Supreme Court, U.S.
FILED
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No. 20-8365

IN THE

SUPREME COURT OF THE UNITED STATES

Richard Gathercole — 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

Richard Gathercole
(Your Name)

FCC Petersburg - P.O Box 1000
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Petersburg, VA 23804-1000
(City, State, Zip Code)

(Phone Number)

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Questions presented

Does a collateral attack waiver waive the appellant's right to appeal based on the alledged partiality of a Judge, who deprived the appellant of a Substantive or procedure right to which the law entitles him?

Did the District Court of Nebraska abuse its discretion in determining the appellants Ineffective assistance claim?

Did the United States Court of Appeals for the Eighth Circuit exceed the scope of CoA analysis?

LIST OF PARTIES

[X] 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:

Table of authorities

Table of authorities

Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct 1595, 146 L.Ed 2d 542 [2000]

Smith v. Lockhart, 923 F.2d 1314, 1321 [8th cir 1991]

Strickland v. Washington, 466 U.S. 668, 687 [1984]

Taylor v. Ky, 436 U.S. 478, 488 n.15 [1978]

Tollett v. Henderson, 411 U.S. 258, 266-67 [1973]

Turner v. U.S., 396 U.S. 398 [1970]

U.S. v. Andis F.3d 886, 891 [8th cir 2003]

U.S v. Chipps, 410 F.3d 438, 447 [8th cir 2005]

U.S. v. Cronic, 466 U.S. 648, 665 [1984]

U.S. v. Detemple, 162 F.3d 279, 289 [4th cir 1998]

U.S. v. Feliciano, 223 F.3d 102-115 [2nd cir 2000]

U.S. v. Hernandez, 281 F.3d 746, 749 [8th cir 2002]

U.S. v. Olano, 507 U.S at 732 [1993]

U.S. v. Powell, 847 F.3d 760, 780 [6th cir 2017]

Visciotti v. Woodford, 288 F.3d 1097, 1110-15 [9th cir 2002]

Wheat v. U.S., 486 U.S. 153, 159 [1988].

Williams v. Taylor, 529 U.S. 362, 391-93 [2000]

28 U.S.C Section 2253 (c)(2)-(3)

Eighth Circuit local Rules - Rule 28A (c)

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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 A to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] 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,
[X] 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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 02-08-2021.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 03-16-2021, 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 ______ (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.

Avery v. Alabama, 308 U.S. 444, 446, 84 L.Ed 377, 60 S.Ct 321 [1940] - The Constitutional guarantee of Counsel "cannot be Satisfied by mere formal appointment."

- Arizona v. fulminante, 499 U.S. at 310-11 - "Violation of right to impartial Judge So basic to a fair trial that it's Violation can never be subject to harmless error analysis,"

- Bannister v. Delo, 100 F.3d 610, 614 [8th cir] - "whether Judges impartiality might be questioned by average person on street who knows all relevant facts."

- Barnes v. U.S., 412 U.S. 837, 845-46 n. 11 [1973] - presumption of knowledge that Property stolen reasonably connected to proof of defendant's unexplained possession of Stolen property because "common sense and experience" Support inference that "petitioner must have known or been aware of the highly probability that the checks were stolen."

- Boykin v. Alabama, 395 U.S. 238 [1969] - The Court held that such waivers must be knowingly and Voluntarily made and that it is therefore a violation of Due Process for a judge to accept a guilty plea unless "on the face of the record" there is "an affirmative showing that it was intelligent and Voluntary".

- Henderson v. morgan, 426 U.S. 637, 644-645, 96 S.Ct 2253, 2257, 49 L.Ed 2d 108 [1976] - A plea cannot Support a Judgment of guilt unless it was Voluntary.

- Hoffman v. Arave 455 F.3d 926 [9th cir 2006] - The Court first determined that Counsel's failure to investigate potential mitigating evidence was unreasonable, then held such failure prejudicial.

