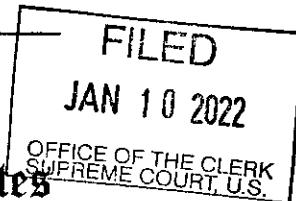


21-6901 ORIGINAL

No. \_\_\_\_\_

In the  
Supreme Court of the United States



WILBERT MATHES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for A Writ of Certiorari to the United  
States Court of Appeals for the Fifth Circuit*

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**PETITION FOR A WRIT OF CERTIORARI**

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WILBERT MATHES  
*Pro Se Petitioner*  
Fed. Reg. No. 07155-095  
FCI Oakdale I  
Post Office Box 5000  
Oakdale, LA 71463-5000

### QUESTIONS PRESENTED

Whether the Fifth Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion by concluding that Mr. Mathes' appellate counsel made a sound strategic decision not to appeal the preserved sentencing objections, is irreconcilable with controlling precedent, such that this Court should remand to the United States Court of Appeals for the Fifth Circuit with instructions to issue a certificate of appealability?

Whether the Fifth Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion in finding that Mr. Mathes' showing of prejudice from appellate counsel's deficiencies was lacking, based on that Court's view that had Mr. Mathes prevailed on appeal and the matter been remanded for resentencing without application of the erroneous inflation of the drug quantity and the inadequately supported leadership enhancement, the district court could have imposed the same sentence because the guidelines are only advisory, is irreconcilable with controlling precedent, such that this Court should remand to the United States Court of Appeals for the Fifth Circuit with instructions to issue a certificate of appealability?

Whether the Fifth Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion in refusing to conduct an evidentiary hearing on Mr. Mathes' claim that he was

deprived of the effective assistance of counsel during the appellate stage of his criminal case by counsel's failure to appeal his sentence, based on the erroneous inflation of the drug quantity used to set Mr. Mathes' base offense level and application of an inadequately supported leadership enhancement, is irreconcilable with controlling precedent, such that this Court should remand to the United States Court of Appeals for the Fifth Circuit with instructions to issue a certificate of appealability?

## PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

## RELATED CASES

- *United States v. Wilbert Mathes*, No. 3:14-cr-00069-SDD-EWD-1, U.S. District Court for the Middle District of Louisiana at Baton Rouge. Judgment entered June 27, 2017.
- *United States v. Wilbert Mathes*, No. 17-30537, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Nov. 21, 2018.
- *Wilbert Mathes v. United States*, No. 3:19-cv-00287-SDD, U.S. District Court for the Middle District of Louisiana at Baton Rouge. Judgment entered Dec. 3, 2020.
- *United States v. Wilbert Mathes*, No. 21-30227, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Nov. 19, 2021.

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OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Fifth Circuit denying Petitioner's motion for certificate of appealability is unpublished and may be found at USCA Case No. 21-30227; *United States of America v. Wilbert Mathes* (Nov. 19, 2021) (Appendix - A1).

The Order of the United States District Court for the Middle District of Louisiana at Baton Rouge, denying Petitioner a certificate of appealability is unpublished and may be found at USDC Case No. 3:14-cr-00069-SDD-EWD; *United States of America v. Wilbert Mathes* (Apr. 29, 2021) (Appendix - A3).

The Order of the United States District Court for the Middle District of Louisiana at Baton Rouge, denying Petitioner's motion to vacate is unpublished and may be found at USDC Case No. No. 3:14-cr-00069-SDD-EWD; *United States of America v. Wilbert Mathes* (Dec. 3, 2020) (Appendix - A10).

STATEMENT OF JURISDICTION

The judgment denying Petitioner's motion for certificate of appealability was issued on November 19, 2021. This petition is timely filed pursuant to Sup. Ct. R. 13. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Fifth and Sixth Amendments. The Fifth Amendment provides in pertinent part:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c) provides that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

...  
(B) the final order in a proceeding under section 2255.  
...

(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.

STATEMENT OF THE CASE

On May 6, 2019, Mr. Mathes initiated this proceeding by filing a timely collateral attack on the judgment of the district court, via the provisions of 28 U.S.C. §2255 (f)(1) ("§2255"). [DE #506]. On May 14, 2019, the district court ordered the Government to respond by May 31, 2019. [DE #508]. After seeking and being granted two extensions of time in which to respond, on July 31, 2019, the United States' filed its response in opposition. [DE #516]. On September 12, 2019, Mr. Mathes' reply to the United States' response was filed. [DE #519].

