22-7729

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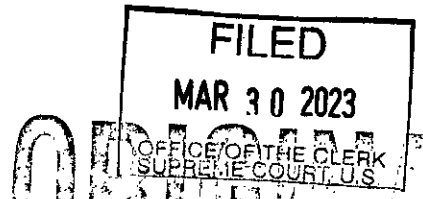

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

William J. Sears — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal for the Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

William J. Sears, #56353-054
(Your Name)
Florence Prison Camp
P.O. Box 5000
(Address)

Florence, Colorado 81226
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Did the Court of Appeals err when it denied my Motion for Certificate of Appealability?

2. Did the District Court err when it denied my § 2255 petition that my plea agreement was obtained involuntarily and as a result of ineffective assistance of counsel?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States of America v. Sears, No. 1:16-CR-00301-WJM-1 & 1:21-CV-00141-WJM, U.S. District Court for the District of Colorado. Judgement entered on July 15, 2022.

United States of America v. Sears, No. 22-1243, United States Court of Appeals for the Tenth Circuit. Judgement entered on November 30, 2022

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was Nov. 30, 2022.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 4, 2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2255

Sixth Amendment, U.S. Constitution

STATEMENT OF THE CASE

I am currently incarcerated at the Federal Prison Camp in Florence, Colorado. I have currently served over 40 months of my 96-month sentence. I am here largely as a result of a federal agent with the FBI lying to enhance her credibility in order to obtain a search warrant and because my attorney failed to provide a competent defense and representation.

Not long after I pled guilty, I - not my attorneys - discovered that Special Agent Funk's affidavit to obtain a search warrant contained serious misrepresentations. I immediately showed this, and other things, to my attorneys. Rather than defend me and represent me, my attorneys withdrew as my advocates, and I filed a motion to withdraw my plea agreement through my new, court-appointed counsel. That motion was denied by the district court. I then filed a motion for reconsideration immediately after that denial, which the district court again denied.

After I was sentenced and incarcerated at Florence FPC, I leanred just how ineffective and below the acceptable standard my attorney's representation was, and I filed a petition to vacate, set aside, or correct my sentence under 18 U.S.C. § 2255.

As this Court knows, at the very least, an evidentiary hearing is to be held for § 2255 petitioins promptly when the petition raises facts that differ from the record. In my case, I provided dozens of exhibits in support of my § 2255 petition evidencing Special Agent Funk's malfeasance and perjury, as well as of my attorney's ineffective assistance of counsel. Notwithstanding,

after nearly 18 months after my petition was filed, the district court - without holding an evidentiary hearing - denied my petition and refused to issue a Certificate of Appealability ("COA").

I then appealed that decision to the Tenth Circuit Court of Appeals and requested the Tenth Circuit issue a COA. That appeal was denied, with the Court arguing that Special Agent Funk's misrepresentations to the district court in order to obtain a search warrant was not a problem because Agent Funk did not say that "she was currently licensed and practicing as a CPA." Moreover, the Court of Appeals rejected my claim of Ineffective Assistance of Counsel, reasoning that I had not "established a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial" - even though I tried to withdraw my plea not once - but twice. I cannot conceive of another action that would show my insistence on going to trial. Finally, the appeals court rejected my request for the district court to hold an evidentiary hearing as required by § 2255.

Because it was clear that the Court of Appeals misconstrued my arguments (as a pro se litigant with only a high school diploma, I'm sometimes not as clear as I should be), I filed a request for re-hearing, where I broke my arguments down to the very core. Whereas it was crystal clear in my 2255 petition and exhibits that an evidentiary hearing was required and should have been granted. Without explanation or decision, the Court of Appeals denied my request for re-hearing.

As this case involves important issues of an inmate's rights and access to effective representation, even beyond my own situation, I am now appealing to the United States Supreme Court through this writ of certiorari. At its very core, this case involves a federal law enforcemetn officer, Special Agent Kate Funk of the FBI, lying to the district court for the sole purpose of enhancing her credibility and experience in order to obtain a search warrant. My attorney's subsequent representation and counsel was so ineffective and prejudicial that I accepted a plea deal I never would have accepted had I known the actual facts and had my attorney provided effective counsel. As proof, I moved to withdraw my plea agreement immediately after learning about Agent Funk's lies and misconduct.

