ORIGINAL

No. 23-5488

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DYWANE TOUSANT,

Petitioner-Appellant.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DYWANE TOUSANT
REG. NO. 14306-298
FCI SHERIDAN
FEDERAL CORR.
INSTITUTION
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APPEARING *PRO SE*

QUESTIONS PRESENTED

I. Whether the Ninth Circuit Erred in Denying Tousant's Motion for Certificate of Appealability ("COA") Because He Has Made a Substantial Showing of the Denial of a Constitutional Right ~~Because Jurists of Reason Could Disagree with the~~ District Court's and Appellate Court's Resolution of His Constitutional Claims or Jurists Could Conclude ~~the Issues Presented Are Adequate to Deserve~~ Encouragement to Proceed Further.

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, DYWANE TOUSANT ("Tousant"), was a criminal defendant in the United States District Court for the Southern District of California, San Diego Division, in USDC Criminal No. 3:09-cr-01250-W-3; as Movant in the United States District Court for the Southern District of California, San Diego Division, in USDC Civil No. 3:21-cv-01905-W; and as Appellant in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in USCA No. 22-56182. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Ninth Circuit.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Rules and Regulations

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit in *USA v. Dywane Tousant*, No. 22-56182 (9th Cir. 2023), is attached in the Appendix at 1A.

STATEMENT OF JURISDICTION

The Dispositive Order of the court of appeals was entered on April 21, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution

> The Fifth Amendment of the U.S. 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 offense 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."

Sixth Amendment of the United States Constitution

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the ~~accused shall enjoy the right . . .~~ to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. The Proceedings Below

On October 30, 2009, a grand jury sitting in the United States District Court for the Southern District of California, San Diego Division, returned a three (3) count Superseding Indictment charging Tousant and three other co-defendants. See Doc. 54.[1] Count 1s charged Tousant with Sexual Exploitation of a Child, in violation of 18 U.S.C. §§ 2251(a), (e), and 2. *Id.* Count 2s charged Tousant with Sex Trafficking of Children and by Force, Fraud, and Coercion, in violation of 18 U.S.C. §§ 1591(a), (b), and (2). *Id.* Count 3s charged Tousant with Attempted Sex Trafficking of Children and by Force, Fraud, and Coercion, Aiding and Abetting, in violation of 18 U.S.C. § 2. *Id.*

On November 2, 2009, a Change of Plea Hearing was held and Tousant entered a plea of guilty as to Count 2s of the Superseding Indictment pursuant to a written Plea

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[1] "Doc." refers to the Docket Report in the United States District Court for the Southern District of California, San Diego Division in Criminal No. 3:09-cr-01250-W-3, which is immediately followed by the Docket Entry Number. "CvDoc." refers to the Docket Report in the United States District Court for the Southern District of California, San Diego Division in Civil No. 3:21-cv-01905-W, which is immediately followed by the Docket Entry Number.

Agreement. See Docs. 56, 58.

On June 2, 2010, Tousant was sentenced to a term of 120 months' imprisonment, 5 years' Supervised Release, $2,160 Restitution, and a Mandatory Special Assessment Fee of $100. See Docs. 126, 127, 132.

On August 9, 2021, Tousant filed a Motion to Reduce Sentence Pursuant to 18 U.S.C. 3582(c)(1)(A)(i) - Compassionate Release, which was denied on September 16, 2021. See Docs. 240, 248.

On October 18, 2021, Tousant filed a Motion to Withdraw Plea, which was denied on October 27, 2021. See Docs. 251, 255.

On November 4, 2021, Tousant filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion"), which the Court denied his motion as untimely on October 19, 2022. See Docs. 256, 262, 280.

On December 15, 2022, Tousant filed a Notice of Appeal Re: denial of his § 2255 Motion. See Doc. 282.

On April 21, 2023, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") issued a Dispositive Order denying Tousant's appeal. See Doc. 287.