Constitutional and Statutory provisions involved

Hill v. Lockhart, 474 U.S. 52, 59 [1985] - In the Context of a guilty plea, a defendant can satisfy the prejudice prong by demonstrating that but for Counsel's deficient performance, a reasonable probability exist that the defendant would not have pleaded guilty and would have insisted on a trial.

- Kimmelman v. morrison, 477 U.S. at 380 - The Court declined to hold either that the guarantee of effective assistance of Counsel belongs to the innocent or that it attaches only to matters affecting the determination of actual guilt.

- Krogmann v. State, 914. N.W 2d 293, 314 [2018] - The defendant must have the ability to control the defense.

- Lindstadt v. Keane, 239 F.3d 191, 199 [2nd cir 2001] - "Tactical decisions about which competent lawyers might disagree" does not qualify as objectively unreasonable."

- Lockhart v. Fretwell, 506 U.S. 364, 367-68 [1993] - If prejudice is not presumed, the defendant must show that Counsel's error were prejudicial and deprived defendant of a "fair trial, a trial whose results is reliable."

- Martel v. Clair, 565 U.S. 648, 663 [2002] - Three general factors when deciding a motion to Substitute Counsel: (1) Timeliness of the motion; (2) Adequate inquiry into defendant's Complaint; and (3) The extent of the conflict between the defendant and Counsel.

Constitutional and Statutory provisions involved

- McCoy v Louisiana, 138 S.Ct 1500, 1508 [2018] - Holding - Counsel could not admit his client's guilt of a charged crime over the client's intrasigent objection to that admission, and violation of a defendant's Sixth Amendment Secured autonomy Constituted Structural error, warranting a new trial, because the admission blocked the defendant's right to make fundamental Choice about his own defense, when a client expressly asserts that the objective of his defense is to maintain innocence of the charged criminal act, his Lawyer must abide by that objective and may not override it by Conceding guilt; U.S. Const. Amend VI. The ABA model Rule of professional Conduct 1.2 (a) (2016) provides that a Lawyer shall abide by a client's decisions Concerning the objectives of the representation.

- McMann v. Richardson, 397 U.S 759, 771 n.14 [1970] - The sixth amendment guarantees the right to effective assistance of Counsel in Criminal prosecutions.

- Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct 1029, 154 L.Ed 2d 931 [2003] - "A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." The COA inqurry, the Court have emphasized is not coextensive with a merits analysis. At the COA Stage, the only question is whether the Applicant has shown that "jurist of reason could disagree with the district Courts resolution of his Constitutional claims or that jurist Could conclude the issues presented are adequate to deserve encouragement to proceed further." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims" Id at 336 "when a Court of Appeals side steps the CoA process by first deciding the merits of an appeal, and then Justifying its denial based on its adjudication, it is essence, deciding an appeal without Jurisdiction." Id at 336-337.

Constitutional and Statutory provisions involved.

- Murray v. Carrier, 477 U.S. 478, 496 [1986] - "The right to effective assistance of Counsel... MAY in a particular case be violated by even an isolated error of Counsel if that error is sufficiently eregious and prejudicial.

- Plumlee v Del papa, 465 F.3d 910, 922 [9th cir 2006] - The trial court should have appointed new Counsel for plumlee; its failure to do so deprived plumlee of his right to counsel under the Sixth Amendment.

- Rickman v Bell, 131 F.3d 1150, 1156-60 [6th cir 1997] - Counsel had abandoned his Client and completely failed to participate in defense, constituted a denial of assistance of Counsel such as that the court need not establish actual prejudice.

