IN THE SUPREME COURT OF THE UNITED STATES

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RAFAEL L.BEIER,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit err in summarily denying a certificate of appealabililty that would allow an appeal from an order denying a motion to vacate, set aside or correct a sentence pursuant to 28 U.S.C. § 2255 when the district court relied on an incorrect legal standard on a claim of ineffective assistance of counsel in denying the motion?

2. Did the Ninth Circuit err in summarily denying a certificate of appealability to appeal the district court's order denying a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 without an evidentiary hearing when the movant alleged that trial counsel failed to investigate mental defenses and failed to advise the movant on the significant increase in the federal sentencing guideline range if movant rejected a plea offer and proceeded to trial?

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Petitioner, RAFAEL L. BEIER (hereinafter Beier) respectfully prays that a writ of certiorari issue to review the Ninth Circuit's order denying a certificate of appealability for an appeal pursuant to 28 U.S.C. § 2253 from an order entered by the United States District Court for the District of Idaho denying a motion, on the merits and without an evidentiary hearing, to vacate, set aside or correct sentencing filed pursuant to 28 U.S.C. § 2255.

OPINION BELOW

On January 25, 2023, the Ninth Circuit entered an order denying a motion for certificate of appealability for an appeal from the district court's denial Beier's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Ninth Circuit's order is attached in the

Appendix (App.) at page 1. The district court's order denying Beier's 2255 motion on the merits and without an evidentiary hearing is attached in the Appendix at 2-14.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and 28 U.S.C. 2253.

STATUTORY PROVISIONS

Section 2253 of United States Code, Title 28 states the following:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253.

Section 2255 of United States Code, Title 28 states the following in pertinent part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> (c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> (d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

28 U.S.C. § 2255.

STATEMENT OF THE CASE

Introduction.

Beier was a medical doctor operating a family medical clinic in Pinehurst, Idaho. In June 2014, the government obtained a single count indictment charging Beier, who was authorized to

dispense controlled substances, with one count of unlawful distribution of oxycodone pain medication outside the scope of his medical practice in violation of 21 U.S.C. § 846(a)(1).

Later, the government obtained a fourth superseding indictment that vastly increased the number of charges. The fourth superseding indictment charged Beier with conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846, sixty six counts of distributing a controlled substance in violation of 21 U.S.C. § 841(a), and four counts of distributing a controlled substance to a minor in violation of 21 U.S.C. § 859. Each count alleged that Beier distributed controlled substances for no legitimate purpose, outside the usual course of his professional practice. Beier proceeded to a jury trial.

Summary of Government's Evidence at Trial

At the time of the allegations, Beier was in his late 50s and early 60s. The government maintained that Beier improperly used his prescription authority to write prescriptions for pills such as hydrocodone, oxycodone and Allerall.

These prescriptions were either given to or sold to much younger female friends that Beier met at Showgirls, an adult entertainment club in Stateline, Idaho. The government's case at trial rested on the testimony of these female friends and acquaintances.

For example, Beier wrote prescriptions to Destiny Blaski, a dancer at Showgirls. Beier and Ms. Blaski developed a relationship. Blaski testified she became addicted to pain pills after a breast augmentation surgery paid for by Beier in 2010. When her surgeon stopped prescribing her pain pills, Beier started providing her with prescriptions. Blaski testified her addiction was so serious that she started having sex with Beier to keep her in supply of the pain pills.

Blaski also testified that Beier started supplying her and her brother prescriptions for

people whose identity she had stolen and that Beier also prepared false patient charts for others who helped her fill prescriptions written by Beier. Blaski testified that she would sell some of the pills obtained from prescriptions. She would keep some of money from the sales, and she gave Beier the remaining money.

Stacy Bernstein was addicted to pain pills. She testified she began purchasing prescriptions from Beier for $200 to $300. She had no medical reason for pain pills.

Maegan Feidt testified she received prescriptions from Beier. She testified that she paid Beier $200 to $300 for prescriptions for hydrocodone, percocet and Adderall. She had no medical reason for pain pills. She testified that Beier made up ailments to justify her prescriptions.

Fawnie Bracamonte purchased prescriptions from Beier for $800. She sold the pills, and had no medical reasons for the pain pills. At trial, Bracamonte identified text messages that referred to Beier as "Doctor," "mr. beier," "MR. BAIER," or "rafael." These text messages were used to corroborate her testimony.

Jordan Newkirk testified that she provided Beier her grandmother's name, Leonella Woods, and a friend's name, Scott Meyers, to buy prescriptions from Beier. Newkirk smoked some of the pills and sold the other pills.

The illegal prescriptions were documented in an exhibit the government admitted that summarized pharmacy records from the Washington State and Idaho. The records coincided with the witnesses' testimony.

