No. 19-7161

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

NOV 22 19
OFFICE OF THE CLERK

AARON MURRAY- PETITIONER

vs.

UNITED STATES OF AMERICA- RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

AARON MURRAY
REG.# 58878-018, UNIT C-3
FEDERAL CORRECTIONAL COMPLEX-
COLEMAN MEDIUM
P.O. BOX 1032
COLEMAN, FLORIDA 33521-1032

QUESTIONS PRESENTED

I. Whether third-party affidavits filed with a motion to withdraw a guilty plea before sentencing, claiming ineffective assistance of counsel, overcomes a defendant's heavy burden to show that his statements about counsel's effectiveness at the plea colloquy were false and that a fair and just reason existed for him to withdraw his guilty plea under Fed. R. Crim. P. 11(d)(2)(B)?

II. Whether a district court's use of relevant conduct in dismissed or unconvicted charges at sentencing for U.S.S.G. § 2G2.2 is an end run around a defendant's constitutional protections, which has created a split in the circuits, and whether counsel's failure to properly object to the use of this conduct qualifies as ineffective assistance of counsel?

III. Whether a denied motion to withdraw a guilty plea before sentenceing, due to ineffective assistance of counsel, prevents a defendant from having his ineffective assistance of counsel claims reviewed during a Title 28 U.S.C. § 2255 proceeding?

IV. Whether a district court can deny a Title 28 U.S.C. § 2255, claiming ineffective assistance of counsel, without judging the reasonableness of counsel's challenged conduct on the facts of the defendant's case, as required by Strickland v. Washington?

V. Whether an ineffective assistance of counsel claim is procedurally barred, during an application for a certificate of appealability submitted to a court of appeals, if a defendant asserted an ineffective claim on direct appeal to preserve the arguement, but the court of appeals defered resolution of the claim until the § 2255 stage and never responded to any of defendant's ineffective claims?

LIST OF PARTIES

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases — Page #

Statutes and Rules

Other

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion on Petitioner's application for a certificate of appealability, in the United States Court of Appeals for the Eleventh Circuit, appears at Appendix B to the petition and is unpublished.

The opinion on Petitioner's Title 28 U.S.C. § 2255 motion, in the United States District Court for the Middle District of Florida, appears at Appendix C to the petitioner and is unpublised.

The opinion on Petitioner's direct appeal, in the United States Court of Appeals for the Eleventh Circuit, appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided my case was June 19, 2019.

A timely petition for reconsideration was denied by the United States Court of Appeals for the Eleventh Circuit on August 27, 2019, and a copy of the order denying reconsideration appears at Appendix A.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5 to the Constitution of the United States

Criminal actions - provisions concerning - Due process of law

"No person shall be held to answer for a capital, or otherwise infamous crime unless a presentment or indictment of a grand jury;... nor shall any person... be deprived of life, liberty, or property, without due process of law..."

AMENDMENT 6 to the Constitution of the United States

Rights of the accused

"In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defence."

TITLE 18 UNITED STATES CODE SERVICE, CHAPTER 110, §§ 2252(a)(1) AND 2252(b)(1)

(a) Any person who--

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(a) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(b) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) whoever violates... paragraph (1)... of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years...

TITLE 18 UNITED STATES CODE SERVICE, CHAPTER 227, § 3353(a)(4), (5), AND (6)

(a) Factors to be considered in imposing a sentence

(4) the kinds of sentence and the sentencing range established...;

(5) any pertinent policy statement... issued by the Sentencing Commission...;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

UNITED STATES SENTENCING GUIDELINES, CHAPTER ONE, PART B, § 1B1.3

Relevant Conduct (Factors that Determine the Guideline Range)

(a) CHAPTER TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS)...

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdicision[] (1)(A)... above that were part of the same course of conduct or common scheme or plan as the offense of conviction.

UNITED STATES SENTENCING GUIDELINES, CHAPTER THREE, PART D, § 3D1.2

Groups of Closely Related Counts

"All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction;

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common sheme or plan;

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts; and

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance invovled, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:... § 2G2.2.

UNITED STATES SENTENCING GUIDELINES, CHAPTER TWO, PART G, § 2G2.2

(a) Base Offense Level:

(2) 22, otherwise.

(b) Specific Offense Characteristics

(2) If the material involved a prepubescent minor who had not attained the age of 12 years, increase by 2 levels.

(3) (Apply the greatest):

(C) If the offense involved distribution to a minor, increase by 5 levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity other than illegal activity [intended to facilitate the travel of the minor], increase by 6 levels.

(4) If the offense involved material that portrays... sadistic or masochistic conduct or other depictions of violence..., increase by 4 levels.

(6) If the offense involved the use of a computer..., increase by 2 levels.

(7) If the offense involved-

(A) at least 10 images, but fewer than 150, increase by 2 levels.

(B) 600 or more images, increase by 5 levels.

STATEMENT OF THE CASE

Petitioner, Aaron Murray, is a federal prisoner serving a 200-month sentence, followed by 20 years of Supervised Release, after pleading guilty to one count of transportation of child pornography, in violation of Title 18 U.S.C. §§2252(a)(1) and 2252(b)(1). This offense involved the discrete act of distributing three (3) images, through the internet, to a Texas juvenile. After he pled guilty, but before the district court sentenced him, Petition moved to withdraw his plea due to actual innocence, ineffective assistance of counsel, and an unknowing plea. Petitioner showed a fair and just reason to withdraw his plea under Fed. R. Crim. P. 11(d)(2)(B), yet the district court arbitrarily and unreasonably denied his motion to withdraw his guilty plea. Petitoner was then sentenced and sent to FCC Coleman Medium in Coleman, Florida, where he timely filed a direct appeal. During his direct appeal, appointed counsel filed an Anders brief and the Eleventh Circuit Court of Appeals accepted counsel's conclusion that Petitioner's claims were without merit. The Court of Appeals never ruled on his ineffective assitance of counsel claims, but deferred Petition's ineffective assistance of counsel claims until the § 2255 stage by not responding to his claims. In response, Peitioner filed a Title 28 U.S.C. § 2255 motion pro se. The district court stated that his ineffective assistance of counsel claims were unworthy of credit and denied his § 2255 motion, without addressing all of his claims or holding an evidentiary hearing. The district court also denied Petitioner a certificate of appealability. Under Fed. R. App. P. 22(b)(1), he filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. The circuit court also denied his motion, without reviewing his claims, stating that he was procedurally barred from raising these claims because the circuit court had already reviewed the claims on direct appeal, even though Petitioner's claims were only deferred on direct appeal. Petitioner now seeks a

writ of certiorari to challenge the district court's and the circuit court's denial of his ineffective assistance of counsel claims.

I.

In May 2014, a grand jury returned a superseding indictment charging Petitioner with five counts of advertising child pornography, four counts of transportation of child pornography, and two counts of possession of child pornography. Initially, Petitioner was represented by Rick Jancha, who was willing to take his case to trial to prove Petitioner's innocence. But in December 2014 - two weeks before Petitioner's trial was set to begin - Mr. Jancha suffered a massive heart attack. Rajan Joshi, who worked at the same law firm as Mr. Jancha, then entered an appearance on behalf of Petitioner. The district court rescheduled Petitioner's trial for June 2015.

Before trail began, though, on the urgeing of Mr. Joshi, Petitioner entered into a plea agreement with the government. Pursuant to the agreement, Petitioner would plead guilty to Count Seven of the superseding indictment and the government would dismiss the remaining counts. Petitioner was told by Mr. Joshi that, if he went to trial, he would be "found guilty" and spend the rest of his "life in prison." Therefore, as stated by Mr. Joshi, Petitioner's "only option" was to plead guilty.

