No. 22- 7552 ORIGINAL

In the Supreme Court of the United States

KALVIN BISHOP

PETITIONER,

V.

SUPERINTENDENT COAL TOWNSHIP SCI; ET AL

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KALVIN BISHOP
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QUESTION PRESENTED

1. Whether the Third Circuit Court of Appeals erred when the Court dismissed Petitioner's application for certificate of appealability when other jurists of reason found issue to be debatable and adequate to proceed further?

PARTIES TO THE PROCEEDINGS

The Petitioner id Kalvin Bishop. Respondent's are Superintendent Coal Township SCI; *et al.*

RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner states that there are no proceedings directly related to this case in this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Kalvin Bishop, respectfully petitions this Court for a Writ of Certiorari to review the court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

Third Circuit Court of Appeals dismissal of application of (COA) (Pet. App. A). The District Court's opinion (Pet. App. B). Magistrate Judge's Report and Recommendation (Pet. App. C).

JURISDICTION

The District Court had jurisdiction over this habeas corpus petition presented by a state prisoner pursuant to 28 U.S.C. §§ 2241, 2254. The Third Circuit Court appellate jurisdiction over this timely Petition for Certiorari pursuant to 28 U.S.C. §§ 1254(1), 2254.

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STATUTES AND RULES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under 28 U.S.C.S. § 2253(c) establishes procedural rules and requires a threshold inquiry into whether a court of appeals may properly entertain such an appeal. A COA determination requires an overview of the claims in a habeas corpus petition and a general assessment of their merits by (1) looking to the district courts application of the AEDPA to a prisoner's constitutional claims, and (2) asking whether that resolution was debatable among jurists of reason. This threshold inquiry does not require full consideration of the factual and legal basis adduced in support of the claims. In fact, the statute forbids it. Accordingly, a court of appeals should not decline a Application for a COA merely because the Court of Appeals believes the applicant will not demonstrate an entitlement to relief, for (1) it is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief, and (2) when a COA is sought, the whole premise is that a prisoner has already failed that endeavor.

28 U.S.C.S. § 2253(c)(2) a prisoner seeking a COA need only demonstrate a substantial showing of a denial of a constitutional right. Moreover, a prisoner satisfies this standard by demonstrating that a jurist of reason could (1) disagree with the district courts resolution of the prisoner's federal constitutional claim, or (2) conclude the issues presented are adequate to deserve encouragement to proceed further.

STATEMENT OF THE CASE

Petitioner, Kalvin Bishop, requests this Court to grant a writ of certiorari and remand Petition to the Third Circuit Court of Appeals to issue a Certificate of appealability (COA) for review of the denial of his habeas petition seeking relief from a state judgment of conviction. Petitioner was convicted of third-degree murder, aggravated assault, and possession of an instrument of crime, after pleading guilty in Philadelphia's Court of Common Pleas. Petitioner seeks review of the Third Circuit's Court's dismissal of Application of (COA) and the District Court's dismissal of his habeas petition without issuing a COA on the following claim: Whether trial counsel provided ineffective assistance of counsel (IAC) for failing to object to trial court's coercive participation in the guilty plea negotiation which caused Petitioner to plead guilty against his will. For the reasons below, the Court should remand this Petition to the Court of Appeals and issue a (COA).

FACTS

On April 17, 2012, Petitioner's shot and killed Shirkey Warthen in a case of arguable self-defense while mistakenly shooting a bystander, Lucretia Philips. (App. D Guilty plea Tr. 38-40, Dec. 13, 2013). In December 2013 Petitioner proceeded to trial on charges of first-degree murder, aggravated assault, and related offenses, after expressing no interest in accepting the Commonwealth's plea offer of 25-50 years of imprisonment. (Guilty plea tr. 3). On the second day of jury selection, the trial Court asked defense counsel whether he wanted it to have a discussion with defendant about his decision to reject the Commonwealth's plea offer. (Guilty plea Tr. 3:3-6). Defense counsel responded by informing the Court that defendant was not interested in the Commonwealth's offer: "I went to the prison last night, spoke with him about an hour-and a-half. **His position has not changed.**" (Guilty plea Tr. 3:7-9)(emphasis added). After the trial Court implied that defense counsel was not capable of securing an acquittal the Court decided to have a "conversation" with the defendant about his choice to reject the Commonwealth's offer. (Guilty plea Tr. 5:18-19).

