

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX A

No: 21-2215

Joshua Britt

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:21-cv-00012-BCB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 29, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSHUA BRITT,

Case No. 21-2215

Appellant.

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v.

UNITED STATES OF AMERICA,

Appellee.

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APPELLANT'S PETITION FOR REHEARING, REHEARING EN BANC
PURSUANT TO FED R. OF APP. P.

COMES NOW, Joshua Britt, Appellant Pro se, hereinafter, Mr. Britt, Petitioning this Court for a Rehearing en banc in the above Captioned matter. In support of the the GRANTING of this petition, Mr. Britt demonstrates that the panel Court's decision, as well as the decision of the district Court's decision in this matter contravenes Eighth Circuit precedent and Supreme Court precedent holding that where a defendant raises an Ineffective Assistance of Counsel (IAC) claim that is supported by affidavits and evidence within and outside the court record, that defendant is entitled to an evidentiary hearing in the district Court on the claim Raised. See, Blackledge v. Allison, 431 U.S. 63, 75, 76 (1977).

STANDARD OF REVIEW

Mr. Britt is a Pro se appellant and Asks that this Court construe this petition liberally, and to be in the Right posture and procedure to GRANT him the Relief he is Asking, and not hold him to the more stringent standards applied to licensed attorneys. See, Haines v. Kerner, 404 U.S. 519, 520 (1972).

Mr. Britt further prays that this Court will apply the principles of Equity to the matter Raised in this petition for Rehearing en banc.

HISTORY OF THE CASE

On August 19, 2019, Mr. Britt plead Guilty to one count of Hobbs Act robbery (18 U.S.C. § 1951). He was later sentenced to 135 months of incarceration within the Federal Bureau of Prisons (BOP) custody on January 15, 2020. Mr. Britt's guilty plea was accepted before the Honorable Laurie Smith Camp, and sentencing was before the Honorable Brian C. Buescher. The Honorable Laurie Smith Camp stated that the applicable guideline range was 135 months to 168 months, with 240 months as the statutory maximum for Hobbs Act robbery. It was noted by the Honorable Laurie Smith Camp that 84 months was negotiated as being the floor sentence per the plea agreement signed by Mr. Britt.

Mr. Britt filed a timely Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on January 11, 2021. In his motion, Mr. Britt alleged that he received Ineffective Assistance of Counsel from attorney Julie A. Frank; the motion contained specific factual allegations supported by Affidavits included in the filing. See Docs. 190, 191.

On January 11. 2021, the District Court ordered the United States to file an Answer to Mr. Britt's § 2255 motion. The United States filed it's Answer on January 19, 2021 opposing the Granting of Mr. Britt's § 2255 motion. On March 8, 2021 Mr. Britt submitted a Reply to the United States' Answer brief; and simultaneously a letter filed by Sidney Britt, a co-defendant in the case, was entered into the record in support of Mr. Britt's claim that he had no prior knowledge of the events surrounding the robbery. On, March 9, 2021 the Honorable Brian C. Buescher denied Mr. Britt's § 2255 motion, the attendant motions to appoint counsel, for an evidentiary hearing, for Discovery, and

motion for compassionate release. See Docs. 190, 196, 197, 200, and 201.

Although not received by this Court until May 24, 2021, Mr. Britt filed a request for a Certificate of Appealability (COA) on May 8, 2021. In his request for a COA, Mr. Britt argued that the District Court's decision regarding his § 2255 motion was debatable, in that, jurists of reason have held that "where assistance of counsel provides 'affirmative misadvice'...an evidentiary hearing has been called for", and; that "the District Court abused it's discretion by denying relief without an evidentiary hearing". See Appellant's Request for a COA, Doc. 219 pgs. 5, 6. Citing Dilang Dat v. United States, 920 F.3d 1192, 1195, 1196. Additionally, Mr. Britt re-presented how he and his family and friends were assured by his counsel that he would be receiving an 84 month sentence from the sentencing court, so he should eschew proceeding to trial, for a lenient sentence from the Court. See, Affidavits in support of the § 2255 motion, Doc. 219 pgs 8-13.

Mr. Britt's request for a COA was denied on July 20, 2021. See Attachment #1. This petition for Rehearing en banc ensues.

ARGUMENT

1. THE COURT PANEL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT ESTABLISHED IN BLACKLEDGE v. ALLISON, 431 U.S. 63, 72, 73

The Supreme Court has held that where a defendant presents "specific factual allegations, indicating exactly what the terms of the promise were; when, where, and by whom it had been made; and the identity of a witness to the communication" his petition should not be dismissed without an evidentiary hearing. See, Blackledge v. Allison, 431 U.S. 63 at 76. This is especially so where, as with Mr. Britt's § 2255 motion, "the allegations, if proved, would entitle the defendant to relief, and that they Raised an issue of fact that could not be resolved simply on the basis of an affidavit from the prosecutor denying the allegations. Because those allegations related primarily to

purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light," Allison at 72, citing Machibroda v. United States, 368 U.S. 487, 494-495. That Court went on to re-state that specific factual allegations are not so "vague and conclusory" so as to permit summary disposition, and ruled that "the defendant was entitled to the opportunity to substantiate them at an evidentiary hearing." Allison at 73.

Although acknowledging the finality of convictions and the significance of solemn declarations made before the court by the defendant, the Supreme Court ultimately observed that "no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a per se rule rendering it 'uniformly invulnerable to subsequent challenge.'" Id. at 73. Citing Fontaine v. United States, 411 U.S. 213, 215. The Supreme Court went on to rule that a motion which included specific factual allegations should be given an evidentiary hearing. Id. at 215.

The Eighth Circuit court panel's decision not to Grant COA where the District Court denied Mr. Britt's § 2255 motion without holding an evidentiary hearing--despite his presentation of specific factual allegations supported by Four (4) affidavits submitted before the District Court, conflicts with Supreme Court precedent affirming a defendant's entitlement to an evidentiary hearing. Allison at 73, citing 28 U.S.C. § 2255. A Certificate of Appealability should have been granted and the case remanded for an evidentiary hearing.

2. THIS COURT PANEL'S DISMISSAL OF MR. BRITT'S APPEAL IN LIGHT OF EVIDENCE PRESENTED SUPPORTING THAT COUNSEL PROVIDED AFFIRMATIVE MISADVICE, CONFLICTS WITH SUPREME COURT, AND EIGHTH CIRCUIT PRECEDENT.

