

23-6756

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

DEC 18 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Kenneth J. Coleman — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Kenneth J. Coleman
(Your Name)

FCI Pollock, P.O. Box 4050,
(Address)

Pollock, Louisiana 71467
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1). Is the petitioner constitutionally entitled to a hearing upon the issue of his competency to stand trial.
- 2). Was the petitioner tried, convicted and sentenced while incompetent.
- 3). Did the prosecution's reading of a codefendant's plea agreement to the jury containing incriminating and inculpatory statements imputed to the witness but not admitted by the witness deny the petitioner's constitutional right to confrontation.
- 4). Whether the reading of a co-defendant's facially incriminating plea agreement to the jury without a limiting instruction was constitutional error.
- 5). Whether appellate counsel's failure to raise a "Pate" claim on behalf of the petitioner, constitutes ineffective assistance of counsel.

LIST OF PARTIES

- ☒ 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 v. Coleman No. 417 CR 156 United States District Court Of Texas
Judgement entered April 2019

United States v. Coleman No. 19-20401 United States Court of Appeals Fifth Circuit
order entered February 2, 2021 (Direct Appeal)

United States v. Coleman Crim. No 417 CR 156 (01) Civil No. H-21-2874 order entered
June 27, 2022

United States v. Coleman 22-20343 United States Court of Appeals Fifth Circuit
order denying Certificate of Appealability May 30, 2023.

United States V. Coleman 22-20343 order denying rehearing September 19, 2023

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OTHER

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

☒ 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,
☒ 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,
☒ 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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 30, 2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 19, 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

Constitutional Amendment 6

Right to not be tried while incompetent

Confrontation Clause (denial of right of confrontation)

Confrontation Clause (Failure to issue a limiting instruction)

Ineffective Assistance of Counsel (Appellate counsel)

STATEMENT OF THE CASE

On March 16, 2017 a grand jury in the Southern District of Texas rendered a nine count indictment charging the petitioner Kenneth J. Coleman and a co defendant Marcus Weathersby in criminal case no. 417-CR-156 for tax and other white collar crimes. Count 1. charged a conspiracy to structure currency transactions in violation of 18 U.S.C 371; Count 2 charged a conspiracy to commit money laundering in violation of 18 U.S.C 1956(h); Counts 3 and 7 charged failure to file income tax returns for Acacia Pharma Distributors and Four Corner Suppliers respectively; in violation of 26 U.S.C 7201; Counts 4 and 6 charged Tax Evasion for Acacia and Four Corner Suppliers in violation of 26 U.S.C 7203; Count 5 charged willful failure to file a personal tax return in violation of U.S.C 7203; Counts 8 and 9 charged willfully filing a materially false return in violation of 26 U.S.C 7206. In August of 2017 the district court appointed the petitioner counsel in the person of Mr. Richard Kuniansky. However; the prosecution objected to Mr. Kuniansky because he had previously and briefly represented a prosecution witness. Mr. Kuniansky withdrew and Mr. Wendell Odom was appointed as counsel in November 2017. Initially, the petitioner and Mr. Odom were cordial, with Odom filing motions on behalf of the petitioner including a motion for the continuance of the trial date until after the new year 2018, because of Mr. Odom's busy trial schedule. After the beginning of the year Mr. Odom filed another motion for continuance following once again to his busy trial schedule. During this latter continuance period the petitioner met with Mr. Odom only once, with a promise from counsel that when he was finished with the trial that he was currently embroiled in, petitioner's case would be made a priority. Shortly afterwards the petitioner and his wife suffered the devastating loss of a child. The pregnancy had been difficult and complicated and the loss was emotionally taxing. During the period of this loss the petitioner suffered a personal health crisis which impaired his vision, speech and hearing also resulting in the full paralysis of the left side of his face. The petitioner was unable to blink, smile or control any part of the left side of his face. It was necessary for petitioner to tape his left eye closed in order to sleep and this necessity often resulted in petitioner's inability to sleep. Grieving and suffering these health issues the petitioner was severely depressed.