During the trial Court's "conversation" with defendant, he repeated his desire to reject the Commonwealth's plea offer:

> "[Trial Court] Your attorney had a discussion with you yesterday on the record regarding the offer that had been made to you to enter a guilty plea to two of the charges I think it was.
>
> [Defendant] Yes.
>
> [Trail Court] That you are facing.
>
> [Defendant] Yes.
>
> [Trial Court] And yesterday you indicated that you were not interested in taking the offer?

[Defendant] Yes."

The trial Court continued "conversation" which consisted of its emphasis that the Commonwealth had multiple eye witnesses to the shooting who would identify the defendant, prompted the Commonwealth to interject by minimally modifying its plea offer to 22.5 to 45 years imprisonment. (Guilty Plea Tr. 6: 13-17:7).

The trial Court then proceeded to expressly imply that defendant should accept the Commonwealth's modified plea offer because his defense was frivolous and that, if he proceeded to trial, he would certainly be convicted of first-degree murder and sentenced to life imprisonment:

> "[Trial Court] So there's been an adjustment in the offer to 22 ½ to 45 years, okay. Now what I want to be sure that you understand is that should the jury listen to the various witnesses including the four people that apparently knew you and observed you shooting the two people here with death resulting for one of them, well, what I can say is, I never know what a jury is going to do. But the chances are-put it this way. I would not be surprised if they returned a verdict of guilty on murder in the first degree. If that were to happen, I have no choice but to sentence you to life in prison without parole.
>
> [Defendant] Yes.
>
> [Trial Court] Okay, how old are you, 25 now?
>
> [Defendant] Yes.
>
> [Trail Court] So you understand that I mean, if you do the math. If you were to take the offer, you would be out, at have a chance of being paroled before you were 50.

(Guilty Plea Tr. 7:9-8:2)

After the trial Court expressed its opinion that pleading guilty was defendants only means to avoid a life sentence, Petitioner reluctantly accepted the Commonwealth's plea offer 22 ½-45 years imprisonment, which is virtually identical to the original plea that he previously rejected. (Guilty Plea Tr. 31-40). The only difference was the trial

Court intervened and facilitated the plea offer of 22 ½-45 years incarceration, which defense counsel did not object to the trail Courts pre-disposed disposition "conversation" with defendant. (Guilty Plea Tr. 1-40).

ARGUMENT

Reasonable jurists would debate whether counsel was ineffective for failing to object to trial Courts coercive participation in plea proceedings which forced Petitioner plead against his will?

REASONS FOR GRANTING THE WRIT

A petitioner seeking habeas relief from a state judgment, pursuant to 28 U.S.C.S. § 2254, on a claim of ineffective assistance of counsel (IAC) must demonstrate that his attorney's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A counsel's performance is deficient if it falls below an objective standard of reasonableness," *Id.* at 688, and a petitioner is prejudiced where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. A district Court reviewing a State Courts habeas petition cannot grant relief on a claim previously denied by a state Court unless the State Court's decision offends clearly established federal law. 28 U.S.C. § 2254(d).

