NO. 20-_____

In the Supreme Court of the United States

JASON ASSAD,

Petitioner,

v.

TODD WASMER, WARDEN OF TECUMSEH CORRECTIONAL INSTITUTION, AND SCOTT R. FRAKES, DIRECTOR OF THE NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is undisputed that the appellate brief filed by Mr. Assad's attorney on direct appeal was so procedurally deficit as to preclude consideration of the merits of any issues and his convictions were summarily affirmed. Mr. Assad noted that under similar circumstances where a criminal defendant had been denied a direct appeal because of the deficiencies of the brief, a panel Eighth Circuit had affirmed the grant of a new direct appeal by the District Court for the Eastern District of Missouri and the Pennsylvania Supreme Court had granted a new direct appeal applying the standard set forth in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). Mr. Assad's case raises two important issues:

1. Did the Court of Appeals for the Eighth Circuit apply an incorrect standard by denying a Certificate of Appealability regarding the threshold no "reasonable jurist" inquiry contrary to this Court's precedents *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759 (2017) and *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003) when there was on-point authority from a prior decision by the Eighth Circuit and recent decision by the Pennsylvania Supreme Court?

2. Does the Sixth Amendment made applicable to the states by the Fourteenth Amendments' require that prejudice be presumed under *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing on direct appeal by only raising an issue that had not been preserved for appeal at the time of trial?

PARTIES TO THE PROCEEDINGS

Petitioner

- Jason Assad

Respondents

- Todd Wasmer,
  Warden of Tecumseh Correctional Institution
- Scott R. Frakes,
  Director of the Nebraska Department of
  Correctional Services

LIST OF PROCEEDINGS

Supreme Court of Nebraska

S-17-1193

State of Nebraska v. Jason Assad

Date of Final Opinion: February 7, 2020

United States Court of Appeals for the Eighth Circuit

20-3448

Jason Assad *Petitioner-Appellant* v. Todd Wasmer, warden Tecumseh Correctional Institution; Scott R. Frakes, Director of the Nebraska Department of Correctional services *Respondents-Appellees*

Date of Final Judgment: January 25, 2021

United States District Court for the District of Nebraska

4:20-cv-3070

Jason Assad, *Petitioner* v.

Todd Wasmer, Warden Tecumseh Correctional Institution; Scott R. Frakes, Director of the Nebraska Department of Correctional Services, *Respondents*

Date of Final Order: October 26, 2020

Nebraska Court of Appeals

No. A-17-1193

State v. Assad

State of Nebraska, *Appellee, v.*
Jason Assad, *Appellant.*

Date of Memorandum Opinion: February 26, 2019

Nebraska Court of Appeals

A-15-000613,

State v. Jason Assad

Date of Final Order: January 21, 2016

District Court of Cheyenne County, Nebraska

Date of final order denying postconviction relief:
October 24, 2017

Date of sentencing following conviction:
June 11, 2015

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jason Assad, respectfully petitions this Court for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit that denied a Certificate of Appealability (COA) and denied review of the decision by the District Court for Nebraska that rejected conditional habeas corpus relief through a new direct appeal pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The January 25, 2021 decision of the Court of Appeals for the Eighth Circuit is unreported and attached in the Appendix at App.1a. The October 26, 2020 decision of the United States District Court for the District of Nebraska is unreported and attached at App.3a. The February 7, 2020 decision of the Nebraska Supreme Court is reported at *State v. Assad*, 304 Neb 979, 938 N.W.2d 297 (2020) and attached at App.21a. The February 26, 2019 decision of the Nebraska Court of Appeals was unreported and attached at App.40a. The January 21, 2016, summary dismissal of the direct appeal by the Nebraska Court of Appeals was unreported is attached at App.49a.

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit denying a COA and declining to discuss any of the merits of issue presented was entered on January 23, 2021. *See* App.1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution.

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

U.S. Const. amend. XIV

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253(c)

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

. . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction.