The lower courts erred when they failed to consider my well-reasoned arguments - with documented proof - in accessing the litigation process. The district court erred in failing to hold, at the very least, an evidentiary hearing on the arguments and evidence raised in my § 2255 petition. The Tenth Circuit erred in failing to issue a COA where it was abundantly clear based on the facts and the evidence that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

While I recognize the need for judicial economy and finality, the way plea agreements are written, with waivers of the right to appeal, it is more important than ever for the Supreme Court

to grant my Writ and hear my case. When verifiable allegations of law enforcement misconduct and ineffective assistance of counsel are brought forth, courts should err on the side of inmates and, at the very least, allow those facts, and supporting evidence, to be raised in an evidentiary hearing. As such, I respectfully request that this Supreme Court review my writ and reverse and remand the Tenth Circuit's denial of a COA and allow me to put forth the evidence supporting my contentions.

This Writ is based on the record on appeal generated in the district court proceedings, as well as the § 2255 petition, and the filings in the Tenth Circuit, and any oral arguments that this Court may conduct.

REASONS FOR GRANTING THE PETITION

1. DID THE COURT OF APPEALS ERR WHEN IT DENIED MY MOTION FOR COA?

"To obtain a COA after a district court has rejected a petitioner's constitutional claims the 'petitioner must demonstrate that reasonable jurists would find the district court's assessment of the ... constitutional claims debatable or wrong.'" Milton v. Miller, 812 F.3d 1252, 1263 (10th Cir. 2016) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A COA is necessary if an issue is "debatable among jurists of reason" or if "a court could resolve the issue [differently], or the question [is] adequate to deserve encouragemetn to proceed further." Barefoot v. Estell, 463 U.S. 880, 893 (1983).

Importantly, the certificate of appelability "inquiry ... is not coextensive with a merit analysis." Buck v. Davis, 137 U.S. 759 (2017). A petitioner "need not show that he should prevail on the merits." Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000). Rather, a petitioner needs to make a "modest" showing. In fact, according to this Supreme Court, 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." Buck, 137 U.S. at 759. A claim may be "debatable" and thus deserving of a COA, "even though every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

ARGUMENT

"The Due Process clause of the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty." United States v. McIntosh, 29 F.4th 648, 655 (10th Cir. 2022). For a plea to be voluntary, the "defendant's decision to plead guilty must be deliberate and intelligent and chosen from available alterntatives." Id.

As in my case, a defendant may show that his guilty plea was involuntary if he should have been - but was not - informed of information relevant to his case. If either the government failed to disclose material exculpatory evidence or if the defendant's attorney failed to discover such information through reasonable investigation, then the defendant may not have "chosen from available alternatives" when he entered a guilty plea. Id. Because, for the reasons set forth herein, it is "debatable" that my guilty plea was "knowingly and voluntarily" entered into, this Supreme Court should grant my Writ and reverse and remand.

A. SPECIAL AGENT KATE FUNK LIED TO ENHANCE HER CREDIBILITY.

It is undisputed that Kate Funk lied to the district court in an effort to enhance her credibility in order to obtain a search warrant. Due to my inexperience, at the lower court level, I confused her violation of Colorado and Kansas laws (by acting as a CPA without being licensed) with the true argument, however, which is that despite her violations of those states' laws, Kate Funk intentionally misrepresented her credentials and education to the court for the sole purpose of enhancing

her credibility in order to obtain the search warrants against me. And, had she not misrepresented her credentials, then the search warrants either would not have issued, or would not have issued without the court further questioning Special Agent Funk about her credentials, education, and experience. As such, because my plea was based on allegations and charges stemming from search warrants that never should have been issued, then my plea was obtained illegall and involuntarily.

The Fourth Amendment to the United States Constitution mandates that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Importantly, the Fourth Amendment is violated if "police knowingly or with reckless disregard include false statements in affidavits that formed the basis for the issuance of warrants." Pierce v. Gilchrist, 359 F.3d 1279, 1289 (10th Cir. 2004). Moreover, a Fourth Amendment violation occurs when "(1) an officer's affidavit supporting a search warrant application contains a reckless misstatement or omission that (2) is material because but for it, the warrant could not have lawfully issued." United States v. Moses, 965 F.3d 1106, 1110 (10th Cir. 2020).

In this case, it is clear that my Fourth Amendment rights were violated. Special Agent Kate Funk lied in her affidavit suppporting the search warrant application, and she did so for the sole purpose of enhancing her credibility and convincing the judge to sign the search warrant. But for her misrepresen-

tations and reckless misstatemetns, the warrant would not have issued. And, because my plea was based on allegations and charges arising out of search warrants that never should have been issued, then my plea was obtained illegally and involuntarily.

It is undisputed that Special Agent Funk became a Certified Public Accountant **certificate holder** in Kansas. It is also undisputed that as a certificate holder only, and not a fully-licensed CPA, Special Agent Funk could not hold herself out as a CPA or perform services as a CPA. The difference was explained in my 2255 exhibits in a paper published by Kenneth W. Boyd titled: "Certificate vs. License." Even providing "litigation support" services required a person to hold a valid permit to practice (which Agent Funk does not have) in order to call herself a CPA. As such, her statement to the court was misleading and made for the sole purpose of enhancing her credibility as a witness.