- Roe v Flores-ortega, 528 U.S. 470, 483-84 (2000) - Counsel does have a Constitutional duty to Consult with the defendant on an appeal "when there is reason to think either (1) That a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

- Slack v. McDaniel, 529 U.S. 473, 484. 120 S.ct 1595, 146 L.Ed 2d 542 (2002) - A litigant seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurist of reason; otherwise, the appeal would not "deserve encouragement to proceed further". "where a district court has rejected the Constitutional claim on the merits, the showing required to satisfy Section 2253(c) is straightforword: The petitioner must demonstrate that reasonable Jurist would find the district Court assessment of the Constitutional claims debatable or wrong." id at 484

Constitutional and Statutory provisions involved.

- Strickland v. Washington, 466 U.S. 668, 687 [1984] - To obtain reversal of a conviction, the defendant must prove: (1) That counsel's performance fell below an objective standard of reasonableness and (2) That counsel's deficient performance prejudice the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding.

- Taylor v. Ky, 436 U.S. 478, 487 n.15 [1978] - Cumulative errors violate Due process guarantee of fundamental fairness and necessitates a new trial.

- Tollett v. Henderson, 411 U.S. 258, 266-67 [1973] - Ineffective assistance may prevent a defendant from entering a knowing and voluntary plea.

- Turner v. U.S., 396 U.S 398 [1970] - A rational connection is often found to exist in situations where "common sense" would seem to dictate that the existence of one facts or set of facts natually suggest the existence of the facts presumed.

- U.S. v. Andis, 333 F.3d 886, 891 [8th cir 2003] - A court can refuse to enforce an otherwise valid waiver of right to appeal if doing so prevents miscarriage of Justice

U.S. v. Chipps, 410 F.3d 438, 447 [8th cir 2005] - multiple indictments violates the Double Jeopardy clause by raising the danger that the defendant will receive more than one sentence for a single crime.

- U.S. v. Cronic, 466 U.S. at 659 [1984] - If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, the adversarial process itself becomes presumptively unreliable.

Constitutional and Statutory provisions involved.

- U.S. v. Detemple, 162 F.3d 279, 289 [4th cir 1998] - Whether defendants own behavior caused the attorney-client conflict.

U.S. v. Hernandez, 281 F.3d 746, 749 [8th cir 2002] Ineffective assistance claims are not cognizable on direct appeal.

U.S. v. Olano, 507 U.S at 732 [1993] - relief is only available if the court determines that the error "seriously affect [ed] the fairness, integrity, or public reputation of judicial proceedings.

- U.S. v. Powell, 847 F.3d 760, 780 [6th cir 2017] - right to counsel violated by courts denial of substitute counsel because "complete breakdown in attorney-client relationship". Court improperly denied motion to withdrawn counsel because motion was timely and there was an "irreconcidable breakdown in the attorney-client relationship."

- Visciotti v. Woodford, 288 F.3d 1097, 1110-15 [9th cir 2002] - Counsel's failure to investigate and present readily available mitigating evidence, His reliance on factually unsupported stategy in mitigation, and his inability to respond to prosecution's aggrevating evidence constituted deficient performance during penalty phase because such conduct could not be justified as strategic decisions.

Constitutional and Statutory provisions involved

- Wheat v. U.S., 486 U.S. 153, 159 [1988] - Federal Courts have an independant interest in insuring that criminal trials are conducted within ethical Standards of the profession and that legal proceedings appeal fair to all who observe them; trial courts, when alerted by objections from one of the parties, have an independant duty to insure that criminal defendants receive a trial that is fair and does not Contrevene the right to counsel under the Sixth Amendment to the Federal Constitution.

- Williams v. Taylor, 529 U.S. at 391-93 [2000] - Showing that the outcome of the proceeding would have been different but for Counsel's errors or Counsel's ineffective assistance deprived the defendant of a substantive or procedural right to which the law entitles him.