Beier's Arrest

Before Beier was arrested, the police arrested Newkirk. Newkirk agreed to participate in a controlled purchase of a prescription from Beier. During the operation, Beier met with Newkirk and went to a restroom at a local hospital in Coeur d' Alene, Idaho. There, Beier wrote a prescription in Newkirk's grandmother's name, and gave it to Newkirk. Newkirk gave Beier police buy money for the prescription.

The police arrested Beier at his car after the sale. The police located the buy money and a prescription pad in the center console of the car.

Beier's Testimony at Trial

Beier's testimony was in stark contrast to the government's evidence and witnesses. He testified he was "on a mission to save Destiny." Beier testified that he wrote prescriptions for hydrocodone for Ms. Blaski after her breast augmentation surgery, "[v]ery, very sparingly."

Blaski had recorded a conversation with Beier where he admitted selling prescriptions for pills for two years to a person Blaski believed might be an informant. In the recording, Beier told Blaski that he was not worried.

Beier testified that the recorded conversation with Blaski did not involve pills. He testified that Blaski was worried about an "undercover cop" because Beier harvested ginseng illegally and was illegally selling it through his medical practice.

Beier characterized Bracamonte's testimony as "a total lie." He testified that he prescribed her medications for pain from facial reconstruction surgery. He denied selling Bracamonte prescriptions.

When questioned about the phone number and text messages to and from Bracamonte, Beier testified hat he "never had that phone number ... those texts were not [his]." Beier said

Bracamonte never referred to him as "Doctor," "Mr. Beier," nor "Rafael."

Beier admited writing the prescription he gave Newkirk in the hospital restroom. Beier testified that all prescriptions he wrote for Newkirk's grandma were legitimate. He testified that he wrote those prescriptions during appointments at his office, except the one he wrote for Newkirk's grandmother in the hospital restroom. Beier denied ever selling prescriptions to Newkirk.

Beier denied receiving money from Newkirk when he wrote the prescription in the hospital restroom. He testified he did not know about the buy-money in the center console of his car located by the police.

When asked on direct examination if he had "ever [sold] prescriptions for cash," Beier responded, "[a]bsolutely not." When asked if he "ever [wrote] prescriptions for no medical purpose," he responded, "[a]bsolutely not." When asked, "[a]re you guilty of any of these counts that have been lodged against you in the indictment," Beier responded, "[a]bsolutely not."

The jury returned guilty verdicts on all counts.[1]

Post-Conviction.

Before sentencing, Beier obtained new counsel. New counsel sought expert assistance of Richard S. Adler, M.D. to determine if Beier was competent, and to determine if Beier's mental status supported mental defenses that were never explored or investigated by trial counsel.

Beier's new counsel reported to Dr. Adler that he "observed and experienced an inability on Dr. Beier [to] rationally process (absorb) the real historical facts relating to the circumstances

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[1] The district court dismissed five substantive counts on the government's motion during trial. Four counts were vacated after trial on double jeopardy grounds.

leading to his charges." App. 111. New counsel reported that after reviewing "Beier's information[,]... trial transcripts, the government's evidence and discovery," he was 'concerned that Dr. Beier suffered from some sort of mental deficit(s) that affects his ability to process facts that are different from his own view, and much to his detriment." *Id.* New counsel "detected an acute inability [with Beier] to rationalize and process facts that are obvious in his case, especially those facts that are beyond dispute and that run [] counter [to his] view of the case." App. 111-12.

Based on these concerns, Dr. Adler conducted a complete forensic psychiatric evaluation. As part of his evaluation, Dr. Adler interviewed Beier's trial counsel. Dr. Alder noted new counsel's "observations are essentially identical to those of" trial counsel. App. 95.

Trial counsel told Dr. Adler that Beier was "a difficult client." App. 71. Trial counsel "had concerns about Dr. Beier's mental status..." App. 70. However, "Beier's 'status as a physician' dissuaded [trial counsel] from" questioning Beier's mental condition. App. 71. Trial counsel indicated that "*there had never been a 'genuine, thorough discussion' of the case with his client*." *Id.* (emphasis in original).

Trial counsel reported that Beier persistently "den[ied] the obvious'" and could not "accept logical deductions." *Id.* Trial counsel reported that there was a "'considerable dissonance between the [case] material and his account.'" *Id.*

During the trial, Beier interrupted trial counsel "throughout." *Id.* Beier "*had an inability to perceive his own behavior*" and was "*mentally 'separated from what he was really doing.*'" *Id.* (emphasis in original). Trial counsel told Dr. Adler, "I may have made a big mistake" in failing to seek a competency evaluation *Id.*

After performing an extensive forensic psychiatric evaluation, Dr. Adler concluded that Beier was not competent. Dr. Adler concluded is that Beier suffered from mild-neurocognitive disorder due to traumatic brain injury (mild-NCD due to TBI), a serious mental disease and defect. Dr. Alder also concluded that Beier's mental impairment supported both a diminished capacity defense and an insanity defense. App.96.

