ORIGINAL

No. 22-7112

THE SUPREME COURT OF THE UNITED STATES

Fuhai Li
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 WRIT OF CERTIORARI

Fuhai Li, Pro Se
Req# 75356-067
FCI McKean
P.O. Box 8000
Bradford, PA 16701

THE QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of appeals' decision denying Petitioner's request for a certificate of appealability (COA) is contrary to the decision of this Court when the Court of appeals sidestepped the COA process by deciding the merit of appeal first and thus decided Petitioner's appeal without jurisdiction ?

II. Whether the Court of appeals' decision denying Petitioner's request for a COA is contrary to the decision of this Court when reasonable jurists would find that the district Court's assessments of Petitioner's constitutional claims in the § 2255 motion were wrong or debatable ?

Suggested answer : Affirmative.

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Exhibit G: Petitioner's petition for rehearing of the Panel's decision along with a memorandum of law in support of the said petition (CA-Doc. 18).

Exhibit H: The court of appeals' order (CA-Doc. 19).

TABLE OF CITED AUTHORITIES

CASES

STATUTES

RULES

OTHERS

PARTIES TO THE PROCEEDING

All parties to this proceeding are the ones shown in the caption of the case, Fuhai Li v. United States of America.

PROCEEDINGS IN THE COURTS

A. Proceeding in the trial court (case No. 3:16-CR-00194-001)

On February 10, 2021, Petitioner filed a pro se 28 U.S.C. §2255 motion (Doc. 258) along with a memorandum of law in support of the said motion (Doc. 259) to the United States District Court for the Middle District of Pennsylvania captioned as United States of America v. Fuhai Li (case No. 3:16-CR-00194-001) (Exhibit A). On May 21, 2021, the government filed its memorandum of law in opposition to Petitioner's §2255 motion (Doc. 270) (Exhibit B- relevant portion). On June 10, 2021, Petitioner filed a reply brief (Doc. 272) (Exhibit C). On May 6, 2022, the district court wrote its opinion (Doc. 276) and issued an order (Doc. 277) denying Petitioner's §2255 motion and declining the issuance of a COA (Exhibit D).

B. Proceeding in the appellate court (case No. 22-2086)

On June 13, 2022, Petitioner filed an application for a COA (CA-Doc. 4) along with a memorandum of law in support of the said application (CA-Doc. 6) to the United States Court of Appeals for the Third Circuit captioned as United States of America v. Fuhai Li, Appellant (Exhibit E). The government did not file a response in opposition to the issuance of the requested COA. On November 30, 2022, a panel of the court of appeals issued an opinion and order denying Petitioner's request for a COA (CA-Doc. 14) (Exhibit F). On January 13, 2023, Petitioner filed a petition for rehearing of the panel's decision along with a memorandum of law in support of the said petition (CA-Doc. 18) (Exhibit G). On February 1, 2023, the court of appeals denied Petitioner's rehearing petition (CA-Doc. 19) (Exhibit H). This Petition for a Writ of Certiorari thus follows because of the fact that the court of appeals' decision is contrary to the decision of this court.

STATEMENT OF JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1). The filing of this Petition for a writ of Certiorari is timely pursuant to Rule 13 of the Rules of the Supreme Court of the United States, because the court of appeals' order denying Petitioner's petition for rehearing of the panel's decision was entered on February 1, 2023. CA-Doc. 19 (see Exhibit H).

STATEMENT OF THE CASE

Petitioner was a medical doctor specializing in pain management (certified in Pain Medicine by American Board of Pain Medicine) and neurology (certified in Neurology by American Board of Psychiatry and Neurology), and practiced both pain management (90%) and neurology (10%) in Milford, Pennsylvania since 2010 after he left his previous group practice- Northeastern Rehabilitation and Pain Management Center in East Stroudsburg, Pennsylvania. Doc. 259 at 5-6, 22.

On about April 2, 2012, Samantha Scicutella (formerly Olivier) was hired by Petitioner as a full-time office staff in Petitioner's medical practice. Id at 6, 25. In October, 2012 Scicutella was given oral admonition at her six-month evaluation of job performance and more oral admonitions were given thereafter by Petitioner due to her being absent from work, being tardy or leaving work early. Id at 25. Doc. 259-1 at 1. Sometime before the end of 2012, the disgruntled Scicutella reported Petitioner to the Pike County District Attorney's Office (PCDAO) for "prescribing high amounts of narcotics outside the scope of his medical profession." Doc. 258 at 24, Doc. 259 at 6, 25, Doc. 259-1 at 1. An investigation about Petitioner's "prescribing of excessive amounts of Schedule 2 narcotic controlled substances" was then conducted by the detective of the PCDAO - a friend of Petitioner's counsel. Doc. 259-3 at 15, the narcotic agent in the Pennsylvania Office of Attorney General- Agent Troy Searfoss. Doc. 259 at 22-23. Doc. 259-1 at 23, and the investigator from the Pennsylvania Department of State Bureau of Licensing, Doc. 258 at 21, which was concluded that "the PA State Department Bureau of Licensing did not believe they had enough information to take administrative action against Li's medical license at this time." Id.

In January of 2013, the Rite Aid Pharmacy decided to stop filling Petitioner's prescriptions for controlled substances after Ms. Janet Hart, the director of the Government Affairs at Rite Aid, became aware that Petitioner was under the Pennsylvania State agencies' investigation. Doc. 259 at 22-23, Doc. 259-1 at 22-23. Subsequently, several local pharmacies started to stop filling or selectively fill Petitioner's prescriptions for controlled substances after they became aware that Petitioner was under the Pennsylvania State agencies' investigation and/or that Petitioner's prescriptions for controlled substances were banned by Rite Aid Pharmacy. Doc. 259 at 23, Doc. 259-1 at 13-14, 22-23.

In about March, 2013, Petitioner's case along with an informant (CS#1 – Samantha Scicutella) was referred to DEA by Counsel's friend – the chief detective of the PCDAO. Doc. 258 at 21, Doc. 259-3 at 15. On March 5, 2013, DEA agent Hischar initiated his investigation about Petitioner's "illegal prescribing of controlled substance medicine", Doc. 258 at 21, and gathered information about Petitioner's prescriptions for controlled substances to support probable cause in his affidavit for an application for a search and seizure warrant through different sources, mainly from his informant – CS#1, from March 5, 2013 to December 29, 2014, Doc. 258 at 20-25, Doc. 258-1 at 1-25, which was related to an alleged crime – "knowingly distributing a controlled substance without a legitimate medical purpose." Doc. 258 at 17, Doc. 259 at 17. It should be noted that Agent Hischar's affidavit was replete with hearsay information where no substantial basis was offered to support that his informant or other hearsay suppliers were credible or their information was reliable. Doc. 259 at 18-20, 24-25, Doc. 259-1 at 1-25, and contained seventy-four (74) false allegations, Doc. 259 at 19-20, Doc. 259-1 at 8-25, Doc. 259-2 at 9-13, 15-16, three (3) intentional material omissions, Doc. 259-2 at 2-6, eight (8) deliberately or recklessly false allegations. Doc. 259-2 at 6-9, and at least ninty-seven (97) stolen patients' protected health information/medical records, Doc. 259-1 at 7-8, Doc. 259-2 at 13-14, none of which were denied or disputed with evidence by the government. Doc. 270 at 35-44. Further, the affidavit indicated that the government's pain management expert did not conclude that Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose after reviewing the affidavit along with the supporting documents. Doc. 258-1 at 23-24, Doc. 259-2 at 16-17, that there was no any legal or factual evidence

about what constitutes knowingly prescribing a controlled substance outside the usual course of professional practice and without a legitimate medical purpose, Doc. 258 at 20-25, Doc. 258-1 at 1-25, Doc. 272 at 7, and that the affiant knew that probable cause did not exist in his affidavit. Doc. 258-1 at 23-24, Doc. 259-2 at 17-18.

On January 29, 2015, Agent Hischar along with other agents including the detectives of the PCDAO - Counsel's friend, conducted a search of Petitioner's medical office and two homes, and seized all patients' medical records, carbon copies of all prescriptions, patients' billing records, cash receipt books, Quickbooks records, financial transaction records and other records such as all business and personal tax returns, u.s. currency, and all business and personal accounts in two banks (PNC and Wells Fargo), pursuant to a search and seizure warrant issued by a magistrate based upon probable cause in Agent Hischar's affidavit. Doc. 259 at 7-8, Doc. 49 at 74-85.

On November 17, 2015, Agent Hischar presented his case without an expert opinion about Petitioner's prescriptions for controlled substances to a federal grand jury, which did not return any indictment against Petitioner. Doc. 259 at 8. See Agent Hischar's grand jury testimony of November 17, 2015.

