

21-7074

No.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
JAN 27 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BENNY DENNIS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Benny Dennis
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QUESTION(S) PRESENTED

- 1) Did the panel of the Fifth Circuit err by deciding the merit of an appeal not properly before the court to justify the denial of a certificate of appealability.
- 2) Has The Supreme Court of the United States overturned its own precedent in *Buck v. Davis*, 137 S.Ct. 759 (2017); *Lafler v. Cooper*, 132 S.Ct. 1376, 1385 (2012); *Lee V. United States*, 137 S.Ct. 1958, 1966 (2017); *Hill v. Lockhart*, 474 U.S. 52,59 (1985). Where the Court decided in evaluating a claim that guilty plea was unknowing or involuntary due to ineffective assistance of Counsel, the defendant must show that "there is a reasonable probability that but for counsel's error he would not have pleaded guilty and would have insisted on going to trial; the Supreme Court further held and instructed Courts in determining prejudice to focus on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial; the Supreme held that an attorney's misadvice regarding the consequences of a plea agreement can render the guilty plea involuntary.

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. The United States District Court for the Northern District of Texas (Wichita Falls Division)

Case No. USDC No. 7:17-CV-2

2. The United States Court of Appeals for the Fifth Circuit
Case No. 20-10731

RELATED CASES

1. Buck V. Davis, 132 S.Ct. 759 (2017)
2. Lafler V. Cooper, 132 S.Ct. 1376, 1385 (2012)
3. Lee V. United States, 137 S.Ct. 1958, 1966 (2017)
4. Hill V. Lockhart, 474 U.S. 52,59 (1985)
5. Tennard v. Dretke, 542 U.S. 274, 283 (2004)
6. Miller v. Cockerll, 537 U.S. 322 at 336-37 (2003).

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OTHER

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

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

OPINIONS BELOW

[X] For cases from federal courts:

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

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished..

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 9, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 21, 2021, and a copy of the order denying rehearing appears at Appendix C.

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

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

For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FIFTH AMENDMENT: No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a present-
ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2255(c)(1)(B): "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from...the final order in a proceeding under Section 2255."

28 U.S.C. §2255(a) "A prisoner in custody under sentence a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

STATEMENT OF THE CASE

The United States District Court dismissed Dennis §2255 motion pursuant to Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts.

The failure of the District Court to hold an Evidentiary hearing on the mertis of Dennis's Ineffective assistance of counsel claims was a direct and purposeful disregard for the mandates set forth by the Statute 28 U.S.C. § 2255 (b); Because "the motion and the files and records of the case [do not] conclusively show [Dennis] 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.

The failure of the Fifth Circuit Court of Appeals to issue a COA on Dennis's claim before determining the merits was a direct and purposeful disregard for the mandates set forth, by the Supreme Court in *Buck V. Davis*, 137 S.Ct. 759 (2017); Where the Supreme Court held that the Fifth Circuit exceeded the limited scope of the COA analysis. The COA statute sets forth a two-step process, the initial determination whether a claim is "reasonably debatable, and then, if it is, an appeal in the normal course. As the Supreme Court made it clear in its decision on the case of *Miller-El V. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1039, 154 L.Ed. 2d 931 (2003), a COA is a "jurisdictional prerequisite", and "until a COA has been issued, the federal courts of appeals lacks jurisdiction to

rule on the merits of appeals from habeas petitioners".

When considering a request for a COA, "the question is the debatability of the underlying constitutional claim, not the resolution of that debate", *Id.* at 1042.

The Fifth Circuit Court of Appeals stated in its denial that when the district court denies a COA on the merits, the movant must demonstrate that "reasonable jurists would find district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Dennis has made no such showing.

Accordingly, his motion for COA is Denied. Dennis's for for the appointment of counsel is also Denied.

The United States Court of Appeals held Dennis to a far more stringent standard than formal pleadings drafted by lawyer. See, *Haines v. Kerner*, 404 U.S. 519 (1972); that that pro se litigant to be held to a lesser stringent standard than formal pleadings drafted by lawyers.