At this time petitioner was forced to discontinue hormone replacement therapy which he was undergoing for the treatment of low testosterone levels. The petitioner was taking weekly injections as prescribed to raise his testosterone levels and then given estrogen injections to balance the levels out when they began to reach higher levels than desired. This treatment was stopped abruptly amid the loss of the child and his other health concerns. Unwittingly the petitioner had become hyper emotional. As the trial date approached the petitioner became concerned at the lack of effort to prepare for the trial. The meetings that petitioner attended with counsel at his office were not very productive as each meeting covered the same material as the previous one and then counsel would be given a message or phone call and he would abruptly leave with instructions to reschedule for the next week. As the trial date approached with no progress being made the petitioner requested that the judge appoint different counsel. The court advised both petitioner and counsel that this issue would be addressed at the upcoming pre-trial conference. On the morning of the conference the petitioner asked Mr. Odom if he knew what their defense would be since they had not spoken of how the defense would be presented or what the defense would be, Mr. Odom looked solemnly at petitioner and stated "I don't know KennyI just don't know...." A few minutes later Mr. Odom walked into the court room and announced "Ready for trial your honor!" The petitioner voiced these concerns to the judge when given an opportunity during the conference. The judge granted counsel's opposed motion for a continuance for 8 weeks and counsel assured the judge and the petitioner that he would meet with him regularly to prepare for his defense. However, after this conference the petitioner was unable to reach counsel for several weeks. When the petitioner was finally able to arrange a meeting with counsel it followed the same pattern as the previous ones. We were now approximately two or three weeks away from the new trial date and the better part of the continuance had been squandered. Under weight of a perceived increasing urgency, and a growing sense of despondency the petitioner in all earnestness filed a complaint with the state bar of Texas hoping to draw attention to his plight before it was too late to correct it, and also to show some diligence in not waiting until the last minute to cry out. This action however, only aggravated the situation setting the stage for petitioner's utter and complete nervous breakdown. When the judge received the bar complaint and request for appointment of different counsel case was moved to another court.

At this time the petitioner was not of sound mind. My perception was that counsel, the prosecutor and judges were all conspiring to take me away from my wife and family unfairly. At the first hearing with the new judge Mr. Odom's motion to withdraw was granted. The judge then stated that he would appoint counsel and hold a hearing on the petitioner's bond. These words were unsettling to the petitioner as his bond had never been at issue. On the way home from court the petitioner was overwhelmed with feelings of grief and impending doom. For the first time in petitioner's life he struggled with thoughts of suicide.

Some time between September 21, 2018 and September 28, 2018 the petitioner's mental condition had become progressively worse culminating in petitioner issuing challenge to the court's jurisdiction and notifying in writing the court and the probation department that he would be making of his own volition a special appearance at the court on October 2, 2018 to verify the court's jurisdiction among other things. Up until this point the petitioner had been on bond for a year without incident. The petitioner at this time for the first time was vehemently rejecting his own identity as Kenneth J. Coleman and claiming that he was Rahsaan Malik Bey A Moorish American National. This was not normal behavior for the petitioner. Never in 50 plus years of life had the petitioner been known to anyone as anything other than Kenneth Coleman. Petitioner was so proud of his name that his eldest child was his namesake and he had planned to dub his now deceased daughter "Kenny". However, in this delusional state of mind petitioner was rejecting his identity and had refused to even speak to newly appointed counsel Gerardo Montalvo an hour before the 2:00p.m court appearance out of paranoia that Montalvo was conspiring against him also. It was in this deluded mind state on October 2, 2018 that the petitioner, earnestly believing himself to be Rahsaan Malik Bey A Moorish American National beyond the jurisdiction of the court, of an under his own free will, walked headlong into the courtroom in the throes of a psychotic episode. Petitioner's claim could have just as easily been that he was Abraham Lincoln. At the hearing the petitioner exhibited bizarre and irrational behavior for example sitting when asked to stand and standing when asked to be seated and refusing to acknowledge his name, while refusing the assistance of Mr. Montalvo because he was not a Moorish American National. The petitioner's bond was promptly revoked and petitioner was thrown into jail.

The petitioner, Never having spent more than a couple of days in jail at a time and not accustomed to being separated indefinitely from the support of his spouse and family spiraled still further into the deluge of depression, paranoia and delusion, that was already engulfing him, Petitioner began self medicating with exorbitant quantities of allergy tablets and aspirin in order to silence the voices in his head begging for relief thru death. On October 11, 2018 without any prior notice the petitioner was transported to court for a hearing which he was later informed was a "Faretta" hearing. The petitioner had no idea what this hearing was for but was certain it was nothing good for him. Petitioner mentally withdrew and was reluctant and unwilling to participate in the proceeding because he lacked an understanding of the purpose or intent of the proceedings. The district judge entered factual findings that the petitioner had validly waived counsel. The trial date was set for November 5, 2018 over objection by the petitioner who was struggling just to understand what was happening in the room around him. When the petitioner was returned to the Joe Corley detention center that evening, he wrote a letter to the court withdrawing the supposed waiver as he came to the conclusion that this waiver was nothing good for him. This letter also requested reappointment of counsel. On November 1, 2018 once again without the benefit of notice the petitioner was transported to court for a hearing. The petitioner's motion for re appointment of counsel was denied and the November 5, 2018 trial date was affirmed. On the morning of November 5, 2018 the judge asked petitioner if he would like standby counsel to assist with juror strikes the petitioner stated that he did not understand how to use the juror strikes and then took this opportunity to re urge his motion for reappointment of counsel. The judge denied the motion and sent standby counsel away to lunch, leaving the petitioner alone with the juror strikes forms. The petitioner was so overwhelmed by these events and his condition that he was unable to complete the forms for jury selection. The petitioner who was in custody was not returned to the court room until after the jurors were selected, sworn in and impanelled. For the rest of day one petitioner was in a state of mental turmoil and distress as the prosecution presented opening statements and witnesses without any adversary whatsoever, as petitioner struggled with his own sanity and standby counsel just stood by. This represents a complete breakdown of the adversarial process.

