No. 21-7925

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Wallace Smith — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Wallace Smith #70111-097
(Your Name)

F.C.I. Terminal Island P.O. Box 3007
(Address)

San Pedro, CA 90733
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1) Did the Ninth Circuit err by deciding the merit of an appeal not properly before the court to justify the denial of certificate of appealability.

2) Has the Supreme Court of the United States everturned its own precedent in Buck v. Davis, S.Ct. 759 (2017); Trevino v. Thaler, 133 S.Ct. 1911 (2013); Martinez v. Ryan, 566 U.S. 1 (2012); and Massaro v. United States, 123 S.Ct. 1690 (2003). Where this court decided that a procedural default would not bar a claim of ineffective assistance of trial counsel, when collateral proceeding was the firdt place to challenge a conviction on a ground of ineffective assistance.

3) Has the Supreme Court of the United States overturned its precedent in Brady v. Maryland, 83 S.Ct. 1194 (1963); Arizona v. Youngblood, 109 S.Ct. 885 (1988); and United States v. Agurs 96 S.Ct. 2392 (1976). Where if there is evidence that is favorable to the defense that it should be handed over.

4) Does the Supreme Court decision in Buck v. Davis violate the equal protection of the law, where it allows a different standard of review for state prisoners as compared to federal prisoners who are similary situated.

LIST OF PARTIES

[x] 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:

RELATED CASES

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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,
[x] 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[ ] is unpublished.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,
[x] 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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 13, 2021.

[X] 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including May 12, 2022 (date) on March 11, 2022 (date) in Application No. 21 A 498.

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 questions presented implicate the following provisions of the Constitution of the United States code.

The Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury except in cases arising in the land or navel 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 witness against himself, nor be deprived of life, liberty, or property without due process of the law; nor shall private property be taken for public use, without compensation.

The Fourteenth Amendment: All person born or naturalized in the United States and subject to the jurisdiction therof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges, or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2253(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 section2255."

28 U.S.C..§2255(a): "A prisoner in custody under sentence of the court established by Act of Congress claiming 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 a 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

On December 20, 2011 Department of Homeland Security (DHS) agent Tim Kotman used a web appication called CPS to search the internet for people using peer-to-peer software who are making known files of child pornograhpy available for public download. Using the CPS application, he identified an IP address that had files of child pornography available to download begining in mid-November 2011.

After obtaining the physical address and subscriber name foe the IP address from the internet provider, he obtained a warrent to search the address of the subscriber, Mary Loyche, Lemoore, California. When the warrent was executed om December 23, 2011, Mary and Greg Loyche, defendant Robert Smith's mother and stepfather, were present in the house, while Smith was in a trailer on the property. Agents found a laptop in the living room of the house and an external hard drive in a case without a plug underneath the bed in the trailer.

After Smith waived his Miranda rights, agent Kotman and another agent interviewed Smith. Portions of the recored interview were admitted and played for the jury. During his interview, Smith told agents the he lived in the trailer on the property and his parents lived in the house. Smith acknowledged that the laptop found in the living room in the house was his and he was the only one who knew the password. He later explained that he kept the password similar to another password and shared it with his ex-girlfriend in case she wanted to access the computer. Smith also told agents that his daughter, who lived a few houses away, sometimes used the computers in the house.

When asked if he used file-sharing software, like Limewire, Smith replied that the last time he had used such software was about five years ago and none would be found on his computer.

He acknowledged that he used file-sharing programs in the past to search for or download movies. When asked specifically about the peer-to-peer software called Frostwire, Smith explained that he had tried to install it a few months ago, but it did not work and he uninstalled it. Smith also told agents that they would not find anything on his computer except for Netflix, and web browsers. Smith normally kept the laptop except when he was sleeping in the trailer, or was receiving medical treatment.

On the external hard drive in the trailer, agents found a folder labeled "Rober's Anime" with a subfolder "Animals" that contained another subfolder "MYOB" that held child pornography files. When agents asked about the folders, Smith admitted that he created the "Robert's Anime" folder, but denied knowing about the "Animals" folder. Smith know that MYOB stood for "Mind Your Own Business."