Significantly, Dr. Beier stated that Beier's "thinking is so separated from reality, that is warrants being described as 'psychotic' as well as 'delusional.'" *Id.* These psychotic and delusional symptoms helped explain the stark contrast between Beier's trial testimony from the government's overwhelming evidence at trial.

The district court held a contested competency hearing. Beier also moved pursuant to Fed. R. Crim. P. 33(b)(1) for a new trial based on newly discovered evidence based on Dr. Adler's diagnosis that supported a diminished capacity defense and an insanity defense. *Id.*

The district court found Beier competent and denied the motion for new trial. App. 22-40. The district court imposed a sentence of 192 months in prison, followed by a ten-year term of supervised release, and imposed a $1,000.00 fine on each count of conviction. Beier appealed.

On direct appeal, the Ninth Circuit affirmed Beier's convictions. *United States v. Beier,* 780 Fed.Appx. 460 (9th Cir. 2019). Specifically, the Ninth Circuit rejected Beier's request for a new trial based on newly discovered evidence of his mental impairment. The Ninth Circuit held that evidence of Beier's mental impairment did not constitute newly discovered evidence, and also held that such evidence "did not indicate that [Beier] would probably be acquitted in a new trial." App. 17-18.

Beier timely filed a motion to vacate, set aside or correct sentence under 28 U.S.C. §

2255. App. 41-57. Beier claimed that he was entitled to relief on two grounds for violation of his Sixth Amendment right to effective assistance of counsel. Beier alleged: (1) his trial counsel was ineffective for failing to investigate mental defenses, and this failure prejudiced the trial proceedings (App. 44, 53-54); and (2) trial counsel was ineffective for failing to advise him of the impact on the sentencing guideline ranges between the much lower guideline range resulting from the government's pretrial offer to settle his case and the much greater guideline range that resulted if he was convicted after a trial. App. 45, 55. Beier alleged that he would have elected against a trial and would have accepted the plea offer had counsel properly advised him of the much greater guideline range if Beier was convicted. App. 55.

1 **Failure to Investigate Mental Defenses**

Beier filed a declaration from Dr. Adler in support of his § 2255 motion. App. 58-66. Dr. Adler reinforced his earlier opinion that Beier "suffered from, and continues to suffer from, a mental disease and defect, namely, ... (mild-NCD) due to ... (TBI)," a diagnosis from the DSM-5, as reflected in his report of evaluation. App. 59, 70, 96. Dr. Alder concluded that the TBI was "caused by several serious blows to the head over years..." App. 59.

Dr. Alder indicated that Beier's mental status "represents a serious and significant impairment in Dr. Beier's mental functioning." *Id.* This "impairment manifests itself in delusional thinking (i.e., psychosis - the most severe level of derangement in thinking.") ... "[with symptoms] consistent with those included in the DSM-5's section on neurocognitive disorders, both mild and major." App. 59, 105.

During his evaluation process, Dr. Adler obtained additional data from other experts. This included neuropsychologist, Elizabeth Ziegler, Ph.D, neuropsychologist, Paul Connor,

Ph.D., and Andrew Newberg, M.D. Dr. Adler also interviewed Branden Beier who reported personality changes in his father. App. 62-64.

Dr. Adler concluded that Beier's mental disease and defect impaired his ability to form the intent to commit the crimes charged. He also concluded that the mental disease and defect was of such a serious nature that it met the criteria that supported an insanity defense. App. 65-66.

Beier's § 2255 motion alleged that trial counsel did not conduct any investigation that would have disclosed the need for a complete psychiatric evaluation to explore mental defenses. Beier alleged trial counsel was ineffective for failing to investigate mental defenses. App. 44, 53-54.

If trial counsel would have conducted some investigation into Beier's background, he would have learned from family members about the several serious head injuries Beier suffered, beginning with a serious automobile accident in 1996 and throughout the years following. Additionally, trial counsel would have learned from family members about Beier's personality changes that started following the 1996 automobile accident.[2]

Dr. Adler concluded that "[b]ased on the interactions between [trial counsel] and Dr. Beier, as reported by [trial counsel], his observations and experiences with Dr. Beier during the course of representation should have alerted [trial counsel] to the potential existence of a mental impairment that warranted investigation and evaluation prior to Dr. Beier's trial." App. 64.65.

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[2] Beier's wife testified at the competency hearing about other blows to Beier's head after 1996, and before his charges in this case. Beier also reported to Dr. Adler other injuries to his head after the 1996 accident. Dr. Beier's oldest son, Branden Beier, testified about Dr. Beier's personality changes beginning after the 1996 automobile accident.

The district court ordered the government to respond to Beier's § 2255 motion. The government responded. App. 114-52.