The District Court characterized Mr. Britt's Affirmative misadvice argument as being a claim that "his counsel inaccurately advised him that he would receive a sentence of 84 months." See Order Denying § 2255 Motion, Doc

215 p. 7, 8. This mischaracterization of Mr. Britt's ineffective assistance of counsel claim is precisely what formed the basis of the Supreme Court's holding in Blackledge v. Allison, 431 U.S. 63, cited throughout this petition. In that case, the District Court reviewed the court record and stated that it "conclusively shows that [Allison] was carefully examined by the Court before the plea was accepted. Therefore it must stand"; the Supreme Court observed that, "Construing Allison's petition as alleging merely that his lawyer's prediction of the severity of the sentence turned out to be inaccurate, the District Court found no basis for relief and, accordingly, dismissed the petition." Allison at 70. The Supreme Court held that this characterization of the petitioner's claim was erroneous and ruled in favor of the Fourth Circuit Court of Appeals.

Just as Allison's Attorney instructed him to "deny the existence of any promises", *id.* at 70, Mr. Britt's Counsel advised him to "ignore the language of the plea agreement" and to "Disregard the Guidelines, they have to say it. Your plea is for 84 months". See Doc. 219 p. 12, Attached. Jurists of reason would find the District Court's and this Circuit Court panel's decision to deny Mr. Britt an evidentiary hearing to be debatable, where that decision conflicts with the Supreme Court's holding that in regard to an unkept promise or affirmative misadvice from counsel, when the prisoner is able to "elaborate upon this claim with specific factual allegations"; and indicate "exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication" the petition should not have been dismissed. See Allison at 76. Mr. Britt's § 2255 motion alleged specific factual allegations, supported by Affidavits from third parties who witnessed the circumstances he alleges; and so, based upon Supreme Court precedent, reasonable jurists would find the District Court's decision not to Grant an evidentiary hearing in this matter, debatable.

EIGHTH CIRCUIT PRECEDENT REGARDING AFFIRMATIVE MISADVICE
AND A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PERTAINING THERETO

In Dilang Dat v. United States, 920 F.3d 1192, 1195, the Eighth Circuit held, in a circumstance of affirmative misadvice from counsel, that "The record does not conclusively show that Dat is entitled to no relief. The District Court abused its discretion by denying relief without an evidentiary hearing. In Mr. Britt's case, the District Court leaned heavily upon Mr. Britt's statements made during the change of plea colloquy, and held those statements to be conclusory and denied Mr. Britt's an evidentiary hearing; However, statements made during guilty plea proceedings have been held to be "evidentiary but NOT conclusory" by reasonable jurists. See Allison at 70. The sentencing Court in Dat also looked to it's plea and sentencing colloquy in determining that Dat's ineffective assistance of counsel claim did not merit an evidentiary hearing; however the Eighth Circuit Court of Appeals held that "Counsel's misadvice specifically undermined these equivocal warnings...they d[id] not necessarily contradict or correct his counsel's alleged misadvice that he would not suffer these consequences in his case." See Dilang Dat at 1195.

Additionally, in Showin Keon Davis v. United States, 858 F.3d 529, 539 (8th Cir. 2017) the Eighth Circuit held that rather than focus on the Court's plea and sentencing colloquy in a claim of ineffective assistance of counsel, the proper inquiry is whether Mr. Britt "would have rejected the plea offer and proceeded to trial had he been properly advised by his attorney". Davis, was remanded for an evidentiary hearing.

The combination of that fact that Mr. Britt's plea agreement was "unusually written", as noted by the Honorable Laurie Smith Camp (See Doc. 219 p.6, re change of plea hearing, attached), the Affidavits from three (3) involved parties containing specific factual allegations supporting Mr. Britt's claim, and Eighth Circuit and Supreme Court precedent holding that such

allegations are not "vague or conclusory", see Allison at 64, Mr. Britt could have "reasonably believed" that he would receive an 84 month sentence, See Dilang Dat at 1196. In Allison at 69, the Supreme Court held that "The fact that the Judge said that he could get more, did not affect, the belief of the petitioner, that he was only going to get a ten year sentence" Based upon the specific factual allegations raised by the petitioner. In Light of Blackledge v. Allison, Dilang Dat v. United States of America, and Davis v. United States, the Eighth Circuit Court panel's decision to not Grant Mr. Britt's petition for a Certificate of Appealability should be reheard en banc, as it conflicts with Eighth Circuit precedent, and Supreme Court precedent holding that in similar, like, and identical circumstances, an evidentiary hearing should be granted by the District Court to determine if the actions of Counsel were "likely to have altered [Mr. Britt's] decision to plead Guilty" and to further find that "defense counsel's error advising [Mr. Britt] is significant only if it was part of the inducement for [him] to perform his part of the plea agreement", See United States v. Coon, 805 F.2d 825 headnote #1 (8th Cir. 1986), citing United States v. Fuller, 769 F.2d 1095, 1098, 1099. The Rehearing en banc panel should reverse the Court panel's decision not to GRANT a Certificate of Appealability in this case.

THE COURT PANEL'S DECISION NOT TO GRANT COA REGARDING MR. BRITT'S
COUNSEL'S FAILURE TO INVESTIGATE HIS CASE SHOULD BE REVERSED.

Mr. Britt's § 2255 motion contained an Affidavit from his brother and co-defendant, Sydney Britt, that expressed how Mr. Britt "did not know what was to take place" on the night of the robbery. This affidavit was obtained by Mr. Britt in preparing his § 2255 motion, when it could have reasonably been obtained by Mr. Britt's Counsel during the pendency of the pre-trial proceedings, had Mr. Britt's Counsel investigated Mr. Britt's claims of innocence regarding active or foreknowledge of the events comprising the

robbery. See Doc. 219 p.8.