Elizabeth Crow was Smith's former girlfriend. They dated from 2002 to 2011. They lived in Lemoore until December 2003, when they moved to Salinas, California. Crow testified that SMith bought a desktop computer in 2009 and then purchased a laptop using financail aid funds a few days before he moved out of her house in mid-June 2011. When Smith moved out, he took his desktop and laptop with him and moved back to his parents. Crows says she never accessed the laptop and did not know the password.

Crow testified that the desktop was always left open without a password. When asked if she ever accessed the desktop, Crow responded "only once **after** he moved out." She then testified that in early June 2011 when Smith was hospitalized, She opened the desktop to try and find another phone number for Smith's parents because his mother was not returning calls to her cell phone. When she opened the computer ot tapped it to wake it up, there was an image of a nude toddler lying with an adult male ejaculating over the toddler. She turned off the moniter so it would not be accidentally seen by anyone else in the home. When Smith returned from the hospital, she confronted him about the image.

He responded that it had been sent by accident and he did not get a chnace to delete it. They continued to live together for about another month and have had only brief interactions since then because they have a child together.

DHS angent Ulises Solorio testified as a computer forensic expert. He used a PowerPoint presntation to explain to the jury how the internet and peer-to-peer software works. Using forensic software, he conducted a forensic examination of the laptop and external hard drive. The laptop had Frostwire installed on it and contained over 100 videos and 100 images of child pornograhpy. Ther was also evidence of deleted child pornograhpy on the laptop, and he was able to recovera small number of deleted files. The laptop's operating system was set up and registered to Robert Smith on October 19, 2010. Agent Solorio also discovered that the laptop's computer was off by an hour and ten minutes.

Agent Solorio created an Excel spreadsheet listing 388 files of child pornograhpy bt exporting data using forensic software, which was admitted as Government's Exhibit 30. This spreadsheet also listed the dates and times the files were created, accessed, or modified.

He created a similar spreadsheet, Exhibit 47, listing files found on the external hard drive. The external hard drive contained a folder labeled "Robert's Anime," which held the subfolder "Animals" with another subfolder "MYOB." Agent Solorio found child pornograhpy in the "MYOB" subfolder.

The jury was shown three videos (Exhibits 35, 36, and 37) and two photos (Exhibits 38 and 39) from the laptop that contained sexually explicit images of minors. A stipulation was read to the jury that if called to testify law enforcment officers would testify that the minors depicted in Exhibits 35, 36, and 39 were six to eight years old, respectively, when the images were produced.

On cross-examination, agent Solorio admitted that he discovered malware on the laptop, but believed it was a false positive. He described malware as a malicious program that may attempt, among other things, to chnage the settings on the computer and redirect internet traffic. He acknowledged that through malware, a hacker could potentially control someone else's computer and direct the computer to perform various tasks from a remote location. Malware can be delivered via a website, sometimes when a person downloads seemingly innocuous files. Besides malware there are other computer programs available to access a computer remotely, such as PCAnywhere or VNC, and other programs for determining a person's computer password.

Agent Solorio also testied that at one point in 2012, the mirror image he created of the laptop's hard drive failed re-verification when he was moving the mirror image from his desktop to the networks storage. This meant that there had been a change in the mirror image, which may have been corrupted. His reports did not show the exact date the mirror image failed re-verification, but believed it was before November 21, 2012. This was the first time while testifying as a forensic expert that he experienced a mirror hard drive failing re-verification.

Greg Loyche in Smith's stepfather. He and his wife Mary Loyche have lived at the same house in Lemoore since 1986. In June 2011, Smith moved back into their house with his possessions, including a laptop. When authorities searched their house on December 23, 2011, Smith was living in their recreational vehicle on their property, but kept his laptop on a small table in the living room of their house. Loyche did not remember the laptop ever leaving their living room. When the laptop was open or Smith was using it, Loyche never saw anything inappropiate on it. When Smith lived there in 2011, Loyche worked at the Naval Air Station weekdays from 7:30 a.m. to 5:30 p.m. Smith's daughter Sarah lives two houses down the street and saw Smith at least twice a week.