In response, the government countered Dr. Adler's opinions primarily through Cynthia A. Low, Ph.D., a Bureau of Prison's psychologist. App. 122-23. Dr. Low, however, accepted Dr. Adler's diagnosis of mild NCD due to TBI. App. 148. She, nonetheless, she reported "an alternate/ additional hypothesis for some of Mr. Beier's symptoms." *Id.* Dr. Low surmised that Dr. Beier's "symptoms appear to be better explained by long-standing personality traits and maladaptive coping mechanisms." *Id.*

Significantly, Dr. Low's evaluation and testimony did not include any assessment or conclusion relating to mental defenses for trial. Her evaluation and testimony only addressed "Beier's competency to proceed to sentencing." App. 155-56.[3]

The government made no effort to counter Beier's § 2255 motion with any new expert information to rebut Dr. Adler's declaration. Specifically, the government did not offer any information that countered Dr. Adler's opinion that Beier suffered from a diminished capacity

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[3] At the competency hearing, the prosecutor Dr. Low, "[w]hat specifically were you asked by the Court in this case?" App. 155-56. Dr. Low responded, "I was asked to render an opinion about Dr. Beier's competency for proceed to sentencing." App. 156. The prosecutor then asked, "is that the only thing you will be addressing today?" Dr. Low responded, "[y]es]." *Id.* Dr. Low did not address mental defenses in her report (App. 130-50), nor in her testimony. The government and the district court's emphasis on Dr. Low's testimony and report that centered only on competency to deny Beier's § 2255 motion in relation to mental defenses is not supported by the Court's prior decision in *Medina v. California*, 505 U.S. 437, 449 (1992). In *Medina*, the Court observed that "entry of a plea of not guilty by reason of insanity, by contrast, presupposes that the defendant is competent to stand trial and to enter a plea." *Id.*

The Court recognizes that the standards for determining competency differ from those supporting mental defenses. *Id.*; *see also, Martin v. Estelle*, 546 F.2d 177, 180 (5th Cir. 1977) (the standard to determine competency "differs materially from the criteria by which trial juries are required to determine sanity at the time of the criminal act.").

and his mental condition met the criteria for an insanity defense. *Id.* Instead, the government relied solely on the record from the competency hearing. *Id.*

Moreover, the government directed the district court toward application of the wrong legal standard for assessing trial counsel's failure to investigate mental defenses. The government quoted Ninth Circuit's memorandum on Beier's direct appeal that reviewed his claim under the newly discovered evidence standard, emphasizing that "the evidence, if new, did not indicate that [Beier] would probably be acquitted in a new trial." App. 124. The government wrote: "[t]his failure to show prejudice alone - that there was an error that raises doubts about the reliability of the proceeding's outcome - negate Beier's claim of ineffective assistance by his counsel." *Id.*

The district court rejected Beier's claim that his trial counsel was ineffective for failing to investigate mental defenses. App. 8-9. In doing so, the district court used the wrong legal standard and adopted the argument set out in the government's response. The district court wrote:

> the Ninth Circuit has already conclusively found that a mental defect would not have changed the outcome of trial. *United States v. Beier*, 780 Fed. App'x 460, 462 (9th Cir. 2019) ("Because the district court found [Beier] competent and rejected his insanity and diminished capacity arguments, the evidence [of traumatic brain injury], even if new, did not indicate that [Beier] would probably be acquitted in a new trial."). *This alone is sufficient to deny this ineffective assistance of counsel claim for lack of prejudicial effect.*

Id. (emphasis added). The district court order is flawed in two ways.

First, the district court ignored that fact that the legal standard for newly discovered evidence referenced by the Ninth Circuit on direct appeal is a higher standard then the standard

adopted by this Court in *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). Secondly, the district court again relied on the competency finding to deny Beier's claim that trial counsel was ineffective for failing to investigate mental defenses, standards that differ from competency. *See, supra,* n. 3.

The Court in *Strickland* held "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case" on a claim of ineffective assistance of counsel. 466 U.S. at 693. This is the legal standard for "newly discovered evidence" and "is not an apt source from which to draw a prejudice standard for ineffectiveness claims." *Id.* at 694.

Strickland, therefore, teaches that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be show by a preponderance of the evidence to have determined the outcome." *Id.* The Court held that a less stringent standard applies to ineffectiveness claims. For ineffectiveness claims "[t]he defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." The district court erred in using the higher legal standard for newly discovered evidence to deny Beier's ineffectiveness claim. App. 8-9.

Beier also maintains that the district court could not make a decision on the merits of Beier's claim that trial counsel was ineffective for failing to investigate mental defenses without an evidentiary hearing. Beier submitted a declaration by Dr. Adler that supported the presence of mental defenses that should have been explored and investigated prior to trial. The government did nothing to counter Dr. Adler's declaration. Instead, the government relied solely on the

evidence adduced at the hearing on competency. Indeed, Dr. Low testified at the competency hearing that she only addressed Beier's competency. She did not address mental defenses.

Trial counsel was the only person who could attest to strategy decisions made during the course of the proceedings and through the trial. Yet, the district court denied Beier's request for an evidentiary hearing without any testimonial evidence from trial counsel.