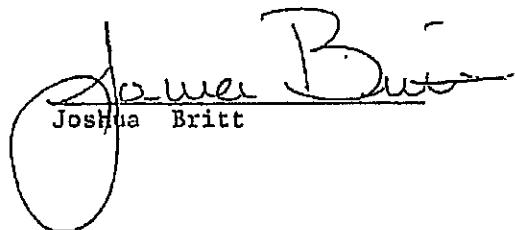
The District Court and Court's panel did not address brother, and co-defendant, Sidney Britt's Affidavit submitted in Mr. Britt's § 2255 motion. Id. p.8. In ignoring the facts alleged in Sidney Britt's affidavit, the District Court relies upon a flawed prejudice analysis regarding the prejudice suffered by Mr. Britt due to his counsel's refusal to investigate his claim(s). In it's reasoning in sections 2, 3, 5, and 6 of It's Order, The District Court bases it's conclusions upon "potential" evidence favorable to Mr. Britt. And "presumes" that there will be favorable testimony from his brothers after they entered their plea agreements. See Doc. 215 p. 5 ORDER. However, the Court need not presume where factual statement's are provided by a co-defendant submitted in the record. And based upon Mr. Britt's presentation of the Affidavit's on his behalf, the potential evidence favorable to him was present from the onset of the case, if not after he was induced to plead guilty by counsel with promises of an 84 month sentence, and after plea agreements were entered into by his Brothers, and co-defendants.

Other Court panel's have held that "when a pro se, indigent prisoner makes allegations that, if proved, would entitle him to habeas corpus relief, he should not be required to prove his allegations in absence of an evidentiary hearing". See Allison at 70. This would prevent the speculation that the District Court has engaged in, and provide actual factual evidence as to what the brother's testimony would have been, and to what extent Mr. Britt was actually prejudiced. And based upon the District Court's assessment on p. 5 of it's order, as to Mr. Britt's instructions to his Counsel, Mr. Britt has already met the standard set in Delgado v. United States, 162 F. 3d 981, 983 (8th Cir. 1998). Mr. Britt stated who the witnesses were to his claim, what said witnesses would testify to, and how such information would have affected the result of the proceedings. Mr. Britt's belief was that he would be

CONCLUSION

Mr. Britt Asks that this petition for a rehearing en banc be GRANTED so that his Claim of ineffective assistance of counsel can be Rightly Adjudicated in accord with Eighth Circuit and Supreme Court established precedent, holding that in cases involving affirmative misadvice from counsel, and where the petitioner presents specific factual allegations and not conclusory statements, an evidentiary should be granted, in keeping with the tenets prescribed for § 2255 motions.

Respectfully Submitted,


Joshua Britt

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2215

Joshua Britt

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:21-cv-00012-BCB)

JUDGMENT

Before COLLTON, KELLY, and GRASZ, Circuit Judges.

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.

Appellant's motion for appointment of counsel is denied as moot.

July 20, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

Criminal Case No. 8:19-CR-28

v.

JOSHUA BRITT,

Appellant,

FILED
US DISTRICT COURT
DISTRICT OF NEBRASKA

MAY 24 2021

OFFICE OF THE CLERK

APPELLANT'S REQUEST FOR
A CERTIFICATE OF APPEALABILITY

COMES NOW, Joshua Britt, Appellant, Pro se, Hereinafter Mr. Britt, requesting this court to GRANT a Certificate of Appealability (COA) in the above-referenced case number. In support of this request, Mr. Britt states as follows:

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291, and as this request for a certificate of appealability is filed within sixty days of the District Court's denial of MR. Britt's § 2255 motion, it is timely filed under Fed. R. App. P. 4(a)(1)(B).

STANDARD OF REVIEW

Mr. Britt is proceeding Pro se in this Matter, alleging the violation of his Sixth Amendment right to the effective assistance of counsel, and Asks that this Court will construe this pleading liberally, and not hold him to the more stringent standards applied to licensed attorneys. See, Haines v. Kerner, 404 U.S. 519, 520. Asking that this pleading be construed to be in the Right Posture and Procedure for GRANTING the relief He Requests.

STATEMENT OF THE CASE

On January 11, 2021, Mr. Britt filed in the District Court his Pro se motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. In addition to that motion, Mr. Britt submitted sworn AFFIDAVITS by himself, Daniel Zuckweiler, and Michaela Wilkins, who each communicated directly with Mr. Britt's Counsel of record as to his request to proceed to Trial. Additionally, Mr. Britt filed Motions to appoint counsel (Doc. 196), for an Evidentiary Hearing on this matter (Doc. 197), and a motion for Discovery (Doc. 200). These motions were filed in the District Court on January 19, and Jan 22, 2021 respectively. Although Mr. Britt filed a motion for compassionate release under the C.A.R.E.S Act of March 2020, and that motion was denied in the same ORDER denying Mr. Britt's § 2255 Motion, that filing is unrelated to Mr. Britt's § 2255 Motion, or the Claims Raised therein.

Eight days after Mr. Britt filed his Motion to Vacate under § 2255, the United States submitted it's ANSWER BRIEF on January 19, 2021. Due to lockdowns at the facility in which Mr. Britt is incarcerated, Mr. Britt requested, and received an extension of time in which to file his Reply to the United States' ANSWER. Within less than Twenty-four (24) hours of receiving Mr. Britt's REPLY TO THE GOVERNMENT'S ANSWER BRIEF (Doc. 212), Judge Buescher issued a single ORDER denying each and all pleadings filed by Mr. Britt related to, and unrelated to Mr. Britt's § 2255 Motion to Vacate sentence (Doc. 215). Mr. Britt's § 2255 Motion was denied without a hearing despite the evidence and AFFIDAVITS presented with his § 2255 Motion, and without any statement from his counsel of record contesting or refuting the constitutional claim of Ineffective Assistance of Counsel Raised in his § 2255 Motion. This request for a Certificate of Appealability follows.

HISTORY OF THE CASE

On December 14, 2018, Joshua Britt provided a ride home to his brothers Sidney Britt and Gary Fellows. He was called to meet them because they were intoxicated and could not safely drive home. On January 23, 2019 Mr. Britt was indicted on a sealed indictment, and on January 31, 2019, he was formally arraigned on charges of Hobbs Act robbery and Receiving Stolen Government Money or Property. Mr. Britt was released on Pre-trial release after pleading "Not Guilty" to the charges in the indictment.

Although Mr. Britt asserted his innocence and lack of knowledge throughout the pre-trial process, his appointed counsel refused to prepare for trial--opting instead to negotiate a plea agreement (See, AFFIDAVITS submitted in the § 2255 Motion, attached). After a plea agreement was reached with Gary Fellows, on April 15, 2019, Mr. Britt's assistance of Counsel persisted in her refusal to prepare for trial, over her client's objections.