On May 15, 2015, Petitioner appeared before the Honorable Philip R. Lammens, United States Magistrate Judge, and entered a guilty plea to Count Seven of the superseding indictment. During the plea colloquy, the Magistrate Judge found that Petitioner's decision to plead guilty was freely, voluntarily, knowingly, and intelligently made with the advice of competent counsel with whom Petitoner was satisfied. In the Eleventh Circuit, statements made during the plea colloquy - declarations made under oath and in open court - carry a strong presumption of verity. See United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994). The

Magistrate Judge issued a report and recommendation, recommending that the district court accept Petitioner's guilty plea.

On May 22, 2015, only seven days after Petitioner pled guilty, Robert Gonzales, a computer forensics expert who was hired by Mr. Jancha before his heart attack, contacted Petitioner and asked him why he pled guilty with all of the exculpatory information and evidence that was discovered during his investigation. Petitioner was unaware of this exculpatory information and he immediately contacted Shari Bishop, the secretary of Mr. Joshi. Ms. Bishop confirmed that Mr. Joshi had the exculpatory evidence, yet he never turned it over to Petitioner. When confronted, Mr. Joshi refused to file a motion to withdraw the guilty plea and admit that he withheld information from Petitioner, which caused the plea to be unknowing and unintelligent. This led Petitioner to fire Mr. Joshi and seek new representation.

On June 23, 2015, after meeting with several lawyers, Petitioner was able to hire new counsel - Daniel Brodersen - who filed a motion to withdraw the guilty plea. After a court accepts a defendant's guilty plea but before it sentences him, a defendant may withdraw his guilty plea if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). "Whether a defendant's motion to withdraw shows a fair and just reason is to be liberally construed." United States v. Hunter, 588 F. App'x 910, 912 (11th Cir. 2014). The motion Petitioner filed alleged that his plea was not voluntary, knowing, or intelligent because Mr. Joshi made material misrepresentations that persuaded him to enter into an unknowing guilty plea. Petitioner also asserted that his plea was coerced because Mr. Joshi withheld the existance of exculpatory information from him and failed to investigate evidence that tended to show Petitioner was innocent.

Petitioner's motion to withdraw his guilty plea directly contradicted the statements made at the plea colloquy: that the decision to plead guilty was

freely, voluntarily, knowing, and intelligently made with the advice of competent counsel whom Petitioner was satisfied. "[W]hen a defendant makes statement's under oath at the plea colloquy, he bears a heavy burden to show his statements were false." United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988). "A defendant who presents a reason for withdrawing his plea that contradicts the answers he gave at a Rule 11 hearing faces an uphill battle in persuading the judge that his purported reason for withdrawing his plea is 'fair and just.'" United States v. Trussel, 961 F.2d 685, 689 (7th Cir. 1992). The thrust of Petitioner's arguments supporting his motion to withdraw his guilty plea was that he did not know Mr. Joshi was ineffective or that the plea was not knowing or intelligently made at the plea colloquy. The plea colloquy was on May 15, 2015 and Petitioner found out that Mr. Joshi was ineffective on May 22, 2015. Petitioner could not have testified at the plea colloquy that Mr. Joshi was ineffective because Petitioner did not know counsel was ineffective.

Petitioner attached five (5) affidavits with his motion to withdraw his guilty plea (See Appendix E). Under U.S.C. § 1746, affidavits signed, dated, and sworn to before a person having authority to administer an oath, are treated as verified. "[T]he court must accept an affidavit as true if it is uncontested by counter-affidavit or other evidentiary material." 3 Am. Jur. 26 § 2. The courts have also held that "no more than affidavits are necessary to make a prima facie case." United States v. Kis, 658 F.2d 526 (7th Cir. 1981). Two (2) of these affidavits were from Petitioner himself, including an affidavit from the day before he entered the plea, which stated in part: "Although I am entering a guilty plea, I am not in fact guilty of these crimes.... I have been told over and over again [by Mr. Joshi] that this plea is my only option [and] I just want it to be known, before I sign this plea, that I do this only because I have been left with no other recourse." (Appendix E-1). In addition, Petitioner attached two (2) affidavits from his parents, who were direct witnesses to Mr. Joshi's ineffectiveness, and one (1)

affidavit from Mr. Gonzalez, the forensic expert, which stated in part: "[Mr. Joshi] was made aware of [the exculpatory] information... and decided to ignore it." (Appendix E-5). Third-party affidavits evidencing ineffective assistance of counsel in the face of representations made during the Rule 11 plea colloquy require resolution via an evidentiary hearing. See Mathews v. United States, 533 F.2d 900, 902 (5th Cir. 1976). The government even sent agents to the notary to confirm that the affidavits were genuine. The three (3) third-party affidavits made a prima facie showing that Mr. Joshi was ineffective for failing to subject the prosecution's case to meaningful adversarial testing and for withholding exculpatory evidence from Petitioner, before advising him to plead guilty. The three (3) third-party affidavits showed that Petitioner was prejudiced by Mr. Joshi's performance and that Mr. Joshi "deprive[d] the [Petitioner] of a fair trial," Strickland v. Wahington, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which violated Petitioner's Sixth Amendment rights to the Constitution of the United States. The three (3) third-party affidavits also showed that there was a "reasonable probability that, but for counel's errors, [Petitioner] would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52 (1985). See also United States v. Cronic, 466 U.S. 648, 659-61, 104 S.Ct. 2039, 80 L.Ed.2d 657 8nn. 25, 28 (1984); Padilla v. Kentucky, 559 U.S. ___, 176 L.Ed.2d 284, 296-97 (2010); Tollett v. Henderson, 411 U.S. 258, 266, 93 S.Ct. 1602, 1607, 36 L.Ed. 235 (1973); McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); Powell v. Alabama, 287 U.S. 45 S.Ct. 55 (1932). Both Petitioner's affidavits and the (3) third-party affidavits show proof that Petitioner entered the guilty plea in haste, confusion, and fear. See United States c. Buckles, 843 F.2d 469 (11th Cir. 1988).

On June 29, 2015, the district court held a short hearing on Petitioner's motion to withdraw his guilty plea. The district court denied the motion, gave

"no evidentiary weight or value" to any of Petitioner's attached affidavits, and completely credited the testimony given in front of the Magistrate Judge at the plea colloquy. The district court incorrectly concluded that Petitioner had effective assistance of counsel and that the guilty plea was knowing and intelligently made. The district court gave "no evidentiary weight or value" to any of the affidavits, including the three (3) third-party affidavits, that provided facts that created a presumption for the existence of other facts related to Mr. Joshi's ineffective representation. A legal conclusion could have been drawn by the facts stated in these third-party affidavits. See Kis, supra, and 3 Am. Jur. 26 § 2. The district court, instead, stated that Petitioner's affidavits were "bizarre" and that they were "allegedly signed" on the day they were notorized. The district court stated "[t]here is no way to reconcile [Petitioner's] inconsistent (sworn) representations; either [he] lied in his affidavits and verified motion, or he perjured himself infront of the magistrate judge." The district court commented that Petitioner tried to "hedge his bet," and that Petitioner "only sought to withdraw his guilty plea after his sentence had been calculated and only because he was dissatisfied with his sentence calculation." The district court also commented that Petitioner's claim of ineffectiveness was "no more that a poorly-camouflauged and calculated attempt to balance [his] sentencing risk" and that Petitioner's guilty plea was "buyers remorse." No evidence was presented to support these comments and conclusions by the district court. The district court never once acknowledged Petitioner's actual argument: that Petitioner did not know of Mr. Joshi's ineffectiveness at the plea colloquy. The district court then labled Petitioner a flight risk and had him detained in federal custody until sentencing. The district court's decision to deny Petitioner's withdraw of plea motion was "arbitrary [and] unreasonable." Fed. R. Crim. P. 11(d).

II.