REASONS FOR GRANTING THE PETITION

I. [Question One] Did the panel of the Fifth Circuit err by deciding the merit of an appeal not properly before the court to justify the denial of a certificate of appealability?

A panel improperly sidestepped the C.O.A. process by denying relief based on its view of the merits.

In reviewing the facts and circumstances of Dennis' case, the Fifth Circuit panel "paid lip service to the principles guiding issuance of a C.O.A." *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), but in actuality the panel held Dennis to a far more stringent standard. Specifically, the Fifth Circuit panel "sidestepped the threshold C.O.A. process by first deciding the merits of [Dennis] appeal, and then justifying its denial of a C.O.A. based on its adjudication of the actual merits, thereby "in essence deciding an appeal without jurisdiction." *Miller-El v. Cockerll*, 537 U.S. 322 at 336-37 (2003).

As the Supreme Court held on *Miller-El*, 537 U.S. 322 at 337.

In Dennis' case however, that is exactly what the panel did.

Dennis filed a motion in the Fifth Circuit seeking a certificate of appealability, so that he may appeal the district court's denial of his §2255 motion. The panel however, determined that Dennis' appointed lawyer had, indeed, provided effective assistance without an evidentiary hearing. Thus,

the panel concluded that Dennis should be denied a certificate of appealability because the appeal was obviously meritless.

The panel impermissibly sidestepped the C.O.A. inquiry in this manner by denying relief because the subsequent appeal would be meritless. The panels assessment of the merits is patently wrong. The panel could not possibly resolve the merits of the appeal based solely on a motion seeking a certificate of appealability. Moreover, without the issuance of a C.O.A. and the district court's record before the panel, the panel was without jurisdiction to determine the merits of the appeal.

II. [Question Two] Has the Supreme Court of the United States overturned its own precedent in *Buck V. Davis*, 137 S.Ct. 759 (2017); *Lafler v. Cooper*, 132 S.Ct.1376, 1385 (2012); *Lee v. United States*, 137 S.Ct. 1958,1966 (2017); *Hill v. Lockhart*, 474 U.S.52,59 (1985). Where the Court decided in evaluating a claim that guilty plea was unknowing or involuntary due to ineffective assistance of counsel, the defendant must show that "there is a reasonable probability that but for counsel's error he would not have pleaded guilty and would insisted on going to trial; the Supreme Court held and instructed Courts in determining prejudice to focus on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial; the Supreme

Court held that attorney's misadvice regarding the consequences of a plea agreement can render the guilty plea involuntary.

A. The Fifth Circuit of the court of appeals held that, when the district court denies a COA on the merits, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." Dennis has made no such showing, his motion for COA is denied. Dennis's Motion for the appointment of counsel is also denied and the Court has no power to say anything about Dennis request for an evidentiary hearing."

The merit in Dennis's §2255 is self-evident. He made the district court aware of counsel's ineffective assistance, pre-plea advice and coercion at his sentencing hearing when he was given the opportunity to speak before the Court, Dennis stated:

THE DEFENDANT: When he came to me and explained to me about the sentencing guidelines, okay? He said this is what--he looked at the complete discovery of the record and everything and this is what he determined. He said I'm facing 97 to 121 months, he said without the reductions. But if you sign today, just one month after I've been indicted, I haven't looked at no discovery or nothing. And he said if you sign today, which on the 26th, well, they will not apply some of the other stuff

such as I've been alleged involved in some drugs with another person. And also that he promised me that the judge normally does not go outside the guidelines. He stayed within it. He said he couldn't promise me the small end or maybe the 121 months, but a reduction of it, and I have no knowledge of a reduction, I wrote down exactly how he went about it and he-- which introduced--cause me to make this plea.