On August 19, 2019, less than two months after having his pre-trial release revoked, Mr. Britt entered into a Plea agreement for a sentence of what he was advised by Counsel, would be an agreement for 84 months imprisonment. Mr. Britt was Advised by his counsel to disregard the language of the plea agreement as well as the sentencing Court's plea colloquy because he would receive and 84 month sentence (See, AFFIDAVIT'S of Joshua Britt, Michaela Wilkins and Daniel Zuckweiler, provided in the § 2255 Motion, Attached). After the change of plea hearing, Mr. Britt requested to withdraw his plea, so that he could exercise his right to proceed to trial. This request was denied by his appointed assistance of Counsel (See, AFFIDAVITS referenced above). In raising his claim of ineffective assistance of counsel in violation of the Sixth and Fifth Amendment, Mr. Britt presented to the Sentencing Court, valid claims that, if true, entitle him to relief--since

but for his counsel's deficiencies, he would have proceeded to trial (See, § 2255 Motion, attached). Additionally, Mr. Britt filed Motions for the Appointment of Counsel, an Evidentiary hearing, and Discovery (seeking the production of phone records, letters and emails) (See, Docs. 196, 197, & 200). Mr. Britt also submitted to the sentencing Court, and AFFIDAVIT from Sidney Britt stating that Mr. Britt did not have knowledge of the events of that night, not had Gary Fellows informed him about the robbery (See, AFFIDAVIT of Sidney Fellows, submitted with the § 2255 Reply, Attached).

SPECIFIC INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Mr. Britt Raised ineffective assistance of counsel claims that Counsel 1. Failed to investigate the Case, i.e., interview witnesses, 2. Failed to prepare for trial, 3. Provided misleading and erroneous legal advice in telling him to "ignore the language of the plea agreement" because "its just legal formality", "you're getting 84 months", 4. Failing to object to the sentencing enhancements as he had no knowledge of the reasonably foreseeable events of the night of the robbery, and 5. Failing to advise him of the defenses to Aiding and Abetting Hobbs act robbery, as he Did not have foreknowledge.

SUMMARY OF THE HISTORY OF THE CASE

Despite the evidence submitted by Mr. BRitt, and the claim Raised, which presents facts which may be disputed, the sentencing Court denied Mr. Britt's meritorious claim, without an evidentiary hearing, or an affidavit from the appointed assistance of counsel. Such action by the Court is debatable, as other Courts in this Circuit and jurisdiction have called for evidentiary hearings, and held that the erroneous advice of counsel is not cured by the sentencing Court's Colloquy, when such advice is not grounded in applicable law (See, Dilang Dat v. United States of America, 920 F.3d 1192, 1195 (8th Cir. January 16, 2019)).

CERTIFICATE OF APPEALABILITY STANDARD

The Standard for determining if a Certificate of Appealability (COA) will issue is relatively light. See, Buck v. Davis, 137 S.Ct. 759 (2017) "This threshold inquiry is more limited and forgiving than 'adjudication of the actual merits'. A full consideration of the factual or legal basis addressed in support of the claims "is not appropriate in evaluating a request for COA. See, Miller-El v. Cockrell, 537 U.S. 322, 327. In making these statements, the Supreme Court cites Slack v. McDaniel, 529 U.S. 473, 481. Further, the same is implicated in determining whether a COA should have issued in the District Court. "[A] prisoner need only demonstrate 'a substantial showing of the denial of a constitutional right' 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" Slack, at 484, *Id.*

(Bold mine)

GROUND FOR CERTIFICATE OF APPEALABILITY

The District Court's decision in denying Mr. Britt's claim Raised and supported in his § 2255 Motion is debatable by jurists of Reason because other jurists of Reason have granted evidentiary hearings in these circumstances, where evidence is presented which raises a dispute of material fact. See, Witthar v. United States, 793 F.3d 920, 922 (8th Cir. 2015), "[T]he general rule is that a hearing is necessary prior to the [§ 2255] motion's disposition if a factual dispute exists".

Where assistance of Counsel provides "affirmative" misadvice", declaring unequivocally what will occur in the proceedings, an evidentiary hearing has been called for by jurists of reason. See, Dilang Dat v. United States

920 F. 3d 1192, 1195, "The record does not conclusively show that [Britt] is entitled to no relief. The District Court abused its discretion by denying relief without an evidentiary hearing."

Although the sentencing Court states that Its plea colloquy supports the denial of Mr. Britt's motion for evidentiary hearing,—and the § 2255 itself--Reasonable jurists have concluded otherwise. See, Dilang Dat, at 1195 "counsel's misadvice specifically undermined these equivocal warnings...they d[id] not necessarily contradict or correct his counsel's alleged misadvice that he would not suffer these consequences in his case." Based upon the manner in which Mr. Britt's plea agreement was "unusually" written (See, Change of plea hearing before Judge Laurie Smith Camp p. 6 ln 13) Mr. Britt "could have reasonably believed" he would receive the 84 month sentence stated to him an his family by his counsel. See, AFFIDAVITS attached, and Dilang Dat, at 1196, showing that reasonable jurists have held that in similar circumstances, an evidentiary hearing is required.

In Denying Mr. Britt's motions for an evidentiary hearing, and for relief under § 2255, the Hon. Brian C. Buescher's inquiry was focused upon the plea colloquy, plea agreement, and sentencing colloquy, and not whether, but for his Counsel's affirmative misadvice, Mr. Britt would have proceeded to trial. Reasonable jurists in this circuit have held that the proper inquiry for an ineffective assistance of counsel claim, however, is whether Mr. Britt "would have rejected the plea offer and proceeded to trial had he properly been advised by. [his] attorney" See, Showin Keon Davis v. United States of America, 858 F.3d 529, 539 (8th Cir. 2017).

The affidavits submitted in the Record on Appeal (ROA) and the correspondences between Mr. Britt and his Counsel of record support that if he had been properly advised, Mr. Britt would have proceeded to trial. The District Court did not make a finding regarding the Evidence submitted in

this filing (See, AFFIDAVITS of Mr. Britt's brother and of Friends of Mr. Britt who were in contact with his Counsel, included in the § 2255 Motion, attached).

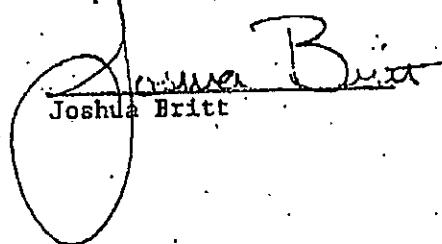
SUMMARY

The District Court's decision in this matter is debatable by reasonable jurists, and Mr. Britt's claim deserves further encouragement to proceed. Jurists in this Circuit have ruled differently regarding the constitutional issues Raised by Mr. Britt of ineffective assistance of counsel and his right to proceed to trial, but for the affirmative disregard and misadvice provided by counsel. In the very least, Evidentiary hearings have been provided in keeping with the provisions of § 2255.

