

MAY 26 2021

OFFICE OF THE CLERK

No. 20-8293

IN THE
SUPREME COURT OF THE UNITED STATES

Louis John Fontanez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

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(Your Name)

pro se representation

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ORIGINAL

QUESTIONS PRESENTED

Was counsel constitutionally ineffective because he failed to consult or hire expert witnesses to investigate the but-for causation of the victim's injury in a case where the petitioner faced the "death or serious bodily injury results" penalty enhancement under 21 U.S.C. § 841(b)(1)(C)?

Did the lower courts commit reversible error by using the performance of the co-defendant's counsel to deny the petitioner's § 2255 claim of ineffective assistance of counsel?

Did the lower courts commit reversible error when they denied the Petitioner's § 2255 motion based upon the probable guilty verdict at trial rather than the likelihood that the petitioner would have pleaded guilty in a case involving a guilty plea?

Was the petitioner's guilty plea sustained in violation of due process warranting habeas relief where the district court repeatedly denied the petitioner's motions for the discovery needed to meet the circuit's threshold to show prejudice in a § 2255 'failure to hire experts' claim? Or alternatively, is the Eighth Circuit's requirement that a prisoner hire their own expert to present testimony to support a 'failure to hire experts' § 2255 ineffective assistance of counsel claim so burdensome that it resulted in the lower courts sustaining the petitioner's guilty plea in violation of due process warranting habeas relief?

Did the courts below commit reversible error by denying petitioner's § 2255 ineffective assistance of counsel claims without conducting an evidentiary hearing?

Did the lower courts commit reversible error by denying a Certificate of Appealability regarding the petitioner's § 2255 ineffective assistance of counsel claims?

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

- Gaylord v. United States, No. 15-1297, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Jul. 12, 2016.

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

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

OPINIONS BELOW

[X] For cases from federal courts:

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

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished. Note: No opinion available, only the one sentence denial.

The opinion of the United States district court appears at Appendix G 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 10/22/20.

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: 01/06/21, and a copy of the order denying rehearing appears at Appendix N.

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

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

For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

"No person shall be ... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation ... and to have the assistance of counsel for his defense."

3. The statute under which the Petitioner was convicted, and for which the Petitioner did not receive effective counsel, 21 U.S.C. § 841(b)(1)(C) provides:

"(C) In the case of a controlled substance in schedule I or II, ... such person shall be sentenced to a term of imprisonment on not more than 20 years and if death or serious bodily injury results from the use of the substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life..."

4. The statute under which the Petitioner sought habeas corpus relief was 28 U.S.C. § 2255, which can be found in total in Appendix A.

5. The Rule under which the Petitioner sought discovery from the district court, Rules Governing Section 2255 Proceedings, Rule 6(a) and 6 (b) which provide:

"(a) Leave of court required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting discovery. A party requesting discovery must provide reasons for the request. The request must include any proposed interrogatories and requests for admission, and must specify any requested documents."

6. The Rule under which the Petitioner sought an evidentiary hearing from the district court, Rules Governing Section 2255 Proceedings, Rule 8 which provides:

"(a) Determining whether to hold a hearing. If the motion is not dismissed, the judge must review the answer, any transcripts or records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted."

7. The Rule under which the Petitioner sought a Certificate of Appealability from the courts below, Rules Governing Section 2255 Proceedings, Rule 11(a) which provides,

"(a) Certificate of appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial, but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22..."