Agent Solorio was recalled to testify in the defense case. He scanned all the computers at the Loyche residence and trailer to look for child pornography, including a desk top found in the house. He found none except on Smith's laptop and external hard drive. Agent Solorio acknowledged that his report stated that adware/virus was discovered on the laptop. He testified that from research he conducted on the internet, it "appears to be a specific type of adware" that "could potentially install skins to the Internet Explorer web browser." His report also stated that a Trojan virus was detected that is designed to redirect the browser to a different web page than the intended website. His report concluded that based on his internet research, "neither of these Trojan, slash, malware, slash, adware viruses appears to download files to specific locations where child pornography was located.

Agent Kotman testified that Crow told him that Smith puchased the laptop near the end of their relationship so that he could use it for school assignments. Crow also told hime about a houseguest named Reva "Kumquat" Albert. Crow stated that Albert lived with them for a couple of months near the end of their relationship in 2011. Agents did not find any desktop computer that they believed belonging to Smith when they search the Loyche property. During his interview, Smith stated that he had thrown his desktop out months ago because he had issues with it.

Smith testified that he did not know his laptop or hard drive contained child pornography and did not put it on either device. He bought the laptop in August of 2009 at a Staples store in Salinas. Smith testified that while the government's spreadsheet purportedly listed files on his external hard drive with dates showing the files were created or added to the hard drive starting in 2007, he did not purchase the hard drive untill 2008.

Smith had a desktop computer but threw it out in 2010 because it was no longer functional. He did not own the desktop in May 2011 when he was hospitalized as Crow testified. Smith testified that before his May 2011 hospitalization, he told crow that he was no longer in love with her and that he loved someone else she knew.

Smith moved from his parents' home into Crow's house in 2002. They relocated to Salinas where their son was born. Smith lived with Crow and their son in Salinas until he moved back into his parents' house on June 11, 2011. Albert lived at Crow's residence too from early 2011 until well after Smith moved out. In May 2011, all three went to an Anime convention in San Jose. See Ech. I. When he moved to his parents' home, he brought everything he owned including the laptop and hard drive. Smith repeatedly denied that Crow told him she found child pornography on any of his computers.

Smith never accessed the hard drive at his parents' home and kept it in a banker's bix because it did not have a power cord. Smith's mother worked with medical transcriptio at home durning the day and his stepfather was always home after work. His daughter Sarah lived down the street and visited many times. She was allowed to use the laptop and play videogames on it. Smith did not have anything on his computer he did not want his daughter to see.

From August 2011 until august 2012, Smith worked for Securitas Security Solutions, a private security company. Between September and December 2011, he worked various sites, including a ConAgra Garlic Processing Plant, a Walmart parking lot, and a Waste Management site. He drove between 30-45 minutes each way for those jobs, sometimes stopping to eat on the way there, and he tried to arrive 15 minutes early for each job. His shifts varied from 6 a.m. to 4 p.m.. 3 p.m. to 11 p.m., or midnight to 8 a.m.

Smith's employment records with Securtias Security Services were admitted as Exhibit **A** to show a partial alibi. He was hired in June 2011, but started work the next month.

Securitas prohibited laptops in the workplace and he could be fired if he had taken one to work. Smith used his work records to creat a calendar (Exhibit **C**) showing the dates and times he worked during the relevent periods. Smith also marked up the government's Exhibit 30 by highlighting the times his was at work in pink, the times he was with family in orange. The highlighted spreadsheet, admitted as Exhibit **G**, thus showed dates and times where child pornography was purportedly created, accessed, or modified on Smith's laptop but where his employment records or testimony showed that he was working, travling to or from work, or with his family.

Smith testied that after he moved out, he visited and stayed with Crow and their children at her house in Salinas from July 18-19, October 11-12, and December 20-21, 2011. Albert was staying there om each visit. Smith went out to dinner with the children on all three visits, with either Crow, Albert, or both. Smith always too his laptop when he went to Salinas in case the children wanted tp watch a movie. He also stayed with Crow and her husband at a different residence in April 2012.