He went from--This what he told me. He said--I just have to read it how I wrote it. He says Dustin Nimez did promise Dennis, that's me a sentence of 57 to 71 months. He said he can't promise Dennis that he will get the 57 months but no more than 71 months. But any months between. But Dennis will have to sign today. If not, Dennis will be facing 5 to 40 years and most likely Dennis will receive 35 years or more.

This was like a treat to me and I said that--Okay. Dustin Nimez, he had talked with the U.S. Government's attorney and he said that there is a significant amount of drugs that Dennis has been accused of being involved but the Government will not pursue it or anything else, and that's kind of coerced. So Dennis, I assert my innocence but agreed to the punishment only because to have picking between 57 and 71 months and 35 years, I picked 57 to 71 months regardless of my innocence to that

plea. He said I show you on the sentencing guidelines how it come out.

I asked Dustin Nimez but-- I don't know why he--so he could verify this. He went across to No. 3,4,5, and 6. Then he went downward to No. 28. Then he went across to 97-121 months and after taking off the plea agreement and accepting responsibility and something about prison overcrowded-ness was a two-points. Therefore he went upward from 97 and 121 to 57 and 71 months. Then he briefed me on the questions for the Honorable Judge Roach. He said Dennis have to answer accordingly "to receive the" 57-71 months at sentencing. After reviewing the Presentence Report and found out that I had been coerced through this plea agreement and forced to sign it, then--Okay. Dennis filed a motion to dismiss his attorney for the above reasons.

Dennis clearly demonstrated under oath before Judge Reed O'Connor that his counsel provided constitutional ineffective assistance. Where the familiar two-prong test of Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective of counsel, Dennis must show that his counsel's performance was objectively unreasonable and prejudicial. Id. at 687-88. Dennis can satisfy the first prong by demonstrating that his counsel's performance fell below an objective standard of reasonableness. Id. at 688. The second prong can be satisfied by demonstrating that "there is a reasonable probability

"that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id.

Dennis's guilty plea was unknowing or involuntary due to ineffective assistance of counsel based on counsel's erroneous pre-plea advice and coercion.

"There is a reasonable probability that, but for counsel's errors, Dennis would not have pleaded guilty and would have insisted on going to trial."

Hill V. Lockhart, 474 U.S. 52,59 (1985). Further, the Supreme Court has recently instructed courts in determining prejudice to "focus on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Lee V. United States*, 137 S.Ct. 1958, 1966 (2017).

The Sixth Amendment to the United States Constitution provides that "a criminal defendant shall have the right to the assistance of counsel for his defense..." "The right has been accorded, we have said, 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens V. Taylor*, 535 U.S. 162 (2002) (quoting *United States v. Cronic*, 466 U.S. 648 (1984).

Dennis provided a sworn affidavit in support of his §2255 motion in support of the evidence of counsel's Ineffective assistance erroneous pre-plea advice and coercion that cause Dennis to enter into an unknowing and involuntary guilty plea. The Court denied Dennis's §2255 without an evidentiary hearing and did not get a declaration from Dennis Counsel and dismissed Dennis's §2255 motion pursuant to Rules Governing Section 2255 proceedings Rule 4(b).

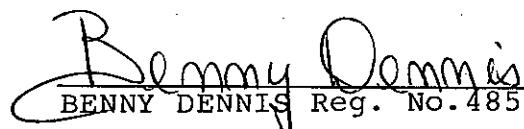
The District Court dismissing Dennis claim was in err, see; The text of §2255 states that "[u]nless the motion and files and records of the case **conclusively** show that the prisoner is entitled to no relief the Court shall cause notice thereof to be served on the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Similarly, the Rules dictate that, upon initial consideration by the assigned District Judge, a §2255 motion should be dismissed only "if it plainly appears from the motion, any attached exhibits, and the record of prior proceedings" that the moving party is not entitled to relief." In all other cases, "the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take action the judge may order." Rules authorize, where appropriate and by order of the Court,

discovery proceedings, an expansion of the record and an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


BENNY DENNIS Reg. No. 48551-177

Date: January 27, 2022