Nearly fifteen (15) months after Mr. Mathes' reply was filed, on December 3, 2020, the district court granted Mr. Mathes' motion to expand the record to include exhibits in support of his motion to vacate, but denied his motion to vacate, set aside, or correct his sentence. [App. C, A10]. Despite the applicable rule instructing that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," the district court's Ruling and Order was silent as to whether Mr. Mathes was granted or denied a COA. [App. C, A10]. *See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts* (2010). Therefore, on December 28, 2020, Mr. Mathes timely filed his notice of appeal and applied to the district court for issuance of COA on the following issues:

**[1]. 1st Question Presented on  
Request and Application for COA**

Did this Court err or alternatively abuse its discretion in concluding that Mr. Mathes' appellate counsel made a sound strategic decision not to appeal the preserved sentencing objections?

**[2]. 2nd Question Presented on  
Request and Application for COA**

Did this Court err or alternatively abuse its discretion in finding that Mr. Mathes' showing of prejudice from appellate counsel's deficiencies was lacking, based on this Court's view that had Mr. Mathes prevailed on appeal and the matter been remanded for resentencing without application of the erroneous inflation of the drug quantity and the inadequately supported leadership enhancement, this Court could have imposed the same sentence because the guidelines are only advisory?

**[3]. 3rd Question Presented on  
Request and Application for COA**

Did this Court err or alternatively abuse its discretion in refusing to conduct an evidentiary hearing on Mr. Mathes' claim that he was deprived of the effective assistance of counsel during the appellate stage of his criminal case by counsel's failure to appeal his sentence, based on the erroneous inflation of the drug quantity used to set Mr. Mathes' base offense level and application of an inadequately supported leadership enhancement?

On December 30, 2020, Mr. Mathes filed his motion to appeal *in forma pauperis*. [DE #592]. On April 29, 2021, the district court issued an order denying Mr. Mathes a COA and permission to appeal IFP, which provided no rationale for the denial of IFP status. [App. B, A3].

On November 19, 2021, the United States Court of Appeals for the Fifth Circuit denied COA. [App. A, A1]. This petition is timely submitted, within 90 days of the Fifth Circuit's November 19, 2021 judgment denying COA. [App. A].

### REASONS FOR GRANTING THE WRIT

This Court should grant the writ of *certiorari*. At a minimum, this Court should order summary reversal because in denying a certificate of appealability, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This is true because the district court's procedural ruling, denying Mr. Mathes the evidentiary hearing to which he was statutorily entitled – where his entitlement to relief on his claim of ineffective assistance of counsel was not conclusively refuted – is irreconcilable and in direct conflict with 28 U.S.C. § 2255, and was thus clearly debatable amongst jurists of reason under controlling precedent. Additionally, Petitioner's claim of ineffective assistance of counsel provided the required constitutional dimension for a certificate of appealability.

Relevant to this application for COA, Mr. Mathes' §2255 Motion with attached Memorandum of Law raised a claim that Mr. Mathes was deprived of the effective assistance of counsel on appeal. Specifically, that appellate counsel was deficient for failing to appeal on the basis that the trial court erred in adopting the pre-sentence investigation report's ("PSR") recommendation that Mr. Mathes be held accountable for 10,575.60 kilograms of marijuana equivalents – based on 35.023 kilograms of cocaine and 1 kilogram of cocaine base – and in applying the inadequately supported leadership enhancement recommended in the PSR.

Moreover, through his filings in the district court, Mr. Mathes established that had counsel presented these issues, there is a reasonable probability that the appellate court would have vacated Mr. Mathes' sentence and remanded for resentencing without the erroneously inflated drug quantity and inadequately supported leadership enhancement, as required by controlling precedent. As relief, Mr. Mathes sought to be resentenced without the erroneously inflated drug quantity and inapplicable leadership enhancement.

Clearly, these issues are cognizable on collateral review and do not under any view constitute a frivolous or unintelligible pleading. Moreover, these issues provide the requisite constitutional dimension for issuance of COA.

