

ORIGINAL

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No.

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SUPREME COURT, U.S.

In the
Supreme Court of the United States

MICHELLE C. CANTATORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for A Writ of Certiorari to the United
States Court of Appeals for the Third Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion by denying Ms. Cantatore's §2255 motion without holding an evidentiary hearing because her entitlement to relief on her claims of ineffective assistance of sentencing counsel were not conclusively refuted, is irreconcilable with controlling precedent, such that this Court should remand to the United States Court of Appeals for the Third Circuit with instructions to issue certificates of appealability?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

RELATED CASES

- *United States v. Michelle C. Cantatore*, No. 2:16-cr-189, U.S. District Court for the District of New Jersey. Judgment entered Sept. 14, 2016.
- *United States v. Michelle C. Cantatore*, No. 16-3658, U.S. Court of Appeals for the Third Circuit. Judgment entered Aug. 25, 2017.
- *Michelle C. Cantatore v. United States*, No. 2:18-cv-14293, U.S. District Court for the District of New Jersey. Judgment entered Nov. 24, 2021.
- *Michelle C. Cantatore v. Attorney General of the United States*, No. 21-3259, U.S. Court of Appeals for the Third Circuit. Order denying COA entered Apr. 6, 2022.

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OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Third Circuit denying Petitioner's motion for certificate of appealability is unpublished and may be found at USCA Case No. 21-3259; *Michelle C. Cantatore v. Attorney General of the United States of America* (Apr. 6, 2022) (Appendix - A1).

The Order of the United States District Court for the District of New Jersey denying Petitioner's motion to vacate and denying her a certificate of appealability is unpublished and may be found at USDC Case No. 2:18-cv-14293; *Michelle C. Cantatore v. United States of America* (Nov. 24, 2021) (Appendix - A3).

STATEMENT OF JURISDICTION

The judgment denying Petitioner's motion for certificate of appealability was issued on April 6, 2022. This petition is timely filed pursuant to Sup. Ct. R. 13. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Sixth Amendment, which provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c) provides that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
...

(B) the final order in a proceeding under section 2255.
...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On September 26, 2018, Ms. Cantatore initiated this proceeding by filing a timely, counseled collateral attack on the judgment of the district court, via the provisions of 28 U.S.C. §2255 (f)(1) ("§2255"). [DE #1]. On October 1, 2018, the district court ordered the Government to respond within forty-five (45) days, and following the Government's failure to do so, an unsuccessful motion for default judgment, and a reset filing deadline for the Government's response, on February 28, 2019, their response in opposition was filed. [DE #2, #4, #6, #7, #8, #9]. On August 25, 2020, Ms. Cantatore filed her reply to the Government's response in opposition. [DE #30]. On August 12, 2021, Ms. Cantatore filed a pro se motion for evidentiary hearing on her claims. [DE #39].

On November 24, 2021, the district court entered an Order denying Ms. Cantatore's motion to vacate, denying her the evidentiary hearing which she had specifically requested and denying her a certificate of appealability ("COA"). [DE #40]. On December 6, 2021, Ms. Cantatore timely filed her notice of appeal. [DE #42].

On April 6, 2022, the United States Court of Appeals for the Third Circuit denied COA, *[App. A, A1]*. This petition is timely submitted, within 90 days of the Third Circuit's April 6, 2022 judgment denying COA. *[App. A, A1]*.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of *certiorari*. At a minimum, this Court should order summary reversal because in denying a certificate of appealability, the Third Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This is true because the district court's procedural ruling, denying Ms. Cantatore the evidentiary hearing to which she was statutorily entitled – where her entitlement to relief on her claims of ineffective assistance of sentencing counsel were not conclusively refuted – is irreconcilable and in direct conflict with 28 U.S.C. § 2255, and was thus clearly debatable amongst jurists of reason under controlling precedent. Additionally, Petitioner's claims of ineffective assistance of sentencing counsel provided the required constitutional dimension for a certificate of appealability.

