No.

IN THE
Supreme Court of the United States

JERRY J. DAVIS, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the District Court and Sixth Circuit Erred When Both Found That Mr. Davis Was Not Entitled to the Issuance of a Certificate of Appealability for Ineffective Assistance of Counsel Under *Strickland*?

Whether the District Court Erred When It Denied Mr. Davis Relief Because His Trial Counsel Improperly Conceded His Guilt?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Jerry J. Davis, Jr., Petitioner and United States of America, Respondent.

LIST OF RELATED PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
Case No. 5:20CV414
JERRY DAVIS, JR. V. UNITED STATES OF AMERICA
Petitioner's Petition to Vacate, Set-Aside, or Correct Sentence DISMISSED. Reproduced in the Appendix.
Judgment dated October 20, 2022

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Case No. 22-3947
JERRY DAVIS, JR. V. UNITED STATES OF AMERICA
Petitioner's Petition for Certificate of Appealability DENIED. Reproduced in the Appendix.
Judgment dated May 13, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Davis respectfully requests that a Writ of Certiorari be issued to review the denial of habeas relief and a Certificate of Appealability by the United States District Court for the Northern District of Ohio and subsequent affirmation of the same by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

On October 20, 2023 the United States District Court Denied Petitioner's Petition for Habeas Corpus relief and such is preproduced in the Appendix. (Pet. App. 11b; 32c).

Thereafter, the Sixth Circuit Court of Appeals for the United States denied Petitioner a Certificate of Appealability on May 12, 2023 and such is preproduced in the Appendix. (Pet. App. 1a).

BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the Sixth Circuit entered its Order on May 12, 2023. This Court granted an application for extension of time to file until September 24, 2023, on July 18, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

> forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C.§ 2253(c)(1)-(3) provides:

> (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(c)(1)-(3).

Title 28 U.S.C. § 2254(d)(1)-(2) provides:

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in

light of the evidence presented in the State court proceedings.

(3) 28 U.S.C. § 2254(d)(1)-(2).

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The Incident In Question

On November 1, 2016, Petitioner was pulled over by Ohio State Highway Patrol Trooper Michael McCarthy after he observed Petitioner driving 35 miles per hour in a 25 mile-per-hour speed zone in a residential area. Petitioner complied with Trooper McCarthy's request for his driver's license, registration, and proof of insurance. Trooper McCarthy asked Petitioner to keep his hand on the steering wheel while he checked Petitioner's license information. During this check, Trooper McCarthy asked Ohio State Highway Patrol Trooper Baker to walk his K-9 around Petitioner's vehicle. Petitioner then drove away from the two patrol troopers at a high rate of speed.

The troopers pursued Petitioner, observed him crash, and subsequently exit, his vehicle. Petitioner was then pursued on foot by Trooper McCarthy and Akron Police Officer Hill. The officers observed Petitioner jump off a bridge, injuring himself. Petitioner was brought to the hospital for medical treatment after his arrest. While in the hospital, Petitioner heard two officers discussing how the drugs discovered in Petitioner's car may be fentanyl. Petitioner stated "I can tell ya that ain't no fentanyl."

After the arrest, Petitioner's car was searched, and investigators sought and obtained a search warrant for "drugs, record of drug trafficking, and firearms" at 435 Center Road, New Franklin – Petitioner's alleged residence.

B. Procedural History

Petitioner Davis was indicted for two counts of possession of cocaine, two counts of possession of a firearm, and one count of being a felon in possession of a firearm by a federal jury. On June 8, 2017, Davis, represented by Trial Counsel Mark B. Marein and Steven L. Bradley, was convicted by a jury of all five counts. Mr. Davis entered a plea of not guilty and did not testify at trial. On December 13th, 2017, Mr. Davis was sentenced to 248 months in prison, with 5 years supervised release.

On November 29th, 2018, the Sixth Circuit Court of Appeals affirmed the lower court's decision. On direct appeal, Mr. Davis was represented by Paul Mancino, Jr. and Brett Mancino.

On February 22, 2020, Petitioner Davis filed a motion to vacate his conviction under 28 U.S.C. § 2255. The district court filed its Order denying his motion on March 16, 2022.