The district court did not have any information from the government that countered Dr. Adler's declaration. Without any additional information and without an evidentiary hearing, the district court concluded, "due to the lack of a severe mental-health defect and the lack of diminished capacity as an appropriate defense, counsel made a reasonable strategic decision in not pursuing any capacity issues further and focusing instead on other tactics. App. 9.

2. **Uninformed Pretrial Offer to Settle**.

Prior to trial, trial counsel received an offer to settle through an email from the government. App. 56-57. The offer included a sentencing guideline range of 46 to 57 month in prison. App. 56. The government indicated that the sentencing range if Beier was convicted at trial would result in 151 to 188 months in prison. *Id.*

Beier alleged that trial counsel never discussed this offer with him. App. 55. Beier alleged that had trial counsel informed him of how the Sentencing Guidelines worked and if he understood how the guideline ranges increased his potential sentence if convicted at trial, Beier indicated he would opted not to go to trial and would have accepted the pretrial offer. *Id.*

In response, the government provided a January 15, 2016 email to the prosecutor from trial counsel informing her that he planned to have "a long sit-down with [Beier]" to have "one last chance to confirm or eliminate the chance of resolving the case short of trial" to rebut Beier's

claim. App. 152. The district court relied in part on this email to deny Beier's claim without an evidentiary hearing. App. 11-12.

Nothing was submitted by the government that confirmed that trial counsel actually had a "long sit-down" with Beier to discuss a settlement. The email submitted by the government is inconsistent with what trial counsel told Dr. Adler - i.e., "*there had never been a 'genuine, thorough discussion' of the case with his client.*" App. 71 (emphasis in original).

An evidentiary hearing was necessary to hear from trial counsel exactly what transpired in any conversations he had with Beier, if any, regarding settlement. Without such testimony, this claim could not be fully determined on the record. *Blackledge v. Allison*, 431 U.S. 63, 82 n. 25 (1977) (requiring information from witnesses with firsthand knowledge before denying post-conviction relief without a hearing).

The district court entered the order denying Beier's § 2255 motion on the merits, without an evidentiary hearing. App. 12-14. The district court also denied issuance of a certificate of appealability (COA). *Id.*

Beier filed an appeal to the Ninth Circuit and filed a motion for issuance of a COA. Beier sought an appeal on the merits of his claim that he was denied the Sixth Amendment right to effective assistance of counsel for trial counsel's failure to investigate the mental defenses.

Beier asserted that the district court relied on the wrong legal standard in rejecting Beier's ineffectiveness claim for failing to investigate mental defenses. Beier also asserted that the district court erred in denying the motion with an evidentiary hearing on trial counsel's failure to investigate mental defenses and for trial counsel's failure to advise Beier of the harsh sentencing consequences in rejecting the government's plea offer and a trial resulting in conviction.

The Ninth Circuit denied issuance of a COA in one sentence: "The request for a certificate of appealability ... is denied because appellant has not made a 'substantial showing of the denial of a constitutional right.'" App. 1 (citing 28 U.S.C. § 2253(c)(2); and *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Beier maintains that a COA should have issued by the Ninth Circuit based on the district court's use of the wrong and higher legal standard in denying his claim of ineffective assistance of counsel based on trial counsel's failure to investigate mental defenses. Beier also maintains that his § 2255 motion should not have been dismissed on the merits without an evidentiary hearing on both of his claims of ineffective assistance of counsel.

REASONS FOR GRANTING THE WRIT

1. Whether the Ninth Circuit erred in summarily denying a certificate of appealabililty (COA) that would allow an appeal from an order denying a motion pursuant to 28 U.S.C. § 2255 when the district court relied on an incorrect legal standard on a claim of ineffective assistance of counsel is an important question of federal law that should be resolved by the Court. The Ninth Circuit denied the COA in a manner that conflicts with prior decisions of the Court and resolution of the question is necessary for a uniform application of federal law.

An appeal from a denial of a motion for relief file under § 2255 may not proceed unless the district court or court of appeals "issues a certificate of appealability." 28 U.S.C. § 2253(c)(1); *Gonzalez v. Thaler*, 565 U.S. 134, 143, n. 5 (2012). To obtain a COA, an applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v,Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). The applicant for a COA must "sho[w] that reasonable jurists could debate

whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). This does not "require [applicants] to prove, before the issuance of a COA, that some jurists would grant the [§ 2255 motion]." Instead, the sole question is whether "claim is reasonably debatable." *Buck v. Davis*, 580 U.S. 100, 117 (2017).

A "COA determination under § 2253(c)" rests on "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 336. Appellate courts must "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id.* This "inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." "In fact, the statute forbids it." *Id.* "When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. *Id.* at 336-37.

To obtain COA, the petitioner is not required to show that the appeal will succeed on the merits. *Id.* at 337. A court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.*; *see also, Welch v. United States*, 578 U.S. 120, 127 (2016).