STATEMENT OF THE CASE

1. On October 23, 2017, the Petitioner distributed less than 1 gm of heroin (without cocaine) to victim R.Z. Approximately 6 hours later, the victim was found unresponsive by his wife. When police arrived, they found the victim without breathing or a pulse. Police performed CPR. When paramedics arrived, the victim was breathing and had a pulse, but remained unconscious. The paramedics administered Narcan, and the victim regained consciousness. At the scene, a syringe with a mixture of cocaine and Heroin was found. At the hospital, the victim was found to have opiates and cocaine in his blood.
2. On 04/18/18, the Petitioner and a co-defendant were indicted by a federal grand jury. Petitioner was indicted on 2 charges, including 21 U.S.C. § 841(b)(1)(C).
3. On 11/27/18, 7 days before trial, the Petitioner requested new counsel because his counsel had done nothing to prepare a defense. However, after the district judge personally endorsed counsel during a hearing on the matter, Petitioner felt he had no choice, and kept his counsel. His motion for a new attorney was denied.
4. On 11/30/18, 4 days before trial, Petitioner accepted a plea deal offered by the government, and changed his plea to Count 2 (841(b)(1)(C)) to guilty.
5. On 04/11/19, the district court assessed punishment at 240 months imprisonment plus a five year term of supervised release. Petitioner instructed his counsel to appeal. Counsel failed to file a notice of appeal.
6. Because he received no response from his counsel to multiple requests for his case file, Petitioner filed a Motion to Compel to Surrender Case File, including work product and discovery, on 09/09/19. That motion was granted in part, but Petitioner was refused discovery with the court saying it would reconsider a discovery request after a § 2255 motion was filed. App. B and C.
7. On 04/21/20, the Petitioner filed a § 2255 Motion to the district court challenging the constitutionality of his conviction on the following grounds: (1) Counsel was ineffective for failing to investigate the case, (2) Counsel was ineffective to file pre-trial motion to suppress evidence, (3) Petitioner did not knowingly or voluntarily accept the plea agreement, (4) Counsel was ineffective for advising Petitioner to accept flawed plea agreement, (5) Counsel was ineffective for failing to file a motion to withdraw guilty plea prior to sentencing. (6) Counsel was ineffective for failing to file a notice of appeal, and (7) Counsel's numerous failures/errors constitute cumulative and constructive ineffective assistance of counsel. See Appendix D.
8. Also on 04/21/20, the Petitioner filed a Motion for Leave to Proceed in Forma Pauperis, Motion to Seal § 2255 Motion and Brief, and a Motion for a Copy of § 2255 Petition.
9. On April 24, 2021, Petitioner filed a Motion for a Substitute Judge. Appx. E.
10. On April 25, 2021, the Court DENIED the Motion for Substitute Judge, DISMISSED Grounds 1-5 and 7 of the § 2255 Petition; ORDERED the government to respond to Ground 7, ORDERED appointment of counsel, and ORDERED an evidentiary hearing

on Ground 6. Appendices F and G.

11. Not ~~Knowing~~ that the Court had appointed counsel, and not requesting counsel, the Petitioner, on May 4, 2021 filed a Motion for Leave to Conduct Discovery. Also note that the Petitioner did not anticipate the Court would make a decision on his § 2255 Motion in less than 4 days.
12. On May 26, 2021, the Court DENIED Leave to Conduct Discovery and the Motion to Seal, and GRANTED the Motion for Leave to Proceed in Forma Pauperis. Appx. H.
13. On 07/09/20, after an Evidentiary Hearing, the Court DENIED the remainder of the Petitioner's § 2255 Motion (Ground 6) and DENIED a Certificate of Appealability.
14. On 07/21/20, the Petitioner filed a Notice of Appeal with the Eighth Circuit Court of Appeals. No Appellant Brief was filed because the Petitioner received notice from the Appeals Court that stated "no further filings are required."
15. On 10/22/20, the Court of Appeals DENIED the Certificate of Appealability. Appx. I.
16. Unbeknownst to the Petitioner, counsel filed an Appellant's Petition for Rehearing En Banc regarding Ground 6 only on 12/07/20. Appx. J.
17. The Petitioner, having no idea he had counsel, filed his own Petition for Rehearing en Banc regarding Grounds 1 and 2 on 12/07/21. It is unclear if the Petition was reviewed by the Appeals Court, or if it is the document filed on 12/11/20, labeled MEMORANDUM. Appx. K.
18. Finding out counsel also filed an application limited to Ground 6, on 12/21/20, the Petitioner filed a "Defendant's Pro Se Clarification For the Court Regarding Petitions for Rehearing and Motion for Appointment of Counsel," specifically requesting counsel be appointed for Grounds 1 and 2 of his § 2255 Motion. Appx. L.
19. On 01/06/21, the Court of Appeals DENIED Petitioner's Application for Rehearing En Banc, Application for Rehearing, and Motion for Appointment of Counsel. Appendix M.

