NO._____

In The
Supreme Court of the United States

LUCAS KENNETH SABATINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is: Whether defense counsel committed prejudicial ineffective assistance of counsel by failing to raise issues relating to defendant's mental capacity at the time of the commission of the alleged crime and at the time of trial.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lucas Kenneth Sabatino, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISIONS BELOW

The Fourth Circuit's opinion in this case is found at App. 1-3. The district court's judgment is found at App. 7-14.

JURISDICTION

The Court of Appeals entered its judgment on October 23, 2020 (App. 4); and it denied Sabatino's petition for panel or *en banc* rehearing on December 7, 2020. App. 15. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The following is a relevant Constitutional provision:

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

Amendment VI, United States Constitution

STATEMENT OF THE CASE

This case was commenced with the filing of a bill of indictment in the Western District of North Carolina on January 15, 2019. CA JA 8[1]. The defendant was charged in a two count bill of indictment. In Count One defendant was charged with inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct in violation of Title 18, U.S.C. Sections 2251(a) and 2251(e). In Count Two he was charged with using a facility of interstate commence to persuade an individual under the age of 18 to engage in sexual activity for which any person could be charged, to wit: the violation of North Carolina General Statute 14-202.1(a)(1), taking indecent liberties with children, in violation of Title 18, U.S.C. Section 2422(b). The indictment contained a notice of forfeiture and finding of probable cause. Defendant was arrested in Ohio and subsequently returned to face these charges in the Western District of North Carolina. He made an initial appearance in an arraignment and detention hearing held on February 20, 2019. He was appointed counsel. In an order of February 20, 2019, he was ordered detained. CA JA 10. On May 1, 2019, a factual basis was filed. CA JA 13. On May 1, 2019, a plea agreement was filed. CA JA 92. On May 2, 2019, a plea hearing was conducted by the magistrate judge who found a factual basis for the plea and

[1]CA JA is reference to the Joint Appendix filed in the Court of Appeals.

accepted the same. CA JA 15. On that same date the magistrate judge accepted the guilty plea and entered a guilty plea. CA JA 37. On May 2, 2019, the magistrate judge entered a consent order and judgment of forfeiture. CA JA 41. On June 18, 2019, a draft of the presentence investigation report was filed. CA JA 98. Defendant's objections to the presentence report were filed on July 2, 2019. CA JA 111. On July 8, 2019, a final presentence report was filed. CA JA 113. On July 16, 2019, the defendant filed a *pro se* letter which the court treated as a motion for inquiry of counsel. CA JA 43.

A hearing into the inquiry of status of counsel was held before the magistrate judge on August 20, 2019. CA JA 127. On October 16, 2019, the defendant filed under seal a sentencing memorandum. CA JA 148. A sentencing hearing was held before district judge Max O. Cogburn, Jr., on October 22, 2019. CA JA 45. The court's written judgment was entered on October 28, 2019. CA JA 75. In that judgment Count Two of the indictment was dismissed, and he was sentenced to 180 months imprisonment on Count One. The statement of reasons was entered that same day. CA JA 167.

On October 29, 2019, the defendant timely filed his notice of appeal to the Fourth Circuit Court of Appeals. CA JA 83. Defendant filed his opening brief on June 17, 2020. App. 16. The sole argument presented in the appeal was the same as the question presented herein, to wit: defense counsel's prejudicial ineffectiveness for failing to raise issues relating to defendant's

mental capacity at the time of the commission of the alleged crime and at the time of trial. Instead of filing a responsive brief, the government elected to file a motion to dismiss the appeal. App. 34. The motion to dismiss was based on the government's contention that defendant's "theory of ineffective assistance of counsel warrants dismissal because the record does not conclusively establish that the performance of his attorney was constitutionally deficient." App. 34. This motion was filed on August 19, 2020. On September 14, 2020, defendant filed his response to the government's motion to dismiss the appeal. App. 51. The defendant's response asserted that his plea agreement specifically permitted appeals grounded on ineffective assistance of counsel. App. 52, CA JA 96.