B. Statement of the Facts

1. Offense Conduct

Tousant, through his counsel's advise agreed to the following stipulated facts:

> The case originally stemmed from an investigation by the Oceanside, California

Police Department (OPD) into a report of a kidnapping in which the perpetrators intended to solicit the victim for prostitution. A 14-year-old girl (MF) was approached in the parking lot of a Church's Chicken by Tousant (driving a vehicle) and another individual, and agreed to go with them to a motel in Oceanside. There, Tousant took pictures of MF, and he then took her to post her photos on craigslist.com to solicit men to engage in commercial sex with MF. They then returned to the motel, and informed MF that she could not leave until she made them some money. They again took pictures of MF, including, at Tousant's direction, and using some physical force, explicit photos of her genitalia. MF eventually escaped and called 911. OPD responded, and located a computer in Tousant's car. Forensic examination of that computer revealed that four advertisements offering MF for commercial sex were posted using that computer. They also recovered a digital camera and cellular phone. Inside the hotel room, they located four more phones, including MF's. MF later stated that she was hit many times by the defendants during this ordeal.

Also, a separate, earlier incident in which Tousant, along with two of his co-defendants, appears to have been involved in attempting to cause a different 14-year-old girl to engage in prostitution, and he stood by while that girl was assaulted for not agreeing. Notably, Tousant was the only one of the four charged defendants in this case who did not admit his involvement post-arrest. When interviewed by U.S. Probation for the PSR, although he did

> comment that he was sorry that the victim went through this, he stated that this was "not as we perceive."

See Doc. 273 at 2-3.

2. Plea Proceeding

On November 2, 2009, a Change of Plea Hearing was held before Judge Thomas J. Whelan. See Doc. 56. Tousant pled guilty to Count 2s and 4s of the Superseding Indictment pursuant to a written Plea Agreement. See Doc. 58. In exchange for Tousant's guilty plea, the government agreed to dismiss, after sentencing, any remaining charges in the Superseding Indictment. *Id.*

3. Sentencing Proceeding

On June 2, 2010, a Sentencing Hearing was held before Judge Thomas J. Whelan. See Doc. 126. Tousant was sentenced to a total term of 120 months' imprisonment as to Count 2s of the Superseding Indictment, 15 months to run concurrently with State Court sentence; followed by 5 years' Supervised Release. See Doc. 127. The Court also ordered payment of a $2,160 Restitution and a Mandatory Special Assessment Fee of $100. *Id.* No direct appeal was filed in this case.

4. Post-conviction Proceeding

On November 4, 2021, Tousant filed a § 2255 Motion, which raised four claims for ineffective assistance of counsel. See Doc. 256, CvDoc. 1. On December 28, 2021, he then filed the Amended § 2255 Motion, which repeated the original four claims and added three more claims for ineffective assistance of counsel. See Doc. 262, CvDoc. 2. In his motion, he argued:

(1) Failure to File A Notice of Appeal;

(2) Failure to Conduct Adequate Mitigation;

(3) Misrepresentation of the Plea Agreement with Regard to Petitioner's Sentence;

(4) Failure to Provide Petitioner with Discovery;

(5) Failure to Object Based on the Ex Post Facto Clause;

(6) Ineffective Assistance of Counsel in Violation of the Fourteenth Amendment; and

(7) Failure to Raise Various Objections.

See Doc. 280 at 3-4.