REASONS FOR GRANTING THE PETITION

The decisions of the lower courts in this § 2255 proceeding violated the Petitioner's right to effective counsel under the Sixth Amendment, and his right to due process of law under the Fifth Amendment through multiple errors that are in direct conflict with applicable decisions of this Court, are based upon split Circuit Court precedents, and/or are issues of first impression that the Circuit Court of Appeals refused to consider, all of which this Supreme Court has the authority to remedy and remand.

First, the Petitioner clearly established that his counsel was constitutionally ineffective for failing to investigate the "but-for" causation defined by this Court in Burrage by failing to consult or hire expert witnesses. Petitioner established prejudice by asserting the opinions such experts would have provided, and how those opinions would have changed his decision to plead guilty. When the district court dismissed this argument (Ground 1 of the § 2255 motion) as "meritless," and the Circuit Court denied a Certificate of Appealability upon "full review of the record," a Circuit split was created (Argument I).

Second, the district court flouted the Petitioner's Sixth Amendment right to effective counsel by dismissing his ineffective assistance of counsel claim as meritless by holding that co-defendant's counsel, not the Petitioner's counsel was effective. This pro se Petitioner could find no case law applicable to this question, suggesting that this is a controversy of first impression for this Court. (Argument II)

Third, the district court's dismissal of Grounds 1 and 2 of the Petitioner's § 2255 motion clearly conflicted with this Court's applicable decisions when it dismissed those grounds on the speculation that the Petitioner's claims would not have resulted in an acquittal at trial, rather than analyzing the proper standard of how his claim would have affected his decision to plead guilty or proceed to trial, regardless of the probable outcome of a trial. (Argument III).

Fourth, and probably most immediate, both lower courts' decisions to deny the Petitioner a COA conflict with the applicable decisions of this Supreme Court and the Eighth Circuit Court of Appeals (Argument IV).

Last, the Eighth Circuit's threshold to establish prejudice in a "failure to consult expert witnesses" argument requires that the Petitioner have access to government discovery to meet it. This not only represents a circuit split, but also resulted in a violation of the Petitioner's Due Process of Law right when he was repeatedly denied access to government discovery, and then his claim was dismissed because he did not meet the threshold that required the government discovery that the Court denied him. So, either the Eighth Circuit's threshold is unconstitutionally burdensome (compared to other circuits), or the Court violated the Petitioner's substantive right to meaningfully access the courts. (Argument V).

ARGUMENTS AMPLIFYING REASONS FOR WRIT

I. THE DISTRICT COURT ERRED IN DISMISSING THE DEFENDANT'S § 2255 CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE BY FAILING TO CONSULT OR HIRE EXPERT WITNESSES TO INVESTIGATE THE "SERIOUS BODILY INJURY OR DEATH" ENHANCEMENT OF HIS § 841(b)(1)(C) CONVICTION AND SENTENCE (ie: FAILED TO INVESTIGATE A BURRAGE DEFENSE)

The district court dismissed Ground 1 of the Petitioner's § 2255 motion without an evidentiary hearing, in violation of his Sixth Amendment right to effective counsel. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to the facts relevant to guilt and degree of guilt or penalty." Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981), cert. denied, 456 U.S. 910, 72 L.Ed.2d 168, 102 S.Ct. 1760 (1982). "Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories," Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993). "Because the [adversarial] testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, ... counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Kimmelman v. Morrison, 477 U.S. 365 384, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986).

Recall the details of this case. The Petitioner distributed a small amount of heroin only (no cocaine) to the victim. Over 6 hours later, the victim was found unresponsive. A syringe was found in the victim's bathroom containing a mixture of heroin and cocaine. The victim was found to have evidence of both cocaine and heroin in his blood. The victim also admitted to using alcohol and anabolic steroids that day.