- 28 U.S.C Section 2253 (c)(2) - A Certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial Showing of the denial of a Constitutional right. 28 U.S.C Section 2253 (c)(3) - The Certifacate of Appealability under paragraph (1) Shall indicate which specific issue or issues Satisfy the Showing required by paragraph (2)

Eight Circuit local Rules - Rule 28A (c) - Briefs filed by pro-se litigants. Pro se litigants Shall submit one paper copy of their merits brief by the date set forth in the Courts briefing schedule. No additional paper copies are required. The clerk will review the brief for compliance with the rules. If the is accepted for filing, the Clerk will file the brief, scan it into the Cm/ECf system and attach it to the docket. The clerk will then serve a notice of Docket activity on the registered user of Cm/ECF showing that the brief has been filed. This electronic notice will constitute service of the brief on these parties. The clerk will notify the pro-se litigant that the brief has been accepted for the filing by sending the litigant a paper notice by mail.

Statement of the CASE

Does a Collateral attack waiver waive the appellant's right to appeal based on the alledged partiality of a Judge (see Bannister v. Delo, 100 F.3d 610, 614 [8th cir 1996]), who deprived the appellant of a substantive or procedure right to which the law entitles him? If a rational, Common sense connection exist (see County Court v. Allen, 442 U.S. at 165 [1979]) that it is more than likely that the Judge, who had an apparent bias, deprived the appellant of a fair trial, should not be barred to Appeal by the Collateral attack waiver in the plea agreement because: (1) A violation to the right to an impartial Judge is a plain error (see Arizona v. Fulminante, 499 U.S at 310-11) that is "clear" or "obvious". (see U.S. v. Feliciano, 223 F.3d 102-115 [2nd cir 2000]); (2) It effected the appellant's "substantial Rights". (see Arizona v. Fulminante, 499 U.S at 310-11); (3) It seriously affects the fairness, integrity, or public reputation of judicial proceedings (see U.S. v. Olano, 507 U.S. at 732 [1993]; see also Jones v. U.S., 527 at 388-389 [1999]), as it suggest that the court does not have to follow the established Circuit Courts factors when deciding a motion to substitute Counsel. (see Martel v. Clair, 565 U.S. 648, 663 [2012]). Thus, violates the appellant's right to effective Counsel (see wheat v U.S., 486 U.S. 153, 159 [1988]) and Due process. (see In re murchison, 349 U.S. 133, 136-39 [1955]; see also Boykin v. Alabama, 395 U.S 238 [1969]; (4) It prejudiced the appellant. (see plumlee v. Del papa, 465 F.3d 910, 922 [9th cir 2006]); and (5) The appellant did not Voluntarily Waive his right to appeal a sentence in a plea agreement because waiver not Voluntary due to ineffective assistance of Counsel. (see Tollett v. Henderson, 411 U.S. 258, 266-67 [1973]). However, a Court can refuse to enforce an otherwise valid waiver of right to appeal if doing so prevent miscarriage of Justice. (see U.S. v. Andis, 333 F.3d 886, 891 [8th cir 2003]).

A rational, common sense Connection exist between the "basic" facts proved (Judge failed to adequately address the motion to Substitute Counsel) and the presumed "ultimate" facts. (Deprived the appellant of a fair trial). (see Francis v. Franklin, 471 U.S. 307, 314-15 [1985]).

Statement of the CASE

A rational connection is often found to exist in situations where "common sense" would seem to dictate that the existence of one facts or set of facts natually suggest the existence of the facts presumed. (see Turner v. U.S., 396 U.S. 398 [1970]). A permissive assumption will be held if the alledged connection between the "basic" fact(s) proved and the presumed "ultimate" facts is rational on its face or is rational based on the particular facts of the given case. (see County Court v. Allen, 442 U.S. at 165). "Common sense and experience" support reasonable inference that the judge must have known, or been aware, of the appellant's multiple timely complaints against his counsel and failure to adequately address the motions, would have led to an unreliable or fundamentally unfair outcome of the proceeding (see Barnes v. U.S., 412 U.S 837, 845, 846 n.11 [1973]), or would otherwise deprive the appellant of a substantive or procedure right to which the law entitles him.