On October 21, 2022, the district court denied Petitioner's certificate of appealability.

On January 12th, 2023, Mr. Davis appealed the district court's decision not to issue a Certificate of Appealability to the Court of Appeals for the Sixth Circuit.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DISTRICT COURT AND SIXTH CIRCUIT ERRED WHEN BOTH FOUND THAT MR. DAVIS WAS NOT ENTITLED TO THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*.

A court may issue a Certificate of Appealability ("COA") when an applicant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court denies a petitioner's habeas petition on procedural grounds "without reaching the merits of the petitioner's constitutional claim," the district court *must* issue a COA if the petitioner at least shows that: (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (citing 28 U.S.C. § 2253(c)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The movant does not need to show that he would prevail on the merits, but rather show that the issues he presents are subject to *debate among jurists of reason*. *See Miller-El*, 537 U.S. at 327. A court could resolve the issues differently, or the issues are worthy of encouragement to proceed further. *See id.*; *see also Buck v. Davis*, 137 S. Ct. 759, 781 (2017) (Thomas, J., dissenting) ("A court may grant a COA even if it might

ultimately conclude that the underlying claim is meritless, so long as the claim is debatable.").

In this case, the District Court should have issued a COA because the issues of the dismissal of Mr. Davis's § 2255 petition could be debated by reasonable jurists on both substantive and procedural grounds. Specifically, Mr. Davis has made a significant showing that he was denied effective assistance of his trial counsel under (1) *Strickland v. Washington*, 466 U.S. 668 (1984).

A. THE DISTRICT COURT ERRED WHEN IT FOUND THAT MR. DAVIS'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS LACKED MERIT UNDER STRICKLAND.

This Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Under *Strickland*, a defendant demonstrates ineffective assistance of counsel by showing that (1) the trial counsel's performance was deficient, meaning that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *See id.* at 686; *Guidry v. Lumpkin*, 2 F.4th 472, 489 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1212 (2022). To establish prejudice, the defendant must show that there "is a reasonable probability that, absent the

errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

In the context of claims involving appellate counsel, the Sixth Amendment guarantees the right to effective representation on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985). The Strickland standard applies to claims relating to appellate counsel as well as trial counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L.Ed.2d 756 (2000); *Ellis v. Hargett*, 302 F.3d 1182, 1186-87 (10th Cir. 2002). Strickland requires a look at the merits of the issues that appellate counsel failed to raise. *Logan v. Sta*te, 2013 OK CR 2, ¶ 6, 293 P.3d 969. Here, Petitioner's previous appellate counsel failed to raise the issue of suppression of evidence on appeal – a meritorious issue on appeal but for counsel's failure. Appellate counsel also failed to raise the issue of the *Franks* violation.

i. SUPPRESSION OF EVIDENCE.

The evidence in question pertains to the statement Petitioner made to law enforcement while receiving medical care and the evidence seized at 435 Center Road. Specifically, Petitioner's assertion that the bags obtained by law enforcement was not fentanyl. The record indicates that the officers stationed in Petitioner's hospital room should have understood the circumstances surrounding the questioning would have led to Fifth Amendment self-incrimination violations. The incriminating statements – notably made after Petitioner was arrested – were an attempt to secure evidence for trial. Law enforcement interrogated Petitioner about the duffle bags while in

the hospital and failed to read Petitioner his Miranda rights.

Confronting a suspect with incriminating evidence may be functionally equivalent to a formal interrogation. See, e.g., *Combs v. Wingo*, 465 F.2d 96 (6th Cir. 1972)(confession inadmissible under *Miranda* when the office obtained it by confronting the defendant with a ballistic report). If an officer takes action because he hopes to obtain an incriminating statement, then that action constitutes the functional equivalent of interrogation. See *Rhode Island v. Innis*, 446 U.S. 291, 301 n.7 (1980). *Miranda v. Arizona* instructs that statements made during interrogation may not be used unless law enforcement has read the suspect his Miranda warning and the suspect has voluntarily, intelligently, and knowingly waived those rights. 384 U.S. 436 (1966). Comments made by law enforcement that produce an incriminating statement are analyzed from the defendant's perspective, *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990), and interrogation is more likely to exist when the defendant is easily susceptible. *United States v. Avery*, 717 F.2d 1020, 1025 (6th Cir. 1983). Moreover, the government must prove that any error stemming from a Fourth Amendment or Miranda violation was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Soto*, 953 F.2d 263, 265 (6th Cir. 1992). Petitioner's admission was facially not harmless, with the trial court explaining that "The statement . . . is very incriminating as it indicates his knowledge and possession of the kilograms of cocaine." [R. 107-1, Memorandum of Law. PageID#1720 (citing R. 45)].