The Petitioner delivered this heroin as a favor to his nephew (and co-defendant) who is an established drug dealer with a long criminal history. Despite the

Petitioner's lack of significant criminal history, the government decided to seek a "death results" enhancement to the defendant's crime. This decision literally put the Petitioner's life at stake. Without the "death results" enhancement, the Petitioner would have had an offense level of 12 with a criminal history category of I, resulting in a Guidelines Range of 10-16 months imprisonment. It's probable that, without the "death results" enhancement, the Petitioner would have pled guilty quickly, resulting in a 2 to 3 level reduction and a subsequent Guideline Range that would have made him eligible for probation, with a maximum sentence of 12 months. With the "death results" enhancement, the Petitioner was exposed to a mandatory sentence of 240 months in prison, and a resulting Guidelines Range of 235-293 months in prison. This is a 2,400% increase in the maximum penalty that the Petitioner faced, and in all practicality, given the life expectancy of African American males in the United States, resulted in a life sentence.

Thus, the stakes couldn't have been higher, and it was incumbent upon the Petitioner's counsel to investigate a Burrage defense in this case. In the past, a defendant could be found to have "caused" serious bodily injury or death under § 841(b)(1)(C) if the drug sold was shown to be a "substantial" or "contributing" factor in producing serious bodily injury or death. However, in 2014, this Supreme Court narrowed that standard by holding that "at least where the use of the drug distributed by the defendant is not an independently sufficient cause" of death or serious bodily injury, "a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. 841(b)(1)(C) unless such use is a but-for cause of the death or injury."
Burrage v. United States, U.S. 134, S.Ct. 881, 892, 187 L.Ed.2d 715 (2014).

In his § 2255 motion, the Petitioner asserted that an expert toxicologist would have testified that it is possible that the cocaine, not purchased from the Petitioner, substantially contributed to, or may have been the sole cause of the victim's injury, and that the victim's response to Narcan does not prove beyond a reasonable doubt that heroin was the "but-for" cause of the victim's overdose injury. The Petitioner asserted

that a toxicology expert would have testified that the effects of a combination of cocaine, heroin, alcohol, and anabolic steroids together have never been studied, nor has the effect of Narcan administration in such a situation, and therefore the expert would have instilled reasonable doubt, and in this case, instilled the Petitioner with the knowledge necessary to make a truly informed, intelligent, and knowing decision about his plea. Moreover, in his § 2555 motion, the Petitioner asserted that an expert in drug use and abuse would have testified that it is very atypical for a heroin user such as the victim to wait 6 hours to use the drugs he has purchased, and that the combination of that timing and the unexplained presence of cocaine in the victim's system supports the theory that the victim bought drugs from someone other than the Petitioner closer to the time he overdosed. In short, with expert witness input, a reasonable probability exists that the Petitioner would have had enough information and confidence in his counsel (and hope) to reject the plea deal and intelligently choose to proceed to trial. This is particularly likely considering that 240 months is likely the sentence the Petitioner would have received if found guilty at trial, given his lack of criminal history and the victim's lack of permanent injury.

However, the Petitioner's counsel made no effort to investigate such a defense. In fact, there is no indication on the record or in the case file that counsel was even aware of Burrage. Other circuits have held that a failure of counsel to investigate expert opinion in an § 841(b)(1)(C) case constitutes ineffective assistance of counsel leading to the prejudice of not knowingly or intelligently accepting a plea agreement. For example, see Anderson v. United States, 981 F.3d 565, 576 (7th Cir. 2020):

[Counsel's] decision not to further investigate the available toxicology evidence was unreasonable. Whether heroin distributed by defendant was a but-for cause of [victim's] death was essential to the application of the death results enhancement. ... Further investigation of the toxicology evidence could have therefore significantly informed Defendant of the viability of a defense to that enhancement and, consequently, whether to plead guilty.

Defendant's counsel never attempted to discover what the results of such an investigation might be. ... [Counsel] could not interpret the toxicological evidence on her own, nor did

she consult with an expert who could. ... Given the obvious value of further investigation in this case, we cannot view the decision of [Defendant]'s counsel to proceed ... without investigating the causation issue as reasonable.