On July 28, 2015, Petitioner was sentenced on Count Seven of the superceding indictment by the district court. Count Seven reads:

> On or about October 1, 2012 at 3:02 p.m., in Lake County, in the Middle District of Florida, and elsewhere, defendant herein, did knowingly transport and ship, using a means and facility of interstate and foreign commerce, that is, by computer, via the internet, visual depictions, the production of which involved the use of a minor engaging in sexually explicit conduct, which visual were of such conduct, and which visual depictions are specifically identified in the following computer files, among others:
>
> 1. "I(6).jpg";
> 2. "1282421620874.jpg"; and
> 3. "[001844].jpg."
>
> In violation of Title 18, United States Code, Sections 2252(a)(1) and 2252(b)(1).

(Crim. Doc. 31 at 5-6). In this instant case, Petitioner was convicted of **ONLY** one count of transportation of child pornography. This transportation involved the discrete act of distributing three (3) images to a juvenile, via the internet. Under the United States Sentencing Guidelines § 2G2.2, the district court enhanced Petitioner two levels for material that involved a prepubescent minor under the age of 12, six levels because the offense involved distribution to a minor that was intended to persuade the minor to engage in illegal activity, four levels were added because the offense involved material portraying sadistic or mascochistic conduct or other depictions of violence, and five levels because the offense involved more than 600 images and videos, as well as two levels for the use of a computer. These enhancements, §§ 2G2.2(b)(2), (b)(3)(D), (b)(4), (b)(7)(D), and (b)(6) were considered "relevant conduct" by the district court.

A sentencing judge may consider uncharged and unajudicated conduct for sentencing purposes if it is deemed relevant conduct. United States Sentencing Guidelines Manual § 1B1.3(a)(1), (2). The Sentencing Guidelines distinguish

between two different categories: "relevant conduct" under U.S.S.G. § 1B1.3(a)(1) includes only acts that occurred during the commission of the offense, while the broader cateogry of "expanded relevant conduct" under U.S.S.G. § 1B1.3(a)(2) includes any conduct that is part of the same scheme or plan as the offense of conviction. The broader category is used solely with respect to offenses which require grouping under U.S. Sentencing Guidelines Manual. Under U.S.S.G. § 3D1.2(d), U.S.S.G. § 2G2.2 is directly listed as a groupable offense.

Application note 1(H) to U.S.S.G. § 1B1.1 defines "offense" to mean "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." Because § 2G2.2 does not specify or clearly indicate that "offense" carries a different meaning for purposes of applying the enhancements, the court must apply the definition set in § 1B1.1. No different conclusion is dictated by § 2G2.2

However, under U.S.S.G. § 1D1.3, grouped counts must involve substantially identical offense conduct. In Petitioner's case at bar, the separate counts occurred over different periods of time and involved different victims. Section 3D1.3 requires groups of closely related counts to (1) "involve the same victim and the same act or transaction"; (2) "involve the same victim and two or more acts or transactions connected by a common... scheme or plan"; (3) "embod[y] conduct that is treated as a specific offense characteristic in... the guideline applicable to another of the courts"; and (4) have "offense behavior" that "is ongoing or ccntinuous in nature and the offense guideline is written to cover such behavior. U.S.S.G. § 3D1.2. The Application notes of § 3D1.2 and § 2G2.2 specifically state that the groupoing of counts only applies if the offense are "closely related." The Application notes also specifically state that "each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under § 3D1.2."

Therefore, § 1B1.3 requires "relevent conduct" to "occur[] during the commission of the offense of conviction, in preperation for that offense, or in the course of attempting to avoid detection or responsibility for that offense," and the court's have explained that this provision can temporally limit the application of § 1B1.3. See United States v. Barraza, 655 F.3d 375, 385 (5th Cir. 2011)("[S]eperate acts or conduct that did not occur during the commission of the presently charged offense may not be relevant conduct"). When considering "relevent conduct," the district court is "limited to examining the... charging document, written plea agreement, transcript of the plea colloquy, and explicit factual findings by the... judge to which the defendant assented. United States V. Shepard, 544 U.S. 13, 16, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005). The government also bears the burden of establishing the applicability of sentencing enhancements. See United States v. Victor, 719 F.3d 1288, 1290 (11th Cir. 2013).

Under § 1B1.3, "relevant conduct" for Petitioner includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the [Petitioner]" in Count Seven, the discrete act of distributing three (3) images to a Texas juvenile. See U.S.S.G. § 1B1.3(a)(1). In addition, because U.S.S.G. § 2G2.2 requires grouping under U.S.S.G. §3D1.2, "relevant conduct" for Petitioner also includes "all acts and omissions... that were part of the same course of conduct or common sheme or plan as" Count Seven, the discrete act of distributing three (3) images to a Texas juvenile. See U.S.S.G. § 1B1.2(a)(2).

In Petitioner's case, the district court adopted that, under § 3D1.2, dismissed charges can be grouped and are considered "relevant conduct," given that one must first possess child pornography before one can transport it. This decision is in direct conflict with the Fifth circuit's precedent case and has created a split between the circuit. In United States v. Teaschler, 689 F.3d 397 (5th Cir.

2012) and United States v. Fowler, 216 F.3d 459, 461 (5th Cir. 2000), the Fifth Circuit stated, "we do not believe the guidelines should be construed so broadly" when applying enhancemnts under U.S.S.G. § 2G2.2. (see Appendix F-1 and 2).

In Petitioner's case, the government did not indicate the date(s) for the possession of material that involved a prepubescent minor under the age of 12. The distribution to the Texas juvenile was "on or about October 1, 2012 at 3:02 p.m." The government did not show that Petitioner's possession of material that invovled a prepubescent minor under the age of 12 were part of the descrete act of distributing three (3) non-prepubescent images to the Texas juvenile, that led to the offense of conviction or any similar scheme or plan. The descrete act of distributing three (3) non-prepubescent images to a Texas juvenile and the possession of material that involved a prepubescent minor under the age of 12 were not sufficiently related to conclude that they were part of the same course of conduct. The dissent would make the possession of any child pornography a part of the offense of the interstate trasportation of child pornography. "We do not believe the guidelines should be construed so broadly." Fowler, supra. Petitioner should not have been enhanced under U.S.S.G. § 2G2.2(b)(2). In addition, "multiple counts involving the exploitation of different minors are not to be grouped under § 3D1.2." U.S.S.G. § 3D1.2.

In Petitioner's case, the government presented no evidence that the distribution of three (3) images to the Texas juvenile was intended to persuade the minor to engage in illegal activity. The government was required to prove beyond a reasonable doubt, through evidence, that Petitioner intended to induce, persuade, entice, or coerce a minor. See United States v. Lundy, 676 F.3d 444, 447 (5th Cir. 2012). Regarding proof on intent, the government was required to prove that Petitioner "intended to cause assent on the part of the minor," not that he acted with the specific intent to engage in illegal activity. United States v. Lee,

603 F.3d 904, 914 (11th Cir. 2010). It is the persuasion, inducement, enticement, or coercion of the minor, rather than the act itself, that is prohibited by statute. See United States v. Murrell, 368 F.3d 1283, 95 Fed. App'x. 1283 (11th Cir. 2004). In Petitioner's case, there was no evidence presented that showed a process to persuade, stimulate, or cause the Texas juvenile to engage in illegal activity or the type of conduct depicted in the images. The investigative reports in this case clearly show that the Texas juvenile was already engaged in prohibited behavior that showed a pattern of activity involving possesssion and distribution of child pornography before ever having electronic contact with Petitioner. No evidence exists that Petitioner intended to induce, pursuade, entice, or coerce the Texas juvenile. The simple fact that the images were sent to a minor does not warrant the enhancement of persuasion, inducement, enticement, or coercion. This dissent would make the interstate trasportation of child pornography to a minor part of the offense of persuasion, inducement, enticement, or coercion of a minor. "We do not believe the guidelines should be construed so broadly." Fowler, supra. Petitioner should not have been enhanced under § 2G2.2(B)(3)(D).