Statement of the Case

The district court abused it's discretion in determining that: (1) Counsel's performance did not fall below an objective standard of reasonableness; (2) Counsel's performance did not prejudice the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceedings; (3) In the context of a guilty plea, the defendant did not satisfy the prejudice prong by failing to demonstrate that, but for Counsel's deficient performance, a reasonable probability exist that the defendant would not have pleaded guilty and would have insisted on a trial; (4) Counsel Clandestinely changed the defendant's Counsel "was effective and did a terriffic job for him."

Prior to the appellant signing the plea agreement, the appellant filed multiple timely motions with the district court informing the magistrate Judge that the appellant was having severe issues with his counsel, the appellant's counsel was coercing him to sign the plea agreement, even though the appellant insisted on going to trial, and that the extent of the conflict was irreparable.

Appellant asserts that his counsel was ineffective by: (1) Counsel's refusing to obtain evidence (or withheld evidence from his client); (2) Counsel was neglecting to adequately communicate with his client; (3) counsel failed to notify the Courts about errors with the indictments, which would have affected the outcome of the sentence or sentencing range; (4) Counsel Clandestinely changed the defendants trial date to a change of plea without his client's consent; (5) Appellant's Counsel was coercing his client to sign the plea agreement, even though the appellant insisted on going to trial; (6) Counsel refused to file a direct appeal when directed to do so; and (7) Counsel neglected to inform the appellant that ineffective assistance of counsel is not cognizable on direct appeal.

- Counsel refusal to obtain evidence (or withheld evidence from his client) is an act or omission of Counsel that is not considered a reasonable professional judgement in which competent lawyers might disagree. (See Lindstadt v. Keane, 239 F.3d 191.199 [2nd cir 2001]). Although appellants have no general

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Constitutional right to discovery in a Criminal proceedings, (See Weatherford v. Bursey, 429 U.S. 545, 559 [1977]), Counsel's failure to investigate, Present readily available mitigating evidence, and his inability to obtain prosecution aggravating evidence Constituted deficient performance, because such Conduct Could not be Justified as Strategic decisions. (See Visciotti v. Woodford, v. 288 F.3d 1097, 1110-15 [9th cir 2002]). In Kimmelman v. Morrison, 477 U.S. 365 [1986], the Court held that counsel's failure to conduct pretrial discovery fell below the level of reasonable professional assistance. Counsel's failure to obtain certain types of evidence to safeguard his client's Due process rights amounted to unreasonable strategy or deficient performance. (See Brady v. Maryland, 373 U.S. 83, 87 [1963]). In Hoffman v. Arave, 455 F.3d 926 (9th cir 2006], the court first determined that Counsel's failure to investigate potential mitigating evidence was unreasonable, then held such failure Prejudicial.

- Counsel neglected to adequately Communicate effectively with his client during critical confrontations with his expert adversary, the government. Effective Communications essentially allows the defendant's Counsel to ensure that any decisions the defendant makes, regarding his criminal trial, represents an intelligent Choice among the alternatives available to the defendant. (See Brady v. U.S., 397 U.S. 742 [1970]). "Access to Counsel's Skills and Knowledge is necessary to accord defendant the ample opportunity to meet the case of the prosecution to which they are entitled." (See Strickland v. Washington, 466 U.S. at 688)

- Counsel failure to notify the Court about error with the indictments, which would have affected the sentence or Sentencing range. Under an effective Standard of reasonableness, a Competant attorney would have challenged the Carjacking indictment as being both multiplicitous and improper Venue, (Two Counts of indictment for Carjacking: one in the District of Nebraska and one in the district of Kansas, from a single incident), because it would

Statement of the casE

force the defendant to serve erroneous sentence imposed under multiplicitious indictment. (see U.S. v. Chipps, 410 F.3d 438, 447 [8th cir 2005]).

