

21-8020
IN THE
SUPREME COURT OF THE UNITED STATES

RONALD MITCHELL - Petitioner

v.

UNITED STATES OF AMERICA - Respondent

Supreme Court, U.S.

FILED

APR 18 2022

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit
Case No. 21-3871

PETITION FOR WRIT OF CERTIORARI

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pro se

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Was trial counsel constitutionally ineffective because she failed to consult or hire an expert witness in drug abuse (rather than toxicology) to investigate the probability of reasonable doubt that the heroin ingested by the victim who suffered "serious bodily injury" was sold by the defendant, for the purposes of the penalty enhancement under 21 U.S.C. § 814(b)(1)(C)?

Answer: YES.

2. Did the district court commit reversible error when denying the Petitioner's § 2255 motion without considering the Petitioner's properly raised argument that trial counsel was ineffective for failing to investigate the distribution element of the Burrage defense?

Answer: YES.

3. Did the courts below commit reversible error by denying a Certificate of Appealability regarding the Petitioner's § 2255 claim of ineffective assistance of counsel (specifically Ground 4)?

Answer: YES.

STATEMENT OF THE CASE

1. Early in the afternoon of 10/23/17, Richard Zubeck purchased less than 1 gram of powdered heroin from co-defendant Fontanez.
2. Approximately 6 hours later, Zubeck was found unresponsive in his bathroom.
3. Police found Zubeck with no pulse or breathing. Police administered CPR. The EMS arrived and found Zubeck to have a pulse and breathing prior to giving Narcan. EMS commented that Zubeck smelled of alcohol.
4. EMS gave Zubeck Narcan, and Zubeck regained consciousness. Hours later, Zubeck left the hospital with no residual health problems.
5. At the scene, police found a syringe later determined to contain a combination of cocaine and heroin, also known as a "speedball."
6. Police interviewed Zubeck on 10/25/17, and he told police that he bought powdered heroin only, and not cocaine or a speedball from the Petitioner's co-defendant, a fact that he repeated under oath during a motion hearing in the district court.
7. Petitioner was indicted on four federal drug counts, the most serious of which was § 841(b)(1)(C) because it includes a penalty enhancement for serious bodily harm or death.
8. Mitchell was appointed a public defender.
9. Despite the fact that the Petitioner told counsel that Zubeck's story did not make sense from the perspective of a drug abuser, counsel failed to investigate by consulting or hiring an expert in drug abuse.
10. Counsel advised Petitioner to plead guilty to 3 of the 4 counts, including § 841(b)(1)(c). He did.
11. Petitioner was sentenced to 240 months of incarceration pursuant to § 841(b)(1)(C) on 04/11/19. (Decision not published)

12. Petitioner filed a timely § 2255 motion.
13. The district court entirely dismissed the Petitioner's original § 2255 motion before the 14 day period to freely amend the petition had passed. APPENDIX A.
14. Petitioner filed a timely amended § 2255 motion and supporting memorandum of law, specifically claiming that trial counsel "was constitutionally ineffective for failing to hire both an expert in drug abuse and an expert in medical toxicology."
15. The district court ordered an Evidentiary Hearing on Ground 4 and appointed counsel for the Petitioner. APPENDIX B.
16. Section 2255 counsel filed a motion for funds to hire an expert witness to show prejudice.
17. At the Evidentiary Hearing, trial counsel and the government presented evidence that trial counsel had consulted two medical toxicologists. No evidence was presented that trial counsel consulted or hired an expert in drug abuse.
18. Without considering the Petitioner's argument regarding the failure to hire a drug abuse expert, the district court determined that trial counsel was not deficient and denied both the § 2255 motion and the motion for funds to hire his own expert. COA was denied. APPENDIX C.
19. The circuit court denied the Petitioner's application for COA without a stated reason on 01/19/22. APPENDIX D.