On July 6, 2016, the government's pain management expert, Dr. Thomas, offered his first expert opinion report where he reviewed about forty (40) patients' medical records selected by Agent Hischar from about 2,000 patients' medical records seized as a result of search of January 29, 2015. Doc. 49 at 86. On July 19, 2016, Agent Hischar presented his case again with Dr. Thomas' expert opinion to a federal grand jury which returned a 24-count indictment against Petitioner. Doc. 259 at 8-9. Doc. 1.

On about January 3, 2017, Petitioner received the government's discovery including Agent Hischar's affidavit and Dr. Thomas' expert opinion report dated July 6, 2016. After becoming aware of the potential exculpatory evidence from the Pennsylvania State agencies' investigation about the same issue from Agent Hischar's affidavit, Doc. 258 at 21, Petitioner asked Counsel to request such exculpatory evidence from the Pennsylvania state agencies several times and Counsel responded that he would subpoena it, but nothing happened. Doc. 259-2 at 20-21.

On August 31, 2017, Dr. Thomas offered his second expert opinion report where he

opined that Petitioner's prescriptions for controlled substances were not for a legitimate medical purpose in one case, but were for a legitimate medical purpose, but substandard, in the other case, based upon the very same evidence he relied on to form his opinion. Doc. 259-3 at 5, Doc. 272 at 12-13, Doc. 219 at 47-49.

On October 17, 2017, Agent Hischar presented his case with sole or primary evidence seized as a result of the search of January 29, 2015 along with Dr. Thomas' expert opinion to a federal grand jury, Doc. 259 at 9, Doc. 49 at 74-189, which returned a 32-count superseding indictment against Petitioner. Doc. 259 at 9, Doc. 47. In front of the grand jury, Agent Hischar testified that "he [expert] couldn't make the final determination without looking at a patient file to see what the patient was being treated for, which is our justification for asking for a search warrant to obtain those patient files." Doc. 259-2 at 18, Doc. 49 at 74.

On January 2, 2018, Counsel filed a motion to suppress evidence seized as a result of the search warrant where he correctly recognized that no probable cause existed in Agent Hischar's affidavit (Doc. 62), but such a critical motion was deemed withdrawn due to Counsel's failure to file a brief in support of the motion to suppress evidence as the court so ordered (Doc. 87), despite the fact that Counsel extended time to file the brief on January 16, 2018 (Doc. 68) and on January 30, 2018 (Doc. 73), and the court granted the extension of time twice (Doc. 72 and Doc. 75). Doc. 259-2 at 21-22.

On March 5, 2018, Counsel filed a motion to exclude the government's expert opinion and testimony (Doc. 95), which was prepared by Petitioner, a legal layperson without any access to legal research, as Counsel failed to prepare it. Doc. 259-2 at 22-23. Counsel also failed to prepare but submitted several other motions and briefs prepared by Petitioner or failed to prepare and submit several other motions and briefs. Id at 21-25.

On May 1, 2018, a Daubert hearing was held before late Honorable Judge Caputo where Counsel conceded the relevance and fit of Dr. Thomas' proffered testimony, Doc. 259-2 at 25, Doc. 126 at 48, despite the fact that Dr. Thomas testified that Petitioner failed to follow the model guidelines - the standard of care, i.e. substandard, but he concluded that Petitioner prescribed controlled substances without a legitimate medical purpose. Doc. 259-2 at 25, Doc. 272 at 12, Doc. 126 at 49.

chief detective of the PCDAO was a friend of Petitioner's counsel, which was NEVER

disclosed to Petitioner by Counsel. Id.

On June 4, 2018, Petitioner was convicted on all remaining 30 counts in the superseding indictment (count 18 and count 21 were withdrawn by the government). Doc. 259 at 10.

On April 3, 2019, Petitioner was sentenced to 330-month imprisonment, and forfeited all U.S. currency, all bank accounts, a medical office building, and a residential property by late Honorable Judge Caputo. Id, Doc. 239.

On September 13, 2019, Petitioner appealed his conviction to the United States Court of Appeals for The Third Circuit, and on July 9, 2020, the court of appeals affirmed Petitioner's conviction. United States v. Li, 819 F. Appx. 111 (3d Cir. 2020).

On February 10, 2021, Petitioner filed a pro se 28 U.S.C. § 2255 motion (Doc. 258) along with a memorandum of law in support of the said motion (Doc. 259) to the United States District Court for the Middle District of Pennsylvania, which was assigned to Honorable Judge Brann. On May 21, 2021, the government filed its memorandum of law in opposition to Petitioner's § 2255 motion (Doc. 270). On June 10, 2021, Petitioner filed a reply brief (Doc. 272).

On May 6, 2022, the district court wrote its opinion (Doc. 276) and issued its order denying Petitioner's § 2255 motion and declining to issue a COA (Doc. 277). It must be pointed out that the district court recited the false allegations in Agent Hischar's affidavit, Doc. 276 at 12-17, dodged Petitioner's allegations in the § 2255 motion throughout its opinion, Id at 1-38, and even altered Petitioner's allegation by stating that counsel's friend was the chief detective of the Pike County Sheriff's office (PCSO), Id at 6, 36-38, which was irrelevant to this case.

On June 6, 2022, a notice of appeal was filed in the district court. Doc. 280. On June 13, 2022, Petitioner filed an application for issuance of a COA (CA-Doc. 4) along with a memorandum of law in support of the said application (CA-Doc. 6) to the United States Court of Appeals for the Third Circuit. The government did not file a response in opposition to the issuance of the requested COA. On November 30, 2022, a panel of the Court of Appeals denied Petitioner's request for a COA. CA-Doc. 14. On January 13, 2013, Petitioner filed a Petition for rehearing of the Panel's decision of November 30, 2022. CA-Doc. 18. On February 1, 2023, the court of appeals denied Petitioner's petition for rehearing. CA-Doc. 19. This Petition for a writ of Certiorari thus follows due to the court of appeals' contrary decision.

COMPELLING REASONS FOR GRANTING THIS PETITION

I. The court of appeals' decision denying Petitioner's request for a COA is contrary to the decision of this court because it sidestepped the COA process by deciding the merit of appeal first and thus decided Petitioner's appeal without jurisdiction.

"Deciding the substance of an appeal in what should be a threshold inquiry undermines the concept of a COA." Miller-EL v. Cockrell, 537 U.S. 332, 342 (2003). "As a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." Id at 336. "Before the issuance of a COA, the Court of Appeals ha(s) no jurisdiction to resolve the merits of petitioner's constitutional claims." Id at 342. "I agree with the majority that the existence of a COA is a jurisdictional prerequisite to the merits appeal." Id at 356 (Justice Thomas, dissenting).

"Until the prisoner secures a COA, the court of appeals may not rule on the merits of his case.... The COA inquiry, we have emphasized, is not coexistence with a merit analysis .... 'when a court of appeals sidesteps [the COA] process by first deciding the merit of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merit, it is in essence deciding an appeal without jurisdiction.'" Buck v. Davis, 580 U.S. 100, 115 (2017). "The statute sets forth a two step process: an initial determination whether a claim is reasonably debatable, and then- if it is- an appeal in the normal course." Id at 117.

In the case at bar, the court of appeals denied Petitioner's request for a COA in Petitioner's both unconstitutional search and seizure claim and ineffective assistance of counsel (IAC) claims. CA-Doc. 14 at 1-2 (see Exhibit F). First, the court of appeals in denying Petitioner's request for a COA in the unconstitutional search and seizure claim phrased its determination in proper terms that "[r]easonable jurists would not debate that Appellant's claim that there was no probable cause for the search warrant was procedurally defaulted, and that he has not shown cause and prejudice... to overcome the default", CA-Doc. 14 at 1 (see Exhibit F), but its decision was wrong, because the procedural default could be overcome by the IAC and prejudice resulting from counsel's

failure to file a brief in support of the motion to suppress evidence as a result of the Search Warrant as discussed below (see Claims A and B).

Second, the court of appeals in denying Petitioner's request for a COA in the IAC claims opined that "for substantially the reasons provided by the District Court, reasonable jurists would agree that Appellant was not denied the effective assistance of counsel.... In particular, Appellant has not shown that his counsel was ineffective in his questioning of the pain management expert, or for failing to challenge the search warrant or to prevent the introduction of all of Appellant's medical records." CA-Doc. 14 at 1-2 (see Exibit F). The court of appeals' above opinion is NOT a decision about the debatability of the district court's assessments of Petitioner's IAC claims, but a decision of the merits of the appeal and a resolution of that debate. The court of appeals thus "sidestep[ped] [the COA] process", Buck, 580 U.S. at 115, its decision "undermine[d] the concept of a COA", Miller-EL 537 U.S. at 342, and "it is in essence deciding an appeal without jurisdiction." Buck, 580 U.S. at 115. Consequently, the court of appeals' decision denying Petitioner's request for a COA is contrary to the decision of this Court in the cases of Miller-EL, and Buck.