In Petitioner's case, the government did not indicate the date(s) for the possession of material portraying sadistic or masochistic conduct or other depictions of violence. The distribution to the Texas juvenile was "on or about October 1, 2012 at 3:02 p.m." The government did not show that Petitioner's possession of material portraying sadistic or masochistic conduct were part of the descrete act of distributing three (3) non-sadistic images to a Texas juvenile, that led to Petitioner's offense of conviction or any similar scheme or plan. The descrete act of distributing three (3) non-sadistic images to a Texas juvenile and the possession of material portraying sadistic or masochistic conduct were not sufficiently related to conclude that they were part of the same course of conduct.

In fact, the government even stated that "the images that portray sadistic or masochistic conduct were not contained within the... images transmitted to [the] Texas [juvenile]." (Sentencing Transcripts, page 4 at 25 and page 5 at 1). The dissent would make the possession of any child pornography a part of the offense of the interstate transportation of child pornography. "We do not believe the guidelines should be construed so broadly." Fowler, supra. In addition, "multiple counts involving the exploitation of different minors are not to be grouped under § 3D1.2." U.S.S.G. § 3D1.2.

In Petitioner's case, the government did not indicate the date(s) for the possession of more than 600 images and videos containing child pornography. The distribution to the Texas juvenile was "on or about October 1, 2012 at 3:02 p.m." The government did not show that Petitioner's possession of more than 600 images and videos containing child pornography were part of the descrete act of distributing three (3) images to the Texas juvenile, that led to the offense of conviction or any similar scheme or plan. In fact, the government stated that only "81 images... were transmitted to a Texas juvenile which relates to [the] count of conviction in this case," (Sentencing Transcripts, page 3 at 13-15), and that "81 images... were involved with the Texas juvenile." (Sentencing Transcripts, page 3, at 19-20). The descrete act of distributing three (3) images to a Texas juvenile and the possession of more than 600 images and videos containing child pornography were not sufficiently related to conclude that they were part of the same course of conduct. The dissent would make the possession of any child pornography a part of the offense of the interstate transportation of child pornography. "We do not believe the guidelines should be construed so broadly." Fowler, supra. Petitioner should not have been enhanced under U.S.S.G. § 2G2.2(b)(2). In addition, "multiple counts involving the exploitation of different minors are not to be grouped under § 3D1.2." U.S.S.G. § 3D1.2.

Our criminal justice system rests on the Fifth and Sixth Amendment guarantees of due process and the right to a jury trial for the criminally accused. These principles require the government to prove a defendant's guilt beyond a reasonable doubt to a jury. Under the Constitution, defendants may be convicted only for conduct proven beyond a reasonable doubt. However, at sentencing, courts may enhance sentences if they find, by a preponderance of the evidence, that a defendant committed other crimes. The difference in those standards of proof means that a sentencing court can effectively enhance a sentence for conduct that was not proven beyond a reasonable doubt. In Ball v. United States, No. 13-10026, 190 L.Ed.2d 279 (2014), this Court denied the petition for the writ of certiorari. Justice Scalia wrote a blistering dissent, joined by Justices Ginsburg and Thomas, writing that, "this has gone on long enough." Id. The presumption of innocence - the cornerstone of American jurisprudence - must be afforded weight. As a result, a person not convicted of certian conduct should not be punished by the United States for that conduct. See Nelson v. Colorado, 137 S.Ct. 1249 (2017). The Eleventh Circuit's use of "relevant conduct" in uncharged and/or dismissed charges for U.S.S.G. § 2G2.2 enhancements at sentencing is anethema to the concept of the presumption of innocence. Absent a conviction, if the United States cannot take a dollar of one's property, how much moreso can it not take a day of one's liberty. To penalize Petitioner for uncharged, unconvicted, or dismissed conduct, by asserting such "charge" as a mere sentencing factor, in conjunction with some other charge, allows the United States to make an "end run" around Petitioner's constitutional protections.

It is clear that, if Petitioner was sentenced in the Fifth Circuit, the guidelines would not have been "construed so broadly," Petitioner's sentence would not have been enhanced by seventeen (17) levels, and his sentencing guideline range would have only been 78-97 months, instead of the 200 months that

Petitioner received. This Court has stated that the guidelines must be "correctly" calculated as the starting point in the district court's imposition of a sentence and that a failure to do so is procedural error that is reversable. United States v. Peugh, 569 U.S. at ____, 133 S.Ct. at 2080 (2013). A defendant who can show he was sentenced under an incorrect guidelines range "should be able to rely on that fact to show a reasonable probability that the distict court would have imposed a different sentence under the correct range." Molina-Martinez v. United States, ___ U.S. ___, 2016 WL 1574581 (2016) Slip Op at 10. How can a guideline be "correctly" calculated if different circuits and judges have a different interpretation of what qualifies as "relevant conduct" under the same guideline?

For enhancement purposes under U.S.S.G. § 2G2.2, with respect to offenses that require the grouping of multiple counts under U.S.S.G. § 3D1.2, the "relevent conduct" in Petitioner's case must be "sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G. § 1B1.3, comment. n. (9)(B). In evaluating whether two or more offenses meet this test, the sentencing court should consider "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." Id. Therefore, "relevant conduct" in Petitioner's case must occur during the commission of discretely distributing three (3) images to the Texas juvenile or must be part of the same course of conduct or common scheme or plan as discretely distributing three (3) images to the Texas juvenile. Petitioner should have received only three enhancements for "relevant conduct" under U.S.S.G. § 2G2.2. The offense "involved distribution to a minor," which requires a 5 level enhancement under § 2G2.2(b)(3)(C). The offense "involved the use of a computer," which requires a 2 level enhancement under § 2G2.2(b)(6). And, the offense involved "at least 10 images, but fewer than 150," which requires a 2 level enhancement under § 2G2.2(b)(7)(A). Petitioner

should have only received a 9 level enhancement for "relevant conduct," because the actions of discretely distributing images to the Texas juvenile are "sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G. § 1B1.2, Comment. N. (9)(8).

The district court may make findings of fact based on undisputed statements in the [Pre-Sentencing Report], but may not rely on those portions to which the defendant objected "with specificity and clarity," unless the government establishes the disputed facts by a preponderence of the evidence. United States v. Philidor, 717 F.3d 883, 885 (11th Cir. 2013). When the sentecning judge makes factual determinations, "bald, conclusionary statements do not acquire the patina of reliability by mere inclusion in the PSR." Cf. United States v. Elwood, 999 F.2d 814, 817-18 (5th Cir. 1993). In Petitioner's case, counsel - Mr. Brodersen - objected to the portions of the PSR that were unrelated to Count Seven of the superceding indictment. During this objection, Mr. Brodersen offered no case law, U.S. Sentencing Commission policy statements, or court rules to support his argument. The district court overruled Mr. Brodersen's ineffective and incompetent objection and adopted the PSR in its entirety, stating, "[a]s to the guidelines application, the court adopts the probation office as stated" (Sentencing Transcripts, Page 10 at 7-9). The district court applied all of the enhancements under § 2G2.2 without explaining the reasoning behind the enhancements.

As a first-time, non-violent offender, Petitioner's base offense level was 22, Criminal History Category I, with a guideline range of 41-51 months. With the five enhancements in the PSR, Petitioner's offense level was increased by 19 levels. U.S.S.G. § 2G2.2 is fundamentally different from most other guidelines and is required to be applied with great care. Under 18 U.S.C.S. 3553(a)(5), the court is required to consider any relevant policy statements issued by the Sentencing

Commission. U.S.S.G. § 2G2.2 is not based on the Sentencing Commission's expertise, but rather Congress's direction. The Sentencing Commission itself has produced a report to Congress effectively disavowing the federal child pornography offenses, due to the failure to meaningfully account for differences in culpability. See Sentencing Commission's December 2012 Report, entitled: "Special Report to Congress: Federal Child Pornography Offenses." The current guidelines under U.S.S.G. § 2G2.2 "produces overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and widespread inconsistent application." Id. The Sentencing Commission has stated that the four enhancements under U.S.S.G. § 2G2.2 are effectively triggered for any first-time offenders and result in a range at or near the statutory maximum, and that it irrationally recommends a higher sentence than applies to adults who actually engage in sex with minors. See United States v. Dorvee, 616 F.3d 174 (2nd Cir. 2010).