The facts regarding the proceedings and dispositions below are not in dispute. Mr. Assad was tried and convicted in the Cheyenne County District Court for Nebraska of possession of a weapon by a prohibited person, first degree false imprisonment, terroristic threats, use of a weapon to commit a felony, and possession of a firearm by a prohibited person. His direct appeal was dismissed on the State's motion for summary affirmance without any review of the merits of his convictions and sentences. (App.25a-26a, 34a), (App.49a).

On postconviction review, Mr. Assad was denied an evidentiary hearing on his allegation of ineffective assistance of appellant and trial counsel. The district court's denial of an evidentiary hearing was affirmed by the Court of Appeals and the Nebraska Supreme Court on petition for further review. (App.21a, 40a).

Mr. Assad sought 28 U.S.C. § 2254 habeas corpus relief unless the State allowed him to file a new direct appeal. The United States District Court denied the writ and denied a COA. (App.3a) The Court of Appeals for the Eighth Circuit refused to grant a COA and did not discuss any of the merits. (App.1a) The underlying state court proceedings are set forth in *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7, parts 1 thru 23.

B. The Trial, Convictions, and Sentencing in the Nebraska State District Court.

At approximately 8:00 am on Sunday, September 14, 2014, a neighbor was leaving his residence in Sidney, Nebraska when he heard a woman's voice to the north and west of his location scream "leave me alone and get out." After this one scream, he heard nothing. The sound came from the direction of the El Palomino Motel which had 24 units and a manager's residence occupied by Mr. Assad and his wife, Debbie Hrbek/Assad. The neighbor called 911.

At approximately 8:11 am a Sidney police officer, talked to the neighbor, knocked on at least three doors to the motel, pushed the buzzer for the office, and called the phone number on the front door. He received no response. The officer heard nothing while he was outside the perimeter of the motel.

Law enforcement obtained a search warrant from the Cheyenne County Court (NE) authorizing them to do the following:

> You are therefore commanded, with the necessary and proper assistance, to search the following described place, person, and vehicle, to wit:
>
> - The apartment and office of the manager of the El Palomino motel located at 2220 Illinois St, Sidney, Cheyenne County, NE
>
> For the purpose of discovering, photographing, and seizing the following described property, to wit:

- Jason Assad, Debbie Hrbek or a female, to see if they require medical attention or aid.

and if found, to seize and deal with the same as provided by law, and to make return of this warrant to me within ten (10) days after the date hereof. (Emphasis added.)

At 12:04 pm a joint jurisdictional SWAT team served the Cheyenne County search warrant. Mr. Assad and his wife were located and removed from the residence. Ms. Assad/ Hrbek, was questioned and said Mr. Assad pushed his head against hers but denied that she had been head butted. A series of search warrants were then issued during which a home security video belonging to Mr. Assad located inside the residence was seized (Ex 51). The recorded videos included activities in Mr. Assad's bedroom, living room area, and the motel parking lot.

After the initial motion to suppress was heard, it was learned that the exterior of the El Palomino Motel had been under video surveillance by law enforcement with a "pole camera." (Ex 27) The camera had recorded the events at the motel during service of the search warrant. For some reason, the activity of the Sidney police officer at 8:11 am in checking the motel was missing. A series of subsequent motions to suppress were all denied by the state district court.

The charges of false imprisonment, terroristic threats, and use of a weapon to commit a felony all alleged Ms. Hrbek/Assad as the victim. She was called as a witness at trial, but only testified as what was shown on the video seized by law enforcement was accurate. There was no sound to the video. It clearly

showed Mr. Assad Ms. Hrbek/Assad arguing. Ms. Hrbek/Assad was seen smoking what appeared to be a meth pipe. Mr. Assad was seen pressing his head against Ms. Hrbek/Assad and at one point holding a small knife near her face. He did not hit, strike, or cut Ms. Hrbek/Assad on the video (Ex 51).