Relevant to this petition, Ms. Cantatore's §2255 Motion with supporting brief raised the following Grounds for Relief: (1) defense counsel was ineffective in not fully investigating or presenting as a downward variance motion Ms. Cantatore's PTSD and/or diminished capacity circumstances [DE #1-1, pp. 24-36]; 2) defense counsel was ineffective in permitting an erroneously calculated criminal history of ten (category v) [DE #1-1, pp. 36-39]; and 3) defense counsel was ineffective in not raising and arguing the unconstitutional sentence disparity between Ms. Cantatore and similarly situated bank robbery defendants [DE #1-1, pp. 39-60]. On these bases, Ms.

Cantatore claimed entitlement to resentencing to time served with a lengthy probationary period. [DE #1-1, p. 61]. Clearly, these issues are cognizable on collateral review and do not under any view constitute frivolous or unintelligible pleadings. Moreover, these issues provide the requisite constitutional dimension for issuance of COA.

Ms. Cantatore demonstrated a substantial denial of a constitutional right in the lower court. This is true because one, like Ms. Cantatore, who claims that her counsel was constitutionally ineffective at sentencing must show that counsel was deficient in connection with sentencing matters and that due to those deficiencies the imposed sentence was greater than it otherwise would have been. *See Glover v. United States*, 531 U.S. 198 (2001).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. A defendant's right to assistance of counsel may be violated if his attorney fails to provide adequate legal assistance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). This right applies at all stages of a criminal proceeding, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

In *Strickland*, this Honorable Court held that a petitioner must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. 466 U.S. at 686-87. First, the petitioner must show that his attorney's

performance fell below an objective standard of reasonableness. *Id.* at 688. To satisfy *Strickland*'s second prong, ineffective assistance claims in the context of noncapital sentencing cases require a showing that the defendant received a greater sentence than she would have, but for counsel's unprofessional errors. *See Glover v. United States*, 531 U.S. 198, 204 (2001). In *Glover*, the Supreme Court held that "any amount of actual jail time has Sixth Amendment significance," and therefore, a claim of ineffective assistance of counsel does not require a showing of a significantly increased sentence as a result of counsel's errors. *Id.*

The lower court's resolution of Ms. Cantatore's claims of ineffective assistance of sentencing counsel are debatable amongst reasonable jurists, as shown herein. Specifically, the district court's decision(s) to deny each of her claims and deny her the evidentiary hearing which she specifically requested – and which appears statutorily mandated based on her well-pled, non-conclusory, and unrefuted claims of ineffective assistance of counsel – are at least debatable amongst jurists of reason. The Third Circuit's cursory adoption of the district court's rationale to deny Ms. Cantatore the COA to which she is entitled should be summarily reversed by this Court.

A. The Certificate of Appealability Standard.

To obtain a certificate of appealability, a *habeas* petitioner must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he “must ‘[s]how reasonable jurists could 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.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

“[A] COA does not require a showing that the appeal will succeed.” *Id.* at 337. As this Court has explained: “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order

may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Reasonable jurists could debate the merits of Petitioner's ineffective assistance of counsel claims and her entitlement to an evidentiary hearing on the same. The legal arguments, set forth below, demonstrate that Petitioner has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are "debatable among jurists of reason." *Miller-El*, 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

B. Reasonable Jurists Could Debate Or, for That Matter, Agree That the District Court Erred in Denying Ms. Cantatore's Claim That Counsel Was Constitutionally Ineffective in Connection with Her Sentencing for Failing to Fully Investigate or Present Ms. Cantatore's PTSD And/or Diminished Capacity Circumstances as Grounds for a Downward Variance.

Ms. Cantatore asserted the following specific acts and omissions of sentencing counsel as falling below the minimum level of competence, required of criminal defense counsel by the Sixth Amendment: (1) not having

retained a trained investigator or not having fully documented the 85 minute rape petitioner suffered that was the catalyst for the current offense and petitioner's traumatic upbringing and life warranted a diagnosis of PTSD/diminished capacity, (2) not having retained the services of an expert psychologist or psychiatrist, and (3) not having filed a downward departure or variance motion pursuant to either § 5K2.0 (if there exists an aggravating circumstance (or, in the case of offenses other than child crimes and sexual offenses, a mitigating circumstance) of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a) (2), should result in a sentence different from that described) or § 5K2.13 ((1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense to constitute a basis for the filing of a downward variance, which should have been and reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.)[DE #1-1, pp. 24-36].