CONCLUSION

WHEREFORE, Joshua Britt prays that based upon the aforementioned statements, this Honorable Court will GRANT a Certificate of Appealability in this matter; or in the alternative, that the Assistance of Counsel will be appointed so that he may Raise his constitutional claim according to the Right Posture and Procedure.

Respectfully Submitted,


Joshua Britt

Sworn to Under the Penalty of Perjury
this day of May 2021.
28 U.S.C. § 1746

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiffs,

8:19-CR-28

vs.

JOSHUA BRITT

Defendant.

ORDER

This matter comes before the Court on Defendant's Motion to Appoint an Attorney. Filing 145. For the reasons stated below, this request is denied.

I. BACKGROUND

Defendant plead guilty to one count of a Superseding Indictment charging him with robbery in violation of the Hobbs Act. Filing 107. This Court ordered Defendant to serve a sentence of 135 months' incarceration, serve three years of supervised release, and pay a \$100 special assessment. Filing 136. Defendant now asks this Court for an attorney to advise him on his options. Filing 145.

II. ANALYSIS

Defendant's Motion fails to specify what specific relief he is seeking that necessitates the assistance of an attorney. Liberally construed, Defendant's motion could be viewed as motion filed under 28 U.S.C. § 2255. However, Defendant fails to comport with the requirements for filing a § 2255 motion. *See Rule 2 of the Rule Governing Section 2255 Cases.* In short, Defendant may be entitled to the appointment of an attorney to assist in postconviction proceedings, but he is not allowed to request counsel to consult with on an open-ended basis.

III. CONCLUSION

For the forgoing reasons, Defendant's Motion to Appoint Counsel is denied. This order does not prevent Defendant to later file an appropriate motion if Defendant has appropriate grounds to do so.

IT IS ORDERED:

1. Defendant's Motion to Appoint Counsel (Filing 145) is denied;
2. The Clerk's Office shall mail a copy of this Order to the Defendant at his current address.

Dated this 9th day of July, 2020.

BY THE COURT:



Brian C. Buescher
United States District Judge

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
2021 JAN 11 AM 9:48
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	RECEIVED U.S. DISTRICT COURT CLERK	OFFICE OF THE CLERK U.S. DISTRICT COURT Omaha
Name (under which you were convicted): Joshua Britt	JAN 11 2021	Docket or Case No.: 8:19-CR-00028-BCB-MDN
Place of Confinement: Leavenworth, KS (BOP)	U.S. DISTRICT COURT	Prisoner No.: 30972-047
UNITED STATES OF AMERICA	Movant (include name under which convicted) V. Joshua Britt	

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

United States District Court
111 S. 18TH Plaza Suite 1152
Omaha, NE 68102-1322

(b) Criminal docket or case number (if you know): 8:19-CR-00028-BCB-MDN

2. (a) Date of the judgment of conviction (if you know): January 16TH, 2019

(b) Date of sentencing: January 15TH, 2019

3. Length of sentence: 135 Months

4. Nature of crime (all counts):

18 U.S.C § 1951 and 2; Hobbs Act Robbery and Aiding and Abetting.

5. (a) What was your plea? (Check one)

(1) Not guilty (2) Guilty (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to? N/A

6. If you went to trial, what kind of trial did you have? (Check one) N/A Jury Judge only

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes N/A No

8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following: N/A

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

(1) Docket or case number (if you know): N/A _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: N/A _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes No N/A

(7) Result: N/A

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes No N/A

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes No N/A

(2) Second petition: Yes No N/A

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

I waived the right to appeal, as a condition of the plea agreement. Except ineffective assistance of counsel (IAC) and unconstitutionality of the conviction/sentence.

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Ineffective Assistance of counsel (See Memorandum Attached) but for counsel's actions I would have proceeded to trial.

(a) Supporting facts (Do not argue or cite law. Just state the facts that support your claim in detail.):

Counsel Julie A. Frank (Ms. Frank) was ineffective for:

1. Failing to investigate the case, i.e., interview witnesses
2. Failing to prepare for trial
3. Providing misleading and erroneous legal advice. Telling me to "ignore" the language of the plea agreement" because "it's just legal formality", "your getting 84 months".
4. Failing to object to the sentencing enhancements because there are no reasonably foreseeable acts in a Robbery that I did not agree to before hand. Reasonably foreseeable acts under relevant conduct apply to conspiracies. This case was not a conspiracy, and I had no knowledge of what others did.
5. Failing to advise me of defense to Aiding and Abetting Hobbs Acts Robbery I didn't have foreknowledge.

(b) Direct Appeal of Ground One: I had no direct appeal

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No N/A

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings: NONE, This is my first § 2255

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No N/A

(2) If you answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No N/A

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND TWO: N/A

(a) Supporting facts (Do not argue or cite law. Just state the facts that support your claim in detail.):

N/A

(b) Direct Appeal of Ground Two: N/A

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings: N/A

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

GROUND THREE: _____

N/A

(a) Supporting facts (Do not argue or cite law. Just state the facts that support your claim in detail.):

(b) Direct Appeal of Ground Three: N/A

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings: N/A

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes No N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four: N/A

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings: N/A

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes No N/A

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:

Julie A. Frank 209 South 19TH Street Suite 323c Omaha, NE 68102

(b) At the arraignment and plea:

Same as above

(c) At the trial:

There was no trial

(d) At sentencing:

Julie A. Frank

(e) On appeal:

There was no direct appeal

(f) In any post-conviction proceeding:

NONE, this is my first 2255

(g) On appeal from any ruling against you in a post-conviction proceeding:

NONE

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes No

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

This motion is timely

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of --

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

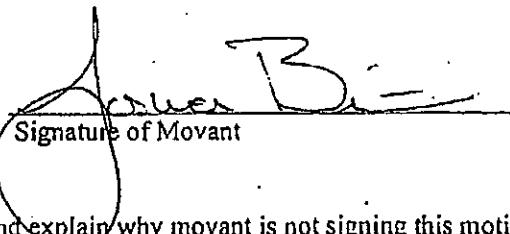
Therefore, movant asks that the Court grant the following relief:

Vacate and set aside the conviction and judgement in this matter
or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on January 7th, 2021
(month, date, year)

Executed (signed) on January 7TH, 2021 (date)


Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
(OMAHA)

UNITED STATES OF AMERICA,

Case No: 8:19-CR-28

Plaintiff,

v.