On day two of the trial the prosecution called witness/co defendant Marcus Weathersby. Weathersby was immediately deemed a hostile witness even though up to this point he had cooperated fully. In spite of this cooperation the prosecutor requested permission from the court to treat Weathersby as a witness adverse to the United States. This request was granted. The prosecutor began questioning Weathersby with questions like "Did you and Mr. Coleman engage in a business to buy and sell fraudulent prescription medications?" Weathersby refused to answer. Upon Weathersby's persistent refusal to answer the prosecution asked for the court's lights to be lowered and then began to display a document on the screen visible to the entire court room. The document was identified by the prosecutor as Weathersby's plea agreement. Before reading from the document the prosecutor stated to the court "we are only offering this for impeachment purposes" to which the judge stated "you're offering it, I understand". The prosecutor then commenced reading the extremely damaging" statements from Weathersby's purported plea agreement to the jury incriminating both Weathersby and the petitioner stopping after each sentence to ask is that what it says?" However, Weathersby did not admit these statements but instead persisted in his refusal to answer, despite being admonished by the judge. The prosecutor continued reading the statements from this document to the jury in this fashion until the entire document or atleast a good damaging portion of it had been read to the jury. After this reading the prosecution began to play audio recordings of Weathersby on phone calls with his brother and another call with a girlfriend under the guise of impeachment but effectively incriminating petitioner. Niether before or after allowing the presentation of this "impeachment" evidence was any effort made to protect the petitioner's substantive rights. The judge made no attempt to explain to the jury what impeachment evidence was or what it could be used for or what it's proper use was. The jurors were just sent off to consider this evidence as they would any other evidence. They were free to consider these extremely damaging statements for any purpose they chose including as evidence against petitioner's guilt or innocence. On the last day of the trial after the jury had heard the testimony from the owners of the companies involved in this case Marcus Weathersby for Acacia Pharma and Darrell Colbert for Four Corner claiming ownership of their companies, the jurors asked to know how they could convict the petitioner for

filing tax returns and the payment of taxes for companies that did not belong to him. The court then changed the jury charge to reflect for counts 3,4,6 & 7 that the jury could convict if they found that the petitioner was the "Beneficial" Owner instead of the "owner" as alleged in the indictment. This change was made over objection. With this "Beneficial" amendment the jury was able to return a guilty verdict on counts 3,4,6 & 7 finding that the petitioner was responsible for the filing of corporate tax returns and Payment of corporate taxes as the "Beneficial" owner. The jury returned guilty verdicts on all counts. On April 4, 2019 again without any notice the petitioner was transported to court for what he would later be told was a sentencing hearing. The petitioner's mental health had deteriorated still further in the months of incarceration and isolation. Petitioner had become even more withdrawn, was not eating and completely neglecting his personal hygiene. The petitioner had not had any contact from the court or probation department, but was now awaiting a sentencing hearing. While in the holding area for the sentencing hearing a person claiming to be from the probation department came to the attorney booth and asked the petitioner to sign some papers but at such a late date the petitioner declined to sign, thinking it could be nothing good for him. When the hearing started the judge asked who was representing the government at which time the prosecutor stood and introduced himself and co counsel, after which the judge looked at the petitioner and stated "and you represent yourself" and with this declaration continued expeditiously into the hearing never again returning to the issue of petitioner's intent to waive his right to counsel at this critical stage of the proceedings. The sentencing judge also noted that the petitioner had not made any input on the presentence investigation or report, instead of asking the petitioner about the matter the judge merely concluded that "he probably would not have done it anyway". Experiencing physically uncontrollable anxiety that he would not be afforded an opportunity to speak for himself but at the same time not being prepared to speak or being in any rational state of mind to do so the petitioner broke down and launched into a heated tirade attacking the court jurisdiction and the judges authority during this psychotic episode the petitioner experienced the sensation of floating and that he was merely a spectator watching someone else speaking for him. This sensation can best be compared to being a passenger in a car seconds before a crash, as the passenger you can see the accident about to happen but are

powerless to stop it. Such was the state of the petitioner's mind at the time of the sentencing hearing, unaided by counsel of any sort and having a nervous breakdown in the face of the prosecution's advocacy. At one point during the sentencing the judge remarked "he did not seem cogent today" he was at the trial, but not today. This statement shows that the court was aware that the petitioner was in some degree of psychological distress but yet pressed the proceedings on against a clearly mentally disturbed defendant without the aid of counsel.