The Government argued that the Amended Petition was untimely because Tousant's judgment was final on June 16, 2010. In his Reply, Tousant did not dispute that his judgment became final more than ten years before the Petition was filed. Instead, he argued the Petition and Amended Petition was timely because he was unaware of the facts upon which his ineffective assistance of counsel claims were based. *Id.* The Court has entered an Order denying Tousant's § 2255 Motion and Amended § 2255 Motion as untimely and barred by the appellate waiver. See Doc. 280. And because reasonable jurists would not find the above assessment of the claims debatable or wrong, the Court also denied a certificate of appealability. *Id.*

REASONS FOR GRANTING THE WRIT

As a preliminary matter, Tousant respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The Ninth Circuit Erred in Denying Tousant's Motion for COA Because He Has Made a Substantial Showing of the Denial of a Constitutional Right Because Jurists of Reason Could Disagree with the District Court's and Appellate Court's Resolution of His Constitutional Claims or Jurists Could Conclude the Issues Presented Are Adequate to Deserve Encouragement to Proceed Further.

Tousant contends that the Ninth Circuit abused its discretion in denying his Motion for COA without conducting a hearing for its decision. By Order dated April 21, 2023, the Ninth Circuit denied Tousant's COA, reads as follows:

> The request for a certificate of appealability (See ROA Doc. No. 8[2]) is denied because Tousant has not shown that "jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the District Court was correct in its

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2 "ROA." refers to the record on appeal in No. 22-56182, which is immediately followed by the page number.

procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).
All pending motions are denied as moot.
DENIED.

See Appendix 1A.

In his Motion for a COA, Tousant raises the issue: Whether, pursuant to 28 U.S.C. § 2253(c)(3), the District Court's resolution of the grounds raised by Tousant in his § 2255 Motion were debatable among jurists of reason, or, for that matter, wrong.

COA: Standard of Review

A COA will issue only if the requirements of 28 U.S.C. § 2253 have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *Hohn v. United States*, 524 U.S. 236, 248 (1998). This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. Under the controlling standard, the Court must make a gateway examination of the district court's application of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), Tousant's constitutional claims, and, ask whether that resolution was debatable among jurists of reason or, for that matter, wrong. When a court of appeals side steps 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. In other words, Tousant must "show 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)).

Further, the decision whether to issue a COA calls for "an overview of the claims in the habeas petition and a general assessment of their merits." Tousant need not prove that some jurists would ultimately grant the petition. Only that the question is debatable on his underlying claim(s) not the resolution of the debate. *Id.* When a district court has dismissed a petition on procedural grounds, the reviewing court should apply a two-step analysis, and a COA should issue Tousant can show both: (1) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling[1" and (2) "That jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right[.]" *Slack*, 529 U.S. at 478.

28 U.S.C. § 2255 "provides the federal prisoner with a post-conviction remedy to test the legality of his detention may do so] by filing a motion to vacate judgment and sentence in his trial court." *Kuhn v. United Stares*, 432 F.2d 82, 83 (5th Cir. 1970). The statute establishes that a prisoner in custody under a sentence of a court established by Congress "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. Where there has been 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." *Id.* (emphasis added).

The Sixth Amendment guarantees that "(i)n all criminal prosecutions, the accused shall enjoy the right ... to have the [effective] assistance of counsel for his defense." See U. S. Const. Amend. VI. See *Yarborough v. Gentry*, 540 U. S. 1, 5 (2003) (per curium); see also, *McMann v. Richardson*, 397 U. S. 759, 771 n. 14 (1970). It is well-established that the accused is entitled to the assistance of counsel not only at the trial itself, but at all "critical stages" of his prosecution. See *United States v. Wade*, 388 U. S. 218 (1967) and *Gilbert v. California*, 388 U. S. 263 (1967).

To prevail on an ineffective assistance of trial counsel claim and obtain reversal of a conviction, Tousant must prove that: (1) counsel's performance "fell below an objective standard of reasonableness" [*Strickland v. Washington*, 466 U. S. 668, 687-88 (1984)); and (2) counsel's deficient performance prejudiced the defendant, "resulting in an unreliable or fundamentally unfair outcome of the proceeding." *Id.* Tousant must show that counsel's errors were prejudicial and deprived him of a "fair trial, a trial whose result is reliable." *Id.* This burden generally is met by showing a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. *Id.* at 694; *Williams v. Taylor*, 529 U. S. 362, 391 (2000). Unlike the performance prong of the *Strickland* test, which is analyzed at the time of trial, the prejudice prong is examined under the law at the time the ineffective assistance claim is evaluated. See *Lockhart v. Fretwell*, 506 U. S. 364, 367-72 (1993). With regard to ineffective assistance of sentencing counsel, "We have described that standard as requiring that counsel 'research relevant facts and law, or make an informed decision that certain avenues will not be fruitful.'" *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003). "... any amount of actual jail time has Sixth Amendment significance," which constitutes prejudice for purposes of the Strickland

