No. 20-7498

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE FEDERICO ALMEIDA OLIVAS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

JOSE FEDERICO ALMEIDA OLIVAS #17162-408
(Your Name)
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QUESTIONS PRESENTED

I. WHETHER THE COURT PROPERLY DENIED COA? THE TRIAL COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING CERTIFICATE OF APPEALABILITY, SETTLED BY THIS COURT IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

II. WHETHER THE TRIAL COURT PROPERLY APPLIED THE PROCEDURAL DEFAULT STANDARD IN VIEW OF THE FACT THAT DAHDA V. UNITED STATES, 584 U.S. _____, 138 S.CT. 1491 (2018), WHICH WAS ISSUED POST THE FINALITY OF ALMEIDA-OVLIVAS'S DIRECT APPEAL (DEC. 2012), AND ALMEIDA-OLIVAS'S FIRST OPPORTUNITY TO PRESENT THE DAHDA CLAIMS TO THE COURT WAS IN HIS §2255?

CERTIFICATE OF INTERESTED PERSONS

Jose Federico Almeida-Olivas certifies, to the best of his knowledge and belief, that the following persons have an interest in the outcome of this case:

Apellant	Jose Federico Almeida-Olivas, pro se
District Court Proceedings:	18-0973-CV-W-DGK-P 14-00063-01-CR-W-PW
	Solicitor General of the U.S. Department of Justice, Room 5614 950 Pennsylvania Ave., N.W. Washington, D.C. 20530-0001
	United States Attorney's Office AUSA Joseph M. Marquez Charles Evans Whittaker Courthouse 400 East 9th Street Room 5510 Kansas City, Missouri 64106 (816) 426-3122 Counsel in §2255 proceedings
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Honorable Chief District Judge
Greg Kays

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2) United States District Court for the Western District of Missouri, Case No. 18-0973-CV-W-DGK-P, Denial of 28 U.S.C. §2255, denial of Certificate of Appealability, appears at Appendix 2.

3) United States Supreme Court, Case No. 17-6616, Denial of Cert., December 4, 2017.

4) United States Court of Appeals for the Eighth Circuit, Case No. 16-3790, August 1, 2017--Affirmed.

5) United States District Court for the Western District of Missouri, Case No. 4:14-CR-00063-DW-1, Honorable Dean Whipple presiding, judgment in a criminal case, January 13, 2016, sentencing September 19, 2016.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 19, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. §2516(1) Authorization for interceptor wire, oral, or electronic communications provides in part:

> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any Acting

> Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter [19 U.S.C.S. §2518] an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of--

18 U.S.C. §2517(4) Authorization for disclosure and use of intercepted wire, oral, or electronic communications, provides in part:

> (4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter [18 U.S.C.S. §2510 et seq.] shall lose its privileged character.

18 U.S.C. §2518(1) Procedure for interception of wire, oral, or electronic communications, provides in part:

> (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter [18 U.S.C.S. §2510 et seq.] shall be made in writing upon oath or affirmation to a judge of competent

jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigating or law enforcement officer making the application, and the officer authorizing the application.

18 U.S.C. §2518(4) Procedure for interception of wire, oral, or electronic communications, provides in part:

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter [18 U.S.C.S. §2510 et seq.] shall specify--

(a) the identity of the person, if known, whose communications are intercepted

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; ...

18 U.S.C. §2518(8) Procedure for interception of wire, oral, and electronic communications, provides in part:

> (8) (a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [18 U.S.C.S. §2510 et seq.] shall, if possible, be recorded on tape or wire or other comparable device ...
>
> (b) Applications made and order granted under this chapter [18 U.S.C.S. §2510 et seq.] shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years ...
>
> (d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2517(7)(b) [18 U.S.C.S. §2518(7)(b)] which is denied or the extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercept communications as the judge may

determine in his discretion that is in the interest of justice, an inventory which shall include notice of--

(1) the fact of the entry of the order of the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

18 U.S.C. §2518(9)(10) Procedure for interception of wire, oral, or electronic communications, provides in part:

(9) The contents of any wire, oral, or electronic communication intercepted, pursuant to this chapter [18 U.S.C.S. §2510 et seq.] or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible

to furnish the party with the above information proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the content of any wire or oral communication intercepted pursuant to this chapter [18 U.S.C.S. §2510 et seq.], or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral

communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter [18 U.S.C.S. §2510 et seq.] ...