If a district Court dismisses a habeas petition, a Court of Appeals does not have jurisdiction to entertain an appeal from the district Courts decision unless a certificate of appealability (COA) is issued by either the district Court or the Court of Appeals. 28 U.S.C. § 2253. A (COA) must issue where a petitioner makes a "substantial showing of the denial of a constitutional right." *Miller-el v. Cockrell*, 537 U.S. 322, 336 (2003). A

petitioner satisfies this standard by showing that "reasonable jurists would 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." *Id.* at 337. The Supreme Court has cautioned, however, that a COA does not require a "showing that the appeal would succeed." *Id.* "Accordingly, a court of appeals should not decline the application for a COA merely because the prisoner did not convince a Judge ... he should prevail ... After all, the whole premise is that the prisoner has already failed in that endeavor." *Id.*

The unique facts of this case present a substantial showing of the denial of Petitioner's Constitutional right to effective assistance of counsel. Here, the district Court held that defense counsel did not provide IAC when he failed to object the court's questioning the defendant at plea proceedings. The district Court adopted the State's reasoning that the trial Court did not coerce Petitioner into pleading guilty because it did not participate in the negations but only informed him of the maximum sentence for first degree murder. (District Ct. op., 10-11 July 14, 2021, Efc. No. 39 App. B). However, reasonable jurists would debate and likely conclude that the State Court's rejection of Petitioner's (IAC) claim is contrary to clearly established federal law and that the district Court's and the Court of Appeals dismissal of Petitioner's habeas petition and application for a (COA) warrants further review.

This Court recognizes the judicial involvement in plea discussing is inherently coercive *United v. Ebel*, 299 F.3d 187, 191 (3rd Cir. 2002). "A coerced plea would not only violate a defendant's constitutional right, it would be also increase the chance of convicting the innocent." *Id.* (citing *United States v. Bruce*, 976 F.3d 552, 556 (9th Cir.

1992). "Any discussion of the penal consequences of a guilty plea, verses going to trial before the defendant and the government has reached an agreement is inherently coercive, no matter how well-intended." (citing *United States v. Cano Varela,* 497 F.3d 1122 (10th Cir. 2007). "The defendant may fear that rejection of the plea will mean imposition of a more severe sentence after trial or decrease his chances of obtaining a fair trial before a judge whom he has challenged." *United States v. Werker*, 535 F.3d 198, 202 (2nd Cir. 1976). In *Bruce,* when the defendant refused the prosecutor's plea offer of 42 months imprisonment, the district Court participated in the plea proceedings by engaging in the following discussion with defendant:

> "The Court: verses a prospective 42 months [under the plea agreement] ... I mention [the life sentence] to you because the new laws are so heavy, so very, very heavy, and I am the one that has to impose that sentence if you are found guilty on all of those things that is going to be tough, but that is what [the] law says I have to give you. You have to think about that okay. See you tomorrow morning, think carefully about that tonight. I don't know if you leave it open tonight. [Prosecutor] Your honor, at the courts request, I will.
>
> The Court: I would think seriously about it, both of you, life in prison is a long time it is really nothing to play with. Gentlemen [sic] are you parents?
>
> The Court: If it was my child, I would think carefully about it, if it comes down to that, I have to give it."

Id. at 555

The defendants subsequently accepted the prosecutor's plea offer. *Id.* The Ninth Circuit vacated the convictions reasoning that the trial court's comments amounted to coercive participation and rendered it a compromiser for the government. *Id* at 557.

In *Cano-Varela*, the defendant entered a pre-trial status conference disappointed with the plea his lawyer negotiated and intended to request a change of counsel so that he could proceed to trial. During this conference, the court informed defendant that he

would potentially face a much more lengthy sentence if he went to trial then if he pleaded guilty. Thus, defendants guilty plea and sentence were vacated in the (10th Circuit).

A (COA) should have been issued in this case because Petitioner's trial Court's coercive participation in the guilty plea negations are similar to and more troubling than the coercive court participation in *Bruce* and *Cano-Varela*.

First, in stark contrast to the District Court's assessment, the record reveals the trial court did much more than merely inform Petitioner of the possible consequences of being found guilty. Instead, the record shows that the facts here are virtually identical to those in *Bruce* and *Cano-Varela*. Just as the *Bruce* trial court *impermissibly* advised the defendant to rethink accepting the plea offer or face a life sentence, Petitioner's trial Court did the exact same thing when it stated that he would likely receive a life sentence if he did not accept the plea offer.