Petitioner's previous appellate counsel also failed to raise the issue of the suppression of evidence seized from 435 Center Road. The search warrant was deficient as a matter of law, but the lower court dismissed this claim, stating that Petitioner was merely repackaging his claim that was originally brought on direct appeal. This analysis was incorrect, because, in his Petition for Writ of Habeas Corpus, Petitioner claimed appellate counsel was ineffective for failing to argue that the search warrant affidavit information was insufficient. The lower court admitted that the conduct complained of was not addressed on appeal and that the search warrant was challenged from a different light. As Petitioner previously argued, the information provided in the search warrant affidavit did not create a nexus necessary to grant a legal search and seizure. Appellate counsel failed to raise this issue on appeal despite the affidavit's use of vague and conclusory statements, and was thus ineffective. Under *Smith v. Robbins*, Petitioner Davis's Strickland claim has merit because he can "show a reasonable probability that, but for his counsel's unreasonable failure . . . [Petitioner] would have prevailed." 528 U.S. 259, 285 (2000).

These errors alone should raise questions of adequacy under the "reasonable jurists" standard found in *Miller-El.* 537 U.S. at 327. Consequently, this Court should grant Mr. Davis's petition for a COA under *Strickland* so that he may continue to seek justice under the law.

ii. DENIAL OF PETITIONER'S REQUEST FOR A *FRANKS* HEARING.

Petitioner Davis was entitled to a *Franks* hearing because he showed that the search warrant issued to search 435 Center Road relied on false statements in the supporting affidavit. In *Franks*, this Court held that a defendant may challenge the sufficiency of statements made in an affidavit to support an executed search warrant if he can prove that the statements were made with "deliberate falsehood or . . . [with] reckless disregard for the truth. . . . [and] the remaining content [without the false statements] is insufficient [to support a finding of probable cause]." *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Here, the affidavit failed to connect Petitioner Davis to 435 Center Road beyond a single, conclusory statement: "Det. Heimbaugh knows through surveillance over the past year Jerry Davis resides at 435 Center Road." [R. 49, Trial Brief, PageID#256.] However, law enforcement's failure to include in the affidavit that Petitioner's driver's license lists a different residential address, is the subject requiring a *Franks* hearing. The conclusory statement, on its own, was false and misleading. There is a reasonable probability that the Sixth Circuit would have required the District Court to conduct a *Franks* hearing had appellate counsel adequately raised this issue and any evidence from 435 Center Road would have been suppressed.

This Court held that a *Franks* hearing is justified when the Petitioner makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth,

was included" in the warrant affidavit. *Id.* at 155-56. Moreover, "the Fourth Amendment requires that a hearing be held" if that statement is necessary to finding probable cause. *Id.* When determining the sufficiency of evidence used for supporting probable cause, a reviewing court is limited to the information within the four corners of the affidavit. *United States v. Coffee*, 434 F.3d 887, 892 (6th Cir. 2006). Here, the lower courts denying Petitioner his Fourth Amendment right was improper, as was appellate counsel's failure to properly raise this issue on appeal. The affidavit was insufficient to support a finding of probable cause because it failed to include the fact that Petitioner's driver's license lists a different residential address than the residence listed in the affidavit.