The prosecution responded to this ground for relief, arguing that it should be denied without an evidentiary hearing because it was both conclusory and lacking in demonstrable prejudice. [DE #9, pp. 13-19]. The Government further argued that all of the potential grounds for downward variance were contained in Ms. Cantatore's PSR and since the district court was inclined,

after reviewing the PSR, to consider an upward departure, there would be no way to demonstrate prejudice. *Id*, pp. 16-17. The Government also suggested that Ms. Cantatore's failure to submit proof that she suffers from a mental-health disability precluded her from demonstrating prejudice. *Id*, pp. 18-19.

In her reply, supported by the expert psychiatric report of Dr. Grigory Rasin and the written opinion of legal ethics and malpractice expert, Professor Michael Ambrose, Ms. Cantatore demonstrated that additional potential grounds for a downward variance, beyond those set forth in the PSR were present in the case, but not made known to the district court at sentencing due to the counsel's deficiencies. [DE #30]. Specifically, Dr. Rasin's expert report, prepared following his in person interview with Ms. Cantatore, concluded that at the time she committed the instant offenses she suffered from:

[I]mpaired judgment, diminished insight, inability to control impulses, and cognitive impairment [these mental health issues are un]deniable in the case. . . I also want to point out that Ms. Cantatore more likely than not was also suffering from Attention Deficit Hyperactivity Disorder as a child and in her adult life. This condition also manifested among other things by relatively poor impulse control. These brain changes, impaired judgement and extremely poor impulse control were superimposed on by Posttraumatic Stress

Disorder, which also manifests by development of dissociative state. It is within a reasonable degree of medical/psychiatric probability that Ms. Cantatore committed the fraud and bank robberies while in one of those untreated dissociative state. It is very difficult to conceive that someone who in fact had no control over her impulses, "crazed" by consumption of alcohol and cocaine, driven by anxiety, depression, and fear, being on and off in dissociative state would commit any rational act. *It is my opinion within a reasonable degree of medical/psychiatric probability that Ms. Cantatore committed the instant criminal offense while in the state of diminished mental capacity. I want to emphasize again that in the process of committing her crimes, Ms. Cantatore could neither appreciate nor control her actions due to diminished capacity.*"

Expert Report of Dr. Rasin, pp. 6-7, attached to DE #30 and filed under SEAL (emphasis added).

The written opinion of Professor Michael Ambrosio, an expert in legal ethics and malpractice, concludes that:

[T]o a reasonable degree of certainty [] defense counsel Theurer deviated from the

applicable standard of care by failing to adequately investigate [Ms. Cantatore's] psychological state at the time she engaged in the conduct for which she was charged with the crimes to which she pled guilty and was sentenced to 162 months in prison. I have further concluded that [Ms. Cantatore's] counsel violated the duty of care she owed [Ms. Cantatore] by failing to hire a psychiatrist to provide expert witness testimony or to apply for a court order appointing a qualified psychiatrist to conduct an examination of [Ms. Cantatore], to submit written report to the court and to testify regarding the findings and conclusions of that report.

Expert Report of Professor Ambrosio, p. 1, attached to DE #30 and filed under SEAL.

The district court erred in its findings that: 1) the mental health issues identified in Dr. Rasin's report were cumulative, foreclosing any finding that former sentencing counsel was deficient for failing to obtain a similar report from an expert prior to Ms. Cantatore's sentencing [DE #40, pp. 7-10]; and 2) Dr. Rasin's report would not have impacted the outcome of Ms. Cantatore's sentencing proceeding. [DE #40, pp. 10-11]. These findings were inconsistent with the record and insupportable as grounds for summary denial without an evidentiary hearing.