Based on the uncontested allegations of the Presentencing report and the petitioner's behavior throughout the pre trial, trial and sentencing phases where the petitioner was suffering a complete and utter mental breakdown the prosecutor asked for a top of the guidelines sentence which was calculated at 235 months but the prosecutor rounded up to 240 months. The prosecutor stated that this was warranted in order to "make an example" of the incompetent, unassisted petitioner. The sentencing judge however; took an upward departure of 120 months and announced a sentence of 360 months, thus punishing the petitioner for being before the court while of unsound mind, unaided by counsel. The petitioner filed a timely notice of appeal and the Fifth circuit court of appeals appointed counsel in the person of Brian Newman.

On direct Appeal counsel raised only two issues.

1. Coleman's waiver of counsel was invalid. Attorney Newman argued that at the faretta hearing held on October 11, 2018 when Coleman was asked by the judge if his decision to represent himself was voluntary? and Coleman responded "under threat, duress and coercion the court was obligated to inquire further, rather than simply ask the question again whether the decision was "entirely voluntary"?
2. The district court should have re elevated standby counsel to counsel.

The Fifth Circuit found that both of these issues were without merit and denied petitioner relief on direct appeal. On October 29, 2020, The United States court of appeals affirmed the verdict and the sentence. (United States v. Coleman, 832 F. App'x 876, 881 (5th Cir 2020) (per curiam) On August 11, 2021 Petitioner timely filed a motion under 28 U.S.C 2255.

Having regained some portion of his mental acuity at th time. On September 3, 2021 the district court ordered the prosecution to respond to a motion under 18 U.S.C 3582 for a sentence reduction etitioner immediately filed a motion to amend his 28 U.S.C 2255 motion since he had not filed

or intended to file a motion under 18 U.S.C 3582. PEtitioner's intent was to challenge the legality of his imprisonment at this time not to ask for a reduction in the sentence. The court did not respond. Approximately 15 days later the petitioner refiled the same motion for leave to amend since ther had been no response to the previous motion. The court did not respond. In November of 2021 the petitioner received a response from the government to a motion under 28 U.S.C 2255. The petitioner was bewildered, since the court had not ordered a response to a motion under 28 U.S.C 2255. The petitioner continued to wait for instruction from the court either granting "leave" to amend or setting a fixed time frame for his reply to the government's response. The petitioner received no communication from the court. On April 28, 2022 the petitioner filed an amended 28 U.S.C 2255 motion just ahead of the expiration of the one year statutory period for filing the original motion under 28 U.S.C 2255, and during the pendency of the original motion. On May 23, 2022 the district court denied petitioner's 28 U.S.C 2255 motion, the two motions to amend as "moot" and petitioner's amended 2255 motion as a second successive motion applying the gatekeeping provision of 28 U.S.C 2255(h). The district court further ordered that no certificate of appealability (COA) be issued. Petitioner then timely filed a motion for reconsideration. The district court denied this motion as well. The petitioner then filed a timely motion of appeal to the Fifth Circuit Court of appeals. The Fifth Circuit Court of Appeals denied this motion for COA. Petitioner then timely filed a motion for en banc consideration this motion too was denied. The Petitioner now seeks Certioari from This Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the petitioner is unlawfully imprisoned in violation of the constitution. This case presents important federal questions that have been decided in a way that conflicts with relevant decisions of this court. These issues are important to the public in that the exercise of this court's discretion is necessary in order to protect against the erosion of constitutionally guaranteed rights and to maintain uniformity of the court's decisions.

The petitioner Kenneth J. Coleman submits that due to a mental break down he was not competent to stand trial in the district court, and despite exhibiting ample indicia of possible incompetency was not afforded a hearing upon his competency. This is contrary to this court's holdings in *Bishop v. United States*, 350 US 961, 100 L. Ed 835, 76 SCT 440 (1956); *Ryan v. Gonzales* (2013 US) 184 L. Ed 2d 528, 133 SCT 696; *Pate v. Robinson* (1966) 383 US 375, 15 L. Ed 2d 815, 86 SCT 836; and *Drope v. Missouri* (1975) 420 162, 43 L. Ed 2d 103, 95 SCT 896. On October 2, 2018 the petitioner demanded that the district court hold a hearing on his case and then at that hearing the petitioner proceeded to attack and assail the court's authority over him by claiming to hold a National Moorish American Status which apparently imbued him with rights that placed him beyond the court's jurisdiction. The petitioner now contends that these actions were the by product of a psychotic episode brought on by stress factors of his personal life, including the recent loss of a child, health issues which may have caused some psychological problems along with the obvious physical manifestations of vision problems, constant ringing in the ears and facial paralysis. The petitioner was also possibly suffering from a hormonal imbalance brought on by an abrupt discontinuation of hormone replacement therapy. Testosterone and Estrogen imbalances have been known to result in suicides in some cases and have even resulted in mother's killing their own infant and small children. All of this along with the stress of facing a criminal trial. Any and all of these factors could have played a role in petitioner's mental break down and psychological issues during the proceedings in the district court. There was ample indicia of the petitioner's possible incompetency including the petitioner's bizarre and irrational behavior at the