21 U.S.C. §841. Prohibited acts, provides in part:

(a) **Unlawful acts.** Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or ...

(b) **Penalties.** Except as otherwise provided in section 409, 418, 419, or 420 [21 U.S.C.S. §849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be sentenced to a term of imprisonment which may not be less than 10 years or more of life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, ...

21 U.S.C. §843(b) & (d), provides in part:

(b) **Communication facility.** It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitation the commission of any acts or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication ...

(d) **Penalties.**

(1) Except as provided in paragraph (2), any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine under title 18, United States Code, or both; except that if any person commits such a violation after one or more prior convictions of him or violation of this section, or for a

> felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine under title 18, United States Code, or both ...

21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt of conspiracy.

28 U.S.C. §1254(1) provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. §2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought

before it to review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

2255 PROCEDURAL HISTORY

Jose Federico Almeida-Olivas ("JFAO") was convicted by a jury of two (2) offenses related to distribution of methamphetamine, 18 U.S.C. §841, in the United States District Court for the Western District of Missouri, Case No. 4:14-CR-00063-DW-1, Honorable Dean Whipple presiding, on January 13, 2016, and sentenced on September 19, 2016.

JFAO timely filed an application on a Court-approved form, along with an amended petition asserting multiple grounds for habeas relief. The Court only considered two (2) grounds for relief: Sixth Amendment, ineffective assistance of counsel; and violations of 18 U.S.C. §§2510-2518, as defined by Dahda v. United States, 584 U.S. _____ 138 S.Ct. 1491 (2018), which was issued by this Court after trial and after appeal was final (Dec. 4, 2017) (Appendix 2). A Certificate of Appealability ("COA") was denied.

JFAO timely appealed the denial of COA, which was denied by the Eighth Circuit Court of Appeals on December 19, 2019; Case No. 19-3056 (Appendix 1).

TRIAL PROCEEDINGS

JFAO claims counsel's failure to investigate are due to counsel's incapacitation. As documented in JFAO's §2255 (Appendix 3 & 4), counsel collapsed during the first trial and a mistrial was declared.[1] After months of (trial counsel) Lozano's hospitalization, he was released just prior to trial, and while

---

[1] Reporter's Record, Day 1, pp.4:25 - 5:24. (Reporter's Record hereinafter "RR".)

Lozano was heavily medicated, JFAO was tried a second time and represented by Lozano. The record indicates that trial counsel had to undergo an hours-long medication routine prior to each day's trial activities, precluding trial preparation and communication with JFAO during trial. (See Appendix 4, at pp.3-4.)

Due to his illness, petitioner's attorney, at trial, John C. Lozano ("Atty. Lozano") filed no pretrial discovery motions regarding the discovery of the Government's affidavit / application for a Title III wire intercept order, nor did Atty. Lozano file a motion with the District Court requesting production of the Order authorizing the wire intercept and the affidavit / application requesting a wire intercept order. The District Court received evidence in JFAO's trial that consisted of:

(i) contents of intercepted communications; and

(ii) evidence derived therefrom the intercepted communications;

(See trial testimony of Department of Homeland Security ("DHS") Agent Yoshikawa's Trial Transcript at pages 63 & 71).

18 U.S.C. §2518(9) specifically requires that before receiving such testimony of DHS Agent Yoshikawa into evidence that JFAO shall be provided with a copy of the Court Order authorizing the wire intercept and affidavit / application for wire intercept.

Neither the District Court nor the Government provided a disclosure of the affidavit / application for wire intercept nor the Court Order authorizing the wire intercept, to JFAO (the only defendant on trial).

Further testimony of telephone calls (subject to the wire intercept orders) between JFAO and cooperating Government witnesses (Orfirio Almeida-Perez and Jesus Almeida-Olivas) were introduced allegedly discussing JFAO's attempt to collect a debt owed to his brother, Jesus Almeida-Olivas, and allegedly a delivery of methamphetamine. Had this evidence been suppressed, there would have been no identification of JFAO nor of his contact with his brother, Jesus Almeida-Olivas, the member of the Drug Trafficking Organization ("DTO"), (not JFAO).

