

No. _____

19-8863

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Strausbaugh — PETITIONER

(Your Name)

vs.

United States of America — RESPONDENT(S)

ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI

FILED
JUN 03 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

United States Court of Appeals for the Third Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Strausbaugh pro-se Reg. No. 69878-067

(Your Name)

Federal Correctional Institution - Fairton

P.O. Box 420

(Address)

Fairton, New Jersey 08320

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the Court of Appeals contravenes this Court's holding in *Buck v. Davis*, 137 S.Ct. 759 (2017)

When a Certificate of Appealability is denied based on the district court's merits determination and subsequent denial of a 28 U.S.C. §2255 petition?

Whether the requirements of *Miller-EL v. Cockrell*, 537 U.S. 322, 327 (2003) are met when the Certificate of Appealability drafting attorney is confirmed, by the United States Senate, as a United States District Court Judge before the Court of Appeals denied the Certificate of Appealability?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Buck v. Davis, 137 S.Ct. 759 (2017) 8

Buck v. Stephens, 632 Fed Appx 668 (5th Cir 2015) 8

Miller El v. Cockrell, 537 U.S. 322 (2003) 6

STATUTES AND RULES

OTHER

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at Unknown; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 22, 2020.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 11, 2020, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment:

Right to due process

Sixth Amendment:

Right to effective assistance of counsel in criminal proceedings

STATEMENT OF THE CASE

Petitioner timely filed a prose motion for relief under 28 U.S.C. §2255 asserting 21 grounds. He thereafter supplemented his motion to raise 3 additional claims. The district court convened an evidentiary hearing on December 21, 2017, during which Petitioner was represented by counsel. The parties filed 2 rounds of post-hearing supplemental briefing.

On May 21, 2019, after a merits determination, the district court denied Petitioner's §2255 Motion. The district court also denied certificate of appealability. Petitioner's counsel filed a notice of appeal and subsequent Application for Certificate of Appealability (COA). On July 26, 2019 counsel presented 2 issues in the COA which are relevant to this Petition for Writ of Certiorari.

Ground 4 of Petitioner's §2255 motion claimed that counsel was ineffective for failing to challenge a warrantless search of an external hard drive. (Appendix B at 15). In denying

this claim the district court stated: "Consequently, even if Attorney West's conduct was deficient in failing to move to suppress that evidence, Strausbaugh cannot show prejudice under the second Strickland prong. We will deny relief on ground 4." (Appendix B at 21).

Ground 9 of Petitioner's §2255 motion claimed counsel was ineffective for opening the door to proffer evidence. (Appendix B at 29). In denying this claim the district court stated: "Accordingly, even if Attorney West had been deficient in opening the door to proffer-session evidence, Strausbaugh cannot demonstrate prejudice.⁶ We will deny relief on Ground 9." (Appendix B at 29, n.6).

Counsel was appointed by the United States District Court for the Middle District of Pennsylvania for the December 21, 2017 evidentiary hearing. She represented Petitioner through the final determination of his §2255 motion in the district court. On July 10, 2014 she filed a notice of appeal on his behalf. Additionally, she filed an

entry of appearance in the Court of Appeals and on July 26, 2019 a motion for issuance of certificate of appealability.

On November 5, 2019 Counsel moved the court of appeals to withdraw from Petitioner's case because she had been nominated to serve as a United States District Court Judge, and the United States Senate voted to confirm her as a U.S. District Court Judge for the Middle District of Pennsylvania. Her motion to withdraw was granted.

On January 22, 2020 the Court of Appeals denied Petitioner's application for COA. The order stated:

"For substantially the reasons provided by the District Court in its opinion denying 28 U.S.C. § 2255 relief reasonable jurist would not debate the conclusion that both of these ineffectiveness claims fail because Appellant has not shown prejudice under *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). And reasonable jurist would not conclude that either of these claims is 'adequate to deserve encouragement to proceed further,' *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Accordingly, Appellant's COA application is denied. See *id.*" (Appendix A)

Petitioner requested rehearing bringing 2 issues.

First, that the January 22, 2020 order denying COA contravened this Court's decision in *Buck v. Davis* 137 S.Ct. 759 (2017). And Second, that because

Petitioner's counsel was confirmed as a United States District Court Judge before denial of COA, the COA requirement that the issue be debatable among jurist was satisfied as counsel was (a reasonable jurist) a U.S. District Court Judge before the denial.

On March 11, 2020 The Court of Appeals denied petition for rehearing.

REASONS FOR GRANTING THE PETITION

In 2017 this Court emphasized, in *Buck v. Davis*, that the COA inquiry is not coextensive with a merits analysis. 197 L.Ed2d at 16. In 2020 the Third Circuit Court of Appeals is still conducting a merits analysis to deny COAs. This issue affects many COA applicants within the Third Circuit. This issue should be corrected by this Court.

In *Davis* the Appeals Court made similar statements as the Third Circuit did in this case. This Court recognized that the *Davis* Appeals Court phrased its determination in the proper terms — "that jurist of reason would not debate that Buck should be denied relief, *Buck v. Stephens*, 623 Fed Appx 668 (5th Cir 2015) — but it reached that conclusion only essentially deciding the case on the merits. The Fifth Circuit put in the second sentence of its opinion: "because [Buck] has not shown extraordinary circumstances

that would permit relief... we deny the application for COA." *Id.* at 669.

The Third Circuit is doing the same as the Fifth Circuit did that led this Court to issue its opinion in *Buck v. Davis*. The Third Circuit stated in its January 22, 2020 order (Appendix A) that: "reasonable jurist would not debate the conclusion that both of [Strausbaugh's] ineffectiveness claims fail because [he] had not shown prejudice under *Strickland*.... Accordingly, Appellant's COA application is denied. The Third Circuit's order and the Fifth Circuit's opinion in *Buck* are essentially the same. Therefore, the Third Circuit is violating this Court's controlling law and Certiorari should be granted to protect COA applicants in the Third Circuit from meeting the same fate as Petitioner.

Additionally, this case presents a unique question. When the COA drafting attorney becomes a

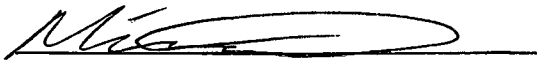
U.S. District Court Judge before COA is denied, is the requirement that the issue be debatable among jurists satisfied. Petitioner's counsel took his COA application to the Third Circuit pro bona. She is then confirmed as a U.S. District Court Judge and requests to withdraw. She believed that 2 issues warranted further review as she felt they were debatable among jurists, she being one of those jurists. Months after the U.S. Senate confirmed Petitioner's counsel as a U.S. District Court Judge, the Third Circuit denied COA. Petitioner asserts that his counsel (the COA drafting attorney) was a reasonable jurist herself, and thus he met the COA requirement.

This unique question warrants the granting of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be "Mia", is written over a horizontal line.

Date: June 2, 2020