hearing of October 2, 2018 which resulted in the petitioner's bond being revoked and petitioner being thrown into jail. This court has held that " the trial and conviction of an accused while he is legally incompetent violates due process " Bishop v. United States , Supra, and this court has repeatedly and consistently recognized that the " criminal trial and conviction of an incompetent defendant violates due process " Ryan v. Gonzales, supra(2013). In Dusky v. United States 362 US 402, 4 L. Ed 2d 824, 80 SCT 788. This court explained that for purposes of due process a person is considered incompetent to stand trial if the person lacks the capacity to (1) Understand the nature and object of the proceedings against him. (2) consult with counsel in a meaningful way and (3) assist in the preparation of his defense. The petitioner contends that on October 2, 2018 and throughout the proceedings in the district court he did not meet this rational understanding criteria. During the episode of October 2, 2018 the petitioner demonstrated (1) a lack of a rational understanding of the proceedings against him, as the petitioner was erratic and irrational. (2) A lack of the capacity to consult with counsel, as the petitioner believed that counsel was not there to assist him but rather to harm him. (3) the inability to assist in preparing a defense, as the petitioner was delusional as to his own identity and relationship to the court. Yet, in the face of all of this evidence of petitioner's possible incompetency ,in a mere 33 days from this complete mental break down before the court, and display of behavior so disturbing that it warranted revocation of his bond that the petitioner had been on without incident for a year, the petitioner was subjected to a criminal trial unaided by counsel, without a hearing upon his competency to do so. Despite ample indicia of his incompetency.

The Fifth Circuit Court of appeals has held that: If the trial court receives evidence viewed objectively, that should raise a reasonable doubt as to competency, yet fails to make further inquiry, this constitutes a denial of a fair trial" Lokos v. Capps 625 F. 2d 1258, 1261-66 (5th Cir 1980). This court has held that a state trial court violated due process rights by failing to order an inquiry as to the accused's competency to stand trial, where information available to the trial court had been sufficient to raise the possibility that the accused

was incompetent. *Pate v. Robinson*, Supra. Moreover, in "Pate" this court concluded that the trial court's failure to make an inquiry on this issue [competency] had deprived the accused of the constitutional right to a fair trial, upholding a United States Court of Appeals determination that the accused was entitled to habeas relief. In *Drope v. Missouri*, Supra it was held by this court that a state court's failure to suspend a criminal trial pending a psychiatric examination to determine the accused's competency to stand trial violated the accused's due process right to a fair trial, as the trial court had failed to consider and give proper weight to information that suggested incompetency. The petitioner contends that the acute episode of October 2, 2018 required further inquiry into the issue of the petitioner's competency to stand trial and the District court's failure to do so deprived the petitioner of a fair trial. The petitioner raised this issue in his rule 59(e) motion for reconsideration of his 28 USC 2255 motion. However, the district court did not address this specifically and ordered that no certificate of appealability be issued. On appeal of the district court's ruling the Fifth Circuit Court of Appeals denied petitioner's motion for issuance of a COA, stating that petitioner had not alleged the denial of a constitutional right. The petitioner respectfully disagrees, based upon relevant Fifth Circuit and Supreme Court precedent the district court's failure to give proper weight to information suggesting incompetency and make a further inquiry into the issue of the petitioner's competency to stand trial deprives him of his constitutional right to a fair trial, and warrants relief. See *Lokos v. Capps*, supra (5th Cir. 1980) and *Pate v. Robinson*, SCT (1966). The petitioner presents the following questions:

- (1). Is the petitioner constitutionally entitled to a hearing upon the issue of his competency to stand trial. (Pate violation) *Pate v. Robinson*, 383 U.S. 375, 15 L. Ed 2d 815, 86 SCT 836; *Drope v. Missouri* (1975) 420 162, 43 L. Ed 2d 103, 95 SCT 896
- (2). Whether the petitioner was tried convicted and sentenced while incompetent

By the reading of a co defendant's plea agreement to the jury by the prosecutor the petitioner was denied the right of confrontation. The district court's ruling is in conflict with this court's holdings in Douglas v. Alabama 380 US 415, 13 L. Ed 2d 934, 85 SCT 1074. and Bruton v. United States 391 US 124, 88 SCT 1620, 20 L. Ed 2d 476