The district court denied Mr. Mathes' motion to vacate without holding the evidentiary hearing to which he was statutorily entitled, by virtue of the reality that his claims were neither refuted by the record, palpable incredible or conclusory, and where if proven Mr. Mathes's claim would entitle him to vacation of his sentence and resentencing.

Mr. Mathes's claim of ineffective assistance of appellate counsel is of constitutional dimension as it states a violation of the Fifth and Sixth Amendments. *See Evitts v. Lucey*, 469 U.S. 387, 393-94, 105 S.Ct. 830, 834-35 (1985); *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984).

The lower courts' resolution of Mr. Mathes' claim is debatable amongst reasonable jurists, as shown herein. Specifically, the district court's decision to deny Mr. Mathes's claim, without holding an evidentiary hearing, where he made a *prima facie* showing of ineffective assistance of counsel, is debatable amongst jurists of reason and deserves encouragement to proceed further. The Fifth Circuit's cursory adoption of the district court's rationale to deny Mr. Mathes the COA to which he is entitled should be summarily reversed by this Court.

**A. The Certificate of Appealability Standard.**

To obtain a certificate of appealability, a *habeas* petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must '[s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

"[A] COA does not require a showing that the appeal will succeed." *Id.* at 337. As this Court has explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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." *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Reasonable jurists could debate the merits of Petitioner's ineffective assistance of counsel claim and his entitlement to an evidentiary hearing on the same. The legal arguments, set forth below, demonstrate that Petitioner has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are "debatable among jurists of reason." *Miller-El*, 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

**B. Reasonable Jurists Could Debate Or, for That Matter, Agree That the Lower Court Erred or Alternatively Abuse its Discretion in Concluding That Mr. Mathes' Appellate Counsel Made a Sound Strategic Decision Not to Appeal the Preserved Sentencing Objections.**

The district court denied Mr. Mathes' motion to vacate, without an evidentiary hearing, based, at least in part, on its assessment that the acts and omissions of Mr. Mathes' appellate counsel could not be considered deficient performance as they were the fruits of counsel's strategic judgment.

Here, Craft [Mr. Mathes' appellate counsel] filed a comprehensive brief on the merits of Defendant's case, which, if successful, would have secured a reversal of Defendant's conviction. Defendant claims that Craft's performance was deficient for failing to raise objections to the PSR. Had those objections been successfully raised on appeal, the Defendant would be subject to resentencing, which may or may not have resulted in a more favorable sentence. The record shows that the objections to the PSR had been argued extensively at sentencing, and the arguments upon which the appeal was based, may have provided the most significant relief to the Defendant. Therefore, the record reflects

that Craft used his professional judgment to select the legal arguments he believed most beneficial to his client. Nothing in the record suggests this strategic choice was ill chosen when compared to the strategy of raising objections to the PSR on appeal, particularly considering that the issues raised on appeal would have, in fact, suppressed the wiretapping evidence relied upon by the PSR. As such, the Defendant has failed to overcome the strong presumption that Craft rendered adequate legal counsel in appealing this matter.

*[App. C, A16].*

The lower court's decision to so rule constitutes an abuse of discretion, or at a minimum reasonable jurists could debate whether the ruling constitutes an abuse of discretion, entitling Mr. Mathes to a COA on this issue for three reasons, cogently conveyed in Mr. Mathes' memorandum brief in support of his motion to vacate: 1) the record demonstrates that the objections were timely presented, erroneously overruled, and constituted meritorious grounds for appeal; 2) appellate counsel's uncontested misadvice to Mr. Mathes, that such objections could not be presented on direct review – which could only result from glaring ignorance of the issues cognizable on direct review, or a conscious intent to mislead a client; and 3) there is circumstantial evidence – in the form of the multiple show cause orders issued by the United States

Court of Appeals, indicating that Mr. Mathes' former appellate counsel fell below the Fifth Circuit's attorney performance expectations on at least four occasions – that appellate counsel lacked the technical proficiency, or failed to apply adequate attention to effectively represent Mr. Mathes on direct review.

