants certiorari to less than 1% of all the cases brought before it.

Thus, for most federal defendants, it is one and done on direct appeal. That leaves a collateral attack, which has no guaranteed appellate review on the merits. If the U.S. Court of Appelas declines to exercise its "discretion" and grant a COA that is for most defendant the end of the line. Assuming, a **pro se** defendant has the wherwithall to file a petition for a writ of certiorari to a Court that grants less than 1% of cert. petitions, the odds of the Court granting certiorari from the denial of a COA are infinitesimal.

As will be discussed below, the District Court's ruling in this case is in direct conflict with the facts and binding precedent. Yet, the Court of Appeals refused to grant the petitioner the necessary COA. Because this case presents a clear abus of discretion by the lower courts, it offers an excellent opportunity for this Court to instruct the lower courts of their obligation and duty to grant COAs.

In denying the 2255, the District Court made multiple factual and legal errors. First, the Court was required to hold an evidentiary hearing to address contested factual allegations in accord with 28 U.S.C. § 2255(b). As an example, the government claims "the defendant did not intend to enter a guilty plea pursuant to an agreement or otherwise without assurances of a term of imprisonment." **Gov. Resp. at App'x. pg. 13b.** Whereas, the petitioner stated in his signed affidavit, "Had I been informed of the option of taking an open plea, I would have pleaded guilty knowing the strength of the Government's case despite available defenses and other available trial strategies." App'x. at pg. 15a . See e.g., **Round tree v. United States**, 751 F.3d 923, 925-27 (8th Cir. 2014).

Second, the District Court held the irregularities at the change of plea hearing did not affect the petitioner's substantial rights. According to the District Court, "the outcome of the proceedings would have been the same even if Lussier's counsel had objected." App'x. at pg. 4d . The Court also erroneously stated "even if [the petitioner] had pursued a straight plea, the reduction for acceptance of responsibility would not have changed his sentencing exposure." **Id.** It is true that if Mr. Lussier had pled guilty to all counts, his statutory **maximum** would not have changed. However, that is a far cry from finding that the **actual** sentence imposed would not have changed, especially given the Court's huge emphasis on acceptance of responsibility. Furthermore, it is quite possible that Mr. Lussier would not have had to plead guilty to the kidnapping counts. As part of the plea agreement, the government was willing to dismiss the kidnapping counts if the petitioner pled guilty to the assault counts. The government was even willing to cap the maximum sentence the petitioner would have faced. Thus, it is more than reasonable to assume the government would have dismissed the kidnapping counts if the petitioner pled guilty to the assault counts **without a cap on the sentence**, especially once the Court stated that the 150 month cap was insufficient.

For the District Court to deny that the acceptance of responsibilty did not affect the petitioner's substantial rights is simply wrong. As this Court has held, **any** error in calculating the Guideline range "can and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." **Molina-Martinez v. United States**, 194 L.Ed.2d 444, 454, 136 S.Ct.

1338, 578 U.S. ____ (2016). See also, **Rosales-Mireles v. United States**, 201 L.Ed.2d 376, 451, 138 S.Ct. ___, 585 U.S. ___ (2018) ("the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings.")

Certainly, "jurists of reason could disagree with the district court's resolution" of Mr. Lussier's ineffective assistance of counsel claim, which is all that is required for the issuance of a certificate of appealability. **Buck v. Davis, supra.** The lower courts' refusal to grant the COA was an abuse of discretion that happens all too frequently for this Court to allow to continue. Therefore, the petitioner prays the Court will grant him a writ of certiorari.

II.) JUDICIAL INTERFERENCE WITH PLEA NEGOTIATIONS

Without the benefit of an evidentiary hearing it is impossible to determine to what degree and to what effect the District Court's "off the record" discussion had on the plea process. What we do know is "the court and defense counsel had a brief conversation prior to the change of plea hearing **regarding a proposed plea agreement**" that was not recorded or attended by the defendant or counsel for the government. Gov. Response to 2255 at pg. 7. We also know there was "off the record" discussions about the plea during the change of plea hearing. App'x. at pg. 51b. Finally, we know "the District Court violated Rule 11(c)(5) of the Federal Rules of Criminal Procedure, and that the entire change of plea hearing was not recorded." Gov. Response to 2255 at pg. 9, App'x. pg. 9b.

Unlike the defendant in **United States v. Davila**, 186 L.Ed.2d 139, 133 S.Ct. 2139, 569 U.S. 597 (2013), there was nothing harmless about the District Court judge's participation in the plea negotiation process and his violation of Rule 11(c)(5).

Here, if the District Court had abided by the rules and advised the defendant of his options as is required by Rule 11(c)(5)(B & C) he would have known that trial was not his only option. When the District Court's rule violation is combined with counsel's ineffective assistance in not informing his client of alternative options to going to trial, not only were the defendant's substantial rights affected, a miscarriage of justice occurred. See, **Missouri v. Frye**, 182 L.Ed.2d 379, 132 S.Ct. 1399, 566 U.S. 134 (2012).

For the lower courts to say, in essence, that no reasonable jurist would find the outcome of this case to be debatable or wrong is wrong. The defendant had the constitutional right to the effective assistance of counsel. The defendant also had the right to plead guilty and potentially save a decade of his freedom. A COA was and is warranted in this case. At a minimum, the Court should grant, vacate, and remand with instructions to grant the petitioner a COA.

CONCLUSION

WHEREFORE, for the foregoing reasons a writ of certiorari should be granted in order to prevent an injustice in this case and thousands of similarly situated federal defendant cases.

Respectfully submitted this 12th day of August 2019 by:

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CERTIFICATE OF SERVICE

The pro se petitioner, Darrell Alan Lussier, hereby certifies under the penalty of perjury, 28 U.S.C. § 1746, that he served a true and correct copy of this petition on the U.S. Solicitor General by placing said petition in a first-class postage prepaid envelope and depositing same in the "legal mail" system at FCI-Pekin in compliance with S.Ct. Rule 29.2 on this 13th day of August 2019.

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