Third, the court of appeals in its opinion was silent about the district court's assessments of Petitioner's following four IAC claims: (1) Counsel entirely failed to defend Petitioner in death count (Count 24). Doc. 276 at 25-31; (2) Counsel failed to investigate a critical source of potential exculpatory evidence. Doc. 276 at 31-32; (3) Counsel erroneously conceded the relevance and fit of Dr. Thomas' proffered testimony at Daubert hearing. Doc. 276 at 32-33; and (4) there existed an actual conflict of interest in Counsel's representation. Doc. 276 at 36-38. See CA-Doc. 14 at 1-2 (Exhibit F). It is not clear whether the court of appeals' denial of Petitioner's request for a COA in these four IAC claims was due to its decision that reasonable jurists would agree that Petitioner was not denied the effective assistance of counsel- merit decision or its decision that reasonable jurists would not debate the district court's assessments of Petitioner's IAC claims- debatability decision. Petitioner, however, submits to this court that the court of appeals erred in denying Petitioner's request for a COA in these four IAC claims either due to the merit decision because "[b]efore the issuance of a COA, the Court of Appeals ha[s] no jurisdiction to resolve the merits of Petitioner's constitutional claim", Miller-EL

537 U.S. at 342 or due to the debatability decision because "reasonable jurists would find the district court's assessments of [Petitioner's these] constitutional claims debatable or wrong", Slack v. McDaniel, 529 U.S. 473, 484 (2000), as discussed below (see Claims C, D, E and F).

II. The court of appeals' decision denying Petitioner's request for a COA is contrary to the decision of this court because reasonable jurists would find the district court's assessments of Petitioner's constitutional claims in the §2255 motion wrong or debatable.

"Where a district court has rejected the constitutional claims on merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessments of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484.

"To the end, our opinion in Slack held that a COA does not require a showing that the appeal will success. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-EL, 537 U.S. at 337. "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. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." Id at 342. "The COA inquiry asks only if the district court's decision was debatable." Id at 348.

"At the COA stage, the only question is whether the applicant has shown...that 'jurists would conclude the issues presented are adequate to deserve encouragement to proceed further'" Buck, 508 U.S. at 115. "We reiterate what we have said before: A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the district court's decision was debatable.'" Id at 116.

Applying the above well-established case laws of this court to the instant case, Petitioner submits to this court that the court of appeals' decision denying Petitioner's request for a COA is contrary to the decision of this court, because reasonable jurists would find the district court's assessments of Petitioner's following six constitutional claims in the §2255 motion wrong or debatable as discussed below.

A. The district court's decision that the procedural default of Petitioner's unconstitutional search and seizure claim could not be overcome, was wrong or debatable when there existed IAC and prejudice, because its decision is contrary to the decision of this court in the case of Murray v. Carrier.

The district court opined that Petitioner's unconstitutional search and seizure claim was procedurally defaulted, which could not be overcome, because Petitioner was not able to establish cause and prejudice. Doc. 276 at 9-10. Petitioner, however, argued that he received IAC and prejudice resulting from counsel's failure to file a brief in support of the motion to suppress evidence after counsel filed a motion to suppress evidence seized as a result of the search warrant. Doc. 259-2 at 21-22, as discussed below in Claim B. As a result, reasonable jurists would find that the district court's decision that the procedural default of Petitioner's unconstitutional search and seizure claim could not be overcome, was wrong or debatable, because its decision is contrary to the decision of this court in the case of Murray v. Carrier, 477 U.S. 478, 488 (1986) ("Ineffective assistance of counsel... is cause for a procedural default."). Because reasonable jurists would find that the district court's assessment of this constitutional claim was wrong or debatable, the court of appeals' decision denying Petitioner's request for a COA in this claim is contrary to the decision of this court in the cases of Slack, Miller-EL, and Buck. Supra.

B. The district court's decision that Petitioner did not receive IAC, was wrong or debatable when counsel failed to file a brief in support of the motion to suppress evidence, because its decision of probable cause existence in the affidavit, good faith exception and prejudice resulting from counsel's said failure is contrary to the decision of this court in relevant cases.

1. The district court's decision that Probable cause existed in the affidavit, was wrong or debatable, because its decision is contrary to the decision of this court in the cases of Franks v. Delaware, Illinois v. Gates and United States v. Ventresca.

"[P]robable cause which will justify the issuance of a search warrant is less than certainty or proof, but more than suspicion or possibility, the test being whether the allegations of the supporting affidavit warrant a prudent and cautious man in believing that the alleged offense has been committed." (emphasis added). United States ex. rel Campbell v. Rundle, 327 F.2d 153, 163 (3d Cir. 1964). See Carroll v. United States, 267 U.S. 132, 161 (1925).

The crux in this claim is whether the affidavit contained a substantial basis or sufficient information for the magistrate to conclude that an alleged crime-Prescriptions of controlled substances were issued outside the usual course of Professional Practice and without a legitimate medical purpose and Petitioner knew or intended that his Prescriptions were issued outside the usual course of Professional Practice and without a legitimate medical purpose, Doc. 276 at 17, was committed by Petitioner.

Petitioner alleged in the §2255 motion that (1) the affidavit was replete with hearsay information where no supporting evidence was offered to credit the hearsays. Doc. 259 at 18-20, 24-25, Doc. 259-1 at 1-25; (2) the affidavit contained Seventy-four (74) false allegations, Doc. 259 at 19-20, Doc. 259-1 at 8-25, Doc. 259-2 at 1, 9-13, 15-16, three (3) intentional material omissions, Doc. 259-2 at 2-6, eight (8) deliberately or recklessly false allegations, Id at 6-9, and at least ninty-seven (97) stolen medical records by the affiant's informant, Doc. 259-1 at 7-8, Doc. 259-2 at 13-14; (3) the government's pain management expert, Dr. Thomas, did not conclude that Petitioner Prescribed controlled substances outside the usual course of professional Practice and without a legitimate medical purpose after having reviewed the affidavit along with the supporting documents. Doc. 258-1 at 23-24, Doc. 259-2 at 16-17; (4) the affidavit did not contain any legal basis or other evidence about what constitutes Knowingly Prescribing Controlled Substances outside the usual course of professional practice and without a legitimate medical purpose. Doc. 272 at 7; and (5) the affiant Knew that probable cause did not exist in his affidavit. Doc. 259-2 at 17-18. Petitioner then argued that the affidavit did not contain a substantial basis or sufficient information for the magistrate to conclude that an alleged crime was committed by Petitioner,

Doc. 259-2 at 16-17. Doc. 272 at 4-7. and probable cause thus did not exist in the affidavit. Id. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

The government did not deny or dispute any of the above allegations. Doc. 270 at 35-44, but argued the existence of probable cause by merely reciting the allegations including the false ones in the affidavit and by fabricating allegations which did not exist in the affidavit. Doc. 272 at 4-7, without providing any reasoning or a legal basis of reasoning about why Petitioner knowingly prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose. Doc. 270 at 35-44.

The district court opined that an alleged crime was committed by Petitioner, because the magistrate could reasonably infer from the allegations in the affidavit that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose and that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Doc. 276 at 18-20, thus satisfying the two elements (element two and element three) required to support that an alleged crime was committed. Id at 17. Petitioner contends that the district court's such a conclusion was wrong or debatable as discussed below.

i. The district court's decision that the magistrate could make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, was wrong or debatable, because such a decision is contrary to the decision of this court in the case of Franks v. Delaware and Illinois v. Gates, the pain management expert's opinion, the sister circuit court's decision, the district court's own ruling, and any logic.

To support its opinion that the magistrate could make a reasonable inference from the allegations in the affidavit that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, thus satisfying element two, Id at 17, the district court based its reasoning upon its own legal ruling on a reasonable inference about prescriptions created in 2021- the first impression in the 3rd circuit jurisdiction that (1) prescriptions of controlled substances in enormous quantities and in dangerous combinations or (2) significant quantities of schedule II con-

trolled substances in pharmacy records and pharmacies' eventual refusal to fill such prescriptions support a reasonable inference that the underlying prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Id at 18-19. The district court offered the following allegations in the affidavit the magistrate could rely on in making a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, based on its above legal ruling: (1) copious amounts of opioids; (2) second largest prescriber in Pennsylvania and fifth highest prescriber in the country. It must be pointed out that this allegation was falsely created without a context in the affidavit where a pharmacy-Express scripts erroneously compared the amounts of controlled substances prescribed by Petitioner, a pain management specialist (certified in Pain Medicine by the American Board of Pain Medicine) with those prescribed by neurologists who rarely treated patients with chronic pain. Doc. 258-1 at 20, Doc. 259-1 at 24-25; (3) penchant for trinity prescribing; (4) significant quantities of schedule II controlled substances in pharmacy records; and (5) pharmacies eventual refusal to fill such prescriptions. Doc. 276 at 18-19. Petitioner argues that the district court's such a decision was wrong or debatable for the following reasons:

a. The district court's decision that the magistrate, relying on the deliberately or recklessly false allegations in the affidavit, could make a reasonable inference about Petitioner's prescriptions in 2015, based upon its legal ruling in 2021, is contrary to the decision of this court in the case of Franks v. Delaware. According to the district court's legal ruling on a reasonable inference about prescriptions in 2021, the magistrate had to rely on either (1) prescriptions of controlled substances in enormous quantities and in dangerous combinations, or (2) significant quantities of schedule II controlled substances in pharmacy records and pharmacies' eventual refusal to fill such prescriptions, in making a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Doc. 276 at 18-19. As Petitioner alleged in the §2255 motion, pharmacies' eventual refusal to fill such prescriptions contained deliberately or recklessly false allegations, Doc. 259 at 22-23, Doc. 259-1 at 13, Doc. 259-2 at 2-5, 8-9, and penchant for trinity prescribing (dangerous combinations) was deliberately

or recklessly false allegation in the affidavit. Doc. 259-2 at 9, 16. Because the district court did not hold evidentiary hearing in this case and did not point out in its opinion that these allegations are clearly frivolous on the basis of the existing record, Doc. 276 at 1-38, it must NOT dodge these allegations and must accept them as true. See Pickard v. United States, 170 F. Appx. 243, 247 (3d Cir. 2005) ("If a hearing is not held, the district court must accept movant's allegations as true 'unless they are clearly frivolous on the basis of the existing record.'"); Moore v. United States, 571 F.2d 179, 184 (3d Cir. 1978) ("Since we deal with the dismissal of a habeas Petition with no hearing or affidavits which expand the record, we must take as true the allegations of the Petitioner, unless they are clearly frivolous."); Also see Blackledge v. Allison, 431 U.S. 63, 75-76, 78 (1977). When these allegations are accepted as true, reasonable jurists would find that the district court's decision that the magistrate, relying on the deliberately or recklessly false allegations - pharmacies' eventual refusal to fill such prescriptions and penchant for trinity prescribing (dangerous combinations), could make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, was wrong, because such a decision is contrary to the decision of this court in the case of Franks v. Delaware, 438 U.S. 154, 168 (1978) ("The requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation', would be reduced to nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause..."). As a result, reasonable jurists would find that the magistrate could not make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element two thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

b. The district court's decision that the magistrate, without any factual or legal basis, could make a reasonable inference about Petitioner's prescriptions in 2015, is contrary to the decision of this court in the case of Illinois v. Gates. First, the government's pain management expert, Dr. Thomas, did not conclude that Petitioner prescribed controlled sub-

stances outside the usual course of professional practice and without a legitimate medical purpose after he had reviewed the affidavit along with the supporting documents. Doc. 258-1 at 23-24. Doc. 259-2 at 16-17. Therefore, reasonable jurists would find that the magistrate, based upon Dr. Thomas' expert opinion, could not conclude that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Second, the affidavit did not contain the above-described legal ruling on a reasonable inference about prescriptions or any other evidence about what constitutes prescribing controlled substances outside the usual course of professional practice and without a legitimate medical purpose. Doc. 258 at 20-25, Doc. 258-1 at 1-25, Doc. 272 at 7. Therefore, reasonable jurists would find that the magistrate, based upon the allegations in the affidavit alone, could not make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Third, the reviewing court confines its review "to the facts that were before the magistrate, i.e. the affidavit, and do[es] not consider information from other portions of the record." United States v. Jones, 994 F.2d 1051, 1055 (3d Cir. 1993). Therefore, reasonable jurists would find that the magistrate could not base upon any information outside the affidavit in making a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Fourth, the affidavit did not contain any factual evidence that the magistrate was qualified to give medical expert opinion. Doc. 258 at 20-25, Doc. 258-1 at 1-25. Therefore, reasonable jurists would find that the magistrate was unable to base upon her medical knowledge or medical experience, if any, in concluding that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Fifth, the above-described legal ruling the magistrate must base upon in making a reasonable inference about whether Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, was created by the district court in 2021 – the first impression in the 3rd Circuit jurisdiction, by quoting a case law from the 9th Circuit in 2020. Doc. 276 at 19. Thus, the magistrate would not have any knowledge and experience of such a legal ruling in 2015 when she issued the search warrant. Doc. 259 at 17. because such a legal ruling did not exist in 2015. Therefore, reasonable jurists would find that the

magistrate could not base upon her own acquired knowledge or everyday life experience as a layperson in 2015 in making a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Finally, the magistrate might reasonably suspect that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose after she reviewed the affidavit in 2015, but "probable cause which will justify the issuance of a search warrant is less than certainty or proof, but more than suspicion or possibility..." (emphasis added). United States ex. rel Campbell, 327 F.2d at 163. See Alabama v. White, 496 U.S. 325, 330 (1990) ("reasonable suspicion is a less demanding standard than probable cause..."). Because the magistrate did not have any factual and legal basis or sufficient information in the affidavit in making a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose as discussed above, reasonable jurists would find that the district court's decision that the magistrate could make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, was wrong, because such a decision is contrary to the decision of this court in the case of Illinois v. Gates, 462 U.S. 213, 239 (1983) ("An affidavit must provide magistrate judge with a substantial basis for determining the existence of probable cause.... Sufficient information must be presented to the magistrate to allow that official to determine probable cause.... Court must continue to conscientiously review the sufficiency of affidavit on which warrants are issued."). As a result, the magistrate could not make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element two thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

C. The district court's decision that the magistrate, based upon the above-described legal ruling on a reasonable inference about prescriptions without benefit of reviewing the patients' medical records, could make a reasonable inference about Petitioner's prescriptions,

is contrary to the pain management expert's opinion, the Federation of State Medical Boards' Statement, the sister Circuit Court's decision and its own ruling in another case. According to the district court's legal ruling on a reasonable inference about prescriptions in 2021, the court can determine that a physician's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose based solely on the issued prescriptions without reviewing the patients' medical records. Doc. 276 at 18-19. This is contrary to the pain management expert's opinion, the Federation of State Medical Boards' statement, the sister Circuit court's decision and its own ruling in another case. First, Dr. Thomas, the government's pain management expert in current case, made clear that "in order to establish which, if any, prescriptions for controlled substances were medically legitimate, he would have to review the medical records of all patients to whom Dr. Li prescribed controlled substances for medical context" and "a review of the medical records would be required to determine if there was a legitimate medical necessity for the prescribed medications." (emphasis added). Doc. 258-1 at 23. Dr. Parran, a pain management expert, in a case in the 11th Circuit also opined that "[t]o decide whether an individual prescription was for legitimate medical purpose or within the course of usual medical practice requires looking at the chart of that individual patient." (emphasis added). United States v. Merrill, 513 F.3d 1293, 1302 (11th Cir. 2008). Second, the Federation of State Medical Boards in 2013 stated "[t]he Board will judge the validity of the physician's treatment of a patient on the basis of available documentation, rather than solely on the quantity and duration of medication administered." (emphasis added). Model policy on the use of opioid analgesics in the treatment of chronic pain (2013) at 6. Third, the 8th Circuit court in a case involving a physician's prescriptions of controlled substances decided that "absent any evidence bearing upon Dr. Jones' treatment of the patients in question, issuance of the prescription without more does not show that Dr. Jones acted unprofessionally in issuing these prescriptions." (emphasis added) United States v. Jones, 570 F.2d 765, 768 (8th Cir. 1978). Fourth, the district court itself on three occasions in a recent case held that "patient medical files are critical for the purpose of prescribing controlled substance because they 'distinguish[] the practice of medicine from drug dealing.'" (emphasis added). United States v. Kraynak, 2020 U.S. Dist. Lexis 208948 at 5 (M.D.Pa. November 9, 2020); United States v. Kraynak, 2021 U.S. Dist. Lexis