- Counsel clandestinely changed the appellant's trial Date to a change of plea without the appellant's consent and counsel coerced the appellant to sign the plea agreement, even though the appellant insisted on going to trial. Counsel had abandoned his client and completely failed to participate in defense, constituted a denial of assistance of counsel. (see Rickman v. Bell, 131 F.3d 1150, 1156-1160 [6th cir 1997]). Counsel is effectively acting as a 2nd prosecutor and it constitutes a denial of assistance of counsel such as that the Court need not establish actual prejudice. (see Rickman v. BELL, 131 F.3d 1150, 1156-1160 [6th cir 1997]).

- Counsel refused to file a notice to appeal, when the appellant reasonably demonstrated to counsel that he was interested in appealing. (see Roe v. Florez-ortega 528 U.S at 484). Counsel's failure to file a post-conviction motion to vacate, despite being directed to by the appellant, was a "Violation of basic duty of an attorney." (see Baldayaque v. U.S. 338 F.3d 145, 152 [2nd cir 2003]). If the appellant did not file a direct appeal with the district court, the appellant would have missed the deadline to file a direct appeal and would have deprived the appellant the right to appeal.

- Counsel neglected to inform the appellant that ineffective assistance of counsel is not cognizable on direct appeal. (see United States v. Hernandez, 281 F.3d 746, 749 [8th cir 2002]). Defense counsel and courts must acknowledge the defendant's role in the defense process. The defendant must have the ability to control the defense. (see Krogman v. State, 914 N.W.2d 293, 314 [2018]). The Supreme Court has stressed that defense counsel's role is to assist the defendant, but that assistance does not mean that counsel has wrestled complete control from the person who is the subject of the prosecution. (see McCoy v. Louisiana, 138 S.Ct 1500, 1508 [2018]).

Statement of the Case

- District Court stated (file #145), "First, any fair reading of the record show that his Counsel was effective and did a terrific Job for him (e.g. filings 78), particularily understanding that the case was indefensible." "Even with overwhelming evidence of guilt" a plea cannot support a judgement of guilt unless it was voluntary. (see Henderson v. Morgan, 426 U.S. 637, 644, 645 96 S.Ct 2253, 2257, 49 L.Ed 2d 108 [1976]). The Constitutional guarantee of Counsel "cannot be Satisfied by mere formal appointment." (see Avery v. Alabama, 308 U.S. 444, 446, 84 L.Ed 377 60 S.Ct 321 [1940]). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." (see Strickland v. Washington, 466 U.S. at 685). The Constitutional rights of criminal defendant's are granted to the innocent and the guilty alike. Consequently, in Kimmelman v. Morrison, 477 U.S. at 380, the Court declined to hold either that the guarantee of effective assistance of Counsel belongs to the innocent, or that it attaches only to matters affecting the determination of actual guilt. Furthermore, the records show that the appellant's own behavior did not cause the attorney-client conflict, but was counsel's deficient performances. (see U.S. v. Detemple, 162 F.3d 279, 289 [4th cir 1998]).

The Sixth Amendment guarantees the right to effective assistance of Counsel in criminal prosecutions. (See McMann v. Richardson, 397 U.S. 759, 771 n.14 [1970]). In Strickland v. Washington, 466 U.S. 668, 687 [1984], the Supreme Court established a two-prong test to evaluate ineffective assistance claims. (The Court in Strickland stated that "The purpose of the effective assistance guarantee of the Sixth Amendment is ... to ensure that criminal defendants receive a fair trial." Id at 689. Strickland states that a Court must: Judge the reasonableness of Counsel's Challenged Conduct on the facts of the particular case, viewed as of the time of Counsel's Conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of Counsel that are alledged not to have been the result of reasonable professional Judgement. The Court must then determine whether, in light of all the Circumstances, the identified acts or omission were outside the wide range of professionally competent assistance. In making that determination, the courts should keep in mind that Counsel's function, as elaborated in Prevailing norms, is to make the adversarial Testing process work in the particular case.) To obtain reversal of a Conviction, the defendant must prove: (1) That Counsel's performance fell below an objective standard of reasonableness. (See Strickland v. WAshington, 466 U.S. at 687-88), and (2) That Counsel's deficient performance prejudice the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. (See Strickland v. Washington, 466 U.S at 687).