test. *Conley*, 349 F.3d at 842 (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001). To show prejudice, Tousant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the [sentencing] proceeding would have been different." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

In this case, Tousant's motion for COA was denied because he failed to present the requisite showing for issuance of a COA as to his ineffective assistance of counsel claims. Contrary to the Ninth Circuit's decision, Tousant did present his grounds from his 2255 Motion and he "has made a substantial showing of the denial of a constitutional right" (28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) because jurists of reason could disagree with the District Court's and Appellate Court's resolution of his constitutional claims or jurists could conclude the issues presented are 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)).

First Claim of Error: Failure to File a Notice of Appeal

The Supreme Court has long held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Rodriquez v. United States,* 395 U.S. 327 (1969); *Roe v. Flores-Ortega,* 528 U.S. 470, 476-77 (2000).

Here, after being sentenced to 120-month imprisonment, Paul W. Blake, Jr. ("Blake"), his appointed pretrial to sentencing counsel, failed to file a Notice of Appeal on his behalf. Although, Tousant instructed Blake

to filed an appeal at the time of his sentencing, records showed that no appeal was filed. And since Tousant was not briefed that he could actually appeal his sentence, he filed his § 2255 Motion to the Ninth Circuit instead.

A lawyer performs deficiently if he "disregards specific instructions from the defendant to file a notice of appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). A lawyer also performs deficiently if he fails to discuss the advantages and disadvantages of an appeal and fails to ascertain the defendant's wishes about an appeal whenever "there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 478-80.

To demonstrate ineffective assistance of counsel based on a claim that counsel failed to file a notice of appeal, Tousant must show Blake performed deficiently and that a reasonable probability exists that, but for counsel's deficient conduct, he would have timely appealed. *Flores-Ortega*, 528 U.S. at 476-77, 484, 486. Counsel's performance is deficient if counsel disregards his client's wishes concerning filing an appeal. *Id.* at 477-78. Tousant need not demonstrate that he would have been able to raise a meritorious issue on appeal. *Id.* at 483-86. Instead, if he demonstrates by a preponderance of the evidence that he ordered Blake to file a Notice of Appeal, prejudice will be presumed, and he should be allowed to file an out-of-time Notice of Appeal. See *Kitchen v. United States*, 227 F.3d 1014, 1020 (7th Cir. 2000). Tousant need only show "that there is a reasonable probability that, but for [Blake] failure, he would have timely appealed." *Id.* at 265.

In addition to considering whether a defendant has clearly communicated a desire to appeal and whether such communication was made in a timely manner, the Court

must also consider whether counsel "fully inform[ed] the defendant as to his appellate rights." To meet his constitutional duty, Blake had to do more than simply give Tousant notice "that an appeal is available or advise that an appeal may be unavailing." *Id.* Instead, he must have advised Tousant "not only of his right to appeal, but also of the procedure and time limits involved and of his right to appointed counsel on appeal." *Id.* Failure to provide such advice constitutes constitutionally deficient performance. *Id.*