In its tardy denial of COA, the district court overlooked the foregoing in stating that "[b]ecause Defendant has not pointed to any specific acts or omissions which can remotely be said to have resulted from counsel's failure to exercise reasonable judgment, he has not raised a debatable question as to whether counsel made a sound strategic decision not to appeal the preserved sentencing objections." To the contrary, in addition to arguing that appellate counsel was deficient for selecting an objectively weaker issue to appeal, Mr. Mathes raised credible allegations, set forth under penalty of perjury and uncontested by counsel – who the United States chose to forego input from – that appellate counsel affirmatively misled Mr. Mathes concerning the cognizability of the sentencing issues he wished to appeal on direct review. An attorney who lies to his client or lacks the basic understanding of the scope of cognizable appellate issues cannot be said to be "exercis[ing] reasonable judgment."

On the foregoing bases, the district court abused its discretion in ruling that Mr. Mathes' claim of ineffective assistance of counsel failed because counsel's acts and omissions were the fruit of his reasonable professional judgment and thus immune from consideration as

"strategic decisions." Likewise, the Fifth Circuit's cursory denial of COA overlooked these errors on the part of the district court. COA should issue on this question or some derivative.

C. Reasonable Jurists Could Debate Or, for That Matter, Agree That the the Lower Court Erred or Alternatively Abuse its Discretion in Finding That Mr. Mathes' Showing of Prejudice from Appellate Counsel's Deficiencies Was Lacking, Based on the Lower Court's View That Had Mr. Mathes Prevailed on Appeal and the Matter Been Remanded for Resentencing Without Application of the Erroneous Inflation of the Drug Quantity and the Inadequately Supported Leadership Enhancement, the Lower Court Could Have Imposed the Same Sentence Because the Guidelines Are Only Advisory.

The district court denied Mr. Mathes' motion to vacate, without an evidentiary hearing, based, at least in part, on its assessment that Mr. Mathes was not prejudiced by the deficient performance of Mr. Mathes' appellate counsel. The progeny of this Court's ruling in *Evitts v. Lucey*, 69 U.S. 387 (1985), have recognized that "[a]n ineffective appellate-assistance claim is governed by the same standard announced in *Strickland*, there applied to ineffective assistance provided at trial. Under *Strickland*, a petitioner must show that appellate counsel failed to perform according to reasonable professional standards which resulted in prejudice to his appeal." *United States v. Merida*, 985 F.2d 198, 202 (5th Cir.

1993). The Fifth Circuit clarified what constitutes prejudice in this context, "when a claim of ineffective assistance of counsel is premised on counsel's failure to raise an issue on appeal, the prejudice prong [] requires a showing that [the appellate court] would have afforded relief on appeal." *United States v. Reinhart*, 357 F.3d 521, 530 (5th Cir. 2004).

In this case, the lower court both offered a fallacious, circular rationale for its decision that Mr. Mathes failed to demonstrate prejudice and misconstrued the required showing of prejudice for Mr. Mathes' claim.

At sentencing, the Court, as described above, noted various portions of the record upon which it based its findings. The Defendant does not offer new arguments or directly address why those findings would be implausible considering the record as a whole; rather, Defendant simply re-argues the same objections raised by Doran at the sentencing hearing. As such, the Defendant has not provided any new or additional grounds upon which his appellate counsel would have successfully had his sentence reversed for clear error.

Further, in evaluating the prejudice prong, the Fifth Circuit considers "the potential minimum and maximum sentence that could have been received, [and] the

placement of the actual sentence within the range of potential sentences." Had appellate counsel succeeded in having the Court's adoption of the PSR's factual allegations reversed, the Court could have given the Defendant the same sentence, per the advisory guidelines. This, too, prevents a finding of prejudice in that Defendant fails to prove the outcome of his case would be different "but for" his counsel's alleged unprofessional error.

*[App. C, A17-18].*

First, the lower court basically rules that since it overruled Mr. Mathes' timely and apparently meritorious objections, then the appellate court would have – obviously – just agreed with the wisdom of the lower court. This stands the entire purpose of, and due process right enshrined in, a federal criminal defendant's right to appeal on its head. This ruling is also irreconcilable with precedent and analysis set forth in Mr. Mathes' motion to vacate and supporting papers, cogently applying that precedent to the facts underlying Mr. Mathes' objections and demonstrating that the objections which appellate counsel refused to present on direct review were meritorious.

