

No. _____

20-7807

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Woodrow Andrew Clark — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

FILED

APR 12 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Woodrow Andrew Clark
(Your Name) Reg. No. 66836-019
FCI Williamsburg Medium
P.O. Box 340

(Address)

Salters, South Carolina 29590
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether reasonable jurists would find the District Court's assessment of Claims one and two debatable or wrong? Or that the issues presented are adequate to deserve encouragement to proceed further?

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:

RELATED CASES

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STATUTES AND RULES

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28 U.S.C. §2255
Fed. R. Evid. 701, 702
Fed. R. Evid. 704(b)
Fed. R. Crim. P. 16

OTHER

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 2020 U.S. App. LEXIS 24273; 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☐ is unpublished.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 _____; 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☐ is unpublished.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☐ is unpublished.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☐ is unpublished.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 July 31, 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: November 12, 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 August 27, 2020 (date) on October 27, 2020 (date) in Application No. App. D.

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

The Sixth Amendment right to counsel is the right to the effective assistance of counsel. A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice.

A claim can be debatable even though every jurist of reason might agree, after the certificate of appealability (COA) has been granted and the case has received full consideration, that petitioner will not prevail. 28 U.S.C. §2253 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.

STATEMENT OF THE CASE

On March 24, 2015, a federal grand jury sitting in the Northern District of Georgia returned a two-count indictment against Woodrow Andrew Clark and his condefendant, Robert Elie, charging them with: (1) conspiring to possess heroin with the intent to distribute, in violation of 21 U.S.C. §§841 and 846 (Count one); and (2) possessing heroin with the intent to distribute, in violation of 21 U.S.C. §841 (Count two). Elie pleaded guilty on January 19, 2016. Clark proceeded to a jury trial on June 27, 2016.

At trial, the government presented testimony and evidence establishing that federal law enforcement received information from a confidential source that a drug transaction was going to occur on March 9, 2015, at unit number 9101 in an apartment complex in DeKalb County, Georgia. Based on that information, eight law enforcement officers set up surveillance at the apartment complex where they believed a supplier would bring heroin that a male would later purchase.

Agents positioned themselves at various locations throughout the area. At approximately 1:00PM, agents saw an orange truck at the complex, near unit 9101. The truck left, but later that day, at around 4:40PM, it returned. Elie was driving the truck, and Clark was sitting in the passenger seat. Elie drove the truck past empty parking spaces in front of 9101 and into the parking deck, where he parked, facing the truck outwards so that it was looking in the direction of unit 9101. Agents watched as Elie get out of the car, and walked around the truck to the passenger side. Once there, Clark handed Elie a red bag. Elie took the bag, walked out

of the parking deck and into the 9000 building breezeway, towards unit number 9101.

After Elie walked into the breezeway, Clark stayed in the car for approximately five minutes before driving out of the apartment complex. About ten minutes later, Clark returned. Once parked, Clark remained in the driver's seat and looked around. He stayed there for approximately ten minutes, only to leave again.

Approximately 15 minutes later, Clark returned to the apartment complex. Elie got in the car, and agents followed as Clark drove the truck out of the apartment complex. After Clark left the apartment complex, a Georgia State Patrol Officer got behind Clark, and subsequently initiated a traffic stop. When the officer did so, Clark slowly pulled over into the left emergency lane, but never came to a stop; instead, he began accelerating and attempted to flee, and in doing so, struck an undercover officer's car, spinning his own vehicle and hitting another law enforcement car. After hitting the police cars, Clark jumped out of the driver's side door, and Elie jumped out of the passenger's side door, and both began running on the interstate, going in different directions. The Patrol Officer caught up to Clark.

After Clark and Elie were arrested, agents searched the truck and found the red bag, \$24,793 in cash, two kilograms of heroin (worth approximately \$104,000 to \$108,000), and three cell phones. Agents obtained search warrants for the three phones found in the car (consisting of an LG, a Nokia, and an Apple iPhone, as well as an Apple iPhone found on Elie when he was arrested. Agents were unable to search the two Apple iPhones, however, given the phones' security features. The Nokia phone was too damaged to search.