In deciding whether Counsel's Performance was ineffective, a Court must consider the totality of the Circumstances. (See Strickland v. Washington, 466 U.S. at 690; See also murray v. Carrier, 477 U.S. 478, 496 [1986] — "The right to effective assistance of Counsel... May in a particular Case be violated by even an isolated error of Counsel if that error is sufficiently egregious and prejudicial.) Nonetheless, the defendant must point to actual ineffectiveness, either through specific errors or omissions of Counsel, and may not rely Soly on the Surrounding Circumstances to prove ineffective assistance. (See U.S. v. Cronic, 466 U.S. 648, 665 [1984]).

In interpreting the prejudice prong, the Supreme Court has identified a narrow Category of Cases in which prejudice is presumed. (See Strickland v. Washington, 466 U.S. at 692). The presumption applies when there has been an "actual or Constructive denial of the assistance of Counsel altogether." (See Strickland v. Washington, 466 U.S. 668, 692 [1984]), when there are "various kinds of State interference with Counsel's assistance." (See Strickland v. Washington, 466 U.S at 692), or when Counsel is burdened by an actual Conflict of interests. (See Cuyler v. Sullivan, 466 U.S. 335, 350 [1980]). In these Situation, Prejudice is so likely to occur that a Case-by-case inquiry is unnecessary. (see Strickland v. Washington, 466 U.S. at 692).

If prejudice is not presumed, the defendant must show that Counsel's errors were prejudicial and deprived the defendant of a "fair trial, a trial whose results is reliable. (See Strickland v. Washington, 466 U.S at 687; See also lockhart v. fretwell, 506 U.S. 364, 367-68 [1993]). This burden generally is met by showing that the outcome of the proceeding would have been different but for counsel's error. (See Williams v. Taylor, 529 U.S. 362, 391-93 [2000]). However, in some cases, the Court will inquire further to determine whether Counsel's ineffective assistance "deprived the defendant of a substantive or procedural right to which the law entitles him." (see williams v. Taylor, 529 U.S. at 391-93)

In the context of a guilty plea, a defendant can satisfy the prejudice prong by demonstrating that but for Counsel's deficient performance, a reasonable probability exist that the defendant would not have pleaded guilty and would have insisted on a trial. (See Hill v. Lockhart, 474. U.S. 52, 59 [1985]).

The Constitution requires that a defendant's plea be made knowingly, intelligently, and voluntarily. (see Brady v. U.S., 397 U.S. 742, 750 (1970)). A guilty plea may be set aside as involuntary if the defendant can establish prejudice from prosecutorial misconduct. (see miller v. Angliker, 848 F.2d 1312, 1321-22 [2nd cir 1988]). Ineffective assistance of Counsel may also prevent a defendant from entering a knowing and voluntary plea. (see Tollett v. Henderson, 411 U.S. 258, 266-67 [1973]). The relevant question is not whether counsel's choice were strategic, but whether they were reasonable. (see Bullock v. Carver, 297 F.3d 1036, 1047-48 [10th cir 2002]). otherwise, if Counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing, the adversarial process itself becomes presumptively unreliable. (See U.S. v. Cronic, 466 U.S. at 659 [1984]).