Thereafter, the Fourth Circuit issued its unpublished opinion on October 23, 2020. App. 1. In that opinion the government's motion to dismiss was denied, but the district court's judgment was affirmed. This was done without requiring the filing of a responsive brief by the government which would have permitted the defendant to file a reply brief. Further, the opinion dispensed with the need for oral arguments. On November 12, 2020, defendant filed a petition for rehearing. App. 56. The Fourth Circuit entered an order denying the petition for rehearing on December 7, 2020. App. 15. Consequently, defendant in due and apt time is filing this petition for writ of certiorari with this Court.

Facts

The bill of indictment in this case was returned on January 15, 2019. CA JA 8. Defendant's court-appointed attorney made her first appearance on or about February 20, 2019. The defendant was ordered to be detained pending trial on February 20, 2019. CA JA 10. Defendant's plea agreement called for him to plead guilty to Count One in which he was charged with inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct in violation of Title 18, U.S.C. Section 2251(a) and 2251(e). CA JA 92. The plea agreement provided that "either party may argue their respective positions regarding any other specific offense characteristics, cross-references, special instruction, reductions, enhancements, departures, and adjustments to the offense level." CA JA 94. Further, either party could seek a departure or variance from the guidelines. Additionally, defendant agreed to register as a sex offender. CA JA 94.

Defendant's counsel did not file any motion with the court which in any way questioned his mental competency prior to filing his plea agreement. At his Rule 11 hearing on May 2, 2019, the magistrate judge inquired as to whether he was under the influence of any drug to which he responded, "No." CA JA 17. The magistrate judge inquired "(i)s your mind clear today and do you understand you're here to enter a guilty plea that cannot later be

withdrawn." He responded: "Yes." CA JA 17 and 18. The magistrate judge then proceeded to advise him and ask him questions required by Rule 11 of the Federal Rules of Criminal Procedure concerning whether defendant understood various matters and things. Defendant was asked by the magistrate judge: "Have you had enough time to discuss with your lawyer any possible defenses you might have to these charges?" Defendant responded: "Not really." CA JA 29 and 30. The magistrate judge attempted to clear this up. CA JA 30 and 31. The magistrate judge asked defendant's counsel to comment. She said: "No, Your Honor. I think it's just a difficult matter, but I do think he's – he's ready to conduct this hearing with Your Honor and proceed." CA JA 31. The magistrate judge asked defendant "(h)ave you heard and understood all parts of this proceeding and do you still wish to plead guilty?" Defendant responded: "Yes." CA JA 31. Defendant further injected: "I didn't mean for this to happen." CA JA 32. Finally, defense counsel informed the court that she had reviewed all the features of the case with defendant, particularly the terms of his plea agreement, and she is satisfied that he understands these things and knows what he is doing. CA JA 32.

While this Rule 11 hearing was held on May 2, 2019, defendant was evaluated by a psychologist at the request of his counsel on May 9, 2019. CA JA 152. She prepared and submitted a report on June 12, 2019. CA JA 152.

Her 12 page report was attached to a sentencing memorandum which his counsel filed with the court. CA JA 148. The entire report is adopted and incorporated herein by reference. CA JA 152-163. The curriculum vitae of the psychologist which is also adopted and incorporated herein by reference was also appended to the report. CA JA 164-166. Importantly, the report provided that defendant's "judgment was marginal to poor. He appeared to be of low average intelligence." CA JA 157. Without setting forth the report in great detail, particularly in view that it is adopted herein in its totality, the diagnosis of psychologist is unspecified neurodevelopmental disorder, post traumatic stress disorder, persistent depressive disorder, unspecified cannabis use disorder, unspecified alcohol use disorder, and other specified personality disorder with paranoid, borderline and avoidant traits. CA JA 159. The psychologist recommends, *inter alia*, that defendant "should continue to participate in mental health treatment, including a medication evaluation, with mood stability, depression, and nightmares as the target symptoms. The provider who prescribes his medications should be made aware of his substance abuse history." Further, the psychologist recommends the defendant "should continue with psychotherapy for his PTSD and depression". CA JA 162.