The Court's decisions on the subject "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-Eli,* U.S. at 337. Therefore, "a COA will issue in some instances

where there is no certainty of ultimate relief." *Id.* "After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'" *Id.* (quoting *Barefoot*, 463 U.S. at 893 n. 4) (internal quotations omitted). "A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El*, 537 U.S. at 338 (quoting *Barefoot*, 463 U.S. at 893) (internal quotations omitted).

The Court does not require a petitioner "to prove ... that some jurists would grant the petition for habeas corpus." *Id.* "[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.* Thus, "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

Here, the district court denied Beier's § 2255 motion on the merits without an evidentiary hearing. App. 12-13. In doing so, the district court relied on the wrong legal standard to weigh prejudice. App. 8-9 ("the evidence [of a traumatic brain injury], even if new, did not indicate that [Beier] would probably be acquitted in a new trial."). The district court concluded, "[t]his alone is sufficient to deny this ineffective assistance of counsel claim for lack of prejudice." App. 9.

This standard , as used by the district court, is employed "to satisfy the severe burden of demonstrating that newly discovered evidence would have resulted in a new trial." *United States*

v. Agurs, 427 U.S. 97, 111 (1976). The district court did not apply the *Strickland* standard of prejudice in denying Beier's § 2255.

Prejudice under *Strckland* is established when a defendant shows "show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Although the district court cited *Strickland*, it did not analyze prejudice under *Strckland*. App. 6-9.

Following *Strickland*, the Court has reiterated that a counsel's "[r]epresentation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Thus, "[i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Id.* at 111 (citations omitted) (quotation in original). "Instead, *Srickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* The inquiry "does not require a showing that counsel's actions 'more likely than not altered the outcome,' and a more probable-than-not standard is slight and matters 'only in the rarest of case.'" *Id.* at 111-12. "The likelihood of a different result must be substantial, not just conceivable." *Id.*

The district court's order resulted in a debatable issue worthy of review by the Ninth Circuit. That debate centers on whether the district court denied relief from use of a higher standard than *Strickland* allows, and whether application of the *Strickland* standard for prejudice would lead to a different result.

Resolution of the issue could result in one of two remedies. The Ninth Circuit could have remanded the case to the district court to apply the correct legal standard under *Strickland.* Alternatively, the Ninth Circuit could have adjudicated that appeal by reviewing Beier's § 2255 materials that supported his claims and affirmed or reversed the district court under the correct *Strickland* standard. Nonetheless, the issue presented by Beier to the Ninth Circuit in his quest for issuance of a COA is worthy of review.

2. Whether the Ninth Circuit err in summarily denying a certificate of appealability to appeal the district court's order denying a motion pursuant to 28 U.S.C. § 2255, without an evidentiary hearing, when the movant alleged that trial counsel failed to investigate mental defenses and failed to advise the movant on the significant increase in the federal sentencing guideline range if movant rejected a plea offer and proceeded to trial is an important federal question that should be resolved by the Court. The Ninth Circuit denied issuance of a COA contrary to decisions of the Court and resolution of the question is necessary to promote the uniform application of decisions from the Court.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255. In *Blackledge*, the Court emphasized that an evidentiary hearing is necessary on a § 2255 motion if the allegations in the motion "if proved, would entitle the defendant to relief and that they raised an issue of fact that could not be resolved simply on the basis of an affidavit from the prosecutor denying the allegations." *Blackledge*, 431 U.S. at 72.

In denying the § 2255 motion without an evidentiary hearing, the district court relied primarily on the testimony and record for the competency hearing. App. 8-10.[4] The district court further ignored the fact that Dr. Low accepted Dr. Alder's diagnosis of mild- NCD due to TBI in her evaluation. App. 148 ("The reader is directed to pages 13-14 for a full explanation of this diagnosis, as explained by Dr. Adler. This psychologist does not dispute this diagnosis").

The district court had before it Dr. Adler's opinion "that the mild-NCD due to TBI suffered by Dr. Beier represents a serious and significant impairment in Dr. Beier's mental functioning." App. 59. Dr. Adler concluded that Dr. Beier's "impairment manifests itself in delusional thinking (i.e., psychosis - the most severe level of derangement in thinking)." *Id.* "This is consistent with those symptoms included in the DSM-5's section on neurocognitive disorders, both mild and major." *Id.*; *see also*, App. at 105 ("Specifiers" of "NCDs has been recognized, particularly in the area of psychotic symptoms ... [p]aranoia and other delusions are common features...").

Dr. Adler's opinion demonstrates how Dr. Beier's mental impairment substantially affected his thought process and influenced his trial testimony. Dr. Adler stated:

> The impact of the mental disease and defect has on Dr. Beier meets both prongs for the insanity defense under federal law. As I explained at the hearing on July 26, 2017, "Dr. Beier ... is psychotic; his reasoning is not actually based in reality; he "maintained ... that what he was doing was helping people ... [a]nd ... the helping of people supersedes and is not related to actually breaking the law or failing to appropriately transact his medical responsibilities: that he maintains that this was solely due to being conned or being taken unawares or undermined by the behavior of others ... which is what leads me to calling the thinking psychotic." ... "[Dr. Beier] doesn't understand that ... he is doing something

[4] *See*, n. 3, *supra* (citing *Medina*, 505 U.S. at 449.