On day 2 of the jury trial, after having declared co defendant/witness Marcus Weathersby a hostile witness. The prosecution displayed and read to the jury the incriminating and inculpatory statements contained in Weathersby's alleged plea agreement under guise of

impeachment. Weathersby however, refused to admit these statements as the prosecutor read the statements to the jury, stopping after each sentence to ask Weathersby, is that what the sentence says? or is that correct? However, Weathersby persisted in his refusal to admit the statements from the plea agreement. The prosecutor continued in this fashion until a good damaging portion of the document had been read to the jury. The petitioner contends that this reading of the incriminating and inculpatory statements from Weathersby's plea agreement and Weathersby's subsequent refusal to admit the statements deprived the petitioner of his constitutional right to confrontation. In Douglas v. Alabama 380 US 415, 13 L Ed 2d 934, 85 SCT 1074. The defendant was indicted in the circuit court of Dallas County, Alabama, on a charge of assault with intent to murder. An accomplice was found guilty in a previous separate trial and, when called as a witness in defendant's trial invoked his privilege against self incrimination. Thereupon the states attorney produced a confession signed by the accomplice and, in the guise of cross examination to refresh the witness' recollection purported to read from the document the co defendant, after every few sentences refusing to answer the attorney's questions whether he made the statement embodied in the sentences. The defendant was convicted and his conviction was affirmed by the Alabama court of appeals. (42 Ala APP 314, 163 So 2d 477) the supreme court of Alabama denied review. However; on certiorari the Supreme Court of the United States reversed. Holding the facts as stated above constituted a denial of the accused's constitutional right of confrontation, Inter-alia. It is the petitioner's contention that the facts of Douglas are

indistinguishable from the instant case, and if these facts constituted a denial of Douglas' constitutional right to confrontation, then they constitute a denial of petitioner's rights as well. The district court denied petitioner's claim in the 28 USC 2255 motion and ordered that no COA be issued, stating that "Coleman did cross examine Weathersby, and therefore petitioner's claim is not supported by the record and is therefore denied." However, petitioner did not allege that he did not cross examine Weathersby, but rather that he had been denied the right of confrontation by the prosecutors reading of a statement to the jury, which was imputed to the witness but not admitted by the witness. The court of appeals for the Fifth Circuit affirmed the denial of the COA. Petitioner now on writ of certiorari to the Supreme Court presents the question

(3). Did the prosecution's reading of a co defendant's plea agreement to the jury containing incriminating and inculpatory statements imputed to the witness but not admitted by the witness deny the petitioner's constitutional right to confrontation.

In the instant case the district court's findings concluded that its failure to issue a limiting instruction was not "extremely damaging" this finding is in conflict with this court's holdings in *Samia v. United States* 599 U.S. 143, 138 S.Ct. 216, 135 L.Ed.2d 597 (2023) and *Bruton v. United States*, *Supra*.

The sixth amendment's confrontation clause guarantees the right of a criminal defendant to be confronted with the witnesses against him. This clause forbids the introduction of out-of-court testimonial statements unless the witness is unavailable and the defendant has had the chance to examine the witness previously. *Samia v. United States* 599 US 143 SCT 216 L.Ed 2d 597(2023). see *Crawford v. Washington* 541 US 36, 53-54, 124 S.Ct. 1354, 158 L. Ed 2d 177(2004). The petitioner in this case contends that the co defendant's plea agreement/confession is testimonial and falls within the clause's ambit. The confrontation clause is implicated by extra judicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions. *Melendez-Diaz v. Massachusetts* 557 U.S. 305, 329, 129 SCT 2527, 174 L.Ed 2d 314 (2009). Although the sixth amendment forbids the introduction of out-of court testimonial statements when the witness is available, in the instant case the prosecution sought to work around this constitutional barrier to introducing these extra judicial statement by claiming

to use them to the impeachment of the co defendant's own credit. However, the trial judge failed to instruct the jury on the permissible uses of these otherwise inadmissible statements, and thereby permitted the jury to consider the statements for the same purposes as any other statements or evidence. The petitioner contends that this failure to issue instructions to the jury in regards to these statements was violative of his sixth amendment rights. " Sparf v. United States, 156 U.S 51, 58, 15 S.Ct 273, 39 L. Ed 343 (1895) the court held that, because co defendant declarations were not in any view of the case, competent evidence against another defendant, the trial court should have admitted them as evidence only against their respective declarants" (quoting Justice Thomas discussing "Sparf") Samia v. United States Supra. One year later in United States v. Ball, 163, U.S. 662, 672, 16 S. Ct 1192, 41 L. Ed 300(1896) The court approved the use of a limiting instruction to restrict the jury's consideration of one defendant's incriminatory statements. There is a strong presumption that a jury will follow its instructions. Blueford v. Arkansas, 566 U.S 599, 606, 132 S. Ct 2044, 182 L. Ed 2d 937 (2012). However; a jury can not follow instructions it is not given. In the instant case on Day 2 of the jury trial after Attorney Sean Beaty had declared co defendant Marcus Weathersby a witness adverse to the United States, Attorney Beaty read statements which were inculpatory and incriminating of the petitioner to the jury under the guise of the impeachment of Weathersby, reading the statements as follows for example:

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3. BY MR BEATY
4. Q. In that plea agreement you and
5. KENNETH COLEMAN were knowing participants in a
6. scheme to facilitate fraudulent sale of second hand
7. prescription drugs Utah based Green Valley Medical
8. Distributors

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2. BY MR BEATY
3. Q. Paragraph 15 of that agreement , December
4. 2010: In Furtherance of this scheme and at MR.
5. COLEMANS direction you established Acacia
6. Distributors

These directly inculpatory and facially incriminating statements were read and presented to the jury without limit to their usage. Neither before or after the reading of these statements was the jury given any instruction what so ever. There was no explanation of what impeachment was or the permissible usages of impeachment evidence. Nor was any delineation made between direct evidence which is used to establish the truth of a matter and impeachment evidence which is presented to annul the credibility of the witness himself and not the defendant. Nothing pointed the inference created by these statements toward the witness himself and nothing forbade the jury's use of these statements as cogent and substantive evidence against the petitioner. The petitioner contends that the nature and character of these allegations levied directly at him and read to the jury from a witness' plea agreement falls squarely within the range of Bruton's rule because the statements were facially incriminating and directly inculpatory of the petitioner. This makes it highly doubtful that the juror's could ignore the inference created by the reading of the content of these extremely damaging statements. However, the petitioner contends that application of the Bruton rule is not required because the court erred and failed to issue any limiting instruction at all to mitigate the damage done to the petitioner by these statements admitted to impeach the declarant's credibility. See Bruton v. United States 391 US 124, 88 S.Ct 1620, 20 L. Ed 2d 476. In the district court's denial of this claim in the 28 USC 2255 proceedings the court posited that it's failure to provide a limiting instruction was not "extremely damaging" and denied the petitioner's claim based upon this finding. The petitioner contends that this finding is in conflict with relevant precedents set by this court, including most recently Samia v. United States 599 U.S 143, SCT 216 L. Ed 597 (2023). The district court's failure to issue a limiting instruction in regards to these statements to protect the petitioner's substantive rights is so prejudicial and egregious that it demands in it's own right the exercise of this court's discretionary powers.

Whether appellate counsel's failure to raise a "Pate" Claim on behalf of petitioner, constitutes ineffective assistance of counsel.

The sixth Amendment to the U.S Constitution guarantees the right to effective assistance of counsel, In Strickland v. Washington 466 U.S 668, 104 S.Ct 2052, 2068, 80 L. Ed 2d (1984).

This court held that:

"A defendant is entitled to a new trial if he can show (1) That trial counsel's performance was deficient and (2) A reasonable probability that but for the deficient performance, the outcome of the proceeding would have been different at Id 687.

The due process clause of the 6th amendment guarantees a criminal defendant the assistance of counsel on his first appeal as of right. Evitts v. Lucey 469 U.S 387 83 L. Ed. 2d 821, 105 SCT 830 (1985).

Overcoming procedural default;

A trial court may consider a defaulted claim only if the petitioner can show "cause" excusing the default and "prejudice" resulting from the alleged errors. United States v. Frady, 456 U.S 152, 165 (1982). Cause and Prejudice can be shown by a meritorious claim of ineffective assistance of counsel. Counsel is constitutionally ineffective only if the decision is so unreasonable that it bears no relationship to a possible defense strategy. The failure to raise an issue on appeal does not constitute ineffective assistance of counsel if that issue has no merit. However; Appellate counsel is deficient if a "dead bang winner" claim is omitted in a direct appeal, where the issue was both obvious from the trial record and one which would have resulted in a reversal on appeal. United States v. Cook, 45 F. 3d 388, 392 (10th cir. 1995)

The essence of a claim of ineffective assistance of counsel is that counsel's unprofessional error so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect" Kimmelman v. Morrison 477 U.S 365, 374, 91 L. Ed 2d 305, 106 S. Ct 2574 (1986). In the instant case on direct appeal Attorney Brian Newman raised two obviously non meritorious issues while omitting several stronger issues. If Attorney Newman had raised the stronger issues, it is probabtive that the result of the direct appeal would have been different.