Agents, however, were able to recover information from the LG phone. Among the information recovered was a text in which Clark's girlfriend asked him to send her a picture, Clark responded, "...I'm working now...." Id. Clark sent that text at 5:48PM, during the time that agents were conducting their surveillance. The government also presented evidence showing that Clark had previously been convicted of selling heroin on two separate occasions in Florida in 2013.

Special Agent Charles Engle was one of the agents conducting surveillance at the apartment complex on March 9, 2015. Agent Engle testified at trial about what he observed during surveillance. Near the beginning of his testimony, the government asked, "Are you familiar with countersurveillance?" Id. Agent Engle responded that he was, the government followed up by asking, "And what is that?" Id. Defense counsel objected, asserting that the government had not provided expert notice under Federal Rule of Criminal Procedure 16, and that "testimony based on experience is what expert testimony is." Id. The court tabled the issue so that it could research the law before ruling.

After researching the law, the court sustained Clark's objection to the government's question about countersurveillance. After sustaining Clark's objection to the government's request for Agent Engle to explain countersurveillance, the court permitted testimony from Agent Engle about what he personally observed and conclusions he drew from those observations. After Agent Engle explained that Clark had driven out of the complex, only to return a short while later, park, and look around, the government asked, "Based on your observations, Agent Engle, what did you think was

happening at the time?" Agent Engle testified:

Because [Clark] had parked, had passed up open parking spaces, had parked in line of sight similar to where we had parked and had a view of the apartment, I believed he was conducting countersurveillance or acting as a lookout... I also observed him looking around. I could see his head moving as though he was looking around the apartment complex.

Id.

The government responded by asking, "How did that affect your level of suspicion about the orange truck at that time?" Id. Agent Engle explained:

I believed that the orange truck had delivered money to the apartment and was going to obtain heroin from the apartment. I believed that the driver was posing as a lookout, because I saw him looking around the complex, and also where he parked. I believed that he was involved. So my level of suspicion was heightened.

Agent Engle also observed Clark driving the truck slowly through the apartment complex as he and Elie were leaving, and, based on that observation, Agent Engle testified "I believe the vehicle was traveling slowly to see if anyone - the driver was driving the vehicle slowly to see if anyone was following." Id.

After hearing evidence, the jury found Clark guilty on count one, the conspiracy charge, and not guilty on count two. On September 12, 2016, the court sentenced Clark to 156 months' imprisonment, to be followed by five years' supervised release, and ordered him to pay a \$100 special assessment and \$22,822 in restitution.

On September 23, 2016, Clark initiated an appeal to the Eleventh Circuit. The single issue raised on appeal was whether the court abused its discretion in admitting the opinion of Agent Engle that Clark was engaged in countersurveillance. Specifically, Clark argued that the court erred by permitting Agent Engle to testify as a lay witness that, based on Clark's behavior, the agent believed Clark was acting as a lookout during the drug transaction. United States v. Clark, 710 F.App'x 418, 421 (11th Cir. 2017), cert. denied, 138 S.Ct. 2663 (2018). Because Agent Engle's testimony was based in part on his experience as a law enforcement officer, Clark argued Agent Engle's statements were expert testimony and required notice. Id.

In affirming Clark's conviction, the Eleventh Circuit stated that, "[c]ontrary to Clark's argument on appeal, we have recognized that a law enforcement officer may testify based on knowledge gained from his experience in a particular field, and that testimony does not necessarily qualify as 'specialized knowledge' within the meaning of Rule 702." Id.

On August 31, 2018, Clark filed a timely petition for relief pursuant to 28 U.S.C. §2255. Clark advances four grounds for relief. First, Clark argued that his counsel was ineffective for failing to file a motion in limine with respect to Agent Engle's testimony regarding countersurveillance. Second, Clark argued that his counsel was ineffective for failing to request special jury instructions regarding expert and lay testimony. Third, Clark argued that his counsel was ineffective for failing to challenge evidence of his prior convictions. Fourth, Clark argued that his cell phone records were inadmissible pursuant to

Carpenter v. United States, 138 S.Ct. 2206 (2018).

