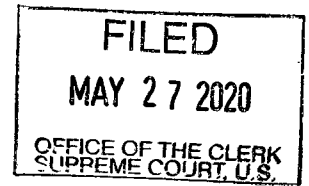


19-8584
NO. 19-8584

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

CHRISTOPHER RAYNARD KIDD
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 19-60292

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Whether trial counsel was ineffective for failing to review all the evidence with Mr. Kidd prior to trial?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

The underlying conviction for which Mr. Kidd seeks relief under the sixth amendment to the United States Constitution is for conspiracy to distribute and distribution of, 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The conviction resulted from a guilty verdict returned by a jury in the United States District Court for the Southern District of Mississippi in case number 3:14CR114-2. Trial began on October 19, 2015 and ended on October 21, 2015. He was sentenced to, inter alia, 366 months' imprisonment on each count, to be served concurrently. A Judgment reflecting this sentence was filed on May 1, 2019. A copy of the Judgment is attached hereto as Appendix B.

Mr. Kidd filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on May 1, 2019. The appeal was assigned Fifth Circuit case number 19-60292. The Fifth Circuit affirmed the district court's rulings via a non published Opinion entered on March 3, 2020 as to the issue of Mr. Kidd's competency. However, as to the issue of ineffective assistance of counsel, the Fifth Circuit declined to reach this issue, without, of course, prejudice to collateral review. A copy of the Opinion is attached hereto as Appendix A. This Petition for Writ of Certiorari followed.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed its Order and Judgment in this case on March 3, 2020. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Kidd's argument is based on the constitutional guarantee of effective assistance of counsel. This right is guaranteed by the Sixth Amendment to the United States Constitution, which states:

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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. VI.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a federal court conviction for conspiracy to distribute 50 grams or more and distribution of 50 grams or more of actual methamphetamine. The federal court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. §3231, because the criminal charges levied against Mr. Kidd arose from the laws of the United States of America.

B. Statement of material facts.

When we examine due process of law, every effort should afford the most vulnerable in society to have a fair and equitable counsel for defense. Mr. Kidd asserts that defense counsel failed to perform in a reasonably competent manner thus violating his right to effective counsel and thus a fair trial guaranteed by the sixth amendment to the United States Constitution.

Christopher Raynard Kidd, was indicted on August 19, 2014, and charged in counts 1 and 9 in a 9 count indictment. In count 1 Mr. Kidd was charged along with 6 others, Rodney Gerald Henderson, Ronnie Round, Thomas Odell Mason Jakeiva Fairley, Beatrice William McEntee and Jamie Tavaré Thames, with knowingly and willfully conspiring with each other and others known and unknown to the grand jury to knowingly and intentionally distribute actual

Methamphetamine, a Schedule II controlled substance, as prohibited by Title 21, Section 841(a)(1), United States Code all in violation of Title 21, Section 846, and Title 18, Section 2, United States Code. In Count 9, Mr. Kidd was charged along with Rodney Gerald Henderson on April 30, 2014 through May 5, 2014 in Scott County, in the Northern Division of the Southern District of Mississippi and elsewhere with aiding and abetting each other and others known and unknown to the Grand Jury, did knowingly and intentionally distribute 50 grams or more of actual methamphetamine, a Schedule II controlled substance, in violation of Title 21, Section 841(a)(1), and Title 18, Section 2, United States Code.

On June 3, 2015, Attorney Aafram Sellers filed a motion to withdraw, and the Court granted the motion.

On June 18, 2015 Attorney Greg Weber filed a motion to withdraw from representing Mr. Kidd and the Court granted the motion.

Attorney Terrence High was appointed to represent Mr. Kidd for trial on June 22, 2015.

Christopher Raynard Kidd's jury trial began on October 19, 2015. Henderson, one of the co-defendants was also scheduled for trial beginning October 19, 2015; however, Henderson entered a guilty plea to Count I of the indictment, conspiracy to distribute methamphetamine prior to the start of the trial.

All of the other co-conspirators had previously plead guilty.

During trial, jurors listened to several recorded telephone conversations where Henderson identified conversations he and Kidd as well as Kidd and others were having involving methamphetamine dealings. The Government wire tapped a telephone belonging to Henderson.

The other co-conspirators gave detailed testimony of Mr. Kidd's involvement in the alleged conspiracy to distribute methamphetamine.

After a Jury trial, Mr. Kidd was found guilty on October 21, 2015, in count 1 of the indictment conspiracy to distribute 50 grams or more of actual Methamphetamine. In count 9 he was found guilty of distribution of 50 grams or more of actual Methamphetamine.