Following the verdicts, an evidentiary hearing was held on the habitual criminal allegations. The State relied on an unsigned Colorado sentencing order to established one of the prior convictions. Mr. Assad was sentenced to a combined term of thirty-five (35) to sixty (60) years with credit for 263 days in custody. The sentences included a mandatory minimum of thirty (30) years during which Mr. Assad receives no "good time" reduction of his sentence.

C. The Direct Appeal to the Nebraska Court of Appeals and Petition for Further Review by the Nebraska Supreme Court.

Mr. Assad's original trial counsel filed timely notice of appeal that was docketed at Nebraska Court of Appeals A-15-613 on July 13, 2015. New appellate counsel entered her appearance on September 15, 2015 and original trial counsel was allowed to withdraw. *Assad v. Wasmer,* 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7, part 4 at p. 3. On October 28, 2015, appellate counsel filed an opening brief assigning only the following two errors, to wit:

> I.
>
> The district court erred in denying ASSAD's Motions to Suppress (including his Supplemental Motions to Suppress) (T102; T117, T135; T147)

II.

The district court erred in not finding all evidence seized following the illegal first breach of ASSAD's residence must be suppressed as "fruit of the poisonous tree." *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7, part 6 at p. 8.

It is a well-established Nebraska law since at least 1991 that when a defendant's trial counsel was different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which was known to the defendant or apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

Multiple Nebraska Supreme Court decision have consistently held that a defendant may not predicate error on the admission of evidence without a timely objection at trial. *E.g.*, *State v. Blair*, 227 Neb. 742, 419 N.W.2d 868 (1988); *State v. Laymon*, 217 Neb. 464, 348 N.W.2d 902 (1984); *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982). Neb. Rev. Stat. § 27-103 specifically directs that to preserve error for an appeal as to the improper or illegal admission of evidence there must be a contemporaneous objection at the time of the offer of the evidence. If there is not an objection at trial, then:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context; . . . (*See*, Neb. Laws 1975, LB 279, § 3.)

On December 16, 2015, the State filed a motion for summary affirmance citing specifically to *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014) and *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013). The State noted that Mr. Assad's trial counsel had not objected to the evidence offered at trial that had been the subject of the various motions to suppress. Because Mr. Assad's grounds for reversal in the opening brief had not been properly preserved for appellate review, the State requested summary affirmance of the conviction. *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7, part 7.

On December 28, 2015, appellate counsel filed a motion for leave to file an amended brief with a copy of the proposed brief attached. *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7, part 8. The State objected. On January 6, 2016 the Nebraska Court of Appeals denied appellate counsel's motion was denied and granted the State's motion for summary affirmance as follows:

> Motion of appellee for summary affirmance sustained; judgment affirmed. *See* Neb. Ct. R. App. P. § 2-107(B)(2); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013) (defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning admissibility of that evidence). (App.49a).

On February 22, 2016, the same direct appellate counsel filed a motion for further review with the Nebraska Supreme Court. *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7, part 10. Her request was denied without comment on May 12, 2016. *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7, No. 4 at p. 4.

D. The Nebraska Postconviction Proceedings with New Counsel.

On March 21, 2017, Mr. Assad's new counsel filed a timely and detailed motion for postconviction relief as provided by Neb. Rev. Stat. § 29-3001 *et. seq*. *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7-19 at p. 4-55. The State filed a motion to dismiss the postconviction motion without an evidentiary hearing. *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7-19 at p. 60-61. Mr. Assad's postconviction counsel filed a brief and alleged that as a result of direct appeal counsel's deficient performance Mr. Assad had been denied any meaningful appellate review. As a result of appellate counsel's deficient performance, the court should presume prejudice and Mr. Assad granted a new direct appeal. *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7-19 at p. 64-72.

The Nebraska state district court granted the motion to dismiss without an evidentiary hearing. The district court held that Mr. Assad could only receive relief pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) if he could show that his trial and/or appellate counsel had provided deficient performance AND that he had been prejudice as a result. With respect to Mr. Assad's layered claim of

ineffective appellate assistance of counsel, the trial court concluded that Mr. Assad could not show prejudice because the arguments he claimed counsel should have presented lacked merit, *i.e.*, no "prejudice." *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7-19 at p. 73-89.