Smith used the family nickname for his son, frogboy, as the password for his laptop, i.e., Frogboy3. Crow also used that nickname and had a tattoo of a frog, representing her son. When they lived together, Smith shared the password with Crow. Crow used the computer and had some informoation on it, including in a folder labeled "Elizabeth." SMith never put any antivirus software on the laptop.

After he purchased the external hard drive in 2008, he kept it on his computer desk in the living room where Crow and Albert had access to it. the hard drive was not password protected. Smith had seen Crow use the hard drive when it was at their house. Smith created the folder "Robert's Anime," but he did not create the "Animals" or "MYOB" subfolders, amd did not know the subfolders were there.

Smith knew that MYOB was an acronym for "Mind Your Own Business" from a TV show called NCIS, which Crow and Albert also watched.

When officers arrived at the Loyche's house to execute tghe warrent, Smith was sleeping in the trailer. He initially brought the laptop to the trailer in Jun 2011, but then moved it to the house because there was not internet service in the trailer. He kept the laptop in the living room at alltimes except when he would bring it to Salinas for the children to use. The laptop was password protected and no onein the household knew the password.

On cross-examination, Smith explained that he had a Virgin Mobile hotspot that he mentioned during interview with investigators, but he discontinued it in August 2011. Smith used Frostwire briefly in October but removed it within 24 hours and did not know it was still on his computer. He knew it made movies available but did not realize it was a file-sharing program.

Finally, Mary Loyche testified that she worked in her home office for McKesson between June and December 2011. Agents did not seize any of her or her husband's computers. When Smith moved back into the home, he brought all his possessions with him. SHe did not see a desktop computer. Her son kept his laptop on an old TV tray table in the living room. She never saw any child porn images on the laptop. She could see the laptop's screen at all time when she was in the living room. She believed the laptop was always in the living room except when Smith took it to Salinas to visit.

In May 2011, she learned through her son Jason that Smith had been hospitalized. She went to Crow's house in Salinas where she met "Reve." Loyche and Crow went to see Smith in the health facility. She stayed there for three days and visited her grandchildren. At night, she slept in her car that was parked outside Crow's house. When Smith was released, Loyche took Smith, Crow, their son Ash, and Reva out to dinner at the Old Town Buffet.

Although she had communicated with Crow numerous times about her grandchildren before May 2011, Crow did not call her or leave any messages on her answering machine when Smith was hospitalized.

The Jury returned a guilty verdict on May 27, 2016. On September 12, 2016, the district court sentenced Smith to 240 months imprisionment and $5,000 in restitution. On appeal, Smith raised various challenges to his conviction and argued that his 240-month, statutory maximum sentence was substantively unreasonable. The Ninth Circuit rejected his challenges and affirmed his conviction and sentence. The Court also denied his petion for rehearing and rehearing en banc.

Smith then filed a §2255 motion seeking relief on several grounds on October 10, 2019. The district court denied Smith's timely filed §2255 and denied issuance of a C.O.A. Smith then filed in the Ninth Citcuit of appeals for issuance of a certificate of appealablity. Smith was denied a certificate of appealablity.

I. **[Question One] Did the panel of the Ninth circuit err by deciding the merit of an appeal not properly before the court to justify the denial of a certifcate of appealability.**

A. The 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 Mr. Smith's case the Ninth Circuit panel "paid lip service to the princuples guiding issuance of a C.O.A" Tennard v. Dretkle, 542 U.S. 274, 283 (2004), but in acuality the panel held Mr. Smith to a far more stringent standard. Specifically, the Ninth Circuit panel "sidestepped the threshold C.O.A. process by first decicing the merits of [Mr. Smith's] 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, the threshold nature of the C.O.A. inquiry "would mean very little if the appellate review were denied because the prisoner did not convice a judge, or, for that matter three judges, that he or she would prevail." Miller-El, 537 U.S. 322 at 337. In Mr. Smith's case however, that is exactly what the panel did.