The Anderson decision built upon the precedent set in Gaylord v. United States, 829 F.3d 500 (7th Cir. 2016). In Gaylord, just like here, the defendant distributed an opiate alone to the victim. The victim died from opiate "and cocaine intoxication." The Circuit court found that because the district court did not hold a hearing, the record did not show whether counsel was aware of the but-for causation standard, examined the medical reports, and provided the defendant with the information necessary for a knowing and voluntary guilty plea. The Court held that the defendant sufficiently alleged ineffective assistance and remanded to the district court for an evidentiary hearing. It is clear that the same should be done here.

Anderson and Gaylord are directly applicable to the instant case, and the fact that the district court dismissed the Petitioner's 'failure to investigate' claim without a hearing, and the 8th Circuit reviewed the case and denied a Certificate of Appealability ("COA"), a circuit split has been created that needs to be resolved by this Honorable Court.

In short, the Petitioner properly and sufficiently asserted a failure to investigate claim in his § 2255 motion. He deserves an evidentiary hearing or COA.

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE PETITIONER'S § 2255 CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BY BASING ITS DECISION ON THE PERFORMANCE OF CO-DEFENDANT'S COUNSEL

In his § 2255 motion, the Petitioner alleged that his counsel's deficient performance resulted in prejudice because the result was his unknowing and involuntary decision to accept the plea deal. The Petitioner argued that counsel was deficient for not consulting or hiring expert witnesses (see Argument I above). The district court improperly dismissed this claim on the basis that co-defendant's counsel did consult and hire expert witnesses.

It is clear and reversible error for the district court to conflate or substitute the co-defendant's counsel's performance for the performance of the defendant's counsel when the claim is that defendant's counsel was constitutionally ineffective. The district court appointed separate and independent counsel for the Petitioner and his co-defendant. These two attorneys worked separately in different practices. Hearings for each defendant were held separately without the other defendant or his counsel present. When the Petitioner tried to talk directly with co-defendant's counsel, she refused to speak with him. When Petitioner later requested the case file from co-defendant's counsel, she appropriately refused. The record and case file support that Petitioner's counsel never requested or received any of the results of co-defendant's counsel's independent investigations or pre-trial motions. While co-defendant's counsel generated 123 separate documents in investigating the defense of the Petitioner's co-defendant to the one single documented by Petitioner's counsel for the Petitioner's defense, none of co-defendant's counsel's documents were created to defend the Petitioner. Clearly, the Petitioner's § 2255 motion only dealt with his counsel's performance. Yet, the district court repeatedly referred to the performance of co-defendant's counsel when finding that the Petitioner did not meet his § 2255 burden of demonstrating his counsel was deficient. See, e.g. (all Document #81, Appx. G):

Page 7: However, the government had a well-qualified toxicologist and the co-defendant consulted another toxicologist.

Page 8: A toxicologist was hired by the defense in this case. It was hired by the public defender who represented the co-defendant of the petitioner. The opinions of that expert were available to the petitioner...

To be clear, the record and case file shows that the Petitioner's counsel did not hire or consult with any expert witnesses while representing the Petitioner. The fact both of the other parties in this case (the government and the co-defendant) did consult and hire expert witnesses only supports the Petitioner's claim that his counsel was ineffective for not doing so. Moreover, the district court justifies its

erroneous finding that Petitioner's counsel was not ineffective because the expert opinions obtained by co-defendant's counsel "were available to the defendant," However, when analyzing counsel's effectiveness, the critical question isn't the availability of the evidence, but whether Petitioner's counsel made any effort to obtain the available information. The record shows, and the Petitioner clearly argued in his § 2255 motion that his counsel did not investigate the opinions of co-defendant's experts, however this argument was totally ignored by the district court.

In short, the district court erred in finding that the Petitioner had sufficient representation based upon the performance of the co-defendant's counsel and not on the performance of his own counsel. Perhaps the district court was inferring that the co-defendant's experts' eventual trial testimony would have also benefited the Petitioner. However, that is pure speculation on the part of the district court, and it goes beyond the proper standard of review by making presumptions about judicial proceedings that never took place (see next argument). Regardless, based upon this reversible error, the Petitioner's § 2255 Ground 1 dismissal should be vacated and remanded back to the district court for reconsideration, or COA.