REASONS FOR GRANTING THE PETITION

I. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CONSULTING OR HIRING AN EXPERT IN DRUG ABUSE IN A CASE INVOLVING A "SERIOUS BODILY INJURY OR DEATH" ENHANCEMENT

In this case, trial counsel failed to investigate the obvious weakness in the government's case: that there is reasonable doubt that the heroin used by the victim was the same heroin sold via the Petitioner. "Because the [adversarial] testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Kimmelman v. Morrison, 477 U.S. 365, 384, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986).

Recall the facts. The victim bought heroin (only) indirectly from the Petitioner, not cocaine. Nearly 6 hours later, the victim overdosed on a speedball, a cooked mixture of cocaine and heroin that he injected intravenously into a vein in his foot. These facts are undisputed by both the record and the victim's statements to police and testimony in court. The victim also testified that this was only the third time he had ever used heroin in his life.

The Petitioner claimed in his § 2255 motion that his trial counsel was ineffective for failing to investigate a Burrage defense into the causation between the heroin he sold and the victim's injury. Courts have established that a defense attorney is obligated to consult expert witnesses regarding causation when the defendant has been charged with the § 841(b)(1)(C) "resulting in death or serious bodily injury" enhancement. See, e.g., Anderson v. United States, 981 F.3d 565, 576 (7th Cir. 2020):

[C]ounsel's decision not to further investigate the available toxicology evidence was unreasonable. Whether heroin distributed by defendant was a but-for cause of [victim]'s death was essential to the application of the death results enhancement. ... Further investigation of the toxicology evidence could have therefore significantly informed defendant of the viability of a defense to that enhancement and, consequently, whether to

plead guilty.

Defendant's counsel never attempted to discover what the results of such an investigation might be. ... [Counsel] could not interpret the toxicological evidence on her own, nor did she consult with an expert who could. ... Given the obvious value of further investigation in this case, we cannot view the decision of [Defendant]'s counsel to proceed without investigating the causation as reasonable.

This excerpt highlights the two essential elements of the Burrage decision (1) that the drug was the but-for cause of the injury, and (2), that the drug was distributed by the defendant. In 2014, this Supreme Court highlighted both of these elements in their holding that:

[A]t least where the use of the drug distributed by the defendant is not an independently sufficient cause, a defendant cannot be held liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.

Burrage v. United States, U.S. 134, S.Ct. 881, 892, 187 L.Ed. 2d 715 (2014).

Here, the Petitioner filed a 2255 motion claiming that his trial counsel was ineffective for failing to investigate a Burrage defense, and he specifically delineated how an expert in drug abuse was needed to investigate the element of whether the heroin in this case came from the Petitioner without reasonable doubt, averring that a drug abuse expert would have concluded:

1. Almost all drug abusers buy from multiple dealers.
2. It is very unusual for a heroin abuser not to use heroin within a very short time of buying it.
3. The fact that the victim overdosed almost 6 hours after buying heroin from Petitioner, and that overdose included cocaine that was not purchased from the Petitioner, implies that the victim purchased drugs from another dealer sometime between the time he bought heroin from Petitioner and the time he overdosed, making it reasonable to conclude that the heroin that caused the injury was not distributed by Petitioner.

Additionally, an expert in drug abuse could have impeached the victim's credibility by pointing out that although he claimed under oath to have only ever

used heroin 3 times in his life, his possession of an injection "rig" and glass pipe, his ability to mix drugs and "cook" a speedball, and his ability to catheterize and inject a vein in his foot (and the fact he chose his foot) are all consistent with sophisticated and long-term drug abuse.

In the Evidentiary Hearing for the § 2255 proceeding, the government and trial counsel presented convincing evidence that trial counsel consulted two toxicologists regarding whether heroin was the but-for cause of the victim's injuries in this case. However, it was clear from the testimony and evidence presented that neither of these medical toxicologists were experts in drug abuse, and neither was asked their opinion about whether the heroin in question was distributed by the Petitioner. Moreover, the Evidentiary Hearing made it clear that counsel did not hire or consult an expert in drug abuse.

As a result, the Petitioner's guilty plea cannot be considered to have been knowing and voluntary. Had trial counsel consulted a drug abuse expert as she was obligated to do in this case, the Petitioner would have been able to intelligently decide to proceed to trial.

II. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER IF TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE THE DISTRIBUTION ELEMENT OF THE BURRAGE DEFENSE

The Petitioner's § 2255 motion clearly asserted that trial counsel failed to investigate either the distribution element by consulting drug abuse experts or the but-for causation element by consulting toxicology elements (Ground 4). The record was ambiguous enough on these claims that the district court ordered an Evidentiary Hearing on Ground 4 specifically.

While that hearing clearly established that trial counsel hired toxicology experts to investigate the but-for causation element, it also established that trial counsel did not consult drug abuse experts to investigate the distribution element, as discussed in detail above.

In the district court's decision to deny both the § 2255 motion and the motion for funds to hire an expert, the district court failed to consider the distribution half of the Petitioner's Ground 4 argument. Had the district court properly considered this argument, it would have had to find that counsel was ineffective for not hiring an expert in drug abuse, and either found prejudice at that time, or granted the motion to fund an expert to consider the prejudice prong of Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) ("To show prejudice where the conviction is based on a guilty plea, the defendant must show a reasonable probability that ... he would have not pleaded guilty, but would have insisted on going to trial but for counsel's errors").

For this reason, the district court's final order on the Petitioner's § 2255 motion should be vacated, and this case should be remanded back to the district court for full consideration of the ineffective assistance of counsel claim for failure to investigate the defense that the drug used by the victim to overdose was not distributed by the defendant.

III. BOTH COURTS BELOW ERRED IN DENYING THE PETITIONER A CERTIFICATE OF APPEALABILITY FOR THE DENIAL OF GROUND 4 OF HIS § 2255 MOTION

The Petitioner clearly showed a "denial of a constitutional right," specifically the denial of his Sixth Amendment right to effective counsel, particularly in regard to his counsel's failure to adequately investigate the 'distribution element' of a Burrage defense. 28 U.S.C. § 2253(C).

In addition, the Petitioner has shown that "reasonable jurists could debate whether ... the petition should have been resolved in a different manner, or that issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Moreover, the issuing of a COA "does not require showing that the appeal will succeed," and "a court of appeals should not decline the application ... merely because it believes

the applicant will not demonstrate an entitlement to relief." Miller-El v. Cockrell, 537 U.S. 322, 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

These thresholds were clearly met by the Petitioner. The district court only denied a COA after failing to consider one of the arguments of merit, and therefore the court's conclusion that the "petitioner cannot show that reasonable jurists would disagree or debate whether the issues presented should have a different outcome, and whether the issues are adequate to deserve encouragement to proceed further" is fatally flawed, and the district court should be compelled by this court to reconsider. Alternatively, the circuit court failed to articulate a reviewable reason for denying the COA application, and therefore this case should be remanded, if for nothing more than a further clarification of the circuit court's reasoning.

CONCLUSION

In this case, trial counsel was deficient for failing to investigate whether the heroin distributed by the Petitioner was the same heroin that caused the victim's injury, a question she should have investigated by hiring an expert in drug abuse rather than a toxicologist. The Evidentiary Hearing established that trial counsel did not investigate this specific defense by hiring a drug abuse expert, but the district court failed to consider this when incorrectly denying Petitioner's §2255 motion. Thus, trial counsel was constitutionally ineffective for failing to investigate this defense, the district court committed reversible error when it failed to consider this argument, and both courts below committed reversible error by denying a COA. The district court's denial of the Petitioner's § 2255 motion should be vacated, and the motion should be remanded to the district court. Alternatively, a COA should be issued so that the Petitioner can have his arguments above heard by the circuit court.

WHEREFORE, this Petition for Writ of Certiorari should be GRANTED.

Respectfully Submitted,

Ronald Mitchell

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CERTIFICATE OF SERVICE

I, Ronald Mitchell, declare under penalty of perjury and under the Federal Mailbox Rule that a true copy of this Petition for Writ of Certiorari was placed into the Institutional Mail system, pre-paid USPS First Class, on April 18, 2022, addressed to:

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