Mr. Smith filed a motion in the Ninth Circuit seeking a certificate of appealabilty, so that he might appeal the district court's denial of his §2255 motion. The panel however, determind that Mr. Smith's appointed lawyer had, indeed, provided effective assistance because they were bar members in good standing. Thus, the panel concluded that Mr. Smith 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); Trevino v. Thaler, 133 S.Ct. 1911 (2013); and Martinez v. Ryan, 566 U.S. 1 (2012). Where the court decided that procedural default would not bar a claim of ineffective assistance of trial counsel; when the collateral proceeding was the first place to challenge a conviction on the grounds of ineffective assistance.

A. The Ninth Circuit of the court of appeals held that "Mr. Smith was procedurally barred from raising ineffective assistance of counsel claims in his §2255 motion because he unsuccessfully raised the claims on direct appeal."

The Supreme Court held that a §2255 "collateral challenge may not do service for an appeal." United States v. Frady, 456 U.S., at 165.

In the Ninth Circuit's de novo review the court found that Mr. Smith was barred by procedure because he unsuccessfully raised a claim of ineffective assistance of counsel in his direct appeal. The claim was raised in a supplemental brief filed Pro Se after appointed counsel John Balazs was not aware of all the facts in Mr. Smiths direct appeal. The panel however, disregarded the Supreme Court said in Buck, "Martinez, 566 U.S., at 9, 132 S.Ct. 1309, 182 L.Ed. 2d 272. We held that when a state formally limits the adjudication of claims of ineffective assistance of trial counsel to collateral review a prisoner may establish cause for procedural default if (1) 'The State courts did not appoint counsel in the initial-reivew collateral proceeding' or 'appointed counsel in [that] proceeding... was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); and (2) 'the underlying... claim is a substantial one, which is to say that... the claim has some merit." IS., at 14 132 S.Ct. 1309 182 L.Ed. 2d 272."

The merit of Mr. Smith's §2255 motion is self-evident. He made the district court awa of the lack of information the Mr. Balazs had. John Balazs was ineffective as an appealate counsel for failing to procure the information showing that the government did not allow access to the first mirror image that had been created and failed the reverifcation process.

B. The Supreme Court has not yet addressed the issue of wether the lack of counsel at the initial review collateral proceeding can qualify as cause for procedural default, in the case of a federal prisoner, concering claims of ineffective assistance of counsel.

Under the procedural default doctrine, if a state prisoner "defaulted his federal claims in the state court purseuant to independent and adequate state procedural rule, federal review of the claim is barred unless the prisoner can demostrate cause for the default and actual predjudice as a result of the alleged violation of federal law..." Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2346, 115 L.Ed. 2d 640 (1991). In general lack of an attorney and attorney error in a state post-conviction proceedings do not establish cause to excuse a procedural default. Id at 757, 111 S.Ct. at 2568.

In Martinez, the Supreme Court announced a narrow, equitable, and non-Constitutional exception to Coleman's holding (that ineffective assistance of colateral counsel cannot serve as cause to excuse a procedural default) in the limited circumstances where (1) a state requires a prisoner to raise ineffective trial counsel claims at an initial-review collateral proceedings; (2) the prisoner failed properly to raise ineffective-trial counsel claims in his state initial-review collateral proceedings; (3) the prisoner did not have collateral counsel or his counsel was ineffective; and (4) failing to excuse the prisoner's procedural default would cause the prisoner to lose a " substantial" ineffective-trial-counsel claim.

In such case, The Supreme Court extended Martinez's rule to cases where state law technically permits ineffective-trial-counsel claims om direct appeal but state procedures make it "virtually impossible" to raise ineffective-trial-counsel claims on direct appeal, see Trevino, 133 S.Ct., at 1915, 1918-21.

There can be no question whether the federal criminal court systems requires that, ineffective assistance of counsel claims should be brought in collateral proceedings, and not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed. The reasons for this rule are self-evident. A factual record must be developed in, and addressed by, the district court in the first instance for effective review. Even if evidence is not necessary, at the very least counsel accused of deficient performance can explain their reasonings and actions, and the district court can render its opinion on the merits of the claim. An option by the district court is a valuable aid to the appellate review for many reasons, not the least of which isthat most cases the district court is familiar with the proceedings, and had observed counsel's performance in context, first hand. Thus even, if the record appears need no further development; the claim will still be presented first to the district court in collateral proceedings, which should be instiuted without delay, so the reviewing court can have benefit of the district court's view. Therefore, the statuory right to appeal, that is part of today's due process in the federal system, has been reduced to a right that no longer includes a right to appeal from the Sixth Amendment I.A.C. claims.