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE PETITIONER'S § 2255 CLAIMS BASED UPON THE FINDING THAT THE PETITIONER WOULD HAVE BEEN FOUND GUILTY AT TRIAL

Due to his appointed counsel's ineffectiveness, the Petitioner unintelligently and involuntarily decided to forego a trial and plead guilty. As a result he will spend the remainder of his natural life in prison for a single, non-violent, less than 1gm drug transaction by a man with no significant criminal history. The record supports, and the Petitioner demonstrated to the district court in his § 2255 motion, that appointed counsel did nothing to defend the Petitioner beyond show up at the required hearings and (possibly) read the case file. Specifically, the Petitioner alleges that counsel failed to investigate the facts, particularly in regards to a Burrage defense. In fact, in the case file surrendered to the Petitioner by court order, there was

only a single document created by counsel, and that document was created after the Petitioner had already unknowingly and involuntarily accepted the plea deal at counsel's advice.

Because of this lack of representation, the Petitioner had no confidence counsel would make the effort required to properly defend him at trial, and so he made the uninformed decision to accept the plea deal.

No one has disputed counsel's deficient performance in this case... not the government, the district court, nor counsel himself. However, the district court summarily dismissed Grounds 1 and 2 of Petitioner's 2255 motion based upon the reasoning that it did not matter if counsel did nothing at all, because the defendant would have lost at trial regardless. See for example (Document 8, page 8, Appx. G):

There is no assurance that [expert testimony] would have any likelihood of acquittal at trial...

Throughout its decision, the district court speculates on the impact of counsel's deficient performance would have had on the outcome of a trial, but does not analyze the impact of counsel's performance of the Petitioner's decision to plead guilty. Thus, the district court applied the wrong standard to dismiss the Petitioner's § 2255 claims. Both this Supreme Court and the Eighth Circuit have clearly held that in a case involving a guilty plea, all the Petitioner need show is that, but for counsel's ineffective performance, he would not have accepted the plea agreement and would have proceeded to trial. See, Matthews v. United States, 114 F.3d 112, 114 (8th Cir. 1997) ("To show prejudice where the conviction is based on a guilty plea, the defendant must show 'a reasonable probability that ... he would not have pleaded guilty and would have insisted on going to trial' but for counsel's errors.") (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). See also, Thompson v. United States, 872 F.3d 560, 567 (8th Cir. 2017) ("In the context of a plea deal, the defendant can show prejudice if he shows there is a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on

going to trial.'") (quoting Lee v. United States, 582 U.S. 137 S.Ct. 1958, 1964, 198 L.Ed.2d 476 (2017)).

In this case, the district court improperly considered whether the Petitioner would have 'won' at trial. Whether the Petitioner would have 'won' at trial is not to be considered. "That is because, while we ordinarily 'apply a strong presumption of reliability to judicial proceedings, we cannot accord' any such presumption 'to judicial proceedings that never took place.'" Lee, 582 U.S. at 1965 (quoting Roe v. Flores-Ortega, 528 U.S. 470 482-83, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)).

The Petitioner clearly demonstrated in his 2255 motion that he planned to go to trial until the last minute, and he even moved the Court for new counsel just 3 days before trial. Had District Judge Jarvey not improperly expressed a personal endorsement of Petitioner's counsel, the Petitioner may be at home even now.

Moreover, the district court furthered its reversible error when it dismissed Ground 2 of the Petitioner's § 2255 motion using the same standard. In Ground 2, the Petitioner asserts his counsel was deficient for failing to file a pre-trial motion to challenge the eyewitness identification. The district court summarily dismissed this claim based upon its speculation; not speculation that such a motion wouldn't have merit, but on speculation that such a motion would have been denied because the co-defendant's counsel filed a "similar" motion. Again, the district court erred in dismissing this claim by improperly making a presumption regarding a "judicial process that never took place." Lee, 582 U.S.

Perhaps most telling, none of these standards are cited in the district court's decision (Document 8). Thus, the district court's dismissal of Grounds 1 and 2 of the Petitioner's § 2255 motion should be vacated, and the proceeding should be remanded back to the district court to reconsider Grounds 1 and 2 using the proper standard of law.