> that is against the law. He believes that he is helping, and that helping supersedes or in some way diminishes from those other considerations." ... "[V]ery closely associated, is the issue of wrongfulness.... So there's some comment where he says, 'They are trying to indict me,' which [] would suggest that he understands the legal wrongfulness[,] [b]ut then there's the area of having consideration of the moral wrongfulness[,] [a]nd he believes he is doing God's work. I think he conveyed that he regards himself as being a saint. And he has all kinds of moral and religious considerations that do affect that arm of the wrongfulness, the moral wrongfulness." ... Thus, it is my opinion that due to the severity of Dr. Beier's mental disease and defect, he could not appreciate the nature and quality or the wrongfulness of his conduct at the time he committed the offenses. Dr. Beier's circumstances meet the definition of an insanity defense under federal law.

App. 65 (record citations omitted).

Upon review of the jury instructions submitted in Beier's trial, Dr. Adler concluded that Dr. Beier's mental impairment would also support a diminished capacity defense at trial. App. 66. Dr. Alder wrote: "the government had to prove that Dr. Beier 'acted with the intent to distribute the controlled substances outside the usual course of professional practice and without legitimate medical purposes' to prove the charges of distribution and to prove the conspiracy." It is Dr. Alder's "opinion, based on the severity of symptoms of his NCD due to TBI, that the severe psychotic/delusional nature of his mental disease and defect, Dr. Beier could not form the intent to distribute the prescription medications outside the usual course of his professional practice and without legitimate medical purposes as set out in the instructions." *Id.*

The government's response did nothing to rebut Dr. Adler's opinion. Again, the government solely relied on the record of the competency hearing. App. 121-24.

Likewise, the district court relied on the record for the competency hearing in making the

conclusion that "due to a lack of mental-heath defect and lack of diminished capacity as an appropriate defense, counsel made a reasonable strategic decision in not pursuing any capacity issues...". App. 9. Yet, the record before the district court in Beier's § 2255 motion rested on Dr. Adler's clear diagnosis that Beier suffered from a mental disease and defect - mild-NCD due to TBI. The record established that Dr. Low accepted his diagnosis. The DSM-5 reveals that this condition could manifest in psychosis and Dr. Alder described Beier's thinking as delusional and psychotic. App. 105.

Finally, the record before the district court contained excerpts from Dr. Adler's interview with trial counsel. Trial counsel observed that Beier persistently denied "the obvious." App. 71. Trial counsel observed that Beier had "'considerable dissonance between the [case] material and his account." Beier insisted that the evidence as trial "doesn't show what they [the US Government] says it shows." *Id.* Trial counsel stated that Beier, "blankedly 'denied everything.'" *Id.* Trial counsel "said that Dr. Beier was mentally 'separated from what he was really doing.'" *Id.*

The behavior described by trial counsel is consistent with Beier's trial testimony where he denied everything, including the obvious. Dr. Alder's opinion directly connects Dr. Beier's delusional manifestations to a serious mental disease and defect. In his opinion, trial counsel experienced and observed significant behavioral problems "that should have alerted [trial counsel] to the potential existence of a mental impairment that warranted investigation and evaluation prior to Dr. Beier's trial." App. 65.

An evidentiary hearing would have cleared up the district court's misconception of the record of whether Beier suffered from a mental disease or defect and what trial counsel did or did

not do to rule out an investigation into mental defenses. The government's response did not present information that rebutted the information presented to the district court in support of Beier's § 2255 motion.

Additionally, trial counsel's testimony at an evidentiary hearing would be critical in this case to determine what he did or did not do in investigating Beier's background with him or his family members. Only then could the district court make a reasonable assessment of trial counsel's trial strategy and decisions. Therefore, Beier was denied an appeal on a record that supported issuance of a COA to review the districts denial of Beier's motion without of an evidentiary hearing on trial counsel's failure to investigate mental defenses.

Similarly, the district court did not hold an evidentiary hearing before denying Beier's claim that trial counsel failed to advise him of the impact of the guideline range if he rejected the government's pretrial offer and was found guilty at a trial. The Court has set out the *Strickland* prejudice needed on claims such as this. The Court stated:

> In order to complete a showing of *Strickland prejudice*, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

Missouri v. Frye, 566 U.S. 134, 148 (2012).