In my § 2255 petition, I clearly alleged that the search warrants were defective because Special Agent Kate Funk lied about her qualifications, credentials and experience. This is important because but for Agent Funk's lies, the government would not have received the search warrants, and I would not have pleaded guilty. Thus, as a direct result of the government's conduct, my plea was obtained illegally and involuntarily.

To be clear, my argument in my § 2255 and now is not that Agent Funk was acting as a CPA when she prepared the affidavit, and therefore she violated two state's laws. Instead, Special Agent Funk's statement in her affidavit that she "received an

Accounting degree from the University of Kansas in 1995" and that she became "a Certified Public Accountant in 1996 through the state of Kansas" contains at least four materially misleading facts. First, Special Agent Funk did not graduate from the University of Kansas with an Accounting degree. Her degree was in business. Second, she did not graduate in 1995, but instead in 1996. Moreover, she did not become a CPA in 1996 through the state of Kansas. Rather, she became a CPA certificate holder - not licensed to practice - in the state of Kansas in 1999. While each individual fact may not seem like a material misrepresentation, it's clear what Special Agent Funk was trying to do - increase or enhance her credibility with the court in order to obtain a search warrant. Otherwise, why not be accurate and truthful?

As part of my original § 2255 petition, I submitted a variety of exhibits supporting my arguments. One of those exhibits was an affidavit of Steven R. Anderson, CPA, JD, a certified public accountant and attorney who represents accountants and others in Colorado. After reviewing Special Agent Funk's affidavit in support of the search warrant, he came to the same conclusion, stating that "[c]learly, Ms. Funk wanted the Court and others to rely on her statements in her affidavit as if they were provided by a CPA ...."

Had Special Agent Funk not intended to misrepresent her credentials to the court, she would have stated that she earned a business degree in 1996 and became a CPA certificate holder (not licensed to practice) through the state of Kansas in 1999. And,

because jurists of reason could debate whether she intentionally misrepresented those material facts (which the lower courts ignored by not addressing them in their denials) for the sole purpose of enhancing her credibility and reliability with the court, then at the very least, a COA should be issued.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The second rationale for attacking my plea agreement is a claim for ineffective assistance of counsel. Again, I thought I laid out how I met the two-part test, but the Court did not even acknowledge or address what I believe to be the most relevant and persuasive arguments. As such, I respectfully request this Court grant my Writ and reverse and remand for the lower court to hold an evidentiary hearing.

It is well-settled in the Tenth Circuit that receiving ineffective assistance of counsel can render a defendant's guilty plea involuntary. United States v. Reed, 39 F.4th 1285, 1293 (10th Cir. 2022). Furthermore, the Supreme Court has long held that the Sixth Amendment right to counsel includes the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). And, the Sixth Amendment right to effective assistance of counsel extends to the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012). It is also clear that representing a "criminal defendant, an attorney has a durty to reasonably investigate the facts and the evidence." Strickland, 466 at 690-91. The question is not necessarily whether the previous counsel made reasonable strategic choices that turned out to be unsuccesful, but rather did the attorney fail to investigate.

The Tenth Circuit analyzes ineffective assistance of counsel claims using the approach set forth in Strickland. Under that standard, "a defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense." United States v. Holloway, 939 F.3d 1088, 1102 (10th Cir. 2019). And, for claims arising in the context of a guilty plea, the prejudice requirement is slightly different and "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words ... the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also, United States v. Lustyik, 842 Fed. App'x 291 (10th Cir. 2021).

Thus, in cases like mine, where a defendant alleges that his counsel's deficient performance led him to accept a guilty plea rather than go to trial, a court does not ask whether the defendant had gone to trial would the result have been different than the result of the plea deal. Rather, the court should consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000). As the Supreme Court held in Hill, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. Because I satisfy both prongs, this Court should grant my Writ of Certiorari, and because reasonable jurists can debate the issue of ineffective assistance of counsel, the Court should grant me a COA.

1. Prong 1: My Attorney's Ineffective Assistance of Counsel.

As set forth by the Supreme Court in Strickland and Hill, and adopted by the Tenth Circuit, when a claim attacking a guilty plea due to ineffective assistance of counsel, a defendant must first show that his "counsel's performance fell below an objective standard of reasonableness." Holloway, 939 F.3d at 1102. In its denial, this Court did not address my arguments regarding this first prong and therefore presumably the Court of Appeals agreed satisfy the test. However, in an abundance of caution and in an effort to make my arguments crystal clear, I will recount how and why my counsel's performance fell below the standard of reasonableness.

