

No. _____

In the
SUPREME COURT OF THE UNITED STATES

GREGORY TODD NUMANN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Whether the Court of Appeals for the Ninth Circuit erred in denying Mr. Numann's motion for certificate of appealability of the denial of his 28 USC 2255 claim, where the trial court refused to hold an evidentiary hearing to resolve conflicting affidavits of whether trial counsel reviewed the government's evidence before advising Mr. Numann to plead guilty to child pornography charges without adequately analyzing the government's evidence and therefore not realizing that federal agents had been unable to access Mr. Numann's password-protected electronic device that was critical to the government's case.

PARTIES TO THE PROCEEDINGS

Gregory Todd Numann, petitioner.

United States of America, respondent.

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AR Ninth Circuit Court of Appeals docket number in Case 21-35275

CR Clerk's Record in the District Court for the District of Alaska,
Case no. 3:16-cr-0065-TMB-1

PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory Todd Numann hereby petitions this Court for a writ of certiorari to review the order of the Ninth Circuit Court of Appeals which denied a certificate of appealability of the District Court's denial of an evidentiary hearing and denial of Mr. Numann's 28 USC 2255 motion that alleged ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

Opinions Below

Mr. Numann appealed his term of imprisonment in *United States v. Numann*, 775 Fed. Appx. 316 (9th Cir. Aug. 15, 2019) (unpublished). The District Court's order denying Mr. Numann's 28 USC 2255 claim and denying a certificate of appealability in case no. 3:16-cr-0065-TMB-1, dated October 25, 2020, is at App-002 et seq. [See also CR 145] The Ninth Circuit's denial of Mr. Numann's motion for certificate of appealability in Case No. 21-35275 can be found at App-001. [See also AR 5]

Jurisdiction

The Ninth Circuit denied petitioner's motion for certificate of appealability on December 20, 2021. [App-001; AR 5] The jurisdiction of this Court is, thus, timely invoked under 28 USC sec. 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 USC 2252 provides in relevant part:

- (a) Any person who--
- (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, . . ., by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if--
 - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
 - (B) such visual depiction is of such conduct;

....

(4) either--

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, . . . which have been mailed or so shipped or transported, by any means including by computer, if--

- (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
- (ii) such visual depiction is of such conduct;

28 USC § 2255. Federal custody; remedies on motion attacking sentence:

(a) A prisoner in custody under sentence of 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 CASE AND FACTS

A. Change of Plea in the District Court.

Mr. Numann was indicted on two counts: Count 1 charged that Mr. Numann "did knowingly receive. . . visual depictions of minors. . . engaging in sexually explicit conduct"; [CR 2 at 2] Count 2 charged that Mr. Numann "did knowingly possess" prohibited images. [CR 2 at 2] Based on his attorney's advice, Mr. Numann plead guilty to receipt of child pornography and possession of child pornography in violation of 18 USC

2252(a)(2) and (b)(1) and (a)(4)(B) and (b)(2) respectively. [CR 97]

After Mr. Numann's guilty plea, the parties learned that federal agents had not been able to gain access to all of Mr. Numann's password-protected electronic devices that authorities had previously seized. [See CR 106 at 6-7] Therefore, the government did not have incriminating images from such devices. Of significance, the government's case was based on images from alleged file sharing, without sufficient evidence that Mr. Numann actually ever received, possessed or viewed such images. At the time of his guilty pleas, Mr. Numann did not know that the government had not been able to access his Apple computer, which was the ONLY computer allegedly used for file-sharing and the linchpin for the government to prove that Mr. Numann received and possessed prohibited images.

B. Ineffective assistance of counsel based on failure to adequately review key discovery before advising Mr. Numann to plead.

Mr. Numann filed a 28 USC 2255 motion in which he asserted that his attorney provided ineffective assistance of counsel when the attorney failed

to adequately analyze the government's discovery (specifically discovery purportedly retrieved from Mr. Numann's electronic devices) prior to advising Mr. Numann at both the plea and sentencing stages of the case.

[CR 113, 114]

The trial attorney provided an affidavit in which the attorney claimed to have reviewed the pertinent discovery:

Mr. Numann alleges I was ineffective for . . . allegedly fail[ing] to review discovery. This is incorrect. I did review the discovery because the discovery showed that the government could document that agents from the government downloaded images that contained child pornography from his I.P. address. The government could not access one computer seized pursuant to the search warrant because it was password protected and the other computer did not have the images that had been downloaded by the agents. Mr. Numann took that to mean that the government did not have the images that were downloaded.