Joshua Britt,

Defendant,

MEMORANDUM IN SUPPORT OF MOTION
VACATE, SET ASIDE, OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255(a) (AND (b)

COMES NOW, Joshua Britt, Defendant Pro se, hereinafter Mr. Britt, Asking this Honorable Court to Vacate the conviction in this Matter due to the ineffective assistance of Counsel of Julie A. Frank. Mr. Britt attests that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-88. Mr. Britt asserts not only "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different", Id., at 694, but also that, but also that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 4747 U.S. 52, 59. Based upon the criteria and authority established Above, Mr. Britt's plea of Guilty was not voluntarily, or intelligently made. In this filing Mr. Britt presents evidence in support of this claim of ineffective assistance of Counsel.

JURISDICTION

This Honorable Court has jurisdiction under Title 28 U.S.C. § 2255, as it has been less than one (1) year from the date of Mr. Britt's Conviction, and

the date upon which that conviction became final.

STANDARD OF REVIEW

This motion under § 2255, claiming ineffective assistance of counsel, is reviewed De Novo. Mr. Britt prays that this Honorable court will construe this pleading to be in the posture and procedure for GRANTING the relief he is asking. Mr. Britt further prays that this Honorable court will construe his pleadings liberally, and not hold him to the more stringent standards applied to licensed attorneys. SEE, Haines v Kerner, 404 U.S. 519, 520.

ARGUMENT

SPECIFIC FACTS REGARDING MS. FRANK'S DEFICIENT PERFORMANCE

Ms. Frank refused to investigate witnesses, or prepare for trial. From the onset of this case Mr. Britt expressed his intention to proceed to trial on the charges in the indictment because he believed himself to be innocent of all the elements of the offenses charged against him. This is because he was guilty of only providing a ride to his brothers, unknowingly to the robbery committed after the fact. Ms. Frank clearly and repeatedly stated that had "no intentions of going to trial", SEE AFFADAVIT of Michaela Wilkins. Ms. Frank advised Mr. Britt against going to trial because "she was not prepared to try a case", SEE AFFADAVIT of Joshua Britt. Ms. Frank further advised Mr. Britt that he would receive an extensive sentence if he lost in trial, and so "it wouldn't be worth proceeding to trial since he was going to receive 84 months". Id.

Ms. Frank's advice and actions regarding her refusal to prepare for trial violates the ABA Model Rule of Professional Conduct 1.2(a)(2016 as stated in McCoy v Louisiana, 200 L.Ed 2d 831, "a lawyer shall abide by a client's decision

concerning the objectives of representation". In the same section, the Supreme Court states "when a client expressly asserts that the objective of his defense is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective", Id. at 831.

Ms. Frank's performance was deficient when she refused to prepare for trial and investigate witnesses. The record shows thats Ms. Frank's performance was deficient and prejudice Mr. Britt when she advised Mr. Britt that he would receive 84 months from his § 11(c)(1)(c) plea agreement. But for Ms. Frank's errors, Mr. Britt would unquestionably have proceeded to trial. Ms. Frank provided erroneous and misleading advice. The plea agreement negotiated by Ms. Frank had no specification that Mr. Britt's sentence would be limited to 84 months. Ms. Frank's additional advice "not to worry about the language of the plea agreement because it was just legal formality", was clearly erroneous and prejudiced Mr. Britt, since that language provided anavenue for Mr. Britt to receive the 135 month sentence he ultimately received. SEE, AFFADAVIT of Joshua Britt and ROA. In response to actions like that of M. Frank,

The Honorable Justice Anton Scalia stated "our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the state". SEE, Martinez v. COURT OF Appeal of Cali, Fourth Appellate Dist., 528 U.S. 152, 165, as cited in McCoy at 1508.

REASONABLENESS OF MR BRITT'S INTENT TO PROCEED TO TRIAL

Based upon the evidence presented in this case, it is reasonable that Mr. Britt would of choose to proceed to trial on the charges in the indictment.

In fact, Mr. Britt communicated to Ms. Frank his intent to proceed to trial repeatedly both before the change of plea hearing, and after the signing of the plea agreement. SEE, AFFADAVIT in support.

This is because Mr. Britt had no knowledge of the planning or execution of a robbery, and he believed he was merely providing a ride to his brothers who needed a lift. Mr. Britt intended to present his case to a jury, since at no point was Mr. Britt inculpated in a robbery, kidnapping or knowledge of possessing stolen Government property. Rather then assist Mr. Britt by advising him of the elements of aiding and abetting Hobbs Act Robbery, kidnapping and receiving stolen Government property under the standard annouced in Rosemond v United States, 134 S. CT. 1240, Ms. Frank stated that she had no intentions of proceeding to trial. This, although there is no evidence in the record that Mr. Britt had foreknowledge that he was aiding in the commission of any criminal offense, SEE ROA. Ms. Frank did not even investigate rather the parties to the offense corroborated Mr. Britt's claim of innocence as to the charges. When Mr. Britt asked Ms. Frank to speak to his brothers, or the counsel, regarding his lack of foreknowledge, she stated, "they're not going to do that".

Ms. Frank's sole communication with the other attorneys in this matter consisted of inquiries as to what type of plea bargains they were negotiating. Ms. Frank's refusal to prepare for trial violates Mr. Britt's right to trial by jury, and for her "Deficient Performance", the outcome of the proceeding would have been different. SEE, Strickland, 466 U.S. 668 at 688. It is well known that "a defendant must be allowed to make his own choices about the proper way to protect his own liberty", SEE McCoy at 1508. In absence of Ms. Frank's deficient performance Mr. Britt would have proceeded to trial.

MS. FRANK'S PERFORMANCE WAS DEFICIENT WHEN SHE MISLED MR. BRITT AS TO THE ACTUAL SENTENCING RANGE HE FACED IN AGREEING TO THE PLEA BARGAIN.

At no time in the case did Ms. Frank advise Mr. Britt that based upon the plea agreement, as negotiated, he could be sentenced to more than 84 months. Therein lies the difference between Mr. Britt's ineffective assistance of counsel (IAC) claim and any raised previously in this circuit -- Mr. Britt's attorney did not advise him of the top range of his plea agreement; and, she advised him "not to worry about the language of the plea agreement because it's just legal formality". SEE, AFFADAVIT of Joshua Britt.