This is true for several readily discernable reasons. First, there can be no question that the contents of the PSR – even supplemented by the opinion of Stephen Block – provide substantially narrower grounds upon which to seek a downward variance when compared to Dr. Rasin's expert report. This reality refutes the district court's erroneous conclusion that Dr. Rasin's report was cumulative of the information before the court in the PSR.

Second, the district court discounted the expert opinion of Professor Ambrosio without explanation. This is particularly troubling in this case as Professor Ambrosio concluded that Ms. Cantatore's:

[A]ttorney's failure to act in accord with the requirements of [the New Jersey Rules of Professional Conduct concerning the need to investigate, develop and present mitigation evidence at sentencing] leads inexorably to the conclusion that [Ms. Cantatore] was effectively deprived of her constitutional right equate assistance of counsel pursuant to *Strickland v. Washington*.

Expert Report of Professor Ambrosio, p. 9, attached to DE #30 and filed under SEAL.

Both the district and appellate courts denied Petitioner a COA. Both the district court's erroneous ruling and the Third Circuit's cursory denial of COA are

unsupportable on the record. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to this question.

C. Reasonable Jurists Could Debate Or, for That Matter, Agree That the District Court Erred in Denying Ms. Cantatore's Claim That Counsel Was Constitutionally Ineffective in Connection with Her Sentencing for Failing to Object to the Inaccurate and Inflated Criminal History Calculations Contain in Her PSR and Adopted at Sentencing.

Ms. Cantatore asserted that sentencing counsel's failure to challenge her placement in criminal history category V, based on an erroneously calculated criminal history of ten, when Ms. Cantatore only had 7 criminal history points (Category IV), fell below the minimum level of competence, required of criminal defense counsel by the Sixth Amendment. Specifically, the PSR in this case recommended that Ms. Cantatore receive 3 criminal history points for a New York State criminal arrest on May 16, 2000 (Attempted Forgery/ Westchester County Court, White Plains, NY; Case Nos. 00-850S & 00849; ("May 2000 case").

The PSR further asserted that Ms. Cantatore was arrested on May 16, 2000, for Possession of a Forged Instrument, 2nd degree, and Criminal Possession of Stolen Property, 5th degree, "but this charge was consolidated for sentencing with her Attempted Forgery, 2nd degree

conviction. It appears that this case was also related to her April 4, 2001, conviction." PSR, ¶104.

On July 24, 2000, Ms. Cantatore was arrested for Access Device Fraud occurring in the U.S. District Court, White Plains, NY (Docket No.: 00CR1275) and was ultimately sentenced on 04/04/2001 to 30 months custody; 3 years supervised release, and \$45,299.75 in restitution; the PSR recommended an additional 3 criminal history points be assessed for this prior conviction.

In fact, no points should have been assessed as the several charges were related and according to the PSR had been consolidated.

In their response in opposition to Ms. Cantatore's 2255, the prosecution argued that:

[T]he two sentences at PSR ¶ 104-05 were not separated by an intervening arrest because the conduct giving rise to the eventual convictions both seem to have occurred before either arrest. Nevertheless, the two sentences did not result from offenses in the same charging instrument-one set of charges was in Westchester County Court and the other was in federal court in the Southern District of New York. PSR ¶ 104-05. The sentences also were not imposed on the same day: the 104 judgment was rendered on April 17, 2001, while the 105 conviction

occurred on April 4, 2001. The convictions are thus counted separately as two prior sentences not a 'single sentence' - and each was correctly assigned three points under § 4A1.1 as prior convictions exceeding one year and one month.

DE #9, pp. 26-27.

In her reply, Ms. Cantatore argued that it was error to score the consolidated sentences twice. In support of this position, Ms. Cantatore cited persuasive precedent and the controlling language of the guidelines. [DE #30, pp. 11-13 (Citing *United States v. Rodriguez-Prieto*, 491 Fed. Appx. 514 (5th Cir. 2012) and USSG §§ 4A1.1(f) & (e))].