I explained his argument had a few problems. First, they could not access one hard drive, so the images could be there. Second, the agents had documented that they had downloaded those images from his I.P. address. Further, agents documented that they downloaded different images on multiple occasions from Mr. Numann's I.P. address. That means that new images were getting onto Mr. Numann's computer.

It was a potential defense that Mr. Numann, using a bit torrent downloader, had inadvertently downloaded child

pornography, but I advised Mr. Numann that defense had some issues. One issue was that the government could not access the other computer. While Mr. Numann's refusal to give a password when the search warrant was executed would likely be inadmissible, the government could likely introduce evidence that they could not access a computer. It would not take a smart juror to figure out why they could not access a computer, which would not help his case. [CR 128 at 1-2]

The attorney's affidavit, asserting that he "did review the discovery" [CR 128 at 1-2] directly conflicts with Mr. Numann's affidavits (original affidavit and supplemental affidavit) that provide that had Mr. Numann known that the attorney had failed to review data that was allegedly procured from his electronic devices, Mr. Numann would have chosen to go to trial:

2. My trial attorney, Steve Wells, told me that he would review all of the government's computer-related evidence in my case.

3. I plead guilty based on my attorney's advice to plead guilty.

4. It was not until the change of plea hearing that I realized that my attorney had not in fact reviewed the government's computer-related evidence as he had told me that he would do. Once I realized he had not reviewed the discovery I believed that it was too late to back out of the change of plea and sentencing.

5. Had I been aware that my attorney had not reviewed the evidence before advising me to plead I would not have entered guilty pleas.

6. I want to withdraw my pleas and execute my right to trial.
[CR 113-1 at 1]

....

2. [(supplemental affidavit of petitioner)] Regarding review of discovery, my attorney told me that “the government does not always have what they think they have.” He told me he would review the discovery and I assumed he had done so when he advised me to plea. [CR 125 at 1]

C. The District Court’s order dismissing the ineffective assistance of counsel claim without holding an evidentiary hearing and denial of a certificate of appealability.

Without holding a hearing to resolve the factual dispute of whether trial counsel reviewed the government’s relevant computer-related evidence purportedly gathered from Mr. Numann’s electronic devices before advising Mr. Numann to plead guilty, the district court denied Mr. Numann’s 2255 application and denied a certificate of appealability. [App-B] [CR 145]

The district court reasoned that no evidentiary hearing was necessary because regardless of whether there were any images discovered on Mr.

Numann's electronic devices, the plea was based on evidence of images discovered from a file sharing site. [See CR 145 at 12-15] The court erroneously disassociated the Apple computer from the IT data flow architecture. The computer was the sole interface with a downloading user. Without the computer, Mr. Numann could have defended on the theory that the government could not have proven beyond a reasonable doubt that Mr. Numann received, possessed, or viewed any images.

Further, the district court erroneously found that Mr. Numann did not refer to "specific discovery that [trial counsel] failed to review. [App-B] [CR 145 at 12-14] Mr. Numann maintains that trial counsel failed to review the government's evidence gained from Mr. Numann's electronic devices – most specifically his password-protected Apple computer. The Apple computer was critical because it is the device that would have received the alleged IP derived evidence.

The district court correctly found that trial counsel filed an affidavit "that directly contradicts Numann's assertion that [trial counsel] did not review the discovery in this case." [App-B] [CR 145 at 12-14] This is

correct: trial counsel's affidavit contradicts Mr. Numann's affidavit. [CR 113-1] Mr. Numann believed that his attorney had determined from his assessment of the evidence that Mr. Numann should plead guilty. Had Mr. Numann understood that the case hinged on alleged file-sharing, with no evidence that Mr. Numann personally viewed or possessed the prohibited files, and that the government was not able to access the device where the alleged file-sharing occurred, he would have chosen to go to trial. This is critical because, as the District Court found, trial counsel has acknowledged:

the Government could not access "one computer seized . . . because it was password protected and the other computer did not have the images that had been downloaded by the agents." [CR 128]

Had the case gone to trial based on the evidence that agents downloaded images from a file-sharing program, Mr. Numann could have defended on several potential theories.

Mr. Numann asserts that due to ineffective assistance of trial counsel, his plea was not knowingly, voluntarily, and intelligently entered. The key question is whether Mr. Numann received competent legal advice and

whether Mr. Numann would have *chosen* to go to trial. Mr. Numann maintains that because the disputed computer that the government had been unable to access was a critical piece of evidence for the government's case, the government did not have evidence of the final link in the chain – Mr. Numann's access to the images. Had he been advised of the evidence and lack of evidence against him, Mr. Numann would have chosen to go to trial and the result of the proceeding would have been different.