Further, when Mr. Britt and his friends and family communicated to Ms. Frank via letters, email, and phone calls, that Mr. Britt was in distress and uncomfortable with the plea agreement, Ms. Frank refused to seek a withdrawal of the plea. She insisted "it's much too late for that", and informed Mr. Britts' friend and family that he would receive 84 months. SEE AFFADAVIT.

Ms. Frank did not advise Mr. Britt as to the consequences of his entering a plea of guilty as to the charges, nor of the possible defenses; and so, as a matter of law Mr. Britts' plea is not valid. SEE, Shafer v Bowersox, 329 F.3d 637, 649 (September 9th, 2002) (8th Cir.), citing McCarthy v United States, 394 U.S. 459, 466; requiring that a defendant understand the law in relation to the facts in order for a plea to be valid.

Even the Honorable Judge Laurie Smith Camp noted that the plea agreement specified 84 months as being the lowest sentence Mr. Britt could receive, rather than the highest, and it called for a sentencing range of between 108 to 135 months, with provisions for 15 points of enhanced sentencing.

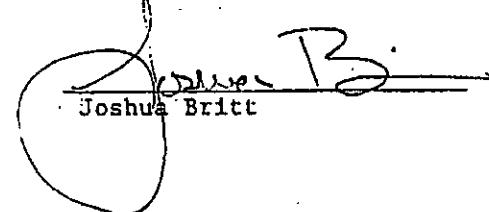
Although 84 months was mentioned in the plea agreement, it was presented as a "floor" that the sentence could not go below. The agreement was devoid of even a recommendation for a sentence of 84 months. Had Mr. Britt been properly advised regarding the consequences of signing the plea agreement, he would have rejected the plea agreement and proceeded to trial. See, Davis v. United States, 858 F.3d 529, 539.

CONCLUSION

Mr. Britt alleges facts which, if true, entitle him to relief under § 2255(a). Mr. Britt's claim is supported by the ROA, AFFADAVITS, and the client communication log of Ms. Frank. The conviction and judgment in this matter should be vacated. Pursuant to § 2255(b), Mr. Britt is entitled to an Evidentiary Hearing, section 2255(b) provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice to be served upon the United States, Grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

WHEREFORE, Joshua Britt prays that this Honorable court will GRANT this motion to vacate, set aside, or correct sentence after determining the facts pertaining thereto in an Evidentiary hearing. Mr. Britt prays that this Honorable court will GRANT this motion and provide all Relief that the law and justice requires.

Respectfully Submitted,


Joshua Britt

I, Michaela Wilkins, swear that the following statement, situations, and dates (within 5 – 7 days window) are true and accurate to the best of my knowledge. I'm writing this affidavit in regards to the encounters/communications with Julie Frank who was the appointed attorney of Joshua Britt.

In the early proceedings leading up to Mr. Britt being remanded to custody and sentencing, I happened to accompany him to some of his attorney visits. Mr. Britt had asked his attorney if she thought he/they should prepare for trial. Attorney Frank's response to both of us was that she had "no intentions to prepare for trial." As she said, "There is no point; it wouldn't be worth it and it seems that the prosecution is going to give you 7 years." Mr. Britt had expressed his concern about taking a deal as he was not guilty of being involved in the crime in any way or planning of the crime, or had any other knowledge of what his two brothers intended to do.

Julie's response to us was that 7 years would be the best thing that could come about and why she was not going to plan/intend on trial. When Mr. Britt was in custody, he had told me that he did not want Julie as his attorney as she didn't communicate with him once he was in jail. Also, that he did not understand the plea she had him sign. The plea deal was not explained to him properly. Mr. Britt voiced that he wanted the plea withdrawn and he me call Julie to inform her of his decision.

On or about September 17th, I left Julie a message informing her, no response again. On or about October 20th, another message was left. November 12th, I was able to speak to Julie, telling her all what Mr. Britt had wanted. Rudely, Attorney Julie Frank told me to tell Josh that it was far too late. Mr. Britt had told me that he needed another attorney to plan for trial as he felt that Attorney Julie Frank didn't have his best interest at heart.

In closing, Mr. Britt had what seemed to have been an attorney who did not want or know how to perform her job in the best interest of the client she was serving. I say that due to the things Attorney Julie Frank assured both me and Josh of during proceedings. I felt and still do feel that she failed Mr. Britt all the way around in giving him proper representation.

I ask the courts to please take this affidavit as true and evidence in the injustice Joshua Britt was given. I ask the court that you find in your power and hearts to please correct the wrong that was done. Joshua Britt is/was only guilty of trying to be a helpful younger sibling and provide a ride to his intoxicated/drunk brothers. I sincerely hope and pray that this affidavit serves as enough reason to return Joshua Britt back home to his family.

Michaela Wilkins

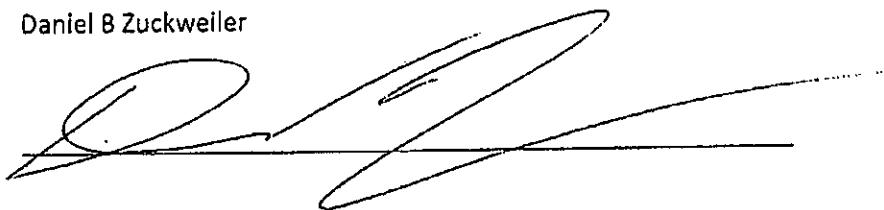
22 October 2020

Michaela Wilkins 10/22/2020

I Daniel Zuckweiler attest that the following statements and dates are accurate & recounted to the best of my memory. On multiple occasions I spoke with Julie Frank, attorney for Joshua Britt on his behalf in regards to concerns he expressed about his court proceedings and plea. Around July (middle of month) 2019, Josh asked me to give Julie a call and ask if the prosecution had put in writing as of yet the offer of 7 years that she had mentioned to not only him but myself as well. Julie stated that there is no need to worry that the 7 years was still on the table.

Josh on multiple occasions after he had signed his plea, told me that he was unclear of what the plea was really saying. Had asked me to call & email Mrs. Frank on multiple occasions to have her clarify the plea and that he wanted his plea withdrawn due to the lack of understanding and that it was not in fact what he had thought he had agreed to. During the months of September, October, November of 2019 I reached out to her and had spoken with her to inform her of this decision.

