No. 21-7692

IN THE

~~SUPREME COURT OF THE~~

UNITED STATES

MANUEL GERALDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Mr. Manuel Geraldo
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LIST OF PARTIES

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

QUESTION PRESENTED

Whether a Court of Appeals Paying Lipservice in denying a COA violates the princples of Due Process in effecting petitioner's opportunity to be heard.

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

OPINIONS BELOW

The opinion of the United States court of appeals for the Second Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court for the Southern District of New York appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date of which the United States Court of Appeals for the Second Circuit decided my case was January 13, 2022.

No timely petition for rehearing or en banc was filed.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

Title 28 U.S.C. §2253(c); §2255

Federal Rules of Appellate Procedure, Rule 22(b)

STATEMENT OF THE CASE

Petitioner caused to be filed a motion under 28 U.S.C. §2255 collaterally challenging his conviction, by way a guilty plea in the United States District Court for the Southern District of New York. Consequently, for reasons unknown to petitioner, his §2255 motion had not been filed with the Court so after contacting the court in writing and the government was directed to respond.

On January 11, 2019, the government filed its opposition to petitioner's §2255, to which he filed a reply a month later. The district court issued an Order denying petitioner relief under §2255, and therein also denied him a certificate of appealability stating he had "not made a substantial showing of the denial of a 'federal' right on January 21, 2021.

After filing a notice of appeal, the Second Circuit court of appeals directed petitioner to file a motion for a certificate of appealability, to which he compiled. On January 13, 2022, a panel of the appellate court issued an Order denying petitioner's motion and dismissed the appeal because he had not made a substantial showing of the denial of a constitutional right.

This petition for a writ of certiorari follows seeking to court to grant him a COA, vacate the circuit court's order and remand the case to issue him a COA.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly admonished lower courts concerning request for a Certificate of Appealability (COA) by habeas applicant's seeking to appeal the denial of a habeas corpus. See Buck v. Davis, 580 U.S. ___ (2016); Miller-El v. Cockrell, 537 U.S. 322 (2003); Slack v. McDaniel, 529 U.S. 473 (2000).

This standard spawned from earlier habeas corpus jurisprudence prior to the enactment of the AEDPA which required a minimal showing when seeking a Certificate of Probable Cause (CPC) by state prisoners. See Barefoot v. Estelle, 483 U.S. 880 (1983).

The Barefoot standard, as it become known, simply required that a habeas applicant to demonstrate a reasonable jurist could disagree with the decision another court could decide the matter differently, or the claim was adequate to serve encouragement to proceed further. Barefoot, supra at n. 4. This modest standard was later incorporated directly into the COA standard which required habeas applicant's to make a "substantial showing of a constitutional right." See Slack, supra (citing 28 U.S.C. §2253 (c)(2)).

Importantly, the substantial showing requirement in §2253(c), is clearly in correlation with the Federal Rules of Appellate Procedure (F.R.A.P.), Rule 22(b), where the statute is referred. When this rule was initially promulgated, it assured that the matter of the certificate would not be overlooked, and that the reasons for denial of the writ would be placed on the record for review purposes. See F.R.A.P. 22(b)—Advisory Committee Notes, 1967 Adoption.

Consequently, lower courts have continued to freeze habeas applicant's opportunity to be heard on appellate review for their collateral relief motions by simply denying a COA beginning at the district court level. (See Appendix B, p. 16)("The Court declines to issue a certificate of appealability. Geraldo has not made a substantial showing of a denial of a **federal** right, and appellate review is therefore not warranted")(Emphasis mine).

This Court has warned lower courts of the practice of paying lipservice to the COA standard; Tennard v. Dretke, 524 U.S. 274, 276 (2004), which is clearly shown to have been the case in this instance. Especially considering, the district court's Order "decline to issue a certificate of appealability [because petitioner allegedly] has not made a substantial showing of the denial of a **federal** right[.]" (See Appendix B).

Significantly, the district court refers to the lesser standard rendered obsolent by the change in the AEDPA, which substituted the "federal right" for a "constitution right" which narrows the range for error that could support issuance of a COA. See Slack, supra. However, even in spite of this obvious change, the significance of the change still does little to the apparent purpose of the COA which does not require a habeas applicant to show he would prevail. See Miller-El, supra at p. 337 ("It is consistent with §2253 that a COA will issue in some instance where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'")(quoting Barefoot).

Given the divergence of the district court and appellate court's COA determination i.e., one stating petitioner did not make the proper showing of a "federal right" (found in the old CPC standard), and the appellate court finding petitioner did not make a showing of a "constitutional right" demonstrates the need for this Court's attention in petitioner's case. It has long been recognized that a court of appeals must properly apply the COA standard (and certainly the district court is charged with the same responsibility), in order to determine whether a habeas applicant's claim is debatable. This would necessarily mean that he has failed to show the claim is meritorious; however, in the COA determination—which this Court has stated is a separate proceeding from the underlying merits, Miller-El, supra—the converse is not true because a habeas applicant's failure to ultimately show his claim is meritorious cannot mean logically that the failure to satisfy the preliminary showing for a COA.

As previously stated, this Court has acknowledged that a court considering the COA determination should not merely "pay lipservice to the principles guiding issuance of a COA[,]" and if reasonable jurist would find debatable or wrong the district court's disposition of petitioner's claim, not whether he made a sustantial showing of the denial of a federal right. See Tennard, supra.

Therefore, for the appellate court to utilize essentially the smae lipservice that the district court did in denying petitioner a COA contravenes due process principles. Particularly when, a reasonable jurist could certainly dsiagree wiht the district court's determination on petitioner's competency and mental health issues, when counsel befittingly failed to raise prior to having him plea

guilty. In fact, the district court itself "recognized at sentencing, Geraldo ha[d] a learning disability: ADHD." (See Appendix B, p. 13). And even assuming, that this is not the criteria to invalidate petitioner's guilty plea, it certainly can support a claim of ineffective assistance of counsel for failing to investigate. See Strickland v. Washington, 466 U.S. 668 (1984)(recognizing a counsel's duty to investigate); see also, Rompilla v. Beard, 545 U.S. 374, 383 (2005).

A reasonable jurist could certainly find that petitioner's ADHD issues would affect his ability to control his impulses and such illness has been found to demonstrate a person's reflective behavoir and planning. See e.g., Dallas v. Warden, 969 F.3d. 1285, 1301 (11th Cir. 2020). Moreover, given petitioner's age at the time of the commission of the offense supports the need for an attorney representing a early teen or young adult raise mitigating evidence of brain maturity at the earliest possible interval of the proceedings.

The issues raised in petitioner's habeas corpus proceedings, even if found to not have supported granting relief on the merits as recognied could not defeat his COA request given the preliminary standard applicable to such request. Furthermore, denying petitioner a COA by just paying lipservice to the applicable modest standard as repeatedly established by this Court. And, the lower courts in this instance failure to apply the proper standard governing a COA amounts to a contravention of due process. See Mathews v. Eldridge, 424 U.S. 319 (1976)(Fundamental element of due process is a litigant having an opportunity to be heard at

a meaningful time and meaningful manner).

Thus, this Court should grant this petition, vacate the lower court's decision to deny a COA, and remand to the properly consider his request for a COA.

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari in this case.

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