135176 at 10 (M.D. Pa. July 20, 2021); and United States v. Kraynak, 2021 U.S. Dist. Lexis 149559 at 8 (M.D. Pa. August 10, 2021). Finally, the district court's such a legal ruling will have a chilling effect on pain management specialists like Petitioner, because (1) they normally Prescribe significant quantities of opioid pain medications to patients with chronic pain for pain relief, (2) they may also prescribe benzodiazepine for anxiety or insomnia and muscle relaxants such as soma for muscle spasm which are very common in patients with chronic pain, thus coincidentally forming "dangerous combinations", Doc. 259-2 at 16, which the government did not dispute, Doc. 270 at 35-44, and (3) pharmacies may refuse to fill Controlled substance prescriptions for various reasons such as altered prescription, refuiring patient ID, not accepting cash payment, not accepting patient's insurance or having their own policy etc. rather than recognizing a problem of the prescriber, Doc. 259 at 20-21, which the government did not dispute, Doc. 270 at 35-44. As a result, reasonable jurists would find that the magistrate, without the benefit of reviewing patients' medical record, might not be able to make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element two thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

d. The district court's decision that the magistrate, as a layperson, based upon its legal ruling created in 2021, was able to make a reasonable inference in 2015 that Petitioner's Prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose where the government's pain management expert, Dr. Thomas, as a layperson and expert, could not so conclude, is contrary to any logic. The very purpose of Dr. Thomas Contracted by the government to review the affidavit was to determine whether Petitioner Prescribed Controlled substances outside the usual course of professional practice and without a legitimate medical purpose. Doc. 258-1 at 23. Dr. Thomas, as a layperson and expert, was not able to draw a conclusion or make a reasonable inference that Petitioner Prescribed Controlled Substances outside the usual course of Professional practice and without a legitimate medical purpose after having reviewed the affidavit and supporting documents. Id

at 23-24. Yet the district court decided that the magistrate, as a layperson only, was able to make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose after reviewing the affidavit only in 2015, even though the legal ruling on a reasonable inference about prescriptions the magistrate had to base upon in making a reasonable inference about Petitioner's prescriptions was created by the district court in 2021. Doc. 276 at 18-19. Evidently, reasonable jurists would find that the district court's such a decision was wrong, because it is contrary to any logic. Had the magistrate been able to make a reasonable inference from the allegations in the affidavit about whether Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, the government would not have contracted Dr. Thomas to review the affidavit and determine whether Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose. As a result, reasonable jurists would find that the magistrate could not make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element two thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

ii. The district court's decision that the magistrate could make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, was wrong or debatable, because such a decision is contrary to the decision of this court in the case of United States v. Ventresca and any logic.

To support its opinion that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, the district court did not provide any reasoning or a legal basis of reasoning and only offered the following allegations in the affidavit that the magistrate could rely on in making such a reasonable inference about Petitioner's prescriptions: (1) pharmacies' refusal to fill Petitioner's prescriptions; (2) prescribing non-traditional combinations of medications; (3) prescribing

Schedule II narcotics to multiple members of the same family; (4) ignoring red flags with his patients; (5) several drug overdose deaths with altered medical records of the deceased patients; (6) prescribing additional narcotic drug to a patient with complete pain relief; (7) prescribing oxycodone to patients with no complaints of pain; (8) prescribing opioid to a pregnant patient after his staff's concern about the prescription; and (9) prescribing opioids to patients with drug test failure. Doc. 276 at 20. Petitioner contends that the district court's such a decision was wrong or debatable for the following reasons:

a. The district court's decision that the magistrate, relying on the informant's unsubstantiated and unreliable information in the affidavit, could make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, is contrary to the decision of this court in the case of United States v. Ventresca. The allegations in the affidavit offered by the district court were essentially the hearsay information of CS#1, a proven disgruntled former employee of Petitioner, Doc. 259 at 25, Doc. 259-1 at 1, a proven dishonest person and liar, Doc. 259-1 at 1-6, a proven hidden thief, Doc. 259-1 at 7, Doc. 259-2 at 13, and a proven paid informant of the affiant, Doc. 259-2 at 13, all of which were not denied or disputed by the government. Doc. 270 at 35-44. "Informants are not presumed to be credible and the government is generally required to show by the totality of the circumstances either that the informant has provided credible information in the past or that the information has been corroborated through independent investigation." United States v. Yusuf, 461 F.3d 374, 385 (3d Cir. 2006). Petitioner alleged in the § 2255 motion that the affiant did not offer any evidence supporting that the informant had provided credible information in the past or that the informant's above hearsay information had been corroborated through independent investigation. Doc. 259 at 25. Doc. 259-1 at 8. Petitioner further alleged that the informant's above hearsays were false, Doc. 259-1 at 8-22, which the government did not deny or dispute. Doc. 270 at 35-44. Because the district court did not hold evidentiary hearing in this case and did not point out that Petitioner's allegations are clearly frivolous on the basis of the existing record, Doc. 276 at 1-38, it must accept these allegations as true. See Pickard, 170 F. Appx. at 247. Supra. Also see Blackledge, 431 U.S. at 75-76, 78. When these allegations are accepted as true, no evidence supports that the informant's hearsay information was reliable or there was a substantial basis for crediting the informant's hearsays. The fact that the

informant had worked with Petitioner in his medical office, had intimate knowledge of that practice etc. does not automatically support that her information was reliable as the district court implied, at least the district court did not cite any authority to support such an opinion. Doc. 276 at 21-22. Further, the district court's such characterization that the informant "had voluntarily contracted [sic] law enforcement to report concerns over Li's behavior" was untrue, because the informant reported Petitioner to PCDAO for investigation as a revenge shortly after she was given oral admonition by Petitioner at her 6-month evaluation of job performance in October, 2012, Doc. 259 at 6, 25, Doc. 259-1 at 1, and the informant had admitted her wrong-doing and even wanted to be taken back as Petitioner's employee again even though the DEA's investigation of Petitioner was still ongoing. Doc. 259-1 at 6-7. As a result, reasonable jurists would find that the district court's decision that the magistrate, relying on the informant's hearsays which were not credited by a substantial basis, could make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, was wrong, because such a decision is contrary to the decision of this court in the case of United States v. Ventresca, 380 U.S. 102, 108 (1965) ("hearsay may be the basis for issuance of the warrant 'so long as there [is] a substantial basis for crediting the hearsay.'"). Consequently, reasonable jurists would find that the magistrate could not make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element three thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

b. The district court's decision that the magistrate could make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose where the magistrate could not make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, is contrary to any logic. As discussed above, the affidavit did not contain any legal basis or other evidence about what constitutes Prescribing Controlled Substances outside the usual course of professional practice and without a

legitimate medical purpose. Doc. 258 at 20-25, Doc. 258-1 at 1-25, Doc. 272 at 7. Therefore, reasonable jurists would find that the magistrate, relying on only these allegations in the affidavit offered by the district court, could not make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. If the magistrate could not make a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, how could the magistrate make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose? Evidently, reasonable jurists would find that the district court's such a decision is contrary to any logic. As a result, reasonable jurists would find that the magistrate could not make a reasonable inference from the above allegations in the affidavit that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element three thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163 Supra. Also see Carroll, 267 U.S. at 161.

C. The district court's decision that the magistrate could make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose where the government's pain management expert, Dr. Thomas, could not conclude that Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose, is contrary to any logic. The very purpose of Dr. Thomas contracted by the government to review the affidavit along with the supporting documents was to determine whether Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose. Doc. 258-1 at 23. Dr. Thomas could not conclude that Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose after he had reviewed the affidavit along with the supporting documents. Id at 23-24, Doc. 259-2 at 16. If Dr. Thomas could not conclude that Petitioner prescribed controlled substances outside the usual course of professional practice and without

a legitimate medical purpose, how could Petitioner know or intend that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose? Assuming arguendo that Petitioner knew that some pharmacies refused to fill his prescriptions or that some of his patients were from the same family, or that he prescribed non-traditional combinations of pain medications, or that a patient was visibly pregnant, or that some of his patients failed urine drug test etc as implied in the allegations, Doc. 276 at 20. When Petitioner prescribed opioid analgesics to these patients with chronic pain for pain relief, but how could he know or intend that his such opioid prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose when the government's pain management expert, Dr. Thomas, could not conclude that Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose after he reviewed these very same allegations in the affidavit offered by the district court? Evidently, reasonable jurists would find that the district court's such a decision is contrary to any logic. As a result, reasonable jurists would find that the magistrate could not make a reasonable inference that Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element three thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

d. The district court's decision that the magistrate, based upon its legal ruling on a reasonable inference about prescriptions in 2021, could make a reasonable inference that in 2015 Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, is contrary to any logic. The only evidence as a legal basis the district court offered that the magistrate could base upon in making a reasonable inference about prescriptions from the allegations in the affidavit was its legal ruling created in 2021 as discussed above. Doc. 276 at 19. Because such a legal ruling did not exist in 2015 when the magistrate issued the search warrant, reasonable jurists would find that Petitioner would not have known or intended that (1) prescriptions of controlled substances in enormous quantities and in dangerous combinations or (2) significant quantities

Of Schedule II controlled substances in pharmacy records and pharmacies' eventual refusal to fill such prescriptions support a reasonable inference that the underlying prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Id. Therefore, reasonable jurists would find that the district court's decision that the magistrate, based upon its legal ruling in 2021, could make a reasonable inference that in 2015 Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose, is contrary to any logic. As a result, reasonable jurists would find that the magistrate, based upon the legal ruling on a reasonable inference about prescriptions in 2021, could not make a reasonable inference that in 2015 Petitioner knew or intended that his prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The element three thus was not satisfied and no crime was committed by Petitioner. Doc. 276 at 17. Because no crime was committed, reasonable jurists would find that the district court's decision that probable cause existed in the affidavit, was wrong. See United States ex. rel Campbell, 327 F.2d at 163. Supra. Also see Carroll, 267 U.S. at 161.