Second, similar to *Bruce* where the trial court's coercive discussion with defendant's focused only on the negative of going to trial verses the benefits of accepting a guilty plea that they did not want, identical to *Cano-Varela*. Petitioner's trial Court's "conversation" consisted entirely of a "doomsday" lecture virtually identical to that in *Bruce* and *Cano-Varela* that highlighted only the potential negative consequences of rejecting the plea offer-i.e., being found guilty and sentenced to life-while openly encouraging its acceptance. As the *Bruce* trial Court's discussion with the defendant communicated only the likelihood of the jury returning a guilty verdict, Petitioner's trial court did not communicate the possibility of an acquittal or even a verdict of a lesser included offense, despite his plausible case of the court's "doomsday" lecture has left an impression upon the record and obviously on the defendant, as follows:

> The Court: "That's fine. So there's been an adjustment in the offer to 22 ½ to 45 years, okay. Now what I want to be sure that you understand is that should the jury listen to the various witnesses including the four people that apparently know you and observed you shooting the two people here with death resulting in one of them, well, what I can say is I never know what a jury id going to do. [But the chances are—Put it to you this way. I would not be surprised if they returned a verdict of guilty on the murder in the first-degree. If that was to happen, I have no choice but to sentence you to life in prison without parole."].(Guilty Plea Tr. 7:9-21).

Petitioner's trial Court was not a judicial officer but an advocate for the government's plea offer. *Bruce* at 976 F.2d at 557.

Third, similar to *Bruce* where the defendants were steadfast in their decision to reject the government's plea offer until the trial court's intervention, Petitioner's own attorney could not convince him to reconsider his rejection of the plea offer. (Guilty Plea Tr. 3:7-9). Petitioner questioned his resolve to proceed to trial only after the trial Court's "conversation" with him. What highlights the coercive nature of the trial Court's "conversation" with Petitioner in a way that distinguishes this case entirely from *Bruce* is that the trial Court's participation in the plea discussion took place after the defendant selected 12 jurors and rejected the district attorneys offer of 25-50 years on the first day of *voir dire*, instead of objecting to the court's inquiry into the defendant's decision to exercise his right to a jury trial defense counsel appeared to complain to the court about defendant refusing to accept plea offer. (Guilty Plea Tr. 3:7-9).

The facts here are more troubling than *Bruce* because there the defendant's were not "bullied" into pleading guilty during jury selection. Instead, the Court's coercion in *Bruce* occurred prior to the commencement of a jury trial but occurred at a pretrial hearing to discuss the possibility of a non-trial disposition. Compare *Bruce*, 976 F.3d at 544 with (Guilty Plea Tr. 1-40).

Finally, what is especially problematic about this case, and which warrants relief or further appellate review is that unlike *Bruce* where the trial court merely expressed the benefits of the defendant's acceptance of the plea offer, that court did not express its subjective opinion about the merits of available defenses. Here, Petitioner's trial Court went a step further than the court in *Bruce* because it expressly implied that Petitioner's defense was frivolous, and that the plea offer was his only means to avoid a life sentence. (Guilty Plea Tr. 7:9-21). The Court's participation was so **egregiously prejudicial** that in *United States v. Werker*, 535 F.2d 198 (2nd Cir 1976) the defendant filed a writ of mandamus to prevent the judge from communicating with defendants about entering into a guilty plea. The writ of mandamus was granted ordering the judge to refrain from promising specific sentences for a subsequent plea of guilt.

Reasonable jurists would debate and likely conclude that defense counsel's performance fell well below an objectively low standard of reasonableness and that there is a reasonable probability that Petitioner would have exercised his right to continue with his jury trial had counsel objected to the trial Court's invitation to have a "discussion" to persuade defendant to plead guilty (Guilty Plea Tr. 3:3-6). (No objection to the Court's inquiry). "Want me to have a discussion with your client this morning about his decision [to get trial?]."

CONCLUSION

The petition for a Writ of Certiorari should be granted.

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Date: March 29, 2022