No: 19-6715

In the
Supreme Court of the United States

BRANDON LASHON INGRAM,

Petitioner,

vs.

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

Brandon Ingram
Reg. 55936-056
FCI Bennettsville
P. O. Box 52020
Bennettsville, South Carolina 29512

ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

1. Does Title 28 U.S.C. § 2255(b) automatically require an evidentiary hearing when an affidavit presented by a defendant alleging a breakdown in communication during the pre-trial stage cannot be disproved by the District Court.

2. Does this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) always control an ineffective assistance of counsel allegation or is counsel permitted to allege a "trial strategy" defense to the allegations of ineffectiveness, thus rendering *Strickland* a nullity.

3. Do *Crawford v. United States*, 541 U.S. 36 (2004) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) violations automatically require a new trial or can harmless error analysis override a Sixth Amendment confrontation violation.

PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeals for the Fourth Circuit, the United States District Court for the Eastern District of North Carolina, (Britt, W. Earl), District Judge.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Brandon Lashon Ingram, ("Ingram") the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, denying Ingram's Title 28 U.S.C. § 2255 whose judgment is herein sought to be reviewed, is an unpublished opinion *United States v. Ingram,* 771 F. App'x 297 (4th Cir. 2019), dated June 24, 2019, and is reprinted as Appendix A to this Petition.

The denial of Ingram's Title 28 U.S.C. § 2255 in the District Court whose judgment is being reviewed was entered on *Ingram v. United States,* 2018 U.S. Dist. LEXIS 179827 (E.D.N.C. Oct. 19, 2018) was entered on October 19, 2018, and is reprinted as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which

> District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

> 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.
>
> * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE CASE

By way of relevant background, in 2015 and after a jury convicting Ingram of five controlled substance offenses, Ingram timely filed *pro se* a § 2255 motion raising multiple ineffective assistance of counsel. The district court-appointed counsel who filed an amended § 2255 motion,

incorporating by reference all the claims asserted in the original § 2255 and adding a claim challenging Ingram's career offender sentencing enhancement based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In response, the government filed a motion to dismiss or, alternatively, for summary judgment on the original ineffective assistance of counsel claims and requested the case be placed in abeyance regarding the *Johnson* related claim in light of *Beckles v. United States*, 137 S. Ct. 886 (2017). Ingram filed a *pro se* motion for an extension of time to file a response to the government's oppositions, however, since Ingram was represented by counsel at the time, the court refused to address any *pro-se* filings.

Several months later, Ingram's counsel filed a motion to withdraw in light of this court's decision in *Beckles*. Shortly thereafter, the court granted the government's motion for summary judgment and found the request to hold in abeyance Ingram's *Johnson* claim as moot in light of *Beckles* and directed the government to file an answer or other response to Ingram's *Johnson* claim. By text order, the court also granted counsel's motion to withdraw. Subsequently, on the government's motion, the court dismissed all the *Johnson* related claims. In the same

order, the court permitted Ingram to file any additional documents relevant to his ineffective assistance of counsel claims and that it would reconsider the summary judgment order in light of any such documents. Ingram filed a response in opposition to the government's motion to dismiss, however, on October 19, 2018 the District Court denied all the claims and denied the request for a certificate of appealability.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the

> accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b)When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

1. When an allegation of ineffective assistance of counsel is presented in light of this court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) along with a sworn affidavit by the Defendant that is not disproved by the records and files of the case is an evidentiary hearing mandated in light of Title 28 U.S.C. § 2255(b)