On November 18, 2019, the U.S. Magistrate Judge issued a report and recommendation recommending that grounds one, two, and three be denied because Clark's counsel did not perform deficient and he was not prejudiced. The magistrate recommended because Carpenter did not apply to the present case, Clark should be denied §2255 relief as to ground four.

On December 2, 2019, Clark filed objections to Magistrate Judge's final report and recommendation.

On January 22, 2018, the district court issued an order adopting magistrate judge's report and recommendation.

On January 31, 2020, Clark filed a motion to reconsider and objections to denial order.

On March 9, 2020, the district court entered an order denying Clark's reconsideration of denial for certificate of appealability.

On March 13, 2020, Clark filed a motion to object and correct sentence after denial of 2255 pursuant to Rule 35(a).

On March 20, 2020, the district court entered an order denying motion to object and correct sentence after denial of 2255 pursuant to Rule 35(a).

On July 31, 2020, the Eleventh Circuit Court of Appeals sent letter stating I had no merits for a COA given 14 days to file a response.

On August 3, 2020, mailed a motion for extension of time to respond to the court's July 31, 2020 letter stating I had no merits for a COA.

On August 27, 2020, I received an order granting an extension for 60 days to file any arguments to the court's July 31, 2020 letter informing I had no merits for a COA.

On October 19, 2020, filed motion in response to court's order denying COA by request for rehearing with suggestion for rehearing en banc.

On November 12, 2020, the Eleventh Circuit Court of Appeals inadvertently mailed the denial to motion in response to court order denying certificate of appealability by request for rehearing with suggestion for rehearing en banc to the wrong mailing address.

On December 15, 2020, I received the Eleventh Circuit denial dated December 3, 2020 denying certificate of appealability by request for rehearing with suggestion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

Mr. Clark will show the denial of his Sixth Amendment right under the United States Constitution was violated when trial counsel failed to (1) file motion in limine with respect to Agent Engle's testimony; and (2) did not request jury instructions on expert testimony. Reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. And the issues presented are adequate to deserve encouragement to proceed further.

The Sixth Amendment right to counsel is the right to the effective assistance of counsel. A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice.

Mr. Clark moves this Court for a certificate of appealability ("COA"), to appeal the district court's order denying his 28 U.S.C. §2255 petition. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). He must demonstrate that "reasonable jurists would find the district court's assessment debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Mr. Clark advances two grounds for relief.

First, Clark argues that his counsel was ineffective for failing to file a motion in limine with respect to Agent Engle's testimony regarding countersurveillance.

Second, Clark argues that his counsel was ineffective for failing to request special jury instructions regarding expert and lay testimony.

Agent Engle's testimony at trial confirmed he was an "expert witness." Agent Engle testified that he was a special agent with U.S. Dept. of Homeland Security - assigned to the organized crime and drug task force and task with investigating criminal organizations as they smuggle narcotics into Atlanta. And for six years he was assigned to the DEA as a DEA Task Force Officer in Atlanta. Under Rule 702, "experienced government agents may provide testimony regarding general techniques used in the drug trafficking business." United States v. Blackburn, 398 Fed. Appx. 453, 456 (11th Cir. 2010) (citing United States v. Chastain, 198 F.3d 1338, 1348-49 (11th Cir. 1999)).

The prosecution's proffer of Agent Engle as a lay witness was error. This error affected the defense ability to present a defense, the defense strategy was determined by the prosecution's interference in its failure to disclose. Clark's substantial rights to a fair trial was violated. The prosecution proffered Agent Engle as a lay witness to evade the reliability requirement under Federal Rule of Evidence 702.

The government asserted "Clark's counsel was not ineffective for failing to file motions in limine with respect to Agent Engle's testimony. To support its contention the government argued "[a]s a practical matter, Clark's counsel did not know the detailed specifics of Agent Engle's testimony before Agent Engle took the witness stand. The government did not disclose the opinion testimony of Agent Engle prior to trial because it was not intended as expert

testimony." Id.