Indigent defenders pursuing first-tier review in a §2255 motion proceeding are generally ill equiped to represent themselves, for (a) first-tier review application, forced to act in Pro Se, would face a record unreviewed byappellate counsel; and (b) without guides keyed to a court review. A Pro Se movant's entitlment to seek relief from ineffective assistance of trial counsel might be more formality than a right, because navigating the criminal, appeal, and collateral process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competnce of individuals afforded only twelve months to learn the federal process involved. Moreover, due process requires appointment of counsel for federal defendents on direct appeal. In the average case however, the most commom claim of Constitutional error is ineffective assistance of counsel. In Mr. Smith's case it is the Ninth Circuit, and not the United States Congress, that elected to change the reach of the United States law that granted a defendent the right to appeal his sentence when the sentence was in violation of the law, see 18 U.S.C. 3006A.

III. **[Question Three] Has the Supreme Court of the United States overturned its precendent in Brady v. Maryland, 83 S.Ct. 1194 (1963); Arizona v. Youngblood, 109 S.Ct. 885 (1988); and United States v. Agurs, 96 S.Ct. 2392 (1976). Where if there is evidence that is favorable to the defense that it should not be withheld.**

A. The Ninth Circuit of the court of appeals held that "Mr. Smith was procedurally barred from raising his claim on collateral challenge because he had not raised the claims on his direct appeal. The Ninth Circuit of the court of appeals did not give a review of the case precedent brought forth in Mr. Smith's §2255 motion. The merit of Mr. Smith's §2255 motion is self-evident. He made the district court aware that the first mirror-image was notpresented, nor made available to trial attorney Eric Fogderude, or appellate attorney John Balazs. The court declined to review the case precedent made in Brady v. Maryland 373 U.S. 83 L.Ed. 2d 281, 109 S.Ct. 1194 (1963); Arizona v. Youngblood 488 U.S. 51, 102 L.Ed. 2d 281, 109 S.Ct. 333, reh den 488 1051, 102 L.Ed. 2d 1007, 109 S.Ct. 885 (1988); and United States v. Agurs 96 S.Ct. 2392 (1976). Under Brady alone the Ninth Circuit of appeals should have held an evidentary hearing to determin if a new trial should have been granted. However the court chose to ignore the merits of Mr. Smith's §2255 motion denying him due process of the law. Which is a violation of the Fourteenth Amendment of the United States Constitution which states that good or bad faith of the state is irrelevent when the state fails to disclose material exculpatory evidence to the defendent in a criminal prosecution.

IIII. [Question Four] Does the Supreme Court decision in Buck v. Davis violate the equal protection of the law, where it allows a different standard of review for state prisoners as compared to federal prisoners who are similary situated.

A. The Ninth Circuit of the United States court of appeals, failed to consider the construction of the federal review process as it is compared to the state process identified in Martinez, Trevino, and Buck.

Mr. Smith claims that it is because he has no counsel during the claim preparation period in his collateral (§2255) proceeding that serves as cause for the procedural default. Although, he did make a claim of ineffective assistance of counsel in his §2255 motion; the claims weak and poorly presented because he was forced, by procedure to rely on himself to draft his claim. Thus, it is the lack of counsel (or the ineffectiveness of §2255 counsel) that caused Mr. Smith's claim of ineffective trial counsel to fail.

Mr. Smith's claim is beyond the reach of direct appeal because of the federal procedure. His claim is also nearly impossible, for a layperson, to raise in a collateral proceeding where he has not right to counsel and must face a more stringent standard of review. Congress had not intended, in 1948, that a defendant be required to await the first round of collateral proceeding to raise a Constitutional error where counsel was unavailible to indigent prisoners. It is unreasonable to believe that the American Criminal Justice System would require a criminal defendant to rely on a layperson-at-law to perfect a federal criminal appeal. This however, is exactly what the procedure requires when making the Constitutional claim that a federal defendant is deprived of effective assistance of trial counsel.