In Petitioner's case, the district court did not consider the relevant policy statements issued by the Sentencing Commission, in violation of 18 U.S.C.S. § 3553(a)(5). Mr. Brodersen, Petitioner's counsel, failed to bring this relevant policy statement to the district court's attention as well, which qualifies as ineffective assistance of counsel. Peitioner was prejudiced by counsel's performance. According to the U.S. Sentencing Comission's own Interactive Sourcebook (isb.USSC.gov), and using the Commission's own fiscal year 2015 Datafile (USSCFY2015), there were 1,557 cases enhanced that year under U.S.S.G. § 2G2.2. In 2015, the mean (average) sentence for U.S.S.G. § 2G2.2 was 101 months and the median (middle) sentence was only 80 months. Petitioner was included in this count, yet he was sentenced to 200-months imprisonment. If Petitioner's guidelines were correctly calculated, his guideline range would have been 78-87 months, which would relate to the other defendants who were sentenced in 2015. The district court fundamentally erred and Mr. Brodersen was ineffective for allowing Petitioner to

be sentenced for "relevant conduct" that was not related or relevant to Count Seven of the superseding indictment, even though Petitioner was a first-time offender, he had no physical contact with any minors, and the case was only transportation of images and not production of images. The district court also violated Title 18 U.S.C.S. § 3553(a)(6) by sentencing Petitioner to 200-months imprisonment, which created an unwarranted sentence disparity because defendants with similar records, who have been found guilty of similar conduct, have received half of Petitioner's sentence. "In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher guidelines range has demonstrated a reasonable probability of a different outcome." Molina-Martinez, supra.

Petitioner was not convicted of distributing a picture of a minor under 12 years of age, he was not convicted of persuading, inducing, enticing, or coercing a minor to engage in illegal activity, he was not convicted of possessing sadistic or masochistic images, and he was not convicted of possessing 600 or more images. Therefore, Petitioner should not have been enhanced under U.S.S.G. § 2G2.2(b)(2), (b)(3)(D), (b)(4), and (b)(7)(D). The U.S.S.G. § 2G2.2 "should not be construed so broadly." Teuschler and Fowler, supra. These enhancements did not "occure[] during the commission of the offense of conviction, in preperation of that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3. These enhancements were also not part of the same course of conduct or common scheme or plan as distribuiting three (3) images to a Texas juvenile. See United States v. Roussel, 705 F.3d 184, 199 (5th Cir. 2013). In addition, the government never established the applicability of the sentencing enhancements by a preponderance of the evidence. See United States v. Victor, supra. It is wholly improper to penalize Petitioner for conduct of which he is presumed innocent. And therefore, Mr. Brodersen was ineffective for allowing

Petitioner to be penalized for uncharged conduct which he is presumed innocent. Petitioner was also prejudiced by Mr. Brodersen's ineffectiveness, which caused him 200-months in a federal prison. In the Ninth Circuit, grouped counts must invovle substantially identical offense conduct. See United States v. Hines, 26 F.3d 1469, 1475 (9th Cir. 1994) and United States v. Barron-Rivera, 922 F.2d 549, 554 (9th Cir. 1991). In the Third Circuit, "separate and distrinct fear and risk to society" that occured "on multiple occasions should not have been grouped together." See United States v. Griswold, 57 F.3d 291, 296 (3rd Cir. 1995). The U.S.S.G. § 2G2.2 enhancements addressed "instances of illegal conduct" separate from Count Seven. See United States v. Riviere, 924 F.2d 1289, 1306 (3rd Cir. 1991). "Multple adjustments [to the guidelines] are properly imposed, however 'when they aim at different harms emanating from the same conduct,'" United States v. Volpe, 224 F.3d at 76 (2nd Cir. 2000)(emphasis added), such as different harms on the same minor. See United States v. Sabhnani, 599 F.3d 215, 251 (2nd Cir. 2010). The enhancements in Petitioner's case occured on multiple occasions, were part of different conduct, and involved different minors. Therefore, Petitioner should not have been enhanced for conduct that was not part of Count Seven, the guidelines "should not [have been] construed so broadly," the district court erred for imposing the incorrect guideline, and Mr. Brodersen was ineffective for not bringing the error to the district court's attention.

Petitioner filed a timely notice of appeal and was appointed counsel - Donna Lee Elm - from the Federal Public defender's Office. Petitioner requested that Ms. Elm obtain a full copy of his Discovery and all the documents from his previous counsel - Mr. Joshi - that was withheld from him. Petitioner also asked Ms. Elm not to file anything without his direct approval. Petitioner knew that evidence in Discovery and the documents from Mr. Joshi would prove that Mr. Joshi was ineffective, that Petitioner was innocent and that the district court erred in denying his motion to withdraw his plea. Instead of following Petitioner's

instructions, Ms. Elm moved to withdraw from his case, pursuant to Anders v. California, 386 U.S. 738, 739, 87 S.Ct. 1396, 1397 (1967), on December 18, 2015. Ms. Elm's withdraw motion specifically stated that she was "unable to find any non-frivolous arguments that could in good faith be presented on appeal," even though Petitioner informed her what arguments he wanted to present on direct appeal. "Under the proceduarl default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004). Due to Ms. Elm's ineffectiveness for filing an Ander's brief and the Eleventh Circuit's proceduarl default rule, Petitioner was forced to file a pro se response to Ms. Elm's motion.

Petitioner's response generally stated that counsel was ineffective and Petitioner included several examples. The Circuit Court denied Petitioner's direct appeal, during its Non-Argument Calendar, in a one paragraph order on November 30, 2016, stating that his appeal is "wholly frivolous." United States v. Murray, 671 F. App'x 747, 748 (11th Cir. 2016)(unpublished).

III.

Thereafter, Petitioner filed a pro se Title 28 U.S.C. § 2255 motion, which he later amended. In Petitioner's amended motion, he argued, in part:

1) Mr. Joshi was ineffective for failing to investigate false testimony presented to the grand jury that led to Petitioner's indictment, in violation of United States v. Cronic, 466 U.S. 648, 659-61, 104 S.Ct. 2039, 80 L.Ed.2d 657 8nn. 25, 28 (1984), before advising Petitioner to plead guilty, in violation of Strickland;

2) Mr. Joshi was ineffective for failing to complete a proper investigation into the HP laptop, in violation of Cronic, before advising Petitioner to plead guilty, in violation of Strickland;

3) Mr. Joshi was ineffective for failing to complete a proper investigation into the internet activity, in violation of Cronic, before advising Petitioner to plead guilty, in violation of Strickland;

4) Mr. Joshi was ineffective for failing to file important subpoenas that would have led to exculpatory information, in violation of Cronic, before advising Petitioner to plead guilty, in violation of Strickland;

5) Mr. Joshi was ineffective for failing to interview an alibi witness, in violation of Code v. Montgomery, 799 F.2d 1481, 1482-83 (11th Cir. 1986), which would have proven Petitioner's innocence, before advising Petitioner to plead guilty, in violation of Strickland;

6) Mr. Joshi was ineffective for overestimating Petitioner's possible sentence by telling him that he was facing life in prison if he went to trial, in violation of Holley v. United States, 718 Fed. App'x 898; 2017 U.S. App. LEXIS 25721 (11th Cir. 2017), while underestemating Petitioner's sentence by telling him that he would only get five or six years if he plead guilty, in violation of Strickland;

7) Mr. Joshi was ineffective for withholding an exculpatory forensics report from Petitioner, in violation of Strickland, which would have led Petitioner to insist on going to trial to prove his innocence. See Hill V. Lockhart, 474 U.S. 52 (1985) and Padilla v. Kentucky, 559 U.S. ___, 176 L.Ed.2d 284, 396-97 (2010);