D. The Ninth Circuit's denial of Mr. Numann's motion for a certificate of appealability.

Mr. Numann moved for a certificate of appealability in the Ninth Circuit Court of Appeals, maintaining that the district court erred in denying his request for an evidentiary hearing and his ineffective assistance of counsel claim based on a Sixth Amendment violation where a factual dispute existed of whether the attorney had reviewed the relevant discovery from the electronic devices before advising Mr. Numann to plead guilty. [AR 2]

The Ninth Circuit declined to issue a certificate of appealability, explaining: "The request for a certificate of appealability (Docket Entry No.

2) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).” [App-A] [AR 5]

In *Miller-El*, 537 U.S. at 327, this Court articulated that a petitioner satisfies the standard for demonstrating that a certificate of appealability should issue 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.

Mr. Numann maintains that the Ninth Circuit Court of Appeals erred in denying his motion for certificate of appealability on the grounds that he had not made “a substantial showing of the denial of a constitutional right.” [App-A] [AR 5] Mr. Numann maintains that the Sixth Amendment right to the effective assistance of counsel in the stage of the case where a criminal defendant must decide whether to waive his right to trial is one of the most important rights that the Constitution affords, reasonable jurists could conclude that Mr. Numann’s Sixth Amendment rights were violated,

and the Ninth Circuit's order denying the certificate of appealability was error.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE REVIEWING APPELLATE COURT ERRED IN FAILING TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE THE DISTRICT COURT FAILED TO HOLD AN EVIDENTIARY HEARING TO RESOLVE WHETHER COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT THE CRITICAL PLEA STAGE OF THE CASE, THEREBY VIOLATING THE DEFENDANT'S SUBSTANTIAL SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Importance of the question presented.

The importance of the right to effective assistance of counsel at the plea stage of a criminal case is paramount.¹ Where a factual dispute exists as to whether trial counsel reviewed critical discovery before advising the client to plea, the district court must hold an evidentiary hearing to resolve the factual question.² If the Ninth Circuit's denial of a certificate of

¹ *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

² See *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir.1992) (an evidentiary hearing on a claim is required where it is clear from the petition that: (1) the allegations, if established, would entitle the petitioner

appealability under such circumstances is allowed to stand, the factual question of what preparation counsel did before advising his client to plea, and the legal question of whether such advice was ineffective assistance will be left unanswered. Due to the paramount importance of the Sixth Amendment right to effective assistance of counsel, this Court should grant the petition in the instant case.

Trial counsel had an obligation to analyze the discovery provided and investigate whether evidence consistent with Mr. Numann's defense existed prior to advising his client to change his plea. Without having first determined whether evidence supporting the charges (and supporting the purported defense) existed, Mr. Numann could not have made an informed, knowing, and voluntary decision whether to plead to the charges. Failure to review all of the government's discovery, conduct reasonable investigations, and advise the client on whether the government

to relief; and (2) the state court trier of fact has not reliably found the relevant facts).

could prove its case constitutes ineffective assistance of counsel under *Strickland v. Washington*.³

A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process.⁴ Indeed, this Court has long recognized that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."⁵ The two-part test set forth in *Strickland v. Washington* applies to challenges to guilty pleas based on ineffective assistance of counsel.⁶ The first part of the test, the performance prong, requires a defendant to show that "counsel's representation fell below the objective standards of reasonableness."⁷ The second prong set forth in *Strickland* is the prejudice prong.⁸ It requires a defendant to "show that there is a reasonable probability that, but for

³ 466 U.S. 668 (1984).

⁴ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

⁵ *Id.*

⁶ 466 U.S. 668 (1984); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

⁷ *Id.* at 694.

⁸ *Id.*

counsel's unprofessional errors, the result of the proceeding would have been different."⁹

Before rendering advice, a competent attorney must, at a minimum, review the basic case documents, have a substantive discussion with his client about the facts, and follow up leads that these initial steps produce. Indeed, ABA Standards for Criminal Justice: Pleas of Guilty 14-3.2 (3d ed. 2015) provides in relevant part:

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. *Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.* *Id.* [(Emphasis added)].

Counsel's duties to investigate and to advise are codependent on one another. Criminal defendants are entitled to the guidance of *informed* counsel when making the critical decision whether to plead guilty or proceed to trial. The trial attorney must ensure that his client understands the charges against him and must offer his informed opinion as to the plea

⁹ *Id.*

that should be maintained, in light of the objective evidence anticipated to be presented by the government and the likely outcome at trial. Trial counsel is incapable of properly advising a client to change his plea if the attorney has failed to review the discovery provided by the government. In turn, a defendant cannot make an informed, intelligent decision to enter a plea if their attorney has not sufficiently reviewed the government's evidence and advised the client regarding how the evidence applies to the charges.