2. The district court's decision that good faith exception applied in this case, was wrong, because such a decision is contrary to the decision of this court in the case of United States v. Leon and Franks v. Delaware.

Petitioner alleged in the §2255 motion that the affiant, DEA agent Hischar, knew that probable cause did not exist in his affidavit, because (1) he documented in the affidavit that the government's expert, Dr. Thomas, did not conclude that Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose. Doc. 258-1 at 23-24. Doc. 259-2 at 17-18, and (2) he testified in front of grand jury that "he [expert] couldn't make the final determination without looking at a patient file to see what the patient was being treated for, which is our justification for asking for a search warrant to obtain those patient files", Id, indicating that the justification for a search warrant was to obtain patient files rather than probable cause. Doc. 259-2 at 17.

The government did not deny or dispute Petitioner's above allegation. Doc. 270 at 35-44.

The district court dodged this allegation. Doc. 276 at 23-25, which was wrong, because it must accept this allegation as true, for the district court did not hold evidentiary hearing in

this case and did not point out that this allegation is clearly frivolous on the basis of the existing record. See Pickard, 170 F.Appx. at 247. Supra. Also see Blackledge, 431 U.S. at 75-76, 78. When this allegation is accepted as true, reasonable jurists would find that the district court's decision that good faith exception applied in this case. Doc. 276 at 24-25, is contrary to the decision of this court in the case of United States v. Leon, 468 U.S. 897, 922 n.23, 923 (1984) (good faith exception does not apply when "a reasonably trained officer would have known that search was illegal despite the magistrate's authorization"... or when the officer "rel[ied] on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'") because the affiant knew that probable cause did not exist in his affidavit. Supra. Further, because the magistrate had to rely on the deliberately or recklessly false allegations in making a reasonable inference that Petitioner's prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose as discussed above, reasonable jurists would find that the district court's decision that good faith exception applied in this case. Doc. 276 at 24-25, is contrary to the decision of this court in the case of Franks v. Delaware, 438 U.S. at 156 (when "the allegation of perjury or reckless disregard is established ..., with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was so lacking on the face of the affidavit.") and in the case of United States v. Leon, 468 U.S. at 923 (good faith exception does not apply "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false..."). Consequently, reasonable jurists would find that the district court's decision that good faith exception applied in this case, was wrong.

3. The district court's decision that Petitioner suffered no prejudice resulting from counsel's said failure and thus did not receive IAC, was wrong or debatable, because such a decision is contrary to the decision of this court in the case of Strickland v. Washington.

As discussed above, probable cause did not exist in the affidavit and good faith exception did not apply in this case. Because "[e]vidence obtained as a direct result of an unconstitutional search and seizure is plainly subject to exclusion", Segura v. United States, 468 U.S. 796, 804 (1984), but for counsel's failure to file a brief in support of the motion to suppress evi-

dence after he filed a motion to suppress evidence seized as a result of search warrant, there was a reasonable probability that the motion to suppress evidence would have been granted and all evidence seized from Petitioner's medical office, two homes and bank accounts would have been suppressed. Doc. 259-2 at 21-22. Further, because Petitioner's indictment and conviction were solely or primarily based upon these seized evidence, Id at 18-19, which the government did not deny or dispute, Doc. 270 at 35-44, but for counsel's said failure, there was a reasonable probability that the outcomes of these legal proceedings would have been different. Doc. 259-2 at 18-19, 22. As a result, reasonable jurists would find that the district court's decision that Petitioner "suffered no prejudice" resulting from counsel's said failure, Doc. 276 at 25, was wrong, because such a decision is contrary to the decision of this court in the case of Strickland v. Washington, 466 U.S. 668, 694 (1984) ("the appropriate test for prejudice finds... there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). As the district court did not argue that the counsel's performance in this claim was not deficient, reasonable jurists would find that the district court's decision that Petitioner did not receive IAC in this claim was wrong, because such a decision is contrary to the decision of this court in the case of Strickland, Id at 687 (counsel's assistance is ineffective when "counsel's performance was deficient... (and) the deficient performance prejudiced defense.")

Because reasonable jurists would find that the district court's assessment of this constitutional claim was wrong or debatable as discussed above, the court of appeals' decision denying Petitioner's request for a COA is contrary to the decision of this court in the case of Slack, Miller-EL, and Buck, Supra.

"This court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant.... By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order." Ventresca, 380 U.S at 111. Petitioner thus respectfully prays that this Honorable Court administer justice in the instant case by "promoting respect for law and order".

C. The district court's decision that Petitioner did not receive IAC in death count (count 24), was wrong or debatable when counsel entirely failed to defend Petitioner in this count

because such a decision is contrary to the decision of this Court in the case of United States v. Cronic and Strickland v. Washington, and the decision of the Third Circuit in the case of Ruiz v. Huntingdon and United States v. Baynes.

Petitioner alleged in the § 2255 motion that Counsel entirely failed to defend Petitioner in death count (count 24) which mandated minimal 20-year imprisonment by failing to perform three critical examinations: a cross-examination on Dr. Thomas, a key witness for Petitioner's conviction, and two direct examinations on both Petitioner's pain management expert and Petitioner himself, key witnesses for Petitioner's innocence, despite the fact that Counsel had evidence in hand to prove otherwise, Doc. 259-3 at 8-13, and particularly by failing to present four pieces of critical exculpatory evidence to the jury for Petitioner's defense: opioid treatment quidelines, blood oxycodone lethal (postmortem) level of 400 to 700 ng/ml, morphine found in the deceased patient's system, and undetermined level of Zolpidum (a sleep pill-respiratory suppressant) in the deceased patient's blood, despite the fact that Counsel had all of the four pieces of critical exculpatory evidence in his hand. Id at 10-13. Petitioner first argued that the key evidence the jury heard in this claim was only the government's version of events and Dr. Thomas' false testimony and baseless opinion were left in the record uncontested, Id at 8-13, Counsel thus entirely failing to subject the prosecution's case to meaningful adversarial testing. Petitioner further argued that the opioid treatment quidelines Counsel failed to present to the jury for Petitioner's defense support that it was not contraindicative or inappropriate to prescribe a controlled substance (Oxycodone 15 mg) to a patient with severe pain for pain relief when the patient had questionable abnormal urine drug screen test result due to cross-reaction, a significant psychiatric history and a history of remote suicidal ideation, which were relied on by Dr. Thomas to form his opinion that Petitioner prescribed Oxycodone 15mg, one tablet, every 4 to 6 hours as needed to the patient with severe pain for pain relief without a legitimate medical purpose. Id at 10-11. Petitioner finally argued that Dr. Thomas' opinion that oxycodone prescribed by Petitioner was the but-for cause of death, was unsupportive, because he failed to consider three key evidence in forming his opinion about but-for cause of death: the blood Oxycodone lethal (postmortem) level of 400 to 700 ng/ml, two to three times higher than the blood Oxycodone level of 215 ng/ml in the deceased patient's blood, morphine found in the deceased patient's system

and undetermined level of zolpidum (a sleep pill-respiratory suppressant) in the deceased patient's blood. Id at 12-13. Because Dr. Thomas' opinion was key evidence for Petitioner's conviction, Doc. 259-3 at 1, 6, 13-14, which the government did not deny or dispute, Doc. 270 at 34-52, but for Counsel's said failure, there was a reasonable probability that the government would not have proven beyond a reasonable doubt in this count that Petitioner prescribed Oxycodone 15mg to the patient with severe pain outside the usual course of professional practice and without a legitimate medical purpose and that the Oxycodone prescribed by Petitioner was the but-for cause of death. Doc. 259-3 at 13-14.

The government did not deny Petitioner's above allegations and did not offer any counter-argument with supporting evidence except for conclusory and irrelevant statements in regard to Petitioner's allegations in this claim. Doc. 270 at 47-51.

The district court dodged Petitioner's allegations about Counsel's entire failure to defend Petitioner in death count and about the previously unpresented evidence including the blood Oxycodone lethal (postmortem) level of 400 to 700 ng/ml, morphine in the deceased patient's system and undetermined level of zolpidum in the deceased patient's blood, and instead tried to explain that Dr. Thomas' testimony the government presented to convict Petitioner was reasonable and the evidence from opioid treatment guidelines counsel failed to present to the jury for Petitioner's defense would not undermine Dr. Thomas' testimony. Doc. 276 at 27-29. The district court thus concluded that Petitioner did not receive IAC in this claim. Id at 31.