The Federal Rules of Evidence set forth the circumstances in which a district court may permit expert testimony on a matter in dispute at trial. An expert witness may testify at trial if his 'scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." United States v. Gutierrez-Farias, 294 F.3d 657, 662 (5th Cir. 2002)(quoting Fed. R. Evid. 702). An expert may testify "in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Id. "[A]n expert in a criminal case may not offer 'an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged'" Gutierrez-Farias, 294 F.3d at 662 (quoting Fed. R. Evid. 704(b)). "Such issues are matters for the trier of fact alone." Id.

In Clark's case, the record shows that the district court relied on United States v. Blackburn, 398 F.App'x 453 to agree with the government that if Agent Engle's testimony is "based on his, what he was thinking at the time based on what he saw at that time." Trial Tr. at 110-111. The district court then agreed "exactly." Id. The government then asked the district court for permission to "go back" on Agent Engle's testimony.

On direct examination the government questioned Agent Engle about his earlier testimony in relation to his surveillance at the Camden St. Clair Apartment Complex. Trial Tr. at 115.

Q. Based on those observations how did that affect your level of suspicion about the orange truck at that time? Trial Tr. at 117.

Clark contends the government presented testimony and evidence that federal law enforcement received information from "a confidential source" that a drug transaction was going to occur on March 9, 2015, at unit number 9101 in an apartment complex in DeKalb County, Georgia. Based on that information, eight law enforcement officers set up surveillance at the apartment complex where they believed a supplier would bring heroin that a male would later purchase.

Agent Engle testified at trial "approximately 12:00PM, agents saw an orange truck at the complex, near unit 9101. The truck left, but later that day, at around 4:40PM, it returned. Elie was driving the truck, and Clark was sitting in the passenger seat. Elie drove the truck past empty parking spaces in front of 9101 and into the parking deck, where he parked, facing the truck outwards so that it was looking in the direction of unit 9101... Clark stayed in the car for approximately five minutes before driving out of the apartment complex. About ten minutes later, Clark returned. Once parked, Clark remained in the driver's seat and looked around.

Agent Engle was one of the agents conducting surveillance at the apartment complex on March 9, 2015. When asked by the government "are you familiar with countersurveillance?" Agent Engle responded that "he was." The government followed up by asking, "and what is that?"

Trial counsel objected arguing "the government had not provided expert notice under Federal Rule Criminal Procedure 16, and that testimony based on experience is what expert testimony is." Id.

The district court sustained counsel's objection to the government's question about countersurveillance. But after sustaining Clark's objection to the government's request for Agent Engle to explain countersurveillance, the district court permitted Agent Engle to testify about what he personally observed and his conclusions he drew from those observations...

And when asked, "What did you think was happening at the time?" Agent Engle testified:

Because [Clark] had parked, had passed up open parking spaces, had parked in line of sight similar to where we had parked and had and had a view of the apartment, I believed he was conducting countersurveillance or acting as a lookout... Id.

Agent Engle was then asked, "How did that affect your level of suspicion about the orange truck at that time?" Id. Agent Engle explained:

I believe that the orange truck had delivered money to the apartment and was going to obtain heroin from the apartment... I believe that the driver was posing as a lookout because I saw him looking around the complex... Id.

Here, Agent Engle had no personal knowledge the orange truck would deliver money to the apartment, nor could he have known Clark and Elie were going to obtain heroin. See United States v. Dulcio, 441 F.3d 1269, 1275 (11th Cir. 2006)(concluding it is

error to admit opinion testimony of lay witnesses based on specialized knowledge). Therefore when Agent Engle was permitted to testify he believed Clark was conducting countersurveillance or acting as a look out... and he believed the orange truck had delivered money to the apartment and was going to obtain heroin Agent Engle was testifying as a person qualified by "knowledge, skill, experience, training and education. This was error. And there is a reasonable possibility that this improperly admitted evidence contributed to the conviction of conspiracy.