During pretrial preparations, a breakdown of communication between Ingram and trial counsel developed. The breakdown hovered over the preparation of the defense and was so extreme that any representation was none existence. In fact, the Court addressed a hearing on September 4, 2012, to address the matter. Ingram complained to the Court that he had no contact with his attorney (Mr. Webb) after Webb was appointed since Webb's office did not accept collect calls. There was no communication with Webb and Ingram during any of the pretrial portions of the case when the defense

preparation and trial strategy could have been prepared and additional information would have been provided to Webb. Communication was so lacking that Webb did not address with Ingram any avenues to present during the case nor did Webb take an opportunity to inquire from Ingram the allegations raised in the indictment. In essence, the breakdown led to Ingram "ride at counsel's coattails" hoping for the best outcome possible. This type of representation cannot be considered "adequate and appropriate" as required by the Sixth Amendment. As this court clarified in *Avery v. State of Alabama*, 308 U.S. 444 (1940) "the denial of an opportunity for counsel to confer or consult with the accused and prepare his defense, could convert the appointment of counsel into a sham that is nothing more than a form of compliance with the Constitutional requirements, that an accused be given the assistance of counsel." Id. *Avery* at 446. Merely relying on Ingram's sworn statement and affidavit attached to the § 2255 alleging that "communications had broken down since the initial inception of this case" was evidence that counsel was either ill-equipped or unwilling to represent Ingram. The fact that counsel would not accept calls from Ingram from the County Jail, establishes that counsel had no interest

in the preparation for Ingram's case. In essence, a commutative-prejudice situation occurs.

There are two such theories that could be asserted for the Court "commutative-prejudice." Counsel's constitutional deficient actions, when viewed together give rise to prejudice and the "commutative-error" of counsel's deficiencies, although "individually" may not be constitutionally deficient, when viewed together amount to an ineffective of counsel claim. The "cumulative-prejudice" theory has been met with much success in several courts. For example, the Ninth Circuit in *Harris by and through Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) held that numerous deficiencies, at least a few commutative errors, prejudiced the defendant in that case. Some of the deficiencies enumerated in the *Wood* are applicable to Ingram's case. In the *Wood* decision, the following deficiencies were noted:

> (1) Failure to investigate and adequately prepare for trial;
>
> (2) Failure to consult or adequately inquire with the defendant on the case.

Id Wood at 1438.

Here, (1) the failure to investigate and prepare adequately for trial, (2) the failure to consult with Ingram, and (3) the failure to accept calls

in preparation of trial, caused the total breakdown of communication between Ingram and counsel, reaching the level of "commutative-errors" explanation explained in *Wood*. Since the breakdown in communication occurred *at the initial inception of this case*, counsel's actions are analogous to *United States v. Gray*, 78 F.2d 702 (3rd Cir. 1999). In the *Gray*, the defendant was charged with possession of a firearm by a convicted felon after he was discovered carrying a handgun by police who arrived at the scene of a brawl outside of a bar. The defendant's contention was that he had taken the gun from an individual from whom he was fighting and was justified to have possession when he was apprehended by the police. Prior to trial, defendant's counsel instructed him to provide the names of the witnesses to the fight. When the defendant complied, counsel asked him to bring the witnesses to a meeting in his office. Counsel did not, however, ask the defendant for their addresses or in any way attempt to contact any witnesses himself nor did he further consult with the defendant on the matter. Most of the witnesses refused to comply to accompany the defendant to his counsel's office and indicated an unwillingness to participate in the trial. Consequently, only the defendant's brother and an attorney who

represented the defendant at his pretrial hearing testified on his behalf. The Court, troubled by counsel's efforts, determined that counsel did not render effective assistance under the *Strickland* standard of review by his failure to properly consult with the defendant prior to trial. The Court specifically stated:

> It is generally clear to the extent of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he or she has not yet obtained the facts on which such decisions can be made.

The Court concluded that such a situation existed in this case because counsel "offered no strategic justification" for his failure to make an effort to investigate the case in the matter and/or prepare a defense for trial. Following the same analogy presented in *Gray*, this Court must agree that the facts, in this case, warranted an evidentiary hearing. Ingram's claims were not disproved by the records and files of the case.

As such, Ingram prays a writ of certiorari be granted based on the lack of counsel due to the breakdown in communication.

2. Does this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) always control an ineffective assistance of counsel allegation or is counsel permitted to allege a "trial strategy" defense to the allegations of ineffectiveness, thus rendering *Strickland* a nullity.