It should be noted that in *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014) the Nebraska Supreme Court had held that it would no longer require appellate counsel to allege "prejudice" when claiming ineffective assistance of trial counsel during a direct appeal.

E. The State Postconviction Appeal to the Nebraska Court of Appeals.

Mr. Assad claimed in the appeal of the denial of postconviction relief that the deficient performance of his appellate counsel was so complete that he was denied any considerations on the merits of any claims on direct appeal, such as "plain error" in jury instructions, the erroneous admission of evidence, and sentencing errors. *See*, *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013), *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994) (Plain error to omit the element of malice from a jury instruction defining second degree murder) overruled in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Mr. Assad's direct appeal was not a situation where appellate counsel had exercised judgment to alleged only one or two ground for relief that proved to be unsuccessful. Appellate counsel can avoid a finding of deficient performance is she chose between several potential issues and selected only the best one, two, or three. The Nebraska Court of Appeals affirmed the district court's order. (App.40a).

F. Petition for Further Review by the Nebraska Supreme Court.

On March 27, 2019, Mr. Assad filed a petition for further review by the Nebraska Supreme Court in which he cited to the concurrence by Justice Cassell joined by Justice Miller-Lehrman in *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (Jan 4, 2019). This concurrence noted the exceptions set forth in *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984), including "where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Assad v. Wasmer*, 4:20-cv-03070 (D. Neb. June 16, 2020), ECF No. 7-15 at p. 11.

Mr. Assad's sole assignment of error was that the Court of Appeals erred by affirming the district court's dismissal of his claim of ineffective assistance of appellate counsel. He again argued that under the circumstances prejudice should be presumed because of the summary affirmance granted to the State. Mr. Assad alleged that he should be granted a new direct appeal under the standards of review for errors on a direct appeal and not the standards in a postconviction motion under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

The Nebraska Supreme Court acknowledge the existence of reported authorities of granting a new appeal in *Hendricks v. Lock*, 238 F.3d 985 (8th Cir. 2001) that found "[P]rejudice was presumed because of the inadequacy of the appellate brief led the Missouri Supreme Court to decline to address the issues the defendant raised on appeal." (App.36a). In addition, the Nebraska Supreme Court identified additional on-point authority with which it disagreed that had not been cited by either party as follows:

> In *Commonwealth v. Rosado*, 637 Pa. 424, 150 A.3d 425 (2016), much like this case, the only issue appellate counsel raised on appeal was an issue that was not properly preserved in the trial court. The Pennsylvania Supreme Court found that prejudice should be presumed. It reasoned that there was no meaningful difference between an attorney who completely fails to file a notice of appeal "and one who makes all necessary filings, but does so relative solely to claims he has not preserved for appeal, producing the same end." *Id.*, 637 Pa. at 439-40, 150 A.3d at 434. (Emphasis added.)
>
> It appears that Assad would be entitled to a presumption of prejudice under the reasoning articulated by the Pennsylvania Supreme Court in *Rosado*. We, however, respectfully disagree with the conclusion . . . (App.37a-38a).

G. Habeas Corpus Petition.

Mr. Assad filed a timely petition for habeas corpus to the United States District Court for the District of Nebraska under 28 U.S.C. § 2254 alleging that:

> PETITIONER HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO ONE DIRECT APPEAL OF HIS CONVICTION UNDER Neb. Rev. Stat. § 25-1912 IN WHICH "PREJUDICE" SHOULD BE PRESUMED BECAUSE THE ERRORS BY APPELLATE COUNSEL TOTALLY PREVENTED PETITIONER FROM OBTAINING ANY REVIEW OF HIS CONVICTION ON ANY MERITS

> IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS AND THE DECISION IN *Douglas v. California*, 372 U.S. 353 (1963) AND *Evitts v Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985) AND THEIR PROGENY. (App.9a).