The attorney must provide straightforward information about the potential consequences of the charges if defendant pleads guilty and likewise those at trial. The attorney should not only convey basic information on the potential consequences, but "must actually and substantially assist the client ... by providing the accused with an understanding of the law in relation to the facts."¹⁰ The defendant should expect that counsel will "explain[] the elements necessary for the government to secure a conviction [and] discuss the evidence as it bears on

¹⁰ *Representation Regarding Guilty Plea*, 9 Fed. Proc. L. Ed. § 22:695 (2013).

those elements,” in order to give the defendant an accurate view of the likely outcome at trial.¹¹ Moreover, the attorney should “address considerations [he or the defendant] deem important … in reaching a decision” to account for the defendant’s priorities and particular circumstances.¹² Regarding the decision to plea, “an accused is entitled to rely upon his counsel to … offer his *informed opinion* as to what plea should be entered.”¹³ “[I]t is the role of counsel to counsel.”¹⁴.

B. The Ninth Circuit’s denial of a certificate of appealability, where the District Court failed to hold an evidentiary hearing to resolve conflicting affidavits regarding counsel’s review of key discovery necessary for the effective assistance of counsel, resulted in a violation of the Sixth Amendment.

Here, the District Court prematurely dismissed Mr. Numann’s 2255 application without holding an evidentiary hearing in order to make a

¹¹ *Smith v. United States*, 348 F. 3d 545, 553 (6th Cir. 2003).

¹² ABA Pleas of Guilty 14-3.2(b).

¹³ *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (emphasis added); *Williams v. Kaiser*, 323 U.S. 471, 475-76 (1945) (“Only counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate.”).

¹⁴ 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.3(b) (West 2012) (emphasis added) (quoting *Gallarelli v. United States*, 441 F.2d 1402, 1404 (3d Cir. 1971))

material factual finding of whether trial counsel sufficiently reviewed the evidence that the government purportedly seized from Mr. Numann's electronic devices before advising Mr. Numann to enter two guilty pleas. In turn, the court could not make the finding of whether Mr. Numann entered informed, voluntary pleas. Mr. Numann maintains that his attorney advised him to plead guilty to possessing and receiving prohibited images without sufficiently reviewing the government's evidence. Had Mr. Numann's attorney attempted to review the evidence he would have found *the government could not access his password protected devices and therefore could not prove beyond a reasonable doubt that Mr. Numann actually received, possessed, or viewed prohibited images by any means to include a file-sharing site.* Had Mr. Numann been aware of this fact he would have chosen to proceed to trial.

To comport with the guarantees of due process, a guilty plea must be knowing, voluntary and intelligent.¹⁵ The accused must be aware of the elements of the charges against him, the constitutional rights he is waiving

¹⁵ *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *United States v. Butcher*, 926 F.2d 811, 817 (9th Cir.1991).

by pleading guilty, and the possible punishment he faces.¹⁶ “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’”¹⁷

Mr. Numann was entitled to make a decision of whether to plead guilty or go to trial based on his attorney’s advice. But such advice could only be constitutionally effective if the attorney had assessed the government’s case, which in turn required the attorney to sufficiently review the discovery. Mr. Numann had a Sixth Amendment right to decide whether to go to trial after being advised by counsel regarding his potential defenses to computer-related crimes. Mr. Numann would have proceeded to trial had he known that the government had not been able to access the relevant electronic devices.

C. This case is a good vehicle to address the question presented.

The instant case presents a good opportunity to address the question

¹⁶ *Id.* at 242-43.

¹⁷ *Hill v. Lockhart*, 474 U.S. 52, 56, (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

presented. There are no preservation issues. The issue of the evidentiary hearing was raised in the district court and Court of Appeals. The affidavits present a factual dispute over whether the attorney assessed the government's evidence purportedly gathered from electronic devices before advising his client to plead guilty on all counts. It is not disputed that the district court failed to hold an evidentiary hearing on this issue, yet the district court and court of appeals determined that no substantial constitutional right was violated.

Second, the appellate court's resolution of the issue was unreasonable. The appellate court found no violation of a substantial constitutional right, yet the Sixth Amendment right to effective assistance of counsel at the plea stage of a criminal case is paramount and a criminal defendant must be adequately informed before giving up his right to trial.¹⁸

CONCLUSION

For the reasons set forth above this court should grant this petition for writ of certiorari.

¹⁸ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Respectfully submitted this 3rd day of March 2022.

s/Jane Martinez

Attorney for Petitioner