Non meritorious issues raised on appeal:

1. Coleman's waiver of counsel was invalid.

Attorney Newman argued that at the fareta hearing held on October 11, 2018 when Coleman was asked by the judge if his decision to represent himself was voluntary? and Coleman responded under threat, duress and coercion the court was obligated to inquire further, rather than simply ask the question again whether the decision was "entirely voluntary". The government contended and the Fifth Circuit court of appeal's agreed that the use of the phrase "under threat duress and coercion was a standard jurisdictional challenge to the court's authority. The court went on to to explain that Coleman's reiteration of this phrase does not establish that his decision to proceed pro se was involuntary. (citing United States v. Mesquiti 854 F. 3d 267 271 (5th cir 2017) declining to find that a general objection to the court's authority showed that the waiver of counsel was invalid. In selecting this issue appellate counsel's performance fell below the constitutional standard . The selection of this issue was so unreasonable that it bears no relationship to a possible defense strategy. As counsel should have known about the court's holding in "Mesquiti" that the court would find the phrase "under threat duress and coercion to be a general objection to the court's authority and that the court would decline to find that the objection showed that the waiver was invalid. More damaging to appellate counsel's argument was the appellate court was bound by the district court's findings that the waiver of counsel was valid. The crucial element here is that the district court's findings of fact are afforded a presumption of correctness, which may only be overcome by a showing that the court's findings were clearly erroneous. Attorney Newman did not challenge the premise of the finding that the waiver was valid. Attorney Newman could have shown from the record that a mere nine days before this hearing petitioner was having a possible nervous break down before the court and without a competency determination the waiver was unreliable. However, Mr. Newman did not raise this issue. Appellate counsel raised just one other issue:

2. The district court should have honored Coleman's subsequent reassertion to the right to counsel

The selection of this issue was equally unreasonable and was also foreclosed on by the district court's findings. The district judge issued a written order finding that "granting Coleman's

request would require delay". It is well settled that this finding is entitled to a presumption of correctness. This issue also foreseeably fails of necessity absent a showing that the district court's findings were clearly erroneous. Mr. Newman offered no argument to overcome the presumption of correctness afforded to this finding. However, such a showing was available for the petitioner's defense but Mr. Newman neglected to raise it. For instance Mr. Newman could have directed the court's attention to the record to highlight the evidence of petitioner's obvious mental break down in the court room on October 2, 2018 a mere nine (9) days prior to the supposed waiver of counsel at the faretti hearing of October 11, 2018. Appellate counsel could have argued that just as the faretti hearing was required to determine that the petitioner was intelligently, knowingly and voluntarily waiving his right to counsel, so also a competency hearing was required to determine if petitioner was competent to tender such a waiver. Further, Mr. Newman does not raise the question of the petitioner's competency to stand trial at the time at all in light of petitioner's irrational and bizarre behavior throughout the proceedings in the district court. Mr. Newman could have challenged the court's finding that to re elevate standby counsel to counsel would require delay as erroneous by simply showing that a delay was exactly what was needed in order to conduct a competency hearing to protect the petitioner's substantive rights. Raising this "Pate claim" on direct appeal would have probatively resulted in a different outcome and placed petitioner's entire case in a whole different light, but for appellate counsel's incomprehensible and unprofessional error. The petitioner was prejudiced by this error in that relief on direct appeal was lost and the indigent, incompetent petitioner was forced to raise his just claim(s) pro se in a habeas corpus proceeding where petitioner's claims were held to a higher standard as compared to direct appeal. Furthermore, the petitioner's claim was denied in the 28 USC 2255 proceedings and both the district court and the court of appeals have declined to issue a certificate of appealability forcing the necessity to petition this court of last resort and plead for this court to exercise it's discretionary powers to correct errors which should have been properly raised on direct appeal. The petitioner has shown that counsel's performance was deficient in raising non meritorious issues while failing to to raise clearly stronger issues which wre obvious and apparent from the record. Petitioner


has shown a reasonable probability that but for counsel's deficient performance the outcome of the proceedings would have been different and finally petitioner has shown prejudice resulting from counsel's deficient performance. petitioner contends that this showing of ineffective assistance meets the criteria of "Strickland.

Finally, I Kenneth J. Coleman an American citizen and petitioner who like millions of other Americans struggles from time to time with mental illness, Do hereby throw myself upon the mercy of this illustrious court and do fervently pray that this distinguished body will find it just to extend some measure of 'compassion' to the petitioner while reviewing this petition for writ of certioari. However; the petitioner is not seeking that which he is not entirely lawfully obliged, but rather prays that this esteemed court will exercise it's discretionary powers to protect and safeguard rights constitutionally guaranteed. The petitioner realizes that without such exercise petitioner will remain unlawfully imprisoned and deprived of rights and liberties secured by the constitution. This would result in a great miscarriage of justice and a personal tragedy for the petitioner, who contends he was denied his constitutionally obligatory day in court by virtue of his mental condition at the time of the proceedings in the district court. I say, our justice system is intended to be better than that, the American public deserves reliance on better and the constitution demands better than that. May the sweet communion of the holy spirit rest, rule and abide with each of the members of this sublime panel. Amen-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


A handwritten signature in dark ink, consisting of a stylized 'R' and 'G' followed by a horizontal line.

Date: December 18, 2023