During trial, JFAO's counsel sought to object to the admission of telephone evidence. The record indicates that the Government responded to counsel's objection (sustained by the Court), noting that no pre-trial suppression motions had been filed by the incapacitated Lozano. (See Appendix 3, ¶¶25 & 35; and Appendix 4, ¶¶ 4, 5, 6, 9, 10, 11, 12, 13, 14, 26, 28, 29, 30, 31, 32, 33, 34, 36, and 37.)

JFAO's jury trial lasted approximately three (3) days, and JFAO was found guilty on both counts of the superseding indictment. JFAO was sentenced to a term of imprisonment of two hundred and fifty-eight (258) months.

On Direct Appeal, the matter was Affirmed by the Eighth Circuit, Case No. 16-3790. Petition for Certiorari was denied by this Court on December 4, 2017.

This petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

I.: WHETHER THE COURT PROPERLY DENIED COA? THE TRIAL COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING CERTIFICATE OF APPEALABILITY, SETTLED BY THIS COURT IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Court's below applied the wrong standard in determining to deny Certificate of Appealability, and in so doing violated Sixth Amendment Rights.

Three (3) sets of analyses inform the decision on the court's denial of COA. The Supreme Court teaches in Slack v. McDaniel, 528 U.S. 473, 146 L.Ed. 2d 542, 120 S.Ct. 1595 (2000), that when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition, the right to appeal is governed by the Certificate of Appealability ("COA") requirements found at 28 U.S.C. §2253(c). Id. at 478. Additionally, Justice Kennedy, writing for the Court, instructs that "when the district court denies a habeas petition on procedural grounds without reading the prisoner's underlying constitutional claim, a COA should issue if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

A COA under §2253(c) must issue where a habeas prisoner makes a "substantial showing" of a denial of a constitutional right, which under Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct.

3383, 77 L.Ed. 2d 1090 (1983), includes showing that reasonable jurists "could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were" "adequate to deserve to proceed further."

Whether the district court has denied relief on the constitutional claims themselves, JFAO must show that reasonable jurists would find the Court's constitutional analysis debatable or wrong.

STRICKLAND V. WASHINGTON

JFAO raises a constitutional claim of ineffective assistance of counsel for two (2) issues: (1) Failure to investigate; and (2) Failure to investigate Title III issues.

To prevail under Strickland, JFAO must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) show that "the deficient performance prejudiced the defense." 466 U.S. 668, 687 (1984). In making this demonstration, JFAO must demonstrate by a preponderance of the evidence that his trial counsel(s) made errors so serious that he was not functioning as a counsel guaranteed by the Sixth Amendment. Id. JFAO must also show that "there is a measurable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-694.

In evaluating Strickland and its progeny to determine whether to grant a COA, both trial courts and courts of appeal have resorted to using "pull quotes" from Strickland without applying Strickland's teachings in their totality.

For example, the trial court relies, as does the United States, on the "no prejudice" argument. (See Appendix 2, at p.2) ([United States] argues: "Almeida-Olivas provides no evidence that defense counsel failed to uncover during the pre-trial investigation and certainly no evidence that established prejudice--that the jury would have acquitted Almeida-Olivas because of the evidence. Almeida-Olivas simply provides a conclusory allegation of error ..." Doc. 7, p.6 (response).) The Eighth Circuit substantially affirmed without comment. (See Appendix 1.)

Initially, that is not the standard. Strickland teaches that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct [failure to investigate due to counsel's incapacitation prior to trial due to medical issues] on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. 668, 690, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984) (emphasis added). The Court concluded in part that "most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules [which is the way the trial court and trial courts in general apply them].

Although these principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness [not whether the errors of counsel would have resulted in an acquittal] of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the

particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. 466 U.S. at 696. (emphasis added).

Here, the Courts below, as is unfortunately typical in the United States now, have devolved into a mechanical application of the pull quotes from Strickland without actually applying the tenants of Strickland. Strickland is, first and foremost, about "fundamental fairness." Id.