The district court acknowledged the decision of the Eighth Circuit in *Hendricks v. Lock*, *supra* and the discussion by the Nebraska Supreme Court in *State v. Sundquist*, *supra*. However, it distinguished this authority on the merits of Mr. Assad's claim and that the Nebraska Supreme Court's decision was not "objectively unreasonable" under 28 U.S.C. § 2254 (d)(1). However, the district court denied a COA under 28 U.S.C. § 2253(c)(1) with the rationale that:

> This Court cannot grant such a certificate unless Assad "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do that, Assad "must demonstrate that reasonable jurists would find [this] [C]ourt's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). (App.19a) (Emphasis added.)

The district court did not reference this Court's decisions in *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759 (2017) and *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029 (2003).

H. Court of Appeals for the Eighth Circuit.

On January 25, 2021, without any discussion of the merits or the standard applicable to a COA, the

Court of Appeals denied a certificate of appealability. (App.1a).

REASONS FOR GRANTING THE PETITION

A. THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DID NOT APPLY THE CORRECT STANDARDS APPLICABLE TO A CERTIFICATE OF APPEALABILITY.

This Court in *Buck v. Davis*, 580 U.S. ___, ___, 137 S.Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336-337, 123 S.Ct. 1029 (2003)) recently stated that:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." . . . This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." . . .

This Court in *Miller-El v. Cockrell*, *supra,* expressly prohibited such a departure from the procedure prescribed by § 2253 . . . .

> "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.". . . .
>
> The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then-if it is-an appeal in the normal course. We do not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry . . . . [citations omitted] [Emphasis added.]

Mr. Assad recognizes that the grant of a COA is no assurance of success on the merits of the denial of the habeas corpus petition. *E.g.*, *Fay Fish v. United States*, 748 Fed. Appx. 91 (8th Cir. 2019); *Anderson v. King*, 732 F.3d 854 (8th Cir. 2013), *Purkey v. United States*, 729 F.3d 860 (8th Cir. 2013); *Wright v. Bowersox*, 720 F.3d 979 (8th Cir. 2013). It is merely a determination that the issue presented is reasonably debatable among jurists and the normal process of conducting an appeal through briefing are to be followed.

B. MR. ASSAD HAS IDENTIFIED SPECIFIC "JURISTS OF REASON" WHO HAVE FOUND THAT A BRIEF ON DIRECT APPEAL THAT ONLY RAISES AN UNPRESERVED ERROR IS *PER SE* INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT AND PREJUDICE IS PRESUMED.

Mr. Assad is not relying on a hypothetical "reasonable" jurist who might find the issue presented in the habeas petition was "debatable" that requires a COA to issue. On the contrary, he identified specific opinions and decisions where a presumption of prejudice was found under identical circumstances meriting a new direct appeal. There is no suggestion that Judges Wollman, Arnold and Hansen of the Court of Appeals for the Eighth Circuit in *Hendricks v. Lock, supra* were unreasonable. The same came be said of the seven justices of the Pennsylvania Supreme Court in *Commonwealth v. Rosado, supra*, when presented with identical facts made the following disposition:

> In this appeal, we consider whether filing an appellate brief which abandons all preserved issues in favor of unpreserved ones constitutes ineffective assistance of counsel. After careful review, we hold that it does, and so we vacate the Superior Court's order and remand to that court for further proceedings. (Emphasis added).

The Pennsylvania Supreme Court in footnote 1 identified the circumstances in which "prejudice" standard in *Strickland v. Washington* would apply verses the "presumption of prejudice" from *United States v. Cronic, supra* in the appellate context.

> [A]n accused seeking relief on the basis of ineffective assistance of counsel must typically demonstrate that his counsel's errors caused him prejudice; however, in certain limited circumstances, he may alternatively demonstrate that his counsel's errors are so plainly egregious as to amount to a constructive denial of counsel, which constitutes ineffective assistance of counsel *per se*. *See Strickland v. Washington*, 466 U.S. 668, 692-94, 104 S.Ct. 2052 (1984); *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039 (1984).