Petitioner contends that the district court was wrong when it dodged Petitioner's allegations, because it must accept Petitioner's allegation as true, for the district court did not hold evidentiary hearing in this case and did not point out in its opinion that these allegations are clearly frivolous on the basis of the existing record. See Pickard, 170 F. Appx. at 247. Supra. Also see Blackledge, 431 U.S. at 75-76, 78. When the above allegations are accepted as true, reasonable jurists would find that the district court's decision that Petitioner did not receive IAC in this claim, was wrong or debatable for the following reasons: First, because Petitioner's counsel entirely failed to defend Petitioner in death count (Count 24) by failing to perform three critical examinations and failing to present four pieces of critical exculpatory evidence which were in counsel's hand to the jury, thus leaving

only the government's version of events to the jury and leaving the government expert's false testimony and baseless opinion in the record uncontested. Supra, the district court's such a decision is contrary to the decision of this court in the case of United States v. Cronic, 466 U.S. 648, 659 (1984) ("if counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, then there has been denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."). Second, because there was a reasonable probability in this claim that, but for counsel's said failures, the outcome of the proceeding in this claim would have been different as discussed above, Petitioner thus suffering an actual prejudice from counsel's said failures, the district court's decision is contrary to the decision of this court in the case of Strickland, 466 U.S. at 694 ("the appropriate test for prejudice finds... there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Third, because the district court dodged Petitioner's allegations, failed to weigh the evidence as a whole and failed to consider the potential impact of the previously unpresented evidence including the blood oxycodone lethal (postmortem) level of 400 to 700 ng/ml, two to three times higher than the deceased patient's blood oxycodone level of 215 ng/ml, the morphine found in the deceased patient's system, and the undetermined level of zolpidum in the deceased patient's blood on the determination of the but-for cause of death, Doc. 276 at 25-31, the district court's such a decision is contrary to the decision of the Third Circuit in the case of Ruiz v. Huntingdon, 672 F. Appx. 207, 210 (3d Cir. 2016) ("In determining whether counsel's failure to present potentially exculpatory evidence was prejudicial, a reviewing court cannot merely determine whether there was sufficient evidence for a conviction at the time of trial, but instead must weigh the evidence as a whole and consider the potential impact of the previously unpresented evidence."). Finally, reasonable jurists would find that the district court's decision that evidence from the opioid treatment guidelines counsel failed to present to the jury for Petitioner's defense would not undermine the government's evidence- Dr. Thomas' testimony at trial and Petitioner thus did not receive IAC, Supra, was wrong or debatable, because such a decision is contrary to the decision of the Third Circuit in the case of United States v. Baynes, 687 F.2d 659, 673 (3d Cir. 1982) ("The point, however, is that precisely questions of this sort- the resolution of which ultimately will affect judgments relating to innocence and guilt- are to be weighed and evaluated by a jury,

and not by court during a habeas proceeding) and the district court usurped the function of the jury. United States v. Jannotti, 673 F.2d 578, 581 (3d Cir. 1982) (en banc) (trial court "usurped the function of the jury [by] decid[ing] contested issues of fact.").

Because reasonable jurists would find that the district court's assessment of this constitutional claim was wrong or debatable as discussed above, the court of appeals' decision denying Petitioner's request for a COA in this claim is contrary to the decision of this court in the case of Slack, Miller-EL, and Buck. Supra.

D. The district court's decision that Petitioner did not receive IAC, was wrong or debatable when counsel failed to investigate a critical source of potential exculpatory evidence, because such a decision is contrary to the decision of the Third Circuit in the case of United States v. Baynes, and the decision of this court in the case of Strickland v. Washington.

Petitioner alleged in the §2255 motion that counsel failed to investigate a critical source of potential exculpatory evidence from the Pennsylvania state agencies' investigation about the same issue immediately prior to the DEA investigation after he knew the existence of such potentially critical exculpatory evidence from the DEA agent Hischar's affidavit and then failed to present it to the jury for Petitioner's defense, despite several requests by Petitioner. Doc. 259-2 at 20-21, Doc. 259-3 at 15, Doc. 272 at 9-10.

The government did not deny the existence of such potential exculpatory evidence, but dodged Petitioner's key point in this claim– counsel's failure to investigate the potential exculpatory evidence from the Pennsylvania state agencies, NOT from the DEA, the federal prosecutor's office or other federal government agency. Doc. 270 at 44-45.

The district court also dodged Petitioner's above key point in this claim, Doc. 276 at 31-32, which was wrong, because it must accept this allegation as true, as the district court did not hold evidentiary hearing in this case and did not point out in its opinion that this allegation is clearly frivolous on the basis of the existing record. See Pickard, 170 F. Appx. at 247. Supra. Also see Blackledge, 431 U.S. at 75-76, 78. When the district court accepts this allegation as true, reasonable jurists would find that its such a decision that counsel "did not act deficiently" in this claim, Doc. 276 at 32, was wrong, because such a decision is contrary to the decision of the Third Circuit in the case of United States v. Baynes, 622 F.2d 66, 69 (3d Cir. 1980)

("failure to investigate a critical source of potential exculpatory evidence may represent a case of constitutionally defective representation."). Further, the district court's opinion that "there would be no prejudice from counsel's decision not to present any such evidence at trial, as [exculpatory] evidence of prior investigations would be irrelevant to Li's guilt or innocence", Doc. 276 at 32, was wrong for the following reasons: First, reasonable jurists would find that the district court's decision about the irrelevance of the exculpatory evidence to Petitioner's guilt or innocence was wrong, because such a decision is contrary to the Federal Rule of Evidence 401 ("Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action") and its own ruling in a recent case where the district court held that a prior Pennsylvania state administrative action in 2012 against a physician about his controlled substance prescriptions was "directly relevant to" his federal criminal prosecution in 2021. United States v. Kraynak, 2021 U.S. Dist. Lexis 149559 at 6. Second, reasonable jurists would find that the district court's decision that there would be no prejudice from counsel's said failure, was wrong, because such a decision is contrary to the decision of the Third Circuit in the case of United States v. Baynes, 687 F.2d at 673 ("the [exculpatory] evidence, if investigated, 'might have led to a viable defense and a [favorable] verdict'... and the failure of [defendant]'s trial attorney so to proceed is not harmless 'beyond a reasonable doubt'"). As a result, reasonable jurists would find that the district court's decision that Petitioner did not receive IAC in this claim is wrong, because such a decision is contrary to the decision of this court in the case of Strickland, 466 U.S. at 687 (counsel's assistance is ineffective when "counsel's performance was deficient... [and] the deficient performance prejudiced the defense.").

Because reasonable jurists would find that the district court's assessment of this constitutional claim was wrong or debatable as discussed above, the court of appeals' decision denying Petitioner's request for a COA in this claim is contrary to the decision of this court in the case of Slack, Miller-EL, and Buck, Supra.

E. The district court's decision that Petitioner did not receive IAC, was wrong or debatable when counsel conceded the relevance and fit of Dr. Thomas' proffered testimony, because such a decision is contrary to the decision of this court in the case of Daubert v. Merrell Dow Pharma.

Inc. and Strickland v. Washington.

Petitioner alleged in the § 2255 motion that Dr. Thomas, the government's pain management expert, opined in his expert opinion report that Petitioner's prescription was not for a legitimate medical purpose, a criminal standard, in one case, but was for a legitimate medical purpose, but substandard, a medical malpractice standard, in the other case, based upon the very same factual evidence, Doc. 259-3 at 5-6, Doc. 272 at 12-13, and in his testimony at Daubert hearing that Petitioner failed to follow the model guidelines- standard of care, which was substandard or medical malpractice, Doc. 259-3 at 5-6, because of "departure from the generally accepted standard of medical practice", based upon the legal standard- jury instruction, Doc. 272 at 13, but he concluded that Petitioner prescribed controlled substances without a legitimate medical purpose, a criminal standard. Doc. 259-2 at 25, Doc. 259-3 at 1, 5-6, Doc. 272 at 12-13. Petitioner then argued that it is clear from both his report and his testimony that Dr. Thomas' opinion did not seperate criminal conducts- prescriptions not for a legitimate medical purpose from medical malpractice- prescriptions for a legitimate medical purpose, but substandard. Id. As a result, reasonable jurists would find that Dr. Thomas' opinion would not aid the jury in resolving a factual dispute- criminal conducts versus medical malpractice, for the fact-finder must decide whether Petitioner's prescriptions were not for a legitimate medical purpose, which must be "something more severe or greater than medical malpractice which in turn means a departure from generally accepted standard of medical practice resulting in harm to a patient", based on the legal standard- jury instruction. Doc. 272 at 13. Because Dr. Thomas' opinion would not aid the jury in resolving a factual dispute, reasonable jurists would find that Dr. Thomas' proffered testimony did not meet the relevance and fit of Daubert standard, thus being inadmissible. See Daubert v. Merrell Dow Pharma. Inc., 509 U.S. 579, 591-92 (1993) (the relevance and fit prong inquires about "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that will aid the jury in resolving a factual dispute... Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.").

The government did not deny or dispute Petitioner's above allegation in this claim except for conclusory statements. Doc. 270 at 46-47.