By way of introduction of this claim, during the trial, the government witness Owens testified under oath that he had on one occasion met Ingram at his Grandmother's residence and bought a half-ounce of cocaine from Ingram. Owens also testified that Bruce Douglas also bought a half-ounce of cocaine as well on the same day. Dennis Stevens testified that the first time he met Ingram was at Kino Wooten's residence. According to Stevens, Wooten was at his residence during the drug transactions and that Ingram had sold drugs to an individual named "Face." The government presented a picture of Wooten's residence which Stevens identified as the residence where Ingram conducted approximately ten drug sales during 2010 and that Wooten or Douglas were present and participated in some manner or other. This testimony was crucial to the Government's case.

Trial counsel had an obligation to investigate whether Wooten actually resided at the residence or whether these transactions occurred. A simple investigation into Wooten's criminal past would

have established otherwise. Between 2010 thru 2012, when these transactions allegedly took place, Wooten was incarcerated in the State of South Carolina Department of Corrections. Thus Douglass could not have been at Kino's residence during that time and most certainly, Kino could not have been at the alleged transactions. A simple review into Wooten's whereabouts during these dates and times, which counsel had as part of their discovery, would have provided a crucial defense. In fact, Wooten himself could have testified for the defense. Had the jury heard that these witnesses testimony was not accurate, the jury could have discredited the witnesses' testimony in their entirety and most likely acquitted Ingram. There was no tactical reason whatsoever why counsel failed to investigate Wooten's criminal history. Ingram provided counsel with Wooten's and Douglas's contact information and provided counsel the testimony that Wooten and Douglas could have presented for the defense. However, due to the breakdown in communications counsel failed to follow through on any of the aforementioned requests. Had counsel questioned Wooten and Douglas and/or subpoenaed Wooten and Douglas to testify for the defense, the

perjury presented by the Government witness could have been disclosed.

As such, Ingram prays a writ of certiorari be granted based on the lack of counsel due to the breakdown in communication.

3. Are this court's decisions in *Crawford v. United States*, 541 U.S. 36 (2004) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) violations automatically require a new trial or can harmless error analysis override a Sixth Amendment confrontation violation

In a continuation of the prior argument raised herein, Ingram presents that counsel rendered ineffective assistance when he failed to object to Agent Dismukes' testimony by failing to object to the admittance of Exhibit # 131, (CCBI, City-County Bureau of Identification) lab report. Exhibit # 131 determining that the substance presented at trial was cocaine and that the "results of the analysis" determined that 5.2 grams of cocaine were tested. This Court's precedent on the introduction of the lab reports from <u>*any other source*</u> apart from the lab technician that prepared the analysis violates both *Crawford v. United States*, 541 U.S. 36 (2004) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). In *Crawford,* the Court clarified that an out of Court testimonial statements cannot be presented against

Ingram unless the declarant is unavailable to testify and the declarant had a prior opportunity to cross-examine that declarant. That theory, also known as the "confrontation clause" has been extended to forensic evidence presented during a trial. That theory was extended to lab reports such as the report from CCBI in this case in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). Testimonial statements include statements that are "the functional equivalent" of a Court testimony, such as affidavits, depositions, prior testimony and "statements that were made in other circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." Id. *Crawford,* 541 U.S. at 51-52.

Agent Dismukes testified that the substance submitted to be analyzed and evaluated by the CCBI lab was cocaine and weighed 5.2 grams. By permitting Dismukes to testify as to the result of the analysis from the lab report, Dismukes was testifying as a surrogate to the actual lab technician who performed the analysis of the cocaine. Any testimony relating to the results of an analysis of the cocaine is confrontational in nature and should have been presented from the actual chemist performing the analysis on the drugs including the

analysis' result and subsequent weight of the cocaine. Dismukes did not personally perform any tests on the cocaine. Permitting Dismukes, or any other agent to introduce the lab results and the results of the analysis is a clear confrontation violation which has been prohibited by this Court's decision in *Crawford* and *Bullcoming*.

As such, Ingram prays a writ of certiorari be granted based on the lack of counsel due to the breakdown in communication.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Eight Circuit.

Done this 20, day of September 2019.

Brandon Ingram
Reg. 55936-056
FCI Bennettsville
P. O. Box 52020
Bennettsville, South Carolina 29512