The facts in *Commonwealth v. Rosado, supra*, and *Hendricks v. Lock, supra* are identical to those presented in Mr. Assad's case. He clearly met the threshold standard for issuance of a COA by both the district court and Court of Appeals for the Eighth Circuit.

C. THERE IS A SPLIT IN AUTHORITY IN THE STATES AND IN PANELS OF THE EIGHTH CIRCUIT REGARDING WHETHER THE *STRICKLAND V. WASHINGTON* OR *UNITED STATES V. CRONIC* APPLIES WHEN A DIRECT APPEAL BRIEF HAS ONLY RAISED NON-PRESERVED ERRORS AT TRIAL BY AN ATTORNEY FILING A BRIEF THAT IS SO PROCEDURALLY DEFICIENT THAT IT PRECLUDED CONSIDERATION OF THE MERITS OF ANY ISSUE HAS NO MEANINGFUL DISTINCTION BETWEEN THE ACTION OF AN ATTORNEY WHO DID NOT FILE ANY BRIEF.

This Court has recognized for at least five decades that there are limited situations where an attorney's deficient performance regarding a direct appeal carries a "presumption of prejudice". In *Rodriquez v. United*

States, 395 U.S. 327, 330, 89 S.Ct. 1715, 1717 (1969), the indigent defendant's attorney failed to file written notice of appeal within the 10 days set by the district court. This Court rejected a rule that would require a showing of "some likelihood of success on appeal" and that denial of a direct appeal was a "species of harmless error." In *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S.Ct. 1029, ___ (2000), this Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims."

This line of Supreme Court authority continued with *Garza v. Idaho*, 139 S.Ct. 738, 586 U.S. ___ (2019) in which there was no dispute Garza wished to appeal. Counsel's decision not to file the appeal because it might void some of the provisions a plea agreement created a "presumption of prejudice." It was not necessity to identifying specific issues that could be raised in a new appeal. This Court resolved a conflict in the circuits and held that:

> The Sixth Amendment guarantees criminal defendants "the right . . . to have the Assistance of Counsel for [their] defence." The right to counsel includes "'the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). Under *Strickland*, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness," 466 U.S. ___, at 687-688,

> and (2) that any such deficiency was "prejudicial to the defense," *id.*, at 692.
>
> "In certain Sixth Amendment contexts," however, "prejudice is presumed." *Ibid.* For example, no showing of prejudice is necessary "if the accused is denied counsel at a critical stage of his trial," *United States v. Cronic*, 466 U.S. 648, 659 (1984), or left "entirely without the assistance of counsel on appeal," *Penson v. Ohio*, 488 U.S. 75, 88 (1988). Similarly, prejudice is presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. ___, at 659. And, most relevant here, prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *Flores-Ortega*, 528 U.S. ___, at 484. We hold today that this final presumption applies even when the defendant has signed an appeal waiver.

Garza v. Idaho, supra, correctly recognized that a rule based on the proving "prejudice" when there had effectively been no appeal made little sense and the better rule compelled by precedent would restore the right to a direct appeal. status quo was that:

> [N]either Idaho nor its amici have pointed us to any evidence that it has proved unmanageable there. That rule does no more than restore the *status quo* that existed before counsel's deficient performance forfeited the appeal, and it allows an appellate court to consider the appeal as that court otherwise would have done-on direct review, and assisted by counsel's briefing.

Appellate counsel may always, in keeping with longstanding precedent, advise the court and request permission to withdraw, while filing a brief referring to anything in the record that might arguably support the appeal. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

CONCLUSION

For the foregoing reasons, Mr. Assad's case presents an unwarranted departure from the COA standards set forth in *Buck v. Davis, supra*, and *Miller-El v. Cockrell, supra*. On that basis alone, certiorari should be granted, and the case remanded to the Court of Appeals for the Eighth Circuit for further proceedings. However, there also represents a clear split of authority between Nebraska and Pennsylvania, as well as between two panels of the Court of Appeals for the Eighth Circuit that should be resolved by this Court as to whether prejudice should be presumed.

Respectfully submitted,

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