IV. BOTH THE DISTRICT COURT AND THE CIRCUIT COURT ERRED IN DENYING PETITIONER A CERTIFICATE OF APPEALABILITY FOR THE DISMISSAL OF GROUNDS 1 AND 2 OF HIS § 2255 MOTION

The Petitioner clearly showed a "denial of a constitutional right," specifically the denial of his Sixth Amendment right to effective counsel, particularly in regard to his counsel's failure to investigate a Burrage defense. 28 U.S.C. § 2253(C).

Moreover, the Petitioner showed that "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Additionally, the issuing of a COA "does not require showing that the appeal will succeed," and "a court of appeals should not decline the application ... merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-El v. Cockrell, 537 U.S. 322, 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

These thresholds were clearly met by the Petitioner, and therefore he respectfully requests this Honorable Supreme Court to compel either lower court to issue a COA regarding Grounds 1 and 2 of his original § 2255 motion. Note that it's not even clear from the circuit court's one sentence denial why the circuit court denied issuing a COA, or whether they reviewed the relevant record (Grounds 1 and 2).

V. THE DISTRICT COURT ERRED IN DENYING PETITIONER ACCESS TO THE DISCOVERY NECESSARY TO MEET THE CIRCUIT'S THRESHOLD TO ESTABLISH THAT HIS COUNSEL WAS DEFICIENT FOR NOT CONSULTING EXPERT WITNESSES, OR IN THE ALTERNATIVE, THE CIRCUIT'S THRESHOLD VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS BECAUSE IT EFFECTIVELY RESTRICTED ACCESS TO THE COURTS.

In the Eighth Circuit, a petitioner must provide to the court the actual testimony an expert would have given, in an affidavit or other admissible document, in order to establish prejudice for a § 2255 ineffective assistance of counsel claim based on counsel's failure to consult or hire expert witnesses. "To prevail on a claim of ineffective assistance of counsel based on a failure to retain and call an expert witness requires evidence of what the testing would have shown and what testimony the expert would have provided. Poitra has provided no such evidence, and this failure is

fatal to his claim." United States v. Poitra, 2013 U.S. Dist. LEXIS 206903 (D.N.D. July 2013) (citing Rodela-Aguilar v. United States, 596 F.3d 457, 462 (8th Cir. 2010)).

However, compare this with the same standard of law in the Seventh Circuit, as stated in Anderson: "Anderson's only burden is only to 'allege facts' that, if proven, would entitle him to relief.' He is not required at this stage to hire a toxicologist and prove the merits of further investigation before the court... Construing this pro se filing liberally, these allegations are sufficiently precise to satisfy Anderson's burden." Anderson, 981 F.3d at 575 (quoting Gaylord, 829 F.3d at 506 (citing Long v. United States, 847 F.3d 916, 920 (7th Cir. 2017)))(emphasis added). This is a clear circuit split regarding the threshold to establish prejudice in this specific type of ineffective assistance of counsel claim.

The Eighth Circuit version of this standard that the district court used to dismiss the Petitioner's § 2255 failure to investigate by failing to consult experts claim is unreasonably difficult for a pro se prisoner Petitioner to meet, and, the Petitioner argues, in and of itself represents an unconstitutional restriction on his right to meaningful court access. When one adds the fact that the district court ignored the Petitioner's request for leave to amend and denied multiple of the Petitioner's Motions for Discovery to this already overly restrictive threshold of law, it becomes clear that the district court effectively violated the Petitioner's Fifth Amendment right to Due Process of Law.

To further explain; in order to meet this standard effectively requires the pro se prisoner defendant to hire expert witnesses so that their likely testimony can be obtained. To hire an expert is difficult enough for an indigent defendant, but in order to hire an expert and solicit their opinion, the defendant not only needs money, but also needs the data for the expert to examine, data that is often under a "protective" court order and therefore not available to the defendant to provide to the expert. For an indigent pro se prisoner to meet such a standard is effectively impossible.