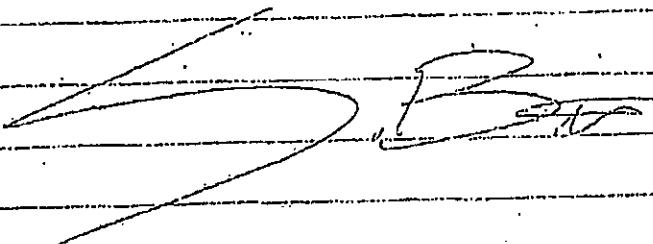
Daniel B Zuckweiler

A handwritten signature in black ink, appearing to read "Daniel B Zuckweiler". The signature is fluid and cursive, with a large, stylized 'D' on the left and a more compact 'Zuckweiler' on the right.

Dear District Court of Nebraska

In THE CASE Involving My BROTHERS
GARY FELLOWS, JOSHUA BRITT AND I Sidney Britt THE
FACTUAL BASES OF THE CASE IN WHICH GARY FELLOWS
GAVE A STATEMENT TO THE COURT AND WAS ACCEPTED
BY THE COURT STATES THAT JOSHUA BRITT NEVER GOT
OUT OF GARY'S TRUCK. I DON'T ~~KNOW~~ BELIEVE GARY
WAS HONEST WITH JOSHUA ABOUT THE REASON FOR THE
TRIP AND JOSHUA DID NOT KNOW WHAT WAS TO
TAKE PLACE.

Sidney Britt

A handwritten signature in black ink, appearing to read "S. Britt". The signature is fluid and cursive, with a large, sweeping initial 'S' and a more compact 'Britt' following it.

A F F I D A V I T

I, Joshua Britt, do hereby Swear and Affirm that the following statements are True, Correct, and Complete to the best of my knowledge:

1. That in or about March of 2019, while at the office of Julie A. Frank, and accompanied by Michaela Wilkins, I stated to Ms. Frank my intent to maintain my innocence and proceeded to trial on the charges in the underlying indictment, and

2. At that meeting, Ms. Frank replied, "No, I'm not prepared to try a case", and that "it wouldn't be worth it", and

3. I expressed to Ms. Frank that I didn't understand why I was even being charged with anything, because I didn't know about any robbery, and

4. Ms. Frank stated that we would go over the discovery at the next visit, and

5. At the next visit Ms. Frank was unable to access the file, and so she set another appointment, so that we could go over the discovery, however

6. At no time have Ms. Frank and I gone over the discovery in this case, and

7. At that rescheduled visit, Ms. Frank advised me that the prosecutor said she believed me that I had no foreknowledge of any robbery, but that Ms. Ceraolo's boss would not let her offer me anything less than Seven (7) years, and

8. I told Ms. Frank that I thought 7 years was a lot of time for being innocent, and

9. Ms. Frank advised me that she would talk to her again, but 7 years is all Ms. Ceraola could offer me, and

10. I stated that I should go to trial, and

11. At no point in this process has Ms. Frank advised me of a defense to the charges I faced, and

12. At no time has Ms. Frank communicated to me that she was investigating the case, and

13. Ms. Frank continued to request continuances for the trial, but stopped communicating with me via email, or phone calls, and

14. I left messages with Ms. Frank from March 2019 through June 2019, and increased my efforts after June 2019, and

15. After June 2019, I asked Michaela Wilkins, Daniel Zuckweiler, Treynel James, and Jeremy Anderson, to contact Ms. Frank on my behalf since I was incarcerated, and

16. Throughout my incarceration, I continued to call Ms. Frank and she did not return the calls, and

17. Two weeks prior to my August trial date, Ms. Frank spoke to me about my Brother's pleas, and she encouraged me to take a plea based upon their pleas, although I intended to proceed to trial, and

18. The next time I saw Ms. Frank, she presented me with the plea agreement, and stated that I would receive 84 months; that was the first week of August 2019, and

19. When I asked if this was the plea agreement for 84 months, Ms. Frank told me "This is an 119C)(1)(c) binding plea for 84 months", and

20. It was at that meeting that I asked questions about the language of the plea agreement, where it mentioned relevant conduct and enhancements, and Ms. Frank told me "Don't worry it, its just legal formality, and there's nothing you can do about enhancements.", and

21. I had no access to Ms. Frank until August 19, 2019 during the Change of Plea hearing, and

22. During the Change of Plea hearing, I asked Ms. Frank what the talk was regarding Guidelines, and she stated "Disregard the Guidelines, they have to say it. Your plea is for 84 months.", and

23. It was not until I met with the Pre-sentence investigation officer that I was informed that enhancements could be argued, and that the enhancements were raising the points assessed to me, and

24. Because the statements made by the presentence officer did not support what Ms. Frank told me, I began having my family and friends contact Ms. Frank in September of 2019, to fight the enhancements, and

25. Ms. Frank did not contact me regarding the calls, nor did she respond to my requests to withdraw my plea, and proceed to trial, and

26. In November of 2019, Ms. Frank told me "It's far too late to withdraw the pleas, we'll just try to deal with it at sentencing", and

27. Up until my sentencing hearing I requested to review the Discovery in the case to find support for my request to proceed to trial, and

28. I was never able to review Discovery with Ms. Frank, but Ms. Frank stated that "there's nothing in there that supports you having knowledge of what your brothers were doing or planned, " and

29. Ms. Franks never provided me with a reason why I should not of gone to trial, except that she felt "it is not worth it", and

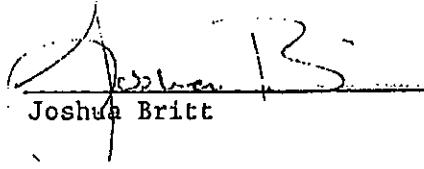
30. If I had been advised that I could be sentenced to to more than 84 months, I would have proceeded to trial, and

31. If I had been advised that not having foreknowledge that a crime was being planned or carried out, is a defense to aiding and abetting a robbery or kidnapping, I would have proceeded to trial, and

32. Based upon what I learned from the presentence investigation and since the sentencing, I would not have waived my right to trial, and

33. Had Ms. Frank advised me accurately regarding my right to proceed to trial, and what my exposure was in the plea agreement, I would have proceeded to trial on the charges alleged against me.

Sworn to under the Penalty of Perjury
28 U.S.C. § 1746


Joshua Britt