In the case below, the Courts disregarded the lack of fundamental fairness that results from appointment of a medically incapacitated counsel (pre-trial). See Weaver v. Mass., 582 U.S. _____, 137 S.Ct. _____, 198 L.Ed. 2d 420 (2017) (prejudice inquiry not to be applied in "mechanical fashion" and "ultimate inquiry must concentrate on the fundamental fairness of the proceeding." citing Strickland at 696); c.f. Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed. 2d 379, 395 (2012) (J. Scalia dissenting) ("ultimate focus on our ineffective-assistance cases on the fundamental fairness of the proceeding) (citing Strickland at 696); Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1326, 182 L.Ed. 2d 398, 417 (2012); Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed. 2d 807, 827 (2012) (fundamental fairness remains the central concern of habeas corpus) (citing Pretke v. Haley, 541 U.S. 386, 393, 124 S.Ct. 1847, 158 L.Ed. 2d 569 (2004) (quoting Strickland 466 U.S. at 697).

The trial court further opined "... movant must show that counsel's performance was both constitutionally deficient and prejudiced." See Appendix 2 referring mechanically to Strickland, 466 U.S. at 687.) However, the perpetually relied upon error and

prejudice standard must be looked at in the context of Strickland as a whole. As this Court teaches:

* "The Sixth Amendment refers simply to 'counsel' ... [i]t relies instead on the legal professions maintenance of standards ..." Strickland, 466 U.S. at 688.

* "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. 466 U.S. at 688 (emphasis added).

* "A fair assessment of attorney performance ... eliminat[ing] the distorting effects of hindsight ... and the evaluate the conduct from counsel's perspective at the time." Id. 466 U.S. at 689 [not the court's perspective or the defendants perspective post trial].

* "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. 466 U.S. at 691 [counsel's failure to investigate at all appears in the record]. (See Appendix 3, ¶¶ 25, 35; Appendix 4, ¶¶ 4, 5, 6, 10, 11, 12, 13, 14, 26, 28, 29, 31, 33, 34, 36, and 37.)

* "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have do not establish mechanical rules. Although these principles should guide the process of decision, the ultimate focus of inquiry must be on fundamental fairness of the proceeding ... being challenged." Id. 466 U.S. at 496. (emphasis added)

Here, as has become the practice in the federal courts, the trial courts, affirmed by the Eighth Circuit, applied "mechanical rules" and failed to consider the teachings of Strickland. Strickland teaches that some of the elements to be considered by the Court is constitutional error (whether counsel is functioning as envisioned by the Sixth Amendment) and prejudice to the defendant. But those are merely "mechanical rules" and not the conclusion to be determined itself. Rather, Strickland teaches that the Court is to apply the elements enumerated in Strickland to determine whether, "viewed as of the time of counsel's conduct," 466 U.S. at 690, the proceeding itself was fundamentally unfair.

Here, that analysis did not take place (fundamental fairness analysis).

Under Slack v. McDaniel, supra, and Barefoot v. Estelle, supra, reasonable jurists could debate whether the Strickland standard was properly applied or mechanically applied. Jurists could disagree whether a trial with a medically infirm counsel, who conducted no pre-trial investigation due to his medical condition was fundamentally fair. Counsel who tried to object during trial but was unsuccessful because he lodged no complaints or filed any motions to suppress pre-trial was fundamentally unfair?

Under these circumstances the Court below had to determine whether the trial was fundamentally fair and not to apply a mechanical procedure.

It did not and under Slack v. McDaniel and Barefoot v. Estelle, a COA should have been granted.

Because the application of mechanical rules instead of fundamental fairness analysis is now the norm in federal courts, this Court should accept Certiorari to correct the practice of applying mechanical rules under the Strickland standard.

II. WHETHER THE TRIAL COURT PROPERLY APPLIED THE PROCEDURAL DEFAULT STANDARD IN VIEW OF THE FACT THAT DAHDA V. UNITED STATES, 584 U.S. _____, 138 S.CT. 1491 (2018), WHICH WAS ISSUED POST THE FINALITY OF ALMEIDA-OLIVAS'S DIRECT APPEAL (DEC. 2012), AND ALMEIDA-OLIVAS'S FIRST OPPORTUNITY TO PRESENT THE DAHDA CLAIMS TO THE COURT WAS IN HIS §2255?