It is undisputed that at all times during the discovery and plea-bargaining phases, my attorney had a duty to provide effective representation. That means to investigate, review evidence, and prepare a defense. Unfortunately for me, my attorney determined early on that I did not have the "resources" for trial, and therefore did as little as possible in hopes of pushing me towards a quick plea deal.

My attorneys did very little to fulfill their constitutional duties to investigate the facts and alleged evidence against me. Had they done so, they would have discovered that Special Agent Funk committed perjury and that her opinions and conclusions were completely wrong. They would have learned, as I did through my own research, that Agent Funk had no experience reviewing financial transactions for a public company, had no experience revieweing and preparing forensic audits, and had no experience with GAAP accounting principles and revenue recognition. My attorney's failure to provide even a modicum of investigation and review of the discovery was not a "strategic" decision. It was instead a complete and total faliure to provide effective assistance of counsel.

Once I was finally able to review the alleged evidence against me, only after I pled guilty, it was clear that the government misunderstood my business and initially thought I was operating a ponzi scheme, which I obviously was not. Reviewing the purpor- probable cause affidavit, it is clear the FBI did not understand the nature of the business, and after executing the search warrant in 2014 and not finding what they expected to find, they had to manufacture new allegations against me in order to charge me nearly 2.5 years later. Because the evidence was withheld from me, and the Government and my attorneys pushed for a quick plea deal, I did not have the opportunity to review the evidence prior to pleaing. Had my attorneys actually provided effective counsel, I would have insisted on going to trial.

In addition to failing to investigate Special Agent Funk's inexperience, my attorneys never discovered that the prosecution failed to register the search warrants with the court - as Federal law required them to do. The government's failure to register the search warrants as required by the Federal Rules of Evidence require flies in the face of well-settled case law in the Tenth Circuit. I discovered the government's misconduct when I called the court to get certified copies of the warrants. I was told the docket reflects there are no warrants to even send certified copies of. To this day, I still don't know what ultimately the FBI was after or what it found, because the search warrants were never registered with the court and I was never provided with certified copies of any such warrants.

2. Prong 2: I was Prejudiced As A Result.

As set forth earlier, once the first prong of the ineffective assistance of counsel analysis has been satisfied, the court then looks to the second prong: whether a defendant was "prejudiced" as a result of teh attorney's ineffective assistance of counsel. For the reasons set forth in detail below, I clearly satisfy this second prong.

According to this Supreme Court, the "two-part Strickland v. Washington test applies to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the ... test is nothing more than a restatement of the standard of attorney competence .... The second, or 'prejudice,'

requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 58-59.

In this particular case, although I thought I clearly met this prong, the Court seemed to disagree with me. Specifically, when discussing whether I was "prejudiced" as a result of my counsel's ineffective assistance of counsel, the Court stated that I had not established "a reasonable probability that, but for counsel's errors, [I] would not have pleaded guilty and insisted on going to trial." Again, for the reasons set forth in my petition for COA as well as below, I respectfully request that this Supreme Court grant my Writ of Certiorari and reverse and remand the lower court's decisions.

Because it is impossible to look back with perfect hindsight and rather than asking how a hypothetical trial would have played out absent counsel's constitutionally deficient performance, the court considers whether there is an adequate showing that the defendant, properly advised, would have opted to go to trial. In my case, that evidence is clear that but for my counsel's ineffective counsel, I "would not have entered the plea but instead would have insisted on going to trial." United States v. Walters, 269 F.3d 1207, 1214 (10th Cir. 2001).

That is becaues, once I was able to review all of the information, allegations, purported search warrants, and other documentation, only after I had already pled guilty, I then moved - not once but twice - to withdraw my plea. This Court does not have to guess how I would have responded had I had this information prior to pleading tuilty. It's clear from the record. I would have insisted on going to trial, a fact that is supported by the two motions to withdraw my plea agreement filed as soon as I learned of my counsel's ineffective performance.

Based on the foregoing, it is clear that jurists of reason could at least debate that I was prejudiced by my counsel's constitutionally defective performance. To this day, no one has been able to point to, nor can I think of another action I could have taken other than to withdraw my plea not once but twice, to show that I wanted to go to trail. As a result, a COA should have been issued.

CONCLUSION

For the foregoing reasons, I respectfully request that this Supreme Court grant my Writ of Certiorari and reverse and remand the lower courts' decisions and order an evidentiary hearing in this matter.

DATED this 23 day of May, 2023.

William J. Sears, pro se