8) Mr. Joshi was ineffective for having a conflict of interest, in violation of Cuyler v. Sollivan, 446 U.S. 335, 348-50, 64 L.Ed.2d 333 (1980), by abandoning Petitioner to open his own law firm, using drugs while representing Petitioner, and getting arrested for cannabis and cocaine possession shortly after Petitioner's plea, in violation of Strickland;

9) Mr. Joshi was ineffective for refusing to file Petitioner's withdraw of plea motion after Petitioner found out he withheld exculpatory evidence and failed to investigate Petitioner's case, in violation of Cuyler, Padilla, Cronic, Strickland, and Hill, supra;

10) Mr. Brodersen was ineffective for not questioning Mr. Joshi under oath at the withdraw of guilty plea hearing, in violation of Strickland and Cuyler, which would have proven that Mr. Joshi rendered ineffective assistance of counsel during Petitioner's pre-trial investigation and during the plea stage; and

11) Ms. Elm was ineffective for filing an Ander's brief during Petitioner's direct appeal, knowing that she could find evidence of Mr. Joshi's and Mr. Brodersen's ineffectiveness in the record and in discovery, in violation of Cronic and Strickland.

(Civ. Doc. # 7 & 8). Every single claim above was filed in Petitioner's § 2255.

The Constitution guarantees everyone an effective and competent lawyer, but Petitioner's constitutional rights were violated due to Mr. Joshi's, Mr. Brodersen's, and Ms. Elm's ineffective assistance and below the standards of representation required of counsel by the Sixth Amendment. Petitioner was constructively denied counsel because Mr. Joshi "entirely fail[ed] to subject the prosecution's case to meaninful adversarial testing," Cronic, supra, and Mr. Joshi "advi[sed] [Petitioner] to plea bargan to an offense which [he had] not investigated." Woodward v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990). See also Gaines v. Hopper, 557 F.2d 1147 (5th Cir. 1978)(stating that "[s]uch conduct is always unreasonable"). It is also clear that Mr. Joshi had a duty to make an independant investigation of the facts and circumstances of the case, See Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985), and adversal balance cannot take place without a proper investigation by the defense. Mr. Joshi's duty to investigate rested on the recognition of pretrial investigation as perhaps the most critical stage of a lawyers preparation. See Strickland, at 691. Mr. Joshi's ineffectiveness prevented Petitioner's plea from being knowing, voluntary, and intelligently entered. See Tollett v. Henderson, 411 U.S. 258 (1973). Petitioner was able to show that Mr. Joshi's advice was not within the range of competence demanded of attorneys in criminal cases and that "but for counsel's errors, he would not have pleaded guilty

and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52 (1985).

The district court denied Petitioner's § 2255 motion, stating that "[d]espite his argument..., nothing in the record (except for [Petitioner's] own self-serving statements and affidavits) supports his claim that [Mr. Joshi was ineffective and] coerced [Petitioner's] guilty plea." (cv. Doc. # 23). The district court also stated that Petitioner's "after-the-fact and conclusory" claims of ineffective assistance of counsel does not "overcome his hearvy bruden of showing that he lied under oath to Judge Lammen at [the plea colloquy] when he admitted his guilty." Id. The district court stated that Petitioner "would now have the court believe that his then counsel coerced him into pleading guilty. This is utterly belied by the plea colloquy at the hearing." Id. The district court stated that "it completely credits the testimony given by [Petitioner] under oath and in front of the magistrate judge." Id. The district court also stated that Petitioner's § 2255 motion "is not entitled to relief on his claims that his plea was unknowing and involuntary due to ineffective assistance of counsel." Id.

The district court's conclusion that Petitioner had effective assistance of counsel is in error. The district court relied on Petitioner's plea and the statements Petitioner made at the plea colloquy, when Petitioner did not know Mr. Joshi was ineffective, to conclude that Mr. Joshi was effective in this case. The district court violated Strickland because it did not "judge the reasonableness of counsel's challenged conduct on the facts of [Petitioner's] case, viewed as of the time of counsel's conduct." Strickland, supra (emphasis added). Petitioner clearly informed the district court that he was unaware of Mr. Joshi's deficient performance until after he pled guilty at the plea colloquy. The district court was required to look at counsel's challenged conduct, not Petitioner's statements, to resolve whether Mr. Joshi performace rendered ineffective assistance of counsel. Mr. Joshi rendered ineffective assistance of counsel during the pre-trial

investigation stage and the plea negotiation stage. See McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1449 (1970) and Hill v. Lockhart, supra. Mr. Brodersen was ineffective during the withdraw of guilty plea hearing and during sentencing. Ms. Elm was ineffective during direct appeal. All three attorney's were ineffective and Petitioner was prejudiced by their preformances, which violates the Sixth Amendment of the United States Constitution.

IV.

Title 28 U.S.C. § 2255 provides in pertinent part: "unless the motion and the files and records of the case conclusively show that the [Petitioner] is not entitled to relief, the court shall... grant a prompt hearing thereon." § 2255. Petitioner was able to show that (1) "counsel's representation fell below an objective standard or reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra. Thus, when the district court considered Petitioner's ineffective assistance of counsel claims, it was required to "judge the reasonableness of counsel's challenged conduct on the facts of [Petitioner's] case, viewed as of the time of counsel's conduct." Id., at 690. See also Gates v. Zant, 863 F.2d 1492, 1497 (11th Cir. 1989). As observe by the Eleventh Circuit Court of Appeals:

> "[The test for ineffective assistance of counsel] has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer... could have acted, in the circumstances, as defense counsel acted.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process..., in fact, worked adequately."

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992)(Citation omitted) (emphasis added). The proper measure of attorney performance is "simply

reasonableness under prevailing professional norms" considering all the circumstances. Hinton v. Alabama, 571 U.S. 263, 273, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014). And, the district court was required to look to the facts at the time of counsel's ineffective conduct, not Petitioner's unknowing statements at the plea colloquy. See Roe Flores-Ortega, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). To be objectively unreasonable, the performance must be such that no competant counsel would have taken the action counsel did. See Rose v. McNeil, 634 F.3d 1224, 1241 (11th Cir. 2011) and Hill v. Thomas, 611 F.3d 1259, 1290 (11th Cir. 2010).

Petitioner presented multiple grounds of ineffective assistance of counsel in his § 2255 motion. Petitioner established disputed facts that the district court was required to address, either because they were uncontested by the government and, thus fell in Petitioner's favor, or addressed via an evidentiary hearing. Instead, the district court did not consider "[P]etitioner's allegations... as true," and the district court did not hold an evidentiary hearing. See Winthrop-Redin v. united States, 767 F.3d 1210, 1216 (11th Cir. 2014). The district court found Petitioner's claims "unlikely," not false, and specifically stated that "any of [Petitioner's] allegations not specifically addressed... have been found to be without merit." (Civ. Doc. # 23). The district court refused to respond to the majority of Petitioner's ineffective assistane of counsel claims, because it knew Petitioner would be entitled to relief if the claims were acknowledged. The district court never reviewed Mr. Joshi's unreasonableness for not conducting a meaningul investigation, before advising Petitioner to plead guilty, in violation of Cronic and Strickland, supra. The district court never reviewed Mr. Joshi's unreasonableness for having a conflict of interest when he advised Petitioner to plead guilty, in violation of Cuyler and Strickland, supra. The district court never reviewed Mr. Joshi's unreasonableness for not interviewing an alibi witness,

before advising Petitioner to plead guilty, in violation of Code and Strickland, supra. The district court never reviewed Mr. Joshi's unreasonableness for withholding an exculpatory forensics report from Petitioner, before advising him to plead guilty, in violation of Strickland, supra. The district court never reviewed Mr. Joshi's unreasonableness for not filing important subpoenas, before advising Petitioner to plead guilty, in violation of Cronic and Strickland, supra. The district court never reviewed Mr. Joshi's unreasonableness for failing to investigate false testimony presented to the grand jury that led to Petitioner's indictment, before advising him to plea guilty, in violation of Cronic and Strickland, supra. The district court never reviewed Mr. Joshi's unreasonableness for refusing to file Petitioner's withdraw of plea motion, after Petitioner found out he withheld exculpatory evidence and failed to investigate his case, in violation of Cronic and Strickland, supra. The district court never reviewed Mr. Brodersen's unreasonableness for not questioning Mr. Joshi about his ineffectiveness during the pre-trial stage and the plea negotiation stage at the withdraw of plea hearing, in violation of Cronic and Strickland, supra. The district court never reviewed Mr. Brodersen's unreasonableness for not properly objecting to the enhancements at Petitioner's sentencing, in violation of Strickland, supra. And, the district court never reviewed Ms. Elm's unreasonableness for filing an Anders Brief, even though Petitioner had arguments that could and should have been heard on direct appeal, in violation of Cronic and Strickalnd, supra. These claims are not "conclusory, meritless, or affirmatively contradicted in the record" and the district court should have held an evidentiary hearing. (Cv. Doc. # 23).