In a handwritten letter to Judge Cogburn filed July 16, 2019, defendant asserts, *inter alia,* "I would like a new attorney (I) feel my current one isn't

looking out for my best interests." CA JA 44. He further asserts in that letter that he was forced into signing the plea deal. CA JA 43. He also says that

> (I) asked for help because (I) have mental health issue's and p.t.s.d from being shot in a house robbery back in 2015. I also come from a broken home as a kid growing up in the system (I)'m not trying to make excuses for what (I) did but all (I) want is help for my Mental health problem's so (I) can be a better person cause most of my life (I) just ignored my issue's cause I was afraid to admit (I) needed help (I) hope it's not to(o) late.

CA JA 43. The letter further says: "(I) really want to be happy and not depressed and mad at the world all the time." CA JA 44. The letter repeatedly says his lawyer is not working for his best interest. He even says she is working against him. CA JA 43. A hearing was held before a magistrate judge on August 20, 2019. CA JA 127. His presentence report addresses his mental and emotional health and his substance abuse in paragraphs 44 and 45. CA JA 121. Defendant's objections to the presentence report did not include any objection under U.S.S.G. Section 5H1.3. He should be entitled to a downward departure under that section.

REASON FOR GRANTING THE WRIT

The question presented is important and potentially frequently recurring, and this case presents an excellent vehicle to resolve it.

Federal trial courts deal on a regular basis with the question of ineffective assistance of counsel, many of which result in some defendants entering into plea agreements without sufficient mental capacity.

In this case, Sabatino's counsel knew or reasonably should have known facts which should have been brought to the court's attention relating to the mental capacity of the defendant. Such facts are set forth in the "*Facts*" found above. Under those facts it is clear that defendant was not competent to stand trial, was not mentally competent to commit the alleged crime, and in fact may have lacked mental capacity to form the *mens rea* requirement for criminal prosecution. "It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California,* 505 U.S. 437, 439, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992). Counsel's failure to investigate possible insanity defense is ineffective assistance of counsel. *United States v. Kauffman*, 109 F.3d 186 (3rd Cir. 1997). In this case there was a psychological evaluation and a handwritten letter from the client, but counsel failed to bring this for a judicial determination as to whether he was competent to stand trial and whether he had adequate mental competence at

the time of the alleged offense. Counsel should have requested a competency hearing in that a failure to do so constitutes ineffective assistance of counsel if there was sufficient indication of incompetence to give objectively reasonable counsel reason to doubt his competency and if there was a reasonable probability that he would have been found incompetent to stand trial had the issue been raised and considered. *Taylor v. Horn,* 504 F.3d 416, 438 (3rd Cir. 2007). The Fifth Circuit in *Bouchillon v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990) held that the court cannot accept a guilty plea from a mentally incompetent and that the failure to investigate defendant's competence is prejudicial if there is a reasonable probability that he is incompetent to plead. *McLuckie v. Abbott,* 337 F.3d 1193, 1199 (10th Cir. 2003) said that "a failure to timely investigate a client's mental state, let alone a failure to assert a mental state defense at trial, falls well below an objective standard of reasonableness" when the defendant shows "severe mental problems".

This Circuit remanded for hearing a claim of counsel's ineffectiveness for counsel's failure to investigate the defendant's competency despite signs of instability. *Beckton v. Barnett*, 920 F.2d 1190 (4th Cir. 1990). The Sixth Circuit found trial counsel's ineffectiveness for failing to present an insanity defense. *Walker v. Hoffner*, 534 Fed. Appx. 406 (6th Cir. 2013). Failure to investigate and assert defendant's incompetency rendered his plea

unknowing and involuntary. *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1994). The failure of counsel to pursue the possibility of defendant's mental instability created ineffective assistance of counsel. *Evans v. Lewis,* 855 F.2d 631, 636-39 (9th Cir. 1988). Evidentiary hearings are required for failing to present mental mitigation evidence and for failing to investigate the insanity defense. See *Wilson v. Simmons,* 536 F.3d 1064, 1096 (10th Cir. 2008) and *McCoy v. Wainwright*, 804 F.2d 1196 (11th Cir. 1986).