His trial attorney filed a Motion to Withdraw as Counsel for Christopher Raynard Kidd.

Undersigned attorney was appointed to represent Mr. Kidd at sentencing. She filed a Motion for A Psychiatric Examination on September 6, 2016. On December 5, 2016, the Order granting the Motion for Psychiatric Examination was signed.

Competency Hearings for Mr. Kidd were held on and continued May 12, 2017, September 7, 2017 and January 9, 2019.

After finding Mr. Kidd competent, the district court sentenced Christopher Raynard Kidd to 336 months as to count 1 and count 9 and each count to run

concurrently in the Bureau of Prisons to be followed by 5 year term of supervised release per count to run concurrently. Mr. Kidd was ordered to pay a partial fine in the amount of \$2,500.00 and a special assessment fee in the amount of \$200.00.

The Fifth Circuit affirmed the conviction and sentence on direct appeal.

V. ARGUMENTS

A. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states in part that [a] “petition for writ of certiorari will be granted only for compelling reasons.” This case presents a compelling reason to grant certiorari.

Mr. Kidd is serving *336 months* in prison as to counts 1 and counts 9 which are run concurrent. According to his trial attorney, he had a 2 year plea offer to testify against co defendants. The obvious nature of mistakes committed by his trial attorney is apparent through a review of the arguments that follow. Certiorari should be granted to cure this injustice.

Mr. Kidd asserts that his case is one where trial counsel's ineffectiveness is so apparent from the record that appellate counsel has raised the issue on direct appeal. Obvious deficiencies in his representation should be addressed by an appellate court sua sponte. *Massaro v. United States*, No. 01-1559, *Certiorari to the United States Court of Appeals for the Second Circuit* (April 23, 2003),

The record permits a fair evaluation of Mr. Kidd's claims of inadequate representation and should be taken up on direct appeal. *United States of America v. Blanco-Rodriguez, No. 17-40516, United States Court of Appeals for the Fifth Circuit (November 6, 2018)*, citing *United States v. Higdon*, 835 F.2d 312, 314 (5th Cir. 1987)

B. *Strickland* standard.

To prevail on his ineffective assistance of counsel claims, Mr. Kidd must establish the two elements set forth by this Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). First, counsel's legal representation must have fallen below "an objective standard of reasonableness." *Skinner v. Quarterman*, 576 F.3d 214, 216 (5th Cir. 2009) (citation omitted).

Second, the deficient representation must have "caused prejudice." *Skinner*, 576 F.3d at 216 (citation omitted). "[T]he 'prejudice' component of the *Strickland* test ... focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The defendant need not show that "counsel's deficient conduct more likely than

not altered the outcome in the case.” *Id.* at 693. In short, “the purpose of the effective assistance guarantee of the Sixth Amendment ... is simply to ensure that criminal defendants receive a fair trial.” *Id.* at 689.

C. Whether trial counsel was ineffective for failing to review all of the evidence with Mr. Kidd prior to trial.

1. First *Strickland* test - objectively reasonable legal representation.

Under the first prong of *Strickland*, an attorney is obligated to provide objectively reasonable representation to a client. In this context, the attorney must keep a client informed about plea and sentencing issues. *See United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005) (stating that an attorney must inform ‘the defendant about the relevant circumstances and likely consequences of a plea.’); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981).

“Failing to properly advise the defendant of the maximum sentence that he could receive falls below the objective standard required by *Strickland*. When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court.”

Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995); *see also United States v. Grammas*, 376 F.3d 433 (5th Cir. 2004) (citing *Teague* and other cases).

This principle is reinforced by Rule 1.4 of the Mississippi Rules of Professional Conduct, which states, “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The Comment to Rule 1.4 goes on to state, “[t]he client should

have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.”

Undersigned counsel would submit that experience has shown that some defendants have the advantage of humble, persistent, demanding, patient, caring, tolerable, selfless, nonjudgmental lawyers and some defendants are not so fortunate.

Mr. Kidd has had four lawyers. The first two withdrew very close in time after signing on to represent Mr. Kidd because of conflicts with him.

Mr. Terence High was Mr. Kidd's third lawyer and he represented Mr. Kidd during his trial. From a review of the record, Mr. High expedited proceeding to trial less than 4 months after being appointed to represent Mr. Kidd. Mr. High was unable to get Mr. Kidd to assist with the names of any witnesses for proper assistance in his defense and unable to get Mr. Kidd to communicate rationally. The record is clear there was no trial strategy. Cross-examining witnesses alone is not trial strategy.