When considering prejudice in a case involving counsel's failure to file a Notice of Appeal, the appeals court does not require Tousant to show that his appeal would have had merit. *Vinyard,* 804 F.3d at 1228 (citing *Flores-Ortega*, 528 U.S. at 486)). The reason that Tousant need not make this showing follows the reasoning in *Strickland* that when counsel's acts render a court proceeding unreliable or nonexistent, the Court presumes prejudice with no further showing from the defendant of the merits of his claims. *Flores-Ortega*, 528 U.S. at 484. Thus, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* As such, "the defendant must only demonstrate that there is a reasonable probability that, but for counsel's failure, he would have timely appealed." *Id.* The Court's focus therefore should be on whether Tousant can demonstrate that, but for Blake's deficient performance, i.e., his failure to file a Notice of Appeal, he would have appealed the District Court's Judgment in a Criminal Case [Doc. 132] in a timely manner. *Flores-Ortega*, 528 U.S. at 484.

In this case, Tousant was in the custody of the CDC-R from June 2010 until January 2021, he then filed a list of unanswered petitions to the courts for the available

information had a typo error which led to various petitions being unanswered. At the same time, Blake did not answer any of Tousant's letters or phone calls. Also, Tousant did not have access to federal legal materials because at the time, R.J. Donovan Reception Center did not have access to those materials. In fact, CDC-R has a policy of "Priority Legal Users" and "General Legal Users" since the Notice of appeal was never filed, Tousant was not classified as a Priority Legal Users and could not access to the materials available. Because of the abovementioned reasons, there was no appeal filed at all. Finally, with lack of expert advise, Tousant ended up getting denied with this § 2255 Motion.

Second and Fourth Claims of Error: Failure to Conduct Adequate Mitigation Investigation and Failure to Provide Discovery

In this case, Blake failed to conduct any kind of a reasonable independent pretrial investigation of Tousant's case. During the course of the proceedings, in both state and federal courts, Tousant was at odds with Blake. His counsel assured Tousant's mother that he would take care of things which Blake never did. When the time came to do the mitigation investigation, Blake failed to look into anything which Tousant asked of him or the private investigator assigned to his case.

Furthermore, Blake failed to provide Tousant's discovery which could have been essential on strategic planning had Tousant opted to proceed to trial. All of his co-defendants received a copy of their own Discovery except for Tousant. Thus, Tousant was unable to study the evidences and check if there were any improbable claims which needed to be straighten out. This left Tousant with no inputs to his own case. Blake failed to research the case

law, interview witnesses or investigate the facts of Tousant's case. There was no independent pretrial investigation to challenge the government's case-in-chief. Blake failed to properly utilize the private investigator to independently investigate his case. There was not any kind of independent pretrial investigation conducted whatsoever to Tousant's knowledge except for reading the government's case file and discussing it with the government prosecutor. It is well settled in this circuit that a criminal investigation requires investigators to piece together evidence, often circumstantial and from multiple sources, to prove a defendant's innocence or guilt. See *Sawyer*, 799 F.2d at 1508 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"(quoting *Strickland*, 466 U.S. at 690-91). Although courts are typically required to show heightened deference to an attorney's strategic decisions supported by professional judgment, where a failure to investigate does not reflect sound professional judgment, such deference is not appropriate. *Id.*

Blake did not put the government's case to any kind of adversarial test. Had he done so, there is a reasonable probability that Tousant would have proceeded to trial or benefited with a significantly less harsh sentence. Hence, Blake missed out on a golden opportunity to assess and evaluate the strength of the government's case and the evidence that they had against Tousant.

Because of the lack of diligence and assistance from Blake, Tousant was unable to obtain the findings that he needed to be fully informed so that he could make an informed decision on whether to plead guilty or proceed to trial. Without this information, he was unable to make an informed decision. As such, he relied on Blake's erroneous advice to his detriment. Had Blake done his job as Tousant's defense counsel by investigating, assessing and

evaluating the government's case-in-chief, there is a reasonable probability that he would have opted to proceed to trial. Blake's representation was deficient because Tousant was not properly informed of the relevant circumstances and likely consequences of pleading guilty as opposed to standing trial in order to make an informed decision about which course to take. However, Blake failed to do so.