Although the Courts are generally reluctant to find a denial of "effective assistance", because they feel that: (1) Honering the claim is an implicit Censure of the trial Court; (2) It forces the trial judge to intervene whenever possible error is being committed; (3) It makes most lawyers even more reluctant to accept Court assignments; and (4) It permits a Lawyer with a desperate case to insure that the client gets a new trial through the lawyers deliberate errors, the Courts should evaluate the totality of the available evidence and adjudicate the defendant's claim based on clearly established precedent. The merits of the appellant's claim are squarely governed by Strickland v. Washington, 466 U.S. 668, 687 [1984] and Hill v Lockhart, 474 U.S. 52, 59 [1985], which are clearly established Federal law as determined by the Supreme Court. Thus, the district Court was required to apply these two cases in Considering appellant's ineffective assistance claim. The district Court prejudice determination was unreasonable because it failed to evaluate the totality of the available evidence. In this case, the district Court's adjudication of the appellant's Claim was both Contrary to and involved an unreasonable application of the Supreme Court's clearly established precedent.

- The United States Court of Appeals for the Eighth Circuit exceed scope of COA Analysis. In a federal habeous corpus case at hand, the accused ineffective assistance and judges partiality Claim was debatable among jurist of reason, so the Court of appeals should have issued a Certificate of Appealability. "A Court of Appeals should limit it's examination [at the COA Stage] to a threshold inquiry into the underlying merits of the claim", and "ask only if the district Court decision was debatable". (See Miller-El v. Cockrell, 537 U.S. at 327). A Claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. (See Miller-El

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v. Cockrell, 537 U.S. at 338).

On february, 08, 2021, the United States Court of appeals for the Eighth Circuit denied the appellant's Coa stating, "This appeal comes before the Court on appellant's application for a Certificate of appealability. The Court has Carefully reviewed the original file of the district court, and the application for a Certificate of appealability is denied. The appeal is dismissed." Because the Eighth Circuit of Appeals did not state whether or not it decided on the merits or whether the claims were debatable among jurist, the appellant filed a motion for statement for reasons. The appeals Court denied the motion for statement for reasons on february 23, 2021. A reasonable jurist would conclude that the Court of appeals improperly applied the COA standard and determined that the appellant's Claim is not even debatable, that necessarily means that the appellant has failed to show that his claim is meritorious But the Converse is not true that an appellant has failed to make the ultimate Showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing Court inverts the statutory order of operations and first decides the merits of an appeal ... then Justifies it denial of a COA based on its adjudication of the actual merits "It places too heavy a burden on the prisoner at the COA Stage." (see miller-EL v. Cockrell, 537 U.S. 336-337). Miller-El Flatly prohibits Such departure from the procedure prescribed by section 2253. The COA inquiry, the supreme Court has emphasized, is not coextensive with a merits analysis. At the Coa Stage, the only question is whether the applicant has Shown that "Jurist of reason Could disagree with the district Court's resolution of his Constitutional Claims or that Jurist Could Conclude the issues presented are adequate to deserve encouragement to proceed further." (See miller-El v. Cockrell, 537 at 327). This threshold question Should be decided without "full Consideration of the factual or legal bases adduced in support of the claims". Id at 336. "when a Court of appeals sidesteps [the COA] process

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by deciding the merits of an appeal, and then Justifying its denial of a COA based on its adjudication of the actual merits, it is essence deciding an appeal without Jurisdiction". Id at 336

Reasons for granting the petition

Federal Courts have an independant interest in insuring that Criminal trials are Conducted within the ethical Standards of the profession and that legal proceedings appear fair to all who observe them; trial Courts, when alerted by objections from one of the Parties, have an independant duty to insure that criminal defendants receive a trial that is fair and does not Contrevene the right to Counsel under the sixth amendment to the federal Constitution. (see wheat v. U.S. 486 U.S. [1988]).

The United states Court of Appeals for the Eighth Circuit not only entered a decision in Conflict with the decisions of the Supreme Court and of another United States Court of Appeals on the same important matters, but also has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Courts Supervisory Power.

"It is better for those who have unquestioned and almost unlimited power in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that perhaps we are in danger of forgetting that the bill of rights which cost so much blood to establish still is worth fighting for, and that no tittle of it should be abridged."

- Oliver Wendell Holms - Supreme Court Justice - 1919

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 04-07-2021