In this case the plea agreement was filed May 1, 2019. The Rule 11 hearing was conducted May 2, 2019. The psychological examination was conducted at the behest of defendant's counsel on May 9, 2019. It is not clear when defense counsel contacted the psychologist, but the plea agreement was signed by the defendant on April 17, 2019. CA JA 97. It was filed May 1, 2019. Clearly the defense counsel must have been placed on notice of defendant's mental problems before the Rule 11 hearing or she would not have ordered the psychological evaluation. The psychological evaluation begs for judicial determination of defendant's mental competence at the time of the alleged offense and his mental capacity to stand trial, yet she failed to do so to his great prejudice. She could have and should have filed proceedings under 18 U.S.C. Section 4248. Further, she should have and could have asserted defenses by notice or motion under 18 U.S.C. Section 17. 18 U.S.C. Section 17 (a) provides as follows:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C. 17a.

Under 18 U.S.C. Section 3006A the defendant was entitled to adequate representation by court appointment if he is unable to afford same. This right, secured by that statute and by the Sixth Amendment to the United States Constitution, was effectively denied to him in that this representation was ineffective. Further, trial counsel should have filed a motion under 18 U.S.C. Section 4241 and 18 U.S.C. Section 4242 for determination of his mental competency to stand trial and for determination of existence of insanity at the time of the alleged offense. It is obvious from the foregoing that defense counsel had enough information to attempt to raise this defense, and her failure to do so is ineffective assistance of counsel. She should have but did not file a notice of insanity defense under Rule 12.2 of the Federal Rules of Criminal Procedure. Defense counsel ignored issues relating to diminished responsibility, diminished capacity and negating the *mens rea*. These issues should have been raised by motion or notice and decided by court, not by counsel. Defense counsel was aware of defendant's mental health information in that on July 2, 2019, she objected to the presentence

report saying that she is continuing to gather records of defendant's mental health information. CA JA 111. U.S.S.G. Section 5H1.3 provides that "Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.*, participation in mental health program (*see* §§ 5B1.3(d)(5) and 5D1.3(d)(5))." Downward departures would be appropriate under the sentencing guidelines, but no such request was found in either the presentence report or in the defense objections thereto.

As is noted above on October 29, 2019, the defendant timely filed his notice of appeal to the Fourth Circuit Court of Appeals. CA JA 83. Defendant filed his opening brief on June 17, 2020. App. 16. The sole argument presented in the appeal was the same as the question presented herein, to wit: defense counsel's prejudicial ineffectiveness for failing to raise issues relating to defendant's mental capacity at the time of the commission of the alleged crime and at the time of trial. Instead of filing a responsive brief, the government elected to file a motion to dismiss the appeal. App. 34. The motion to dismiss was based on the government's contention that defendant's "theory of ineffective assistance of counsel warrants dismissal because the record does not conclusively establish that the performance of his attorney was constitutionally deficient." App. 34. This motion was filed on August 19, 2020. On September 14, 2020, defendant filed his response to the

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It is the respectful contention of defendant that the record established in the district court meets both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, defendant contends that the record before the trial court heretofore described conclusively shows the ineffective assistance of counsel as required in *United States v. Martinez,* 136 F.3d 979 (4th Cir. 1998); *United States v. Allen,* 491 F.3d 178 (4th Cir. 2007); and *United States v. Hoyle*, 33 F.3d 415 (4th Cir. 1994). Therefore, the record shows the prejudicial ineffectiveness of counsel conclusively and a 28 U.S.C. §2255 motion is not

necessary to permit the further development of the record. *United States v. Baptiste,* 596 F.3d 214, 216 No. 1 (4th Cir. 2010).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

May 5, 2021.

Respectfully submitted,

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