According to Mr. High, Mr. Kidd had a plea offer of 2 years if he had testified against the co-defendants.¹

During his trial, the district court ordered Mr. Kidd shackled. As part of its reasoning for ordering Mr. Kidd shackled, the trial court mentioned his erratic and agitated behavior throughout the life of the case. The trial court also mentioned in

1 Mr. High informed undersigned that the plea offer to testify against the co-defendants was 2 years.

its reasoning the number of attorneys and the reasons for those attorneys withdrawal, along with the fact of Mr. Kidd's demeanor and that he was more agitated than what the district court normally observed.

The fourth lawyer, undersigned counsel, was appointed to represent Mr. Kidd at his sentencing. Because of concerns in his irrational behavior, she filed a Motion for a Psychiatric Examination.

After trial, and during the competency hearing for Mr. Kidd, Mr. High testified that while in preparation for his trial, Mr. Kidd accused him of working against him for the government. He also testified that Mr. Kidd would have mood swings especially concerning not having been provided copies of his discovery. However, he testified that he was able to discuss trial strategy with Mr. Kidd.

Along with the above this court should also take into consideration that two psychologist examined Mr. Kidd. Both agree he has some type of personality disorder. Forensic psychology and violence risk assessment are the two areas where Dr. Channel is typically called as an expert witness. Dr. Shawn Channel believed Mr. Kidd has an Antisocial Personality Disorder. He believed Mr. Kidd was competent. However, he said that this personality disorder is something that is in place early on in life and affects a person throughout their life in the way they interact with other people and the way they approach situations. He said that it

would certainly not only impact or affect their interaction with others in a courtroom setting but also in every area of their life.

Dr. C. Gerald O'Brien 's practice for the past 25 to 30 years is mostly forensic work and he is specialized in stress management, depression, anxiety, personality disorders, the diagnosis and treatment of all the above. He believed Mr. Kidd has a paranoid personality disorder. He said Mr. Kidd had suffered from this disorder early in his life. He believed that Mr. Kidd was not competent during his trial. Dr. O'Brien's opinion was that Mr. Kidd's judgment based on his mental functioning impairs his competence when it came to facts related to the case that Mr. Kidd would want to discuss with a lawyer, when it comes to issues about challenging witnesses and when it comes to issues about plea bargains among other things.

Also, during the competency hearing the trial judge questioned Mr. High as to whether he thought that Mr. Kidd was mad at him and just making a derogatory statement as opposed to if he truly believed that Mr. High was employed by the government to help them with their case. Mr. High's response to the trial court pretty much was that if Mr. Kidd truly believed that he was working against him then Mr. Kidd would have asked for new counsel. However, when questioned by undersigned, Mr. High said he was not sure if Mr. Kidd believed that he was working against him.

Of importance is the fact that during Mr. Kidd's sentencing, Mr. Kidd reminded the Court that he had tried to get the Court to allow him to fire Mr. High prior to his trial.

Dr. O'Brien and Dr. Channel gave prognosis, a probable course, giving Mr. Kidd's maladaptive behavior a certainty, that he was acting out with anti social or paranoid behavior with Mr. High, making communication with him very difficult.

Finally, during his sentencing, Mr. Kidd also informed the Court that Mr. High hadn't seen him in a month or more and came the day before his trial to go over the evidence. He stated that Mr. High brought a broken laptop to the jail the day before his trial was to begin and he did not get a chance to review all the evidence the government had against him prior to the deadline for plea bargaining or trial.

Mr. Kidd was given a plea offer that was substantially better than the sentence he received. There was a mountain of evidence against him. Some alternative strategies, that could have been employed by Mr. High in this cited case to provide reasonably objective representation to Mr. Kidd are logical and reasonable. Examples:

- Mr. High could have requested a continuance to have more time to proceed slower through all the evidence, thus providing reasons for the best option of plea bargaining?

- Mr. High could have called the warden at the detention center and asked to allow Mr. Kidd's family to come talk with Mr. Kidd.
- Mr. High could have asked other defense attorneys to get involved to help support modifying his erratic behavior in order to help him understand the evidence and the consequences of going to trial.
- Mr. High could have moved to withdraw from Mr. Kidd's case as the other two attorney's did in the hope that another attorney could work through his client's uncooperative behavior.

This is one of those rare cases when a claim of inadequate representation should be taken up on direct appeal. The record is sufficient in the present case that trial counsel ignored his client's resistant and uncooperative behavior and proceeded to trial. Alternative strategies of acceptable approaches to mediate client's resistance have been given. Mr. Kidd's Petition for Certiorari should be granted.