In this case, Beier submitted an email that had been faxed by trial counsel to Beier's medical clinic the very day the government set as the deadline for accepting the favorable plea offer. App. 55-57. Beier alleged he did not open or receive the email. App. 55. Beier alleged that trial counsel never met with him to discuss the offer with him. *Id.* Beier alleged that trial

counsel never explained the sentencing guidelines to him "and never explained [] how the calculations would significantly increase the prison term if [he] lost at trial." *Id.*

Beier alleged "that had he read the email had he understood how the sentencing guidelines operated before his trial, and had he understood that if he lost at trial he was facing 15 or more years in prison, [he] would not have elected to go to trial." *Id.* Beier alleged he would have accepted the favorable pretrial offer to settle. *Id.*

The district court dismissed Beier's allegation as simply "conclusory allegations." App. 11. The district court concluded that Beier's allegation could not "be true considering the text of the email Beier himself used as evidence." *Id.*

The record, however, establishes that trial counsel must have concluded Beier did not receive the email because the email was later faxed to Beier. App. 55-57. The facsimile copy of the email shows that the deadline for accepting the plea offer was November 6, 2014. App. 57. The facsimile shows that trial counsel did not fax the email offer to Beier until November 6, 2014 at 12:07 pm. App. 56-57. These circumstances establish a strong likelihood that Beier's allegations are true - i.e., trial counsel never met with him to discuss the offer before the deadline lapsed.

The district court relied on a later email to dismiss Beier's claim. App. 11. The government submitted an email from January 16, 2016, from trial counsel to the prosecutor in response. App. 11, 152. Trial counsel informed the prosecutor that he planned "a long sit-down with [Beier], soon..." Trial intended this "sit-down" to "be one last chance to confirm or eliminate the change of resolving the case short of trial." App. 152.

While the district court relied on trial counsel's statement that he planned to meet with

Beier to discuss settlement, the record reasonably demonstrates that such meeting did not occur. Trial counsel specifically informed Dr. Alder the "*there had never been a 'genuine, thorough discussion' of the case with his client.*" App. 71 (emphasis in original). The record contained sufficient information and allegations to warrant an evidentiary hearing on this claim.

The January 2016 email does not address the claim about the failure to discuss the sentencing ramifications before the November 6, 2014, deadline passed. Trial counsel is the only person that could explain, contradict or discuss Beier's allegations. The government's response did not include information from trial counsel, nor did the district court request a response in any manner from trial counsel.

The Court demands that "before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily the district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge...." *Blackledge*, 431 U.S. at 82 n. 25. And, "'[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.'" *Id.* (quotations in original) (citations omitted).

The government did not submit any information that would alleviate the need for an evidentiary hearing on this issue. The only way this issue can be resolved is through an evidentiary hearing. Again, the Ninth Circuit had before it sufficient information to isseue a COA permitting review of the district court's order denying Beier's claim that counsel failed to advise him of the impact of the government's offer without an evidentiary hearing.

The Court is the only vehicle left to resolve the questions presented and correct egregious error.

The Court has previously found counsel ineffective for failing to investigate "mental health or mental impairment" for mitigation. *Porter v. McCollum*, 558 U.S. 30, 40 (2009). There, trial counsel failed to "uncover" the defendant's "family background," and "military service." *Id.* "The decision not to investigate did not reflect reasonable professional judgement." *Id.*; *see also*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel ineffective for failing to expand investigation). Trial counsel in this case similarly failed to investigate mental defenses.

Neither the district court nor the Ninth Circuit followed the Court's standards in determining whether to grant Beier relief under § 2255. The district court employed the wrong standard of prejudice, contrary to *Strickland.*

The Ninth Circuit failed to correct that error by granting issuance of a COA to review that issue on the merits on Beier's appeal. The errors in this case are egregious and should be corrected.

Furthermore, Beier made sufficient allegations with sufficient corroborating information to justify review of his claim that trial counsel failed to advise him on the impact of the sentencing guidelines if he rejected the government's pretrial offer to settle in October 2014 and proceeded to a trial. Again, the district court denied Beier's claim without an evidentiary hearing, and without anything from trial counsel that contradicted his allegations. This also runs contrary to *Blackledge* where the Court demands that district court's seek information from those who have firsthand knowledge before dismissing a claim. 431 U.S. at 82 n. 25. Here, the only person capable of addressing Beier's specific allegations was trial counsel.

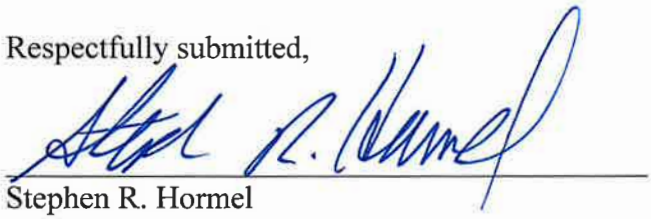
Neither the district court nor the Ninth Circuit required trial counsel to address either claim before rejecting Beier's motion. Again, the district court's order, including the refusal to grant an evidentiary hearing, and the Ninth Circuit's refusal to grant a COA run afoul of previous decisions of the Court, and are so contrary to the standards set out by the Court that the alleged errors should be subjected to further review. The Court is the only vehicle now upon which the proper review Beier's claims may be conducted.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari and resolve the questions presented.

Dated this 18th day of April, 2023.

Respectfully submitted,



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