II. THE DISTRICT COURT ERRED WHEN IT DENIED MR. DAVIS RELIEF BECAUSE HIS TRIAL COUNSEL IMPROPERLY CONCEDED HIS GUILT.

The District Court should have granted habeas relief because Petitioner's trial counsel unlawfully conceded his guilt in violation of his constitutional rights. The Sixth Amendment provides that "the accused shall . . . have the assistance of counsel for his defence." U.S. Const. amend. VI. A defendant's autonomy to choose between asserting innocence versus conceding guilt is fundamental to the Sixth Amendment, even if one's attorney counsels against their decision. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). The District Court acknowledged that Petitioner held this right despite denying relief.

During his opening statement, Petitioner's counsel made the following concession:

> Most of the evidence that you're going to hear is largely going to be uncontested by the defense. And the real dispute going to center around that unloaded firearm that was found in that detached garage . . . [W]e will ask that you return a verdict of not guilty as to that single count . . . Jerry Davis accepts responsibility for his participation in these offenses. And based on the evidence that the government has presented here and with that acknowledgement . . . your verdicts will so reflect his participation in these offenses . . . I want to focus my remarks on really the only count in the indictment that is disputed, and that would be Count 4.

[R. 121, Transcript, at PageID #1914-15.]

The lower court incorrectly held that there was not a "true concession of guilt because declarations made in opening statements and closing arguments are not evidence." [R. 123, Order, PageID#1955.] The court also stated that there was no "true concession of guilt" because Mr. Davis did not provide any stipulations conceding certain facts or guilt. *Id.* This analysis was incorrect because Petitioner did not seek to concede his guilt. Mr. Davis sought the opposite, in fact, and was surprised by trial counsel's unilateral decision to concede his guilt. [R. 120, Transcript, PageID #1884.] The lower court treats the fact that there was no stipulation or no guilty plea as dispositive of trial counsel's effectiveness. Rather, the reason neither

exist is because Petitioner never agreed to concede his guilt.

In *Florida v. Nixon*, 543 U.S. 175 (2004), this Court held that an attorney's decision to concede his client's guilt was not automatically determinative of the attorney's effectiveness as counsel. However, the circumstances in *Nixon* are in stark contrast to the facts of our case. Nixon's attorney attempted to explain his decision to concede guilt to Nixon multiple times, but was met with disinterest from Nixon. *Id.* at 181. Additionally, Nixon never gave his attorney an affirmative approval or denial or this strategy, and generally provided very little assistance or guidance to his trial attorney. *Id.* Presently, Mr. Davis's conduct can be distinguished from Nixon's. While Nixon never provided his attorney with an opinion regarding the strategy to concede his guilt, Mr. Davis did quite the opposite. Mr. Davis was not only stunned by his attorney's decision to concede his guilt, but he explicitly told trial counsel that "I don't like how you conceded my guilt and . . . told the jury that I was guilty of the drugs in the house." [R. 120, Transcript, PageID #1885.] Mr. Davis testified that he would have been willing to concede guilt to the evidence found in the car, but not what was in the house. [R. 120, Transcript, PageID #1886.] Additionally, counsel in *Nixon* attempted to discuss his strategy with Nixon numerous times, 543 U.S. at 181. This is in contrast with our case, as Mr. Davis's counsel could not recall having such a discussion with him, despite the decision to concede his client's guilt being a "very significant thing to do." [R. 120, Transcript, PageID #1901.]

Trial counsel's conduct in this case was per se prejudicial because he did not consult with Petitioner prior to conceding his guilt, and the statements he made in his opening statement were concessions. Additioanlly Attorney Marien testified that he did not recall Mr. Davis expressing a willingness to plea to all counts, except count IV. [PageID #1841]. The same can be said of Attorney Bradley who could not recall Mr. Davis being consulted with about his plea to all counts. [PageID #1854]. Importantly Mr. Davis only offered to plead guilty to counts one and two during negotiations. Mr. Davis was not on board with conceding guilt entirely and certainly did not want to concede guilt ***during trial. Attorney*** Bradley wholly failed to explain this situation and noted that his client accepted full responsibility, despite evidence not being strong. Petitioner's claims have merit and a certificate of appealability is necessary to further rectify those claims.

Thus, the district court erred when it denied Mr. Davis's request for habeas relief and a Certificate of Appealability, and this Court should order a remand accordingly.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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