The district court's ruling, denying this ground for relief without an evidentiary hearing, constitutes error. This is true because the miscalculation of Ms. Cantatore's criminal history is clear from the record based on double counting prior convictions for which a combined sentence was imposed. Moreover, as the error was clear from the record evidence available to sentencing counsel, and sentencing counsel's failure to object to this error resulted in imposition of a lengthier sentence, the claim meets the *Strickland* standard as applied in *Glover*.

Both the district and appellate courts denied Petitioner a COA. Both the district court's erroneous ruling and the Third Circuit's cursory denial of COA are unsupportable on the record. As reasonable jurists could debate the appropriateness of the district court's decision

as described, *supra*, a COA should issue as to this question.

D. Reasonable Jurists Could Debate or, for that Matter, Agree That the District Court Erred in Denying Ms. Cantatore's Claim That Counsel Was Constitutionally Ineffective in Connection with Her Sentencing for Not Raising and Arguing the Unconstitutional Sentence Disparity Between Ms. Cantatore and Similarly Situated Bank Robbery Defendants.

Ms. Cantatore asserted the following specific acts and omissions of sentencing counsel as falling below the minimum level of competence, required of criminal defense counsel by the Sixth Amendment the failure to: (1) object when the district court did not give proper consideration at sentencing to the need to avoid unwarranted sentencing disparities when it sentenced Ms. Cantatore to 162 months' imprisonment; and (2) advance a colorable argument at sentencing that a 162 month sentence constituted an unwarranted disparate sentence with similarly situated non-violent bank robbers. [DE #1-1, pp. 39-60].

The district court erred in denying this ground for relief without holding an evidentiary hearing on the bases that there was no valid objection to be made and the failure to make an unwarranted objection can neither be the basis of deficient performance nor prejudicial. [DE #40, pp. 13-20]. This true because Ms. Cantatore offered several cases with similarly situated defendants who

received substantially shorter sentences, demonstrating that counsel was deficient for failing to present the same cases in support of her objections at sentencing and that such deficiency was prejudicial within the meaning of *Strickland* as applied in *Glover*.

Both the district and appellate courts denied Petitioner a COA. Both the district court's erroneous ruling and the Third Circuit's cursory denial of COA are unsupportable on the record. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to this question.

E. Reasonable Jurists Could Debate Or, for That Matter, Agree That the District Court Erred or Alternatively Abused its Discretion by Denying Ms. Cantatore's §2255 Motion Without Holding an Evidentiary Hearing Where Her Entitlement to Relief on Her Claims of Ineffective Assistance of Counsel Were Not Conclusively Refuted.

The district court erred and abused its discretion by denying Ms. Cantatore's §2255 motion without holding an evidentiary hearing where her entitlement to relief on her claims was not conclusively refuted.

Title 28 U.S.C. § 2255 provides that "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with

respect thereto." (Emphasis added). This Honorable Court has recognized that a district court's failure to grant an evidentiary hearing when the files and records of the case are inconclusive on the issue of whether movant is entitled to relief constitutes an abuse of discretion. *Fontaine v. United States*, 411 U.S. 213, 215, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973) (per curiam)).

As Ms. Cantatore's entitlement to relief was not conclusively refuted by the record, her claims were not palpable incredible and if proven those same claims would entitle her to relief, the district court abused its discretion by refusing to hold the evidentiary hearing to which Ms. Cantatore was entitled and which she requested. [DE #39].

Both the district and appellate courts denied Petitioner a COA. Both the district court's erroneous ruling and the Third Circuit's cursory denial of COA are unsupportable on the record. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to this question.

F. This Court Should Summarily Reverse the Third Circuit's Denial of COA.

This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. Summary reversals are

“usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g.*, *United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was “contrary to” established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was “plainly wrong”). The Third Circuit’s order denying Petitioner’s motion for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Third Circuit, vacate the Third Circuit's order denying COA and remand the matter to the Third Circuit with instructions to grant COA.

Respectfully submitted,

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