Petitioner "allege[d] facts that, if true, would entitle him to relief" and the district court should have held "an evidentiary hearing [to] rule on the merits of [Petitioner's] claim[s]." Aron v. United States, 291 F.3d 708, 714-15 (11th Cir. 2002)(citation omitted). Petitioner was entitled to an evidentiary hearing

because he "alleg[d] facts that would prove both that his counsel performed deficiently and that he was prejudiced by his counsel's deficient performance." Hernandez v. United States, 778 F.3d 1230, 1232-22 (11th Cir. 2015). Without holding an evidentiary hearing and ignoring Petitioner's claims, the district court determined that Petitioner "enjoyed the close assistance of counsel throughout his case." (Cr. Doc. 101 at 11). "How can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused" without holding an evidentiary hearing that was "required when [Petitioner] allege[d] facts which, if taken as true, would entitle him to relief"? Powell v. Alabama, 287 U.S. 45, 61, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and Aron v. United States, supra. Not only did the district court deny Petitioner's § 2255 motion, it also denied Petitioner a Certificate of Appealability.

V.

In October of 2018, Petitioner filed an application for a Certificate of Appealability in the United States Court of Appeals for the Eleventh Circuit. Petitioner asserted that he had ineffective assistance of counsel, that the district court failed to address all of his ineffective assistance claims in his § 2255 motion, and that the district court erred in failing to hold an evidentiary hearing before denying his § 2255 motion. The circuit court denied Petitioner's application for a C.O.A., without addressing the merits of Petitioner's claims. The circuit court stated that Petitioner was "procedurally barred" because the court already reviewed his ineffective assistance of counsel claims on direct appeal. The circuit court also asserted that the district court "expressly stated that any issue not specifically addressed in its [§2255 denial] Order was without merit" and that Petitioner's "own response on direct appeal set out the same evidence he relies on now and that he discovered that evidence of his counsel's purported ineffectiveness before he moved to withdraw his plea, and, thus well before direct appeal."

(Appendix B)(emphasis added). These statements by the circuit court are untrue and without merit.

As an initial matter, Petitioner's ineffective assistance of counsel claims are not "procedurally barred." Under Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004), Petitioner was required to advance his available ineffective assistance of counsel claims during his direct appeal or else he would have been barred from presenting those claims in his § 2255 proceedins. The Eleventh Circuit Court of Appeals considers arguments not raised on direct appeal as abandoned. See Isaccs v. Head, 300 F.3d 1232, 1246 (11th Cir. 2002), but it also considers issues raised on direct appeal by a prisoner in a pro se response to appointed counsel's motion to withdraw under Anders v. Claifornia, supra, as raised for purposes of § 2255. See Stoufflet v. United States, 757 F.3d 1236, 1239 (11th Cir. 2014). Petitioner presented several ineffective assistance of counsel claims that were available to him at that time, so that his ineffective assistance claims would not be "abandoned." Isaccs, supra. If he did not present those arguments, Petitioner would have been barred from presenting those claims in his § 2255 motion, because the procedural default rule applies to all claims, including constitutional claims. See Lynn, supra. Therefore, Petitioner preserved his claims for the § 2255 stage.

The Eleventh Circuit generally does not address ineffective assistance of counsel claims on direct appeal where the record is not sufficiently developed to allow review. See United States v. Puentes-Hurtado, 704 F.3d 1278, 1285 (11th Cir. 2015)(decling to review ineffective assistance claims where there was no testimony from the defendant or his attorney regarding their discussions about, or understanding of, a plea agreement); see also United States v. Perez-Tosta, 36 F.3d 1552, 1563 (11th Cir. 1994)("It is setteled law in this circuit that a claim of ineffective assistance of counsel cannot be considered on direct appeal if the claims were not

first raised before the district court and if there has been no opportunity to develop a record of evidence relevant to the merits of the claim."). Instead, "in most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." Massaro v. United States, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003).

At no time in this case has the Eleventh Circuit Court of Appeals reviewed Petitioner's ineffective assistance of counsel claims. The Eleventh Circuit ordinarily prefers to defer resolution of ineffective assistance of counsel claims until the § 2255 stage. See United States v. Patterson, supra. This is exactly what the circuit court did in Petitioner's case. During the circuit court's Non-Argument Calendar, the circuit court adopted Ms. Elm's assessment of the relative merit of Petitioner's appeal, granted her motion to withdraw as counsel, and affirmed Petitioner's conviction and sentence. The circuit court did not review the merits of Petitioner's ineffective assistance of counsel claims. It only defered them until the § 2255 stage. Therefore, the circuit court could have and should have reviewed Petitioner's ineffective assistance of counsel claims during his application for a certificate of appealablilty.

According to Clisby v. Jones, 960 F.2d 925, 930-36 (11th Cir. 1992), the district court was required to address all of Petitioner's ineffective assistance of counsel claims presented in his § 2255 motion. See also Holley v. United States, 718 Fed. App'x, 98; 2017 U.S. App. LEXIS 25721 (2017)(where the district court's denial of a defendant's 28 U.S.C. § 2255 motion was vacated, and the case remanded becuase the district court did not address one of the defendant's claims of ineffective assistance of counsel). In Petitioner's case, the district court did not address over ten of Petitioner's ineffective assistance of counsel claims. The district court simply stating that "any issue not specifically addressed... is without merit," does not meet the review standard required by Clisby, supra. The district court did not expressly address counsel's ineffectiveness for not

investigating the case, failing to interview an alibi witness, and withholding exculpatory information from Petitioner to coerce his plea, so it never resolved whether Mr. Joshi's plea advice was deficient or whether Petitioner was prejudiced by Mr. Joshi's advice. The district court also did not expressly address Mr. Brodersen's ineffectiveness for not questioning Mr. Joshi at the withdraw of plea hearing and not properly objecting to Petitioner's enhancements at sentencing, as well as not expressly addressing Ms. Elm's ineffectiveness for ignoring Petitioner's claims on direct appeal and filing an Anders Brief. "[R]easonable jurists would find the district court's assessment" of Petitioners ineffective assistance of counsel "constitutional claims debatable or wrong" and that "the issues were adequate to deserve encouragment to proceed further" in the circut court. Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000). Therefore, the Eleventh Circuit was required to remand Petitioner's case back to the district court, which it did not do.