Each case involving the constitutional issue of effectiveness of counsel depends on the facts the specific conduct of the parties involved." *King v. Beto*, 429 F.2d 221, 222, n. 1 (5th Cir. 1965) Cert. Denied, 401 U.S. 936, (1971).

Undersigned counsel would argue that the totality of the circumstances supports a trial attorney who failed to provide objectively reasonable representation to his client. *Lovett v. Florida*, 627 F.2d 706 (5th Cir. 1980).

2. Second *Strickland* test – prejudice to the defendant.

Mr. Kidd was prejudiced by trial counsel's sub-standard representation. Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. Missouri v. Frye, 566 U.S. 134, (2012); Hill v. Lockhart, 474 U.S. 52, 57 (1985). During plea negotiations defendants are “entitled to the effective assistance of competent counsel.” McMann v. Richardson, 397 U.S. 759, 771 (1970). In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. See Missouri v. Frye, 566 U.S., at 136, (2012). “The prejudice requirement... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process”. Hill v. Lockhart, 474 U.S., at 59 (1985).

There was obvious contention between Mr. Kidd and his trial counsel. The record is clear that Mr. Kidd was very difficult to deal with. Whether he was suffering from paranoid personality disorder, anti-social personality disorder or something else, Mr. Kidd was not the norm. His trial counsel had a duty to provide reasonable objective representation to him. All defendant's are not the same and a requirement to meet the needs of individual clients is always at issue.

According to trial counsel, Mr. Kidd had a plea offer of as low as two years. He proceeded to trial and was sentenced to, inter alia, 366 months' imprisonment on each count, to be served concurrently.

Mr. Kidd argues that the record is sufficient to show that there is a reasonable probability that, but for counsel's unprofessional error, he would have accepted the governments plea offer.

The prosecution made plea offers to all of the co-defendants and did not prevent the offers from being accepted. The district court accepted all of the terms of the plea offers for the co-defendants. That makes it a reasonable probability that neither the prosecution nor the district court would have prevented the offer from being accepted or implemented.

Mr. Kidd in his lay opinion went to trial believing that the jurors would see what he knew that his defense counsel was not representing him properly. This does not mean that Mr. Kidd would not have plea-bargained, but that he was not aware of all the evidence the government had against him and could not make an informed decision.

Mr. Kidd argues that Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981), is analogous because even though *Beckham* involved withdrawal of a plea, it involved the defendant not being able to make an intelligent choice on whether to accept a plea or go to trial because he failed to be fully informed of the risks of going to trial. Because his trial attorney failed to review all of the evidence with

him prior to plea or trial Mr. Kidd could not make an intelligent choice of plea bargaining.

Based upon Mr. High's testimony and Mr. Kidd's statement to the Court, Mr. High did not spend sufficient time with his client to go through all the evidence prior to trial in order to help Mr. Kidd make an informed decision that plea-bargaining was in his best interest.

Mr. Kidd informed Dr. O'Brien and Dr. Channel that Mr. High did not represent him properly, truthfully or in his best interest. Dr. O'Brien testified by educational means Mr. Kidd may be able to work with his lawyer. Meaning, that if the attorney would work slowly and use simpler terms to explain the legal issues to Mr. Kidd it would help. It may take a bit longer, but simplify the terms so that he could understand.

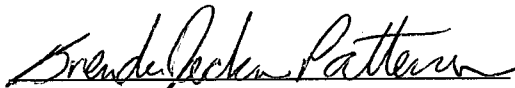
The failure of trial counsel to communicate effectively with his client and failure to review all the evidence with his client prior to plea bargaining deadline and trial deadline and thus to proceed to trial regardless of the obvious contention between he and his client renders this proceeding fundamentally unfair. All of the above provide proof of ineffective assistance of counsel by the trial attorney.

Based on the analyses presented above, both of the tests set forth in *Strickland* are satisfied. Accordingly, this Court should grant Mr. Kidd's Petition for Writ of Certiorari to address the subject issue.

If this Court finds the evidence insufficient to support a finding of ineffective assistance of counsel then the appellant reserves the right to file a 28 U.S.C. §2255 Habeas petition.

VI. CONCLUSION

Mr. Kidd asserts his ineffective assistance of counsel argument in this Petition for Writ of Certiorari. He has satisfied the two *Strickland* tests to prove that he was denied effective assistance of counsel, as guaranteed by the Sixth Amendment to our Constitution. The lower courts erred in finding otherwise. Mr. Kidd therefore asks this Court to grant certiorari in this case.



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