The Court starts with the language of the statute. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 L.Ed. 2d 290, 109 S.Ct. 1026 (1989). The Court construes words of a statute with their "ordinary, contemporary, common meaning," unless Congress has indicated them to be defined differently. See Walters v. Metropolitan Ed. Enterprises, Inc., 519 U.S. 202, 207, 136 L.Ed. 2d 694, 117 S.Ct. 660 (1997), c.f. Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Part., 507 U.S. 380, 123 L.Ed. 2d 74, 113 S.Ct. 1489 (1993). See also Bailey v. United States, 516 U.S. 137, 141, 133 L.Ed. 2d 472, 116 S.Ct. 501 (1995).

Title 28 U.S.C. §2255 provides in part: "A prisoner in custody ... claiming a right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence." Id.

Nothing in the statute prohibits JFAO's requested relief. Therefore, the underlying judicial premise for consideration is the generally applied rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause a prejudice (for the procedural default). United States v. Frady, 456 U.S. 152, 167-168, 71 L.Ed. 2d 816, 102 S.Ct. 1584 (1982); Bousley v. United States, 523 U.S. 614, 621-622, 140 L.Ed. 2d 828, 118 S.Ct. 1604 (1998).

The trial court, without analysis, denied JFAO's Dahda claims. Dahda was recognized post-JFAO's October 2017 Petition for Certiorari to this Court or his direct appeal, thereby proscribing JFAO's prior application for relief in any other court.

The Court further teaches in Welch v. United States, 578 U.S. _____, 136 S.Ct. 1257, 194 L.Ed. 2d 387 (2016), that "[a] certificate of appealability may issue 'only if the applicant has made a substantial showing of the denial of a right.' §2253(c)(2). That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have resolved in a different manner.' [citing] Slack v. McDaniel, 529 U.S. 473, 484 (2000). Further, this Court confirmed that [o]btaining a certificate of appealability 'does not require a showing that the appeal would succeed' and 'a court of appeals should not decline the application ... merely because it believes the applicant will not demonstrate an entitlement to relief.'" [citing] Miller-El v. Cockrell, 537 U.S. 322, 337 (2003).

That is exactly what happened here.

The trial court applied, as to JFAO's first point, a mechanical application of the Strickland elements without addressing fundamental fairness. The trial court applied, as to JFAO's second point, the judicial made procedural default bar without considering the merits of JFAO's Dahda arguments. And the Eighth Circuit summarily affirmed. (See Appendix 1 & 2.)

As this Court properly identified in Massaro, the "rules of procedure should be designed to induce litigants to present their contentions ..." in the right forum. Here, this court issued its decision in Dahda v. United States, 584 U.S. _____, 138 S.Ct. 1491 (2018), just months after JFAO's case was final. (JFAO had filed his direct appeal petition for certiorari with this Court on October 17, 2017, in which he raised issues involving the Title III process (18 U.S.C. §2510-2518) which was denied just prior to Dahda being issued.)

At the first opportunity JFAO had to present the Dahda argument to a court, JFAO raised the issue with the trial court. The trial court summarily denied the matter without consideration of the merits, urging procedural default. (See Appendix 2, p.2). The Eighth Circuit summarily affirmed without comment. (See Appendix 1). In short, JFAO has not had a forum or an opportunity to present his Dahda arguments regarding the Title III orders in his case. Under these circumstances, JFAO respectfully urges that the Massaro standard should be extended to his circumstances.

This Court is respectfully requested to grant Certiorari to determine whether inmates may raise in an initial §2255 application Supreme Court announced changes in law that took place after their direct appeals were final, but before their first §2255 habeas petitions were filed.

CONCLUSION

For these reasons, Almeida-Olivas requests this Court grant Certiorari, and appoint counsel, to clarify that Strickland is a fundamental fairness analysis and not merely a mechanical rule enumeration. Additionally to consider whether the procedural default bar should apply to cases such as Almeida-Olivas were petitioner has not had an opportunity to previously present his claim, due to a Supreme Court decision that arose after the petitioner's direct appeal was final, but before his §2255 filing deadline. Almeida-Olivas requests such other and additional relief, whether in equity or in law, to which he may be entitled.

(INTENTIONALLY BLANK)

RESPECTFULLY SUBMITTED,

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