Petitioner's own response in direct appeal did rely on some of the same evidence he relied on in his § 2255 motion, but Petitioner did not have the ineffective assistance of counsel evidence "before" he moved to withdraw his plea, as the circuit court stated. If that was true, Petitioner would have presented that evidence at the withdraw of plea hearing. Even if Petitioner had the evidence, which he did not, that would mean Mr. Brodersen was ineffective for not bringing this evidence to light at the withdraw of plea hearing. Petitioner only obtained the evidence after he was incarcerated, after he obtained a copy of Discovery, and after Ms. Elm filed her Anders Brief stating Petitioner's direct appeal was "wholly frivolous." The only reason Petitioner presented this evidence was to preserve it for the § 2255 stage, as required by Lynn, supra. Therefore, Petitioner did not have this evidence before he moved to withdraw his plea and Petitioner did not have this evidence well before direct appeal. Ms. Elm could have obtained

this evidence and she could have challenged Mr. Joshi's and Mr. Brodersen's ineffectiveness on direct appeal. Instead, Ms. Elm ignored Petitioner, filed an Anders brief, and prejudiced Petitioner by here actions. But for these fundamental errors by counsel, the proceedings would have been different. See Strickland, supra.

The Eleventh Circuit should have remanded Petitioner back to the district court because all of Petitioner's claims were not addressed by the district court in his § 2255 motion, in violation of Clisby, supra. The circuit court should have also remanded Petitioner back to the district court for an evidentiary hearing. See Aron, supra. Petitioner's Fifth Amendment right to due process was violated by the district court and the circuit court, because both courts ignored Petitioner's ineffective assistance of counsel claims. Petitioner's Sixth Amendment right to effective assistance of counsel was also violated because of Mr. Joshi's, Mr. Brodersen's, and Ms. Elm's ineffectiveness. Petitioner's continued incarceration is a miscarraige of justice.

REASONS FOR GRANTING THE PETITION

Petitioner is aware that review of a writ of certiorari is not a matter of right, but of judicial discretion. Petitioner believes that the integrity of our judicial system and Petitioner's violated constitutional rights are a compelling reason to review this writ. This Court has discretion to correct the errors in this case because it seriously affects the fairness, integrity, and public reputation of our judicial system. A writ is warranted because:

1) The U.S. Court of Appeals for the Eleventh Circuit has "decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). This Honorable Court has never settled what qualifies as "a fair and just reason for requesting the withdrawal" of a guilty plea under Fed. R. Crim. P. 11(d)(2)(B). While some circuits have decided that a fair and just reason is to be "liberally construed," United States v. Hunter, supra, "a defendant faces an uphill battle in persuading the judge that his purported reason for withdrawing his plea is 'fair and just.'" United States v. Trussel, supra. If multiple third-party affidavits, confirming counsel was ineffective for withholding exculpatory evidence from a defendant to coerce a plea, is not enough to show a "fair and just" reason to withdraw a guilty plea, what is?

2) The U.S. Court of Appeals for the Eleventh Circuit, in light of reviewing Petitioner's enhancements, has "entered a decision in conflict with the decision[s] of [other] United States Court[s] of Appeals, [notably the Fifth Circuit,] on the same important matter." Rule 10(a). A writ would give this Court the opportunity to clarify Congress's intent in enacting U.S.S.G. § 2G2.2, and to express, for uniform application, what conduct qualifies as "relevant conduct" for enhancements under U.S.S.G. § 2G2.2. The case at bar is an adequate fit to express how Petitioner would not have been enhanced in other cirucits, most notably the Fifth Circuit, yet he was enhanced in the Eleventh Circut, the Fifth Circuit's sister circuit. A writ

would resolve the conflict among the circuits, ensure the uniform application of the law across the land, and express the criminal culpability for U.S.S.G. § 2G2.2 enhancements. Using the Eleventh Circuit's interpretation of "relevant conduct" concerning Title 18 U.S.C. § 2252, Petitioner was enhanced under U.S.S.G. § 2G2.2 by 19 levels. Under the Fifth Circuit's interpretation, Petitioner would not have been enhanced so much because the Fifth Circuit does "not believe the guidelines should be construed so broadly" when applying U.S.S.G. § 2G2.2 enhancements. Fowler and Teaschler, supra.

3) The U.S. Court of Appeals for the Eleventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). A writ would give this Court the opportunity to correct an error in this case that has resulted in a complete miscarriage of justice. The Eleventh Circuit has violated this Court's decision in Strickland v. Washington, supra, by not "judg[ing] the reasonableness of counsel's challenged conduct on the facts of [Petitioner's] case, viewed as of the time of counsel's conduct." Id. Because the circuit court never judged the reasonableness of counsel's challenged conduct in this case, the circuit court never determined whether the adversarial process worked adequately or whether Petitioner had ineffective assistance of counsel, in violation of the Sixth Amendment of the U.S. Constitution.

4) The U.S. Court of Appeals for the Eleventh Circuit has sanctioned the district court to depart from "the accepted and usual course of judicial proceedings" and requires this "Court's supervisory power." Rule 10(a). It is of national importance that the lower courts be required to address claims that are presented in Title 28 U.S.C. § 2255 motions. If lower courts are allowed to dismiss claims that are inconvenient to them or claims that are "unlikely," without holding an evidentiary hearing and without addressing the facts and merits of the claims, every federal prisoner's Fifth Amendment right to due process is threatened. If this

Honorable Court grants Petitioner a writ, it will send a message to the lower courts that they are required to address claims and that they are barred from ignoring claims that are presented in Title 28 U.S.C. § 2255 motions.

5) The U.S. Court of Appeals for the Eleventh Circuit has departed from "the accepted and usual course of judicial proceedings" and requires this "Court's Supervisiory Power." Rule 10(a). Under the Fifth Amendment of the U.S. Constitution, Petitioner has a right to appeal his sentence and conviction. The Eleventh Circuit never addressed Petitioner's ineffective assistance of counsel claims on direct appeal because a motion brought under 28 U.S.C. § 2255 is preferable to direct appeal for deciding claims of ineffective assistance. Therefore, the circuit court is not "procedurally barred" from hearing ineffective assistance of counsel claims in an application for a certificate of appealability, which was filed as a result of the district court denial of a § 2255 motion.

This Honorable Court's intervention is necessary as these important issues affects defendants across the country; past, present, and future. Correction of the Eleventh Circuit's decision to ignor Petitioner's ineffective assistance of counsel claims presented in his Title 28 U.S.C. § 2255 and the Eleventh Circuit's conflict with the other circuits, most notably the Fifth Circuit, over U.S.S.G. § 2G2.2 enhancements, is within this Court's descretion. Not only is granting a writ necessary, it is warranted and required based on the necessity for constitutional clarity and uniform application of the law.

CONCLUSION

Petitioner now seeks a writ of certiorari to challenge the district court's and the Eleventh Circuit's denial of his ineffective assistance of counsel claims. It is perfectly clear that Petitioner's Sixth Amendment right to effective assistance of counsel has been violated. It is also clear that the district court and the circuit court violated Petitioner's Fifth Amendment right to due process by ignoring Petitioner's ineffective assistance of counsel claims and acting like Petitioner never included them in his motions. If Petitioner was in a different circuit, the outcome of these proceedings would have been different, which has created a circuit split between sister circuits.

"The law 'doth so abhor fraud and covin, that all acts, as well as judicial as others, and which of themselves are just and lawful, yet, being mixed with fraud and deceit, are in judgment of law wrongful and unlawful.'" This quote is from this Honorable Court approximately 200 years ago in Ford v. Douglas, 12 L.Ed. 89, 92. In the context of equity, it is just as appropriate today in 2019 regarding a counsel's adequacy of representation. This quote specifically applies to the case at bar. When a defense attorney accepts the responsibility to defend an accused, he takes on that obligation to perform up to certain standards. These standards include investigating the case, being honest and truthful with his client, along with presenting to the client all of the information obtained in the case. To withhold information or to present facts in a certian light which, ultimately, benefit only the attorney and not the client can only constitute ineffective representation. And, while the conviction and sentence imposed in this case may be "lawful," because it is mixed with counsel's thorough and complete disregard for his accepted obligations under the Sixth Amendment to perform his assistance of counsel to Petitioner up to those standards, it makes the judgement imposed on Petitioner "wrongful" and "unlawful."

Respectfully Submitted, Aaron Murray

Aaron M. Murray, pro se