In United States v. Sumlin, 489 F.3d 683, 688 (5th Cir. 2007), the court allowed Sergeant Kingsley, the arresting officer to testify as to the circumstances of the stop, arrest and his drug interdiction efforts. Kingsley testified he suspected Sumlin was transporting narcotics. The Fifth Circuit concluded that the admission of the testimony was erroneous because the evidence was insufficient to prove that Sumlin had transported narcotics, so the testimony was "relevant only to the defendant's character and should not have been admitted. See *id.* at 691. In conducting a harmless error inquiry, the Fifth Circuit concluded "the district court's error in admitting Kingsley's testimony affected Sumlin's substantial rights, and there was a reasonable possibility that this improperly admitted evidence contributed to the conviction." *Id.* at 691.

Accordingly, Clark has showed that counsel performed deficiently and that counsel's deficient performance caused prejudice. The issue that Clark's counsel was ineffective for failing to file a motion in limine with respect to Agent Engle's testimony regarding countersurveillance is adequate to deserve encouragement to proceed

further. A certificate of appealability should be GRANTED on this ground.

Second, Clark argues that his counsel was ineffective for failing to request a special jury instructions regarding expert and lay testimony. A defendant is entitled to have the court instruct the jury on a theory of defense when there is a basis in the evidence and legal support.

The government asserts "Clark's counsel was not ineffective for failing to request a special jury instruction." Id. To support this contention the government argued that "it is likely that the court would have denied any request for an expert witness jury instruction because, with no expert witness at trial, there was no basis in the record for the instruction. Thus, counsel's failure to request the instruction was not ineffective nor did it cause prejudice to Clark's case." Id.

Agent Engle testified based on his observation he "believe that the orange truck had delivered money to the apartment and was going to obtain heroin from the apartment." Trial Tr. at 118.

In *United States v. Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999), the Eleventh Circuit found such testimony as "expert testimony." In this case, the government presented Agent Engle - an expert testimony - as a lay witness. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. And when Agent Engle testified

Because [Clark]... had parked in line of sight similar to where we had parked and had a view of the apartment, I believe he was conducting countersurveillance or acting as a lookout....

he was testifying as a person qualified by "knowledge, skill, experience, training and education, rather than in form of a opinion. Agent Engle was employed as an investigator of organized crime for smuggling narcotics in the Atlanta area. He worked for Homeland Security assigned to a narcotics unit since 2008. Prior to 2008 he worked for the Cobb County Police Department for ten and a half years assigned to the Marietta Cobb Smyrna Narcotics Task Force. And he worked six years assigned to the DEA as a DEA Task Force Officer in Atlanta. See Trial Tr. at 55-56. Hence, seeing as how the jury found Clark not guilty of possessing heroin with intent to distribute, without Agent Engle's opinion "him believing Clark was conducting countersurveillance or acting as a lookout, there is no other evidence to link Clark to the conspiracy. Had the jury been explained the difference between expert and lay testimony, there is a reasonable possibility the jury may have found Clark not guilty of the conspiracy to possess heroin with the intent to distribute. It was error to admit opinion testimony of a lay witness based on specialized knowledge. And counsel's failure to request the instruction was prejudice.

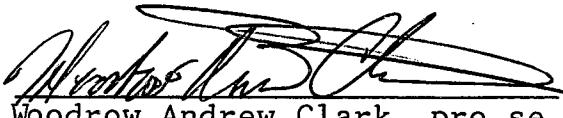
Based on the aforementioned Clark has demonstrated that reasonable jurists would find the district court's assessment of his Sixth Amendment constitutional claims debatable or wrong, Tennard v. Dretke, 542 U.S. 274, 282, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)(quoting Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), or that "the issues presented are

adequate to deserve encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). This Court should GRANT Clark a COA and remand the case to the district court for further proceedings.

CONCLUSION

The certificate of appealability should be granted.

Respectfully submitted,


Woodrow Andrew Clark, pro se.
Reg. No. 66836-019

Date: 4-12-2021