Third Claim of Error: Misrepresentation of A Plea Agreement

When considering whether to plead guilty or proceed to trial, a defendant should be aware of the relevant circumstances and the likely consequences of his decision so that he can make an intelligent choice. See *Lee v. United States*, 582 U.S. ___ (2017). Where a defendant persists in a plea of not guilty, counsel's failure to properly inform him about potential sentencing exposure may constitute ineffective assistance. *United States v. Smith*, No. 96-5385, 1998 WL 136564 (6th Cir. Mar.19, 1998).

To obtain relief on an ineffective assistance claim, Tousant ultimately must demonstrate that his attorney's performance was deficient, and that there is a reasonable probability that, but for counsel's deficient performance, he would have proceeded to trial. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("*Strickland*"); see also, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) ("*Lafler*"); *Missouri v. Frye*, 132 S. Ct. 1399 (2012) ("*Frye*"); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010) ("*Padilla*") ("Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

In *Hill*, the Court considered a *Strickland* claim based on allegations that the petitioner's lawyer had given bad advice that caused him to plead guilty instead of proceeding to trial. While there have been many cases analogous to *Hill*, it has been understood that *Hill* established a rule applicable to other circumstances when lawyers advise their clients at the plea-bargaining stage of the case. Cf. *Lafler*, supra; *Frye*, supra; *Padilla*, 130 S. Ct. at 1485 n.12. For instance, *Hill* has been applied to a case in which a lawyer was found to have provided ineffective assistance of counsel when the defendant rejected a plea deal and proceeded to trial in the face of overwhelming evidence of guilt and lacking any viable defense. See *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991).

The U.S. Supreme Court decided *Lafler* and *Frye* in an effort to provide guidance in how *Hill* applies to differing factual settings, and established constitutional standard applicable in all of the separate phases of a criminal trial where the Sixth Amendment applies, including the point at which a defendant decides whether to plead guilty to a crime. In *Lafler*, the Court held that when counsel's ineffective advice led to an offer's rejection, and when the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. In *Frye*, the Court held that the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and that right applies to "all 'critical' stages of the criminal proceedings."

Blake repeatedly attempted to have Tousant be a material witness against his co-defendant who went to trial. They met with the FBI and AUSA at the AUSA Office downtown more than once [to go over the recommendation]. And so, the government superseded his Indictment. The government sent a letter to Blake which stated that, if Tousant discussed with them about prostitution in San Diego County, they would offer 10 years to ran concurrent with his state sentence. With these statements, Tousant was under the impression that, if he spoke in general terms about his involvement in the prostitution, Tousant would not see federal prison because both cases would ran concurrently. And when Tousant received the Plea Agreement, he strongly disagreed to it. In fact, it was signed under duress because Blake advised Tousant that, he would get a life sentence if he refused to sign it. Blake seemed to had taken side with the government instead of securing a favorable Plea Agreement from the government. Due to the incorrect advice, Tousant would have opted to plead guilty without a Plea Agreement (so he can preserve all his rights to appeal) and receive a significantly less harsh sentence. Blake told Tousant that if he refused to accept what's going to happen or cooperate [with the government], it would ruin the working relationship between Blake and the AUSA. In sum, Blake coerced Tousant to plead guilty despite his disagreement.

This present matter is similar to *Lafler* in that Tousant was misinformed by Blake of the likely consequences of pleading guilty rather than proceeding to trial. In fact, there is a reasonable probability that Tousant would have proceeded to trial had Blake not affirmatively misadvised him regarding his case. Tousant was forced to wholly rely on Blake's advice, and based on that advice, plead guilty and netted him a 120-month sentence. Had Tousant been properly informed by Blake, he would have had a correct understanding of the facts, law of the case and likely consequences in order to make an intelligent and