The Supreme Court in Martinez held that the procedural default that occured when Martinez post-conviction counsel did not raise a claim of ineffective assistance in his state collateral proceeding would not bar his petition under 28 U.S.C. §2254, where "the state collateral proceeding was the first place to challenge his conviction on the grounds of ineffective assistance." 132 S.Ct., at 1313. The Supreme Court explained that "if in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective," procedural default would not "bar a federal hebeas court from hearing substantial claim of ineffective assistance at trial." Id., at 1320 (emphasis added).

In Martinez, state law required the petitioner to wait until the initial-review collateral proceeding before raising such a claim. A year later in Trevino, The Supreme Court extended Martinez's holding to cases in which the state did not require defendants to wait until the post-conviction stage, but "[t]he structure and the design of the [state] system in actual operation... [made] it virtually impossible for an ineffective assistance claim to be presented on direct review." 133 S.Ct., at 1915. The question is wether these holdings apply to some or all federal prisoners who bring motions for post-conviction relief under 28 U.S.C. §2255. The Seventh Circuit has already answered this question in the affirmative.

In Choice Hotels Intern., Inc, v. Grover, 792 F 3d. 753 (7th Cir., 2015), where the panel wrote that "[a]lthough Maples and Holland [v. Florida, 506, U.S. 631.] were capital cases, we do not doubt that their holdings apply to all collateral litigations under 28 U.S.C. §2254 and §2255." Id., at 755 (citations omitted). A closer look at the issue should convince us that the Seventh Circuit's postion is correct.

In Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed. 2d 714 (2003), The Supreme Court considered the case of a man who did not raise any claim relating to ineffective assistance of trial counsel on his direct appeal, and so was trying to raise such an argument in a motion under 28 U.S.C. §2255. The United States argued that the ineffectiveness claim was procedurally defaulted, because Massaro could have raised it on direct appeal. The Supreme Court however, rejected that postion and held instead that there is no procedural default for failure to raise an ineffective-assistance claim on direct appeal, even if new counsel handles the direct appeal and even in the basis for the claim apparent from the trial record. Id., at 503-04. Indeed, the court criticized the practice of bringing these claims on driect appeal, because "the issue would be raised for the first time in a forum not best suited to assess those facts." Id., at 504. All appeal courts have been critical on direct appeal, where appointment of counsel is a statutory guarantee.

Because the federal courts have no established procedure to develop ineffective assistance claims for direct appeal, the situation of a federal petitioner is the same as the one this court described in Trevino. As a practicail matter, the first opportunity to present a claim of ineffective assistance of trial counsel or direct appeal counsel is almost always on collateral review, in a motion under 28 U.S.C. §2255. Although there may be rareexceptions, as Massaro acknowledged, for a case in which trial counsel's ineffectiveness "is so apparent from the record" that it can be raise on direct appeal; Mr. Smith's case is not one of those.

Neither Martinez nor Trevino suggested that, for these purposes, the difference between §2254 and §2255 was material. What does matter is the way in which ineffective assistance of counsel claims must be presented in the particular procedural system. This varies among state, and between states and the federal systems, but Mr. Smith has already explained why a great majority of federal cases, ineffectiveness claims must await the first round of collateral review. Moreover, if the review were to be more restricted on either the state or federal side, federalism concerns suggest that it would be on the state side. Most of the rules that govern petitions under section §2254 are mirrored in section §2255, including importantly the procedure for handling second or successive petition.

Mr. Smith can think of no reason why Martienz, Trevino, and Buck should be read in a way that would provide different results between federal and state proceedings. The Supreme Court should intervene now and correct a egregious misapplication of settled law in an area of great public concern.

Mr. Smith respectfeully pleads that this court grant his petition for a wirt of certiorari and permit briefinf and argument on the issues contained herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Wallace Smith

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