And such was the case here. Prior to filing his § 2255, the Petitioner researched

Eighth Circuit law and recognized the difficulty of this standard, understanding that he would need the discovery and possibly the assistance of an attorney to meet it. Prior to filing his § 2255 motion, the Petitioner filed a Motion for Discovery (under his original criminal case, no. 3:18-cr-00033). In its decision, the district court ordered counsel to release the case file, but denied the Petitioner's request for discovery, stating the the Petitioner's discovery request would be reconsidered after he filed his § 2255 motion. The Petitioner then filed his § 2255 motion and a separate Second Motion for Discovery, stating good cause to obtain discovery in both. The Petitioner specifically stated that he needed the "protected" first responder reports and lab/toxicology/hospital reports so that he could seek his own expert witnesses and obtain their opinions to add to his § 2255 motion to meet the Eighth Circuit standard. He also requested leave to file an amended § 2255 motion and filed a Motion for Appointment of Counsel.

The district court denied his Second Motion for Discovery, stating that it had already denied a similar motion, and that it would not accept the pro se motion now that counsel had been appointed. However, counsel was appointed only to represent the Petitioner on Ground 6 of his § 2255 (Failure to File a Notice of Appeal - not at issue in the instant petition), and counsel refused to help the Petitioner obtain discovery or challenge any of the dismissed § 2255 grounds despite repeated requests by the Petitioner. Despite this, the Petitioner attempted to contact several experts on his own from prison, but either received no reply, or was told that no opinion could be offered without the discovery documents. The Petitioner's request for leave to file an amended § 2255 motion was ignored by the district court.

To deny discovery, but then require that a defendant meet a threshold that requires that same discovery for the defendant to meet the threshold is a Due Process violation, especially when that denial of discovery has no reasonable basis. The district court cannot have it both ways. Either the threshold requiring the defendant to present an expert opinion is too high, or the district court must release discovery that the

defendant needs to reasonably attempt to obtain that expert opinion.

Effectively, the district court both required the Petitioner to meet this threshold and actively withheld the evidence the Petitioner needed to meet this threshold, and that he could obtain from no other source. Thus, the district court violated the Petitioner's Due Process right to meaningful court access for habeas relief in a manner that led to the summary dismissal of Ground 1 of his § 2255 motion.

Moreover, the Petitioner would have met his burden under Seventh Circuit law because he would have only have been required to assert facts to meet the prejudice threshold. See Anderson 981 F.3d, *supra*; Gaylord 829 F.3d, *supra*. In Ground 1 of his § 2255 motion, the Petitioner asserts that an expert would have testified that the cocaine may have led to the victim's injury, that a response to Narcan did not unequivocally show that heroin was responsible for the victim's injury, and that the other drugs ingested by the victim, including alcohol and anabolic steroids, could have substantially contributed to the victim's injury. The Petitioner asserts that an expert would testify that the timing of events and the presence in the victim's blood of cocaine not sold by the Petitioner means that the victim probably bought drugs from someone other than the Petitioner before he overdosed, injecting reasonable doubt into the government's argument. The Petitioner supported all of these assertions with references, case citations, and even the notes of the co-defendant's expert interviews. Yet, the district court erroneously ignored all of this, incorrectly stating, "The petitioner does not allege that the toxicologist retained by co-defendant's counsel in this case or any other toxicologist would support the petitioner's claims." (Document 8, page 8, Appendix G).

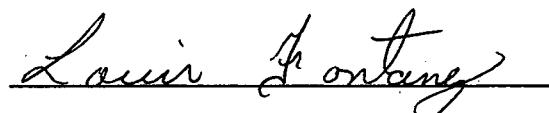
In summary, the district court's summary dismissal of Ground 1 of his § 2255 motion should be vacated, discovery should be compeled, leave to amend the § 2255 motion should be granted, counsel should be appointed, and this proceeding should be remanded to the lower court for reconsideration. In the alternative, the Eighth Circuit's threshold for showing prejudice for counsel's failure to consult experts

should be found to be unconstitutional, the district court's summary dismissal of Ground 1 should be vacated, and the § 2255 motion should be remanded back to the district court with further guidelines for proper reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: May 24, 2021

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