informed decision of whether to proceed to trial or to plead guilty without a written Plea Agreement. "It is the lawyer's duty to ascertain if the plea is available, that it would have led to a shorter sentence and entered voluntarily and knowingly. He must actually and substantially assist his client in deciding whether to plead guilty. It is his job to provide the accused an understanding of the law in relation to the facts." *Gonzalez v. Crosby*, 545 U.S. 524, 542 (2005). The advice he gives need not be perfect, but it must be reasonably competent. His advice should permit the accused to make an informed and conscious choice. *Lafler*, supra. In other words, if the quality of counsel's advice falls below a certain minimum level, the client's decision whether to plead guilty or proceed to trial cannot be knowing and voluntary because it will not represent an informed choice. *Id.*

As such, Blake performed below an objective standard of reasonableness. Had he familiarized himself with the facts and researched the applicable law and sentencing guidelines, he would have been able to correctly inform Tousant of the likely consequences and hurdles that he faced if he pled guilty or proceeded to trial. He simply failed to do so, and as a result, Tousant was prejudiced by receiving a 120-month sentence. *Glover*, supra. Blake's misrepresentation of material facts, which Tousant wholly relied on, constituted deficient performance. He suffered prejudice from Blake's acts and omissions when he received a 120-month sentence. As such, Tousant easily meets *Strickland*'s two prong test for ineffective assistance of counsel and relief should be granted in the first instance. Blake's errors in this case were so blatant and flagrant that the Court can conclude that they resulted from a lack of experience, or neglect rather than an informed professional deliberation. He failed his duty to properly advise Tousant.

Blake's advice was not a predication, probability, or an estimate, but rather a lack of communication with Tousant. In turn, Tousant had to wholly rely on his

erroneous advice. Thus, Tousant was not fairly apprised of the consequences of his decision to plead guilty. In other words, Tousant's reliance on Blake's significantly flawed advice about the consequences of pleading guilty rather than proceeding to trial violated his due process rights. See *Hill*, 474 U.S. at 56.

Fifth and Sixth Claims of Error: Failure to Object to the PSR at Sentencing and Failure to Raise Any Objections in Court

Experienced lawyers normally assist their clients with the PSR, they also discuss to the client the implications of the PSR, and they are more knowledgeable to the things which the Court includes on it. In this case, Blake failed to raise objections to the PSR during sentencing nor made any objections in Court. Some issues which Blake could have raised were the following:

a. *Ex Post Facto Application of Law and the United States Sentencing Guidelines Manual.* In Tousant's appeal, he contended that his sentence was based on the application of Ex Post Facto Application of Law and the United States Sentencing Guidelines Manual. Tousant was sentenced on May 26, 2010 on a 3-count Indictment stemming from an alleged kidnapping in Oceanside, CA in September 2008.

In this case, Tousant was sentenced using the 2009 U.S.S.G. in violation of ex post facto application of U.S.S.G. was used to sentence him. This is in violation of §1B1.11(b)(2). The controlling date of offense conduct was September 30, 2008. On December 23, 2008, the Congress amended the Trafficking Victims Protection Act which modified the

execution of the sentence to add more punishment to the sentence, as well as, aggravating the base offense from 24 to 30 and ensured that there is no mitigation of role in the instant offense. This altered Tousant's sentence since the Guidelines Manual Used was November 1, 2009, thus, resulting to a Base Offense Level 30 to § 1591 offense. In November 2011, Tousant's co-defendant was relieved from the § 1591 conviction due to Ex Post Facto violations of the United States Constitution. Tousant, as his co-conspirator in the offense, the same relief should apply to his case. Had Blake tried to raise this issue during sentencing, Tousant could have been sentenced accordingly. However, he failed to do so.