Second, the lower court appears to apply the wrong standard of prejudice from deficient performance on appeal. Specifically, the lower court seems to believe that Mr. Mathes must establish that he would have received a

lesser sentence upon resentencing, a position which is simply wrong as a matter of law. Although Mr. Mathes disagrees with the cynical theorization that the lower court might reject guidance from a lesser advisory guidelines range, were he to prevail on direct appeal and be remanded for resentencing, more to the point, the question is irrelevant to prejudice from appellate counsel's deficient performance. To establish that deficient performance on appeal is prejudicial, a 2255 movant must show that the appeal would have had a more favorable outcome. *See, United States v. Merida*, 985 F.2d 198, 202 (5th Cir. 1993) ("Under Strickland, a petitioner must show that appellate counsel failed to perform according to reasonable professional standards which resulted in prejudice to his appeal. Merida is only entitled to collateral relief if, indulging the assumption that counsel's failure to raise the issue was below reasonable professional standards, the admission of the exhibits would have in fact occasioned reversal on appeal."). Mr. Mathes' memorandum brief in support of his motion to vacate included such a showing.

In its tardy denial of COA, the district court rejected the opportunity to cure its application of an erroneous standard of prejudice. The lower court's stubborn refusal to address the reality that in overruling Mr. Mathes' sentencing objections it clearly erred, constitutes an abuse of discretion, or at a minimum reasonable jurists could debate whether the lower court's ruling constitutes an abuse of discretion, entitling Mr. Mathes to a COA on this issue.

Additionally, the district court committed a mistake of law as to the applicable prejudice showing – by relying on its own ability to cure any prejudice from appellate counsel's deficiencies by offering a *post hoc* hail mary that the court could have imposed the same sentence without erroneously overruling Mr. Mathes' meritorious sentencing objection – which Mr. Mathes was required to make in order to establish ineffective assistance on direct appeal. This ruling conflicts with controlling precedent which defines prejudice in the context of Mr. Mathes' claim as, "a showing that [this Court] would have afforded relief on appeal." *United States v. Reinhart*, 357 F.3d 521, 530 (5th Cir. 2004). The district court's adoption of analysis based on the wrong standard of prejudice as grounds to deny Mr. Mathes' claim is more than debatable amongst reasonable jurists, it is quite simply a glaringly clear error of law, warranting COA and ultimately reversal of the erroneous denial. COA should issue on this question or some derivative.

**D. Reasonable Jurists Could Debate or, for that Matter, Agree that an Evidentiary Hearing was Statutorily Mandated.**

The district court erred and abused its discretion by denying Mr. Mathes's §2255 motion without holding an evidentiary hearing where his entitlement to relief on his claim was not conclusively refuted.

Title 28 U.S.C. § 2255 provides that "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . .

. grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (Emphasis added). Rule 8 of the Rules Governing §2255 Proceedings instructs: "[i]f the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Federal courts have applied the foregoing statutory and rule mandate to hold that "a motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir.1992) (per curiam). Instructively, courts recognize that "[w]hen [ ] factual allegations 'relate[ ] primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light,' and where the ultimate resolution rests on a credibility determination, an evidentiary hearing is especially warranted." *United States v. White*, 366 F.3d 291, 302 (4th Cir. 2004) (internal citations omitted).

An objective review of the record before the district court reveals that nothing conclusively established that Mr. Mathes was not entitled to relief on the claim of ineffective assistance of appellate counsel, presented in his motion to vacate. Thus, the district court's denial of Mr. Mathes's motion to vacate under 28 U.S.C. § 2255, where an evidentiary hearing was mandated, is more than debatable amongst jurists of reason, it is simply an abuse of discretion. COA should issue as to this question or some derivative.

The Fifth Circuit denied Petitioner a COA in a cursory three paragraph judgment. [App. A, A1-2]. Both the district court's erroneous ruling and the Fifth Circuit's cursory denial of COA are unsupportable on the record. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to this question.

**E. This Court Should Summarily Reverse the Fifth Circuit's Order Denying COA.**

This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. Summary reversals are "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was "contrary to" established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was "plainly wrong"). The Fifth Circuit's order denying Petitioner's motion for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit, vacate the Fifth Circuit's order denying COA and remand the matter to the Fifth Circuit with instructions to grant COA.

Respectfully submitted,

*Wilbert Mathes*  
WILBERT MATHES

*Pro Se Petitioner*

Fed. Reg. No. 07155-095  
FCI Oakdale I  
Post Office Box 5000  
Oakdale, LA 71463-5000

January 1st, 2022.