The district court dodged Petitioner's allegation in this claim, Doc. 276 at 32-33, which

was wrong, because it must accept such an allegation as true, for the district court did not hold evidentiary hearing in this case and did not point out in its opinion that this allegation is clearly frivolous on the basis of the existing record. See Pickard, 170 F.Appx. at 247. Supra. Also see Blackledge, 431 U.S. at 75-76, 78. When this allegation is accepted as true, reasonable jurists would find that the district court's decision that Dr. Thomas' opinion was "specifically geared toward assisting the jury in answering the question of whether Li's prescriptions ... were for a legitimate medical purpose", Doc. 276 at 33, was wrong, because such a decision is contary to the above factual allegation—Dr. Thomas' opinion did not seperate criminal conducts from medical malpractice, which was precisely the factual dispute in this case, and thus would not help the jury in answering the question of whether Petitioner's prescriptions were not for a legitimate medical purpose. Since Dr. Thomas' opinion would not help the jury in resolving the factual dispute, reasonable jurists would find that the district court's decision that Dr. Thomas' opinion "would have been admitted even if counsel had not made such a concession", Doc. 276 at 33, was wrong, because such a decision is contrary to the decision of this court in the case of Daubert, 509 U.S. at 591-92 ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."). As a result, reasonable jurists would find that there was a reasonable probability that, but for counsel's concession, Dr. Thomas' proffered testimony would not have been admitted. Moreover, without Dr. Thomas' opinion, there was a reasonable probability that the government would not have proven beyond a reasonable doubt that Petitioner prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose, Doc. 259-3 at 1, which the government did not dispute. Doc. 270 at 34-52. Consequently, reasonable jurists would find that the district court's decision that Petitioner was not prejudiced by counsel's concession, Doc. 276 at 33, was wrong, because such a decision is contrary to the decision of this court in the case of Strickland, 466 U.S. at 694 ("the appropriate test for prejudice finds ... there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Since the district court did not argue that counsel's performance in this claim was not deficient, reasonable jurists would find that the district court's decision that Petitioner did not receive IAC, was wrong, because such a decision is contrary to the decision of this court in the case

Of Strickland, 466 U.S. at 687 (Counsel's assistance is ineffective when "counsel's performance was deficient... [and] the deficient performance prejudiced the defense.").

Because reasonable jurists would find that the district court's assessment of this constitutional claim was wrong or debatable as discussed above, the court of appeals' decision denying Petitioner's request for a COA in this claim is contrary to the decision of this court in the case of Slack, Miller-EL, and Buck. Supra.

F. The district court's decision that there existed no actual conflict of interest and Petitioner thus did not receive IAC, was wrong or debatable when Counsel Knew that his friend investigated Petitioner and then referred Petitioner's case to DEA. Counsel's subsequent multiple failures diverged Petitioner's interests, and counsel rejected Petitioner's viable alternative defense, because such a decision is contrary to the decision of the Third Circuit in the case of United States v. Gambino and the decision of this court in the case of Cuyler v. Sullivan and Strickland v. Washington.

Petitioner alleged in the § 2255 motion that (1) Counsel Knew or should have Known that his friend- the chief detective of the Pike County District Attorney's Office (PCDAO) investigated Petitioner about his prescriptions of controlled substances; (2) Counsel Knew or should have Known that his friend referred Petitioner's case along with an informant to DEA after the Pennsylvania State agencies- the PCDAO, the Pennsylvania Office of Attorney General and the Pennsylvania Department of State Bureau of Licensing, concluded their investigation without any civil or criminal action against Petitioner; (3) Counsel then refrained from obtaining the critical exculpatory evidence from his friend's investigation and refrained from presenting it to the jury for Petitioner's defense, despite several requests from Petitioner; (4) Counsel failed to prepare and submit or failed to prepare but submitted numerous motions and briefs prepared by Petitioner, a layperson without any access to legal research; (5) Counsel erroneously conceded the relevance and fit of Dr. Thomas' proffered testimony at Daubert hearing; (6) Counsel failed to cross-examine Dr. Thomas on a patient-by-patient basis in all of the 34 patients' medical records he testified; (7) counsel failed to perform direct-examination on Petitioner's expert to counter Dr. Thomas' false testimony and baseless opinion in 31 of the 34 patient's medical records he testified; (8) Counsel failed to perform direct-

examination on Petitioner to counter Patients' false testimony in 16 of the 20 Patients who testified; (9) Counsel entirely failed to defend Petitioner in death count (count 24) which mandated a minimal 20-year imprisonment; and (10) Counsel informed Petitioner that the chief detective of the PCDAO was in court at Petitioner's trial, but failed to disclose to Petitioner that the chief detective of the PCDAO was his friend until one day counsel accidentally disclosed it to Petitioner. Doc. 259-2 at 20-25, Doc. 259-3 at 1-13, 15-16.

The government did not deny or dispute any of Petitioner's above allegations, and in fact did not even mention this claim at all in its brief. Doc. 270 at 44.

The district court first altered Petitioner's critical allegation in its opinion by erroneously documenting that Counsel's friend was the chief detective of the Pike County Sheriff's Office (PCSO) which was irrelevant to this case, Doc. 276 at 6, 37-38, despite the fact that Petitioner only mentioned the Pike County District Attorney's Office (PCDAO) and never mentioned the Pike County Sheriff's office in the §2255 motion, Doc. 259-3 at 15-16, and the district court then dodged Petitioner's all of the above allegations in this claim, Doc. 276 at 36-38, which was wrong, because it must accept Petitioner's all allegations as true, since the district court did not hold evidentiary hearing in this case and did not point out in its opinion that these allegations are clearly frivolous on the basis of the existing record. See Pickard, 170 F. Appx. at 247. Supra. Also see Blackledge, 431 U.S. at 75-76, 78. When all these allegations are accepted as true, reasonable jurists would find that the district court's decision that there existed no actual conflict of interest adversely affecting counsel's performance, Doc. 276 at 37, was wrong, because such a decision is contrary to the decision of the Third Circuit in the case of United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988) ("An actual conflict of interest" is evidenced if, during the course of the representation, the defendant's interests diverge with respect to a material factual or legal issue or to a course of action"... and adverse effect on counsel's performance turns on whether "some plausible alternative defense strategy or tactic might have been pursued... [that] possessed sufficient substance to be a viable alternative... [and] the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests") when Petitioner's interests in this case so much diverged with respect to the above factual allegations – Counsel's friendship with the chief detective of the PCDAO who

investigated Petitioner and then referred Petitioner's case along with an informant to DEA, and his subsequent multiple failures in pursuing Petitioner's interests during the course of his representation, Doc. 259-3 at 15-16, thus there existing an actual conflict of interest in this case, and when counsel rejected Petitioner's alternative defense- exculpatory evidence defense that "possessed sufficient substance to be a viable alternative", See Baynes, 687 F.2d at 673 ("the [exculpatory] evidence ... might have led to a viable defense and a [favorable] verdict") by refraining from obtaining the critical exculpatory evidence from his friend's investigation and then refraining from presenting it to the jury for Petitioner's defense, despite several requests by Petitioner, Doc. 259-2 at 20-21, Doc. 259-3 at 15-16, "due to [counsel]'s other loyalties or interests" to his friend, thus such an actual conflict of interest adversely affecting counsel's performance or the adequacy of his representation. Since there existed an actual conflict of interest adversely affecting counsel's performance or the adequacy of his representation in this case as evidenced above, reasonable jurists would find that the district court's decision that Petitioner did not receive IAC in this claim, Doc. 276 at 37-38, was wrong, because such a decision is contrary to the decision of this court in the case of Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) ("a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief") and Strickland, 466 U.S. at 686, 692 ("Actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective." ... "Prejudice is presumed when counsel is burdened by an actual conflict of interest.").

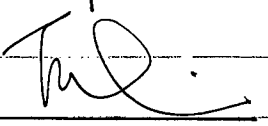
Because reasonable jurists would find that the district court's assessment of this constitutional claim was wrong or debatable as discussed above, the court of appeals' decision denying Petitioner's request for a COA in this claim is contrary to the decision of this court in the case of Slack, Miller-EL, and Buck, Supra.

CONCLUSION

"The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty." Price v. Johnston, 334 U.S. 266, 269 (1948). "The writ of habeas corpus plays a vital role in protecting constitutional rights." Slack, 529 U.S. at 483.

For the foregoing reasons, Petitioner respectfully prays that this Honorable Court grant the instant Petition for a writ of certiorari and ultimately grant Petitioner's request for a COA so that Petitioner can appeal the district court's wrong decision of Petitioner's constitutional claims in the § 2255 motion where Petitioner's constitutional rights had been flagrantly infringed, as this petition may be Petitioner's last "judicial method of lifting undue restraints upon personal liberty" and last chance in seeking the "vital role in protecting constitutional rights."

Respectfully submitted,

By: 

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