b. *Sentence Miscalculation.* With the abovementioned reason, Blake failed to challenge Tousant's sentence due to the ex post facto violation discussed above which the Court incurred. This could have been prevented if only Blake performed his duty as his counsel effectively. The Court relied on the 2009 guidelines manual and did not use the entire 2009 guidelines to deliver the sentence. The Court did not consider the fact that this activity occurred before the TVPA was amended on December 23, 2008. That coupled with the fact that this was Tousant's first and only exposure to prison while some of his co-defendants have significantly worse records than him warranted a second look because Tousant signed a Stipulated Plea Agreement for 10 years on SCS2255068 and was sentenced on the same day to the stipulated agreement Tousant's criminal

history was overstated and was used to make Tousant looked like the most culpable. The District Court did acknowledge that this activity was short lived but did nothing about it and Blake made no objections at all.

c. *Failure to suppress false statements.* The range of conduct alleged in the indictment itself did not conform with the law as it was when the conduct was taking place. It is well documented in prostitution cases that during the life span of a relationship between a prostitute and a pimp the prostitute has a right to choose. When a crime is being committed and other people are committing similar crimes no rational person would call the police or intervene in someone else's "business." In this case, Tousant did not benefit financially from the venture. In fact, Tousant's laptop computer, digital camera, and cell phone were the only ones found in his automobile. No ads were placed using Bignigga619@yahoo.com or just2exclusive@yahoo.com nor was there any texts or e-mails or phone calls made by Tousant to the alleged victim. The evidence reflected this. Blake did not suppress false statements made to further burden Tousant. Had Blake challenged the court, Tousant could have received the same relief as his co-defendant.

At sentencing, Blake failed to properly argue the aforementioned issues. Tousant was confused by the way the Guidelines worked in his case. Because Tousant was unfamiliar with the federal judicial system and unschooled in federal law, he was forced to wholly rely on his

attorney's advice. Had Blake studied his case before advising Tousant to plead guilty, he could have had his § 1591 conviction be remanded for resentencing.

No reasonably competent counsel would have failed to object to the PSR's guideline calculations, especially in the face of the parties' Plea Agreement, and there was no arguable strategy for the failure to do so. The error of Tousant's counsel in failing to challenge in any way the calculations contained in the PSR was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

As such, Tousant received a sentence of 120 months' imprisonment, which is substantively unreasonable. Blake's failure to properly argue PSR objections and failure to object to his sentence being substantively unreasonable, he failed to preserve any issues for appellate review.

Seventh Claim of Error: Failure of Counsel to Act in Tousant's Best Interests

Chapter 1, Rule 1.4: Communication of the California Rules of Professional Conduct states that:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably ~~informed about the status of the~~ matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in his representation. It is one of the cornerstones of effective legal representation by an attorney.

In this case, there was not any reasonable communication from the beginning of this case between Tousant and Blake, so that he could effectively participate in his defense. He certainly did not meet the standard as set forth above in Rule 1.4 of the California Rules of

Professional Conduct or any other professional norm for that matter. Blake failed to reasonably consult with Tousant about the means to be used to accomplish his objectives other than push Tousant to plead guilty.

Adequacy of communication depends in part on the kind of advice or assistance that is involved. Because Tousant wholly relied on counsel's advice, Tousant acquiesced to same. Blake failed to consult and explain the general strategy and prospects of success and the likely result in the sentence he would receive. Blake felt that because Tousant was more likely than not involved in prostitution that he was involved in the matter before the Court. On more than one occasion, Blake asked Tousant if he was a pimp and had rudely talked to him regarding his case. The guiding principle is that a lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest. Blake failed to do so.

As noted above, the Court must assume at this point that Tousant can prove his allegations. The hearing will enable the District Judge to consider them along with trial counsel's testimony and any additional evidence the parties wish to present.

Hence, Tousant has shown violations of his constitutional rights where jurists of reason could conclude that the grounds presented in his § 2255 Motion are debatable, or wrong, and that they are adequate to deserve encouragement to proceed further. As such, the Ninth Circuit erred when it denied to issue Tousant a COA.

CONCLUSION

For the above and foregoing reasons, Tousant's petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: July ___, 2023

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