23-7238

ORIGINAL

No. 22-4042

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD LEE DEVITO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

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

Richard Devito, Pro Se
Register #76454-061
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Edgefield, SC 29824

Questions Presented for Review

1). Did the Circuit Court, initially composed of one judge, err by exceeding the "threshold inquiry" as prescribed by this Court in **Miller-El**?

2). Did the Circuit Court, by concluding no COA should issue, given "reasonable jurists will follow controlling law," err by failing to consider the claim was related to a failure to follow or apply the Sixth Circuit's controlling law in **Schock**?

3). Did the Circuit Court err in finding previous counsel's single statement "adequately explained" or satisfied counsel's 'duty to investigate' pseudo counts under **Strickland**?

4). Did the Circuit Court panel, upon denying a request for panel rehearing, err by giving "careful consideration...[to] any point of law or fact in issuing the order"; doing so without jurisdiction as proscribed by this Court in **Miller-El**?

List of Parties in Court Below

1). Richard Lee Devito

2). United States of America

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Jurisdictional Statement

This Court has jurisdiction of this matter under 28 U.S.C. §1254(1) because:

1). On September 7th, 2023, the United States Court of Appeals for the Sixth Circuit entered its final decision, declining to rehear its denial of a Certificate of Appealability.

2). On December 1st, 2023, Petitioner timely filed a Writ of Certiorari in this Court.

Citations of Lower Court Decisions

The decisions of the United States Court of Appeals for the Sixth Circuit were reported at:

1). Single circuit court judge denial of Certificate of Appeal-ability:

Richard Lee Devito v. United States of America
2023 U.S. App.LEXIS 11541, May 10th, 2023

2). Denial of Petition for panel rehearing and rehearing en banc:

Richard Lee Devito v. United States of America
2023 U.S. App.LEXIS 23865 September 7th, 2023

Controlling Provisions, Statutes, and Regulations

Petitioner, Richard Lee Devito, appearing pro se, asks that this filing be held to less stringent standards than formal pleadings drafted by lawyers, and that it be liberally construed. (Estelle v. Gamble 429 U.S. 97, 106, 79 S.Ct. 285 50 L.Ed. 2d 251 (1976)).

STATEMENT OF THE CASE

This Court has never heard a case involving pseudo counts.[1] Subsequently, this Court has also not had the opportunity to weigh deficient performance of counsel under **Strickland** in relation to said pseudo counts.

In the case at bar, pseudo counts remain at issue, as the Sixth Circuit Court of Appeals, in the form of a single judge's extensive and searching review was out of line with the normal judicial standards, in deciding whether to grant a Certificate of Appealability.

By exceeding the scope of COA analysis as outlined by the Supreme Court in **Miller-El** and 28 U.S.C. §2253; disposing of the case; and then declining to have a panel rehear if that analysis was improper, this Court should grant certiorari to instruct the lower courts of the Sixth Circuit on proper procedure.

Short of this Court's reversal and instruction, the Sixth Circuit will likely continue, as it has in this case, to issue lengthy merits analyses, by single judges, rather than three judge panels, without jurisdiction. Inverting the statutory order of operations prescribed in 28 U.S.C. §2253 and barring further review.

1. U.S.S.G §2G2.1(d)(1)

SUMMARY OF ARGUMENT

This Court determined long ago in **Hohn** 118 S.Ct. 1969, 141 LED 2D 242, 524 U.S. 236 that:

> it is more consistent with the Federal Rules and the uniform practice of the Courts of Appeals to construe §2253 (c)(1) as conferring the jurisdiction to issue Certificates of Appealability upon **the Court** of Appeals rather than upon **a judge** acting under his or her own seal (see In re Burwell, 350 U.S. 521, 522, 100 L.Ed. 666, 76 S.Ct. 539 (1956)).

F.R.A.P. Rule 27(c) provides:

> "a circuit judge...may not...determine an appeal or other proceeding" and **"the court"** may review the action of a **single judge."**

When one circuit judge takes it upon him or herself to depart from the accepted and usual course of judicial proceedings by transforming "what should be a quick overview of the claims in the habeas petition" **Miller-El**, 537 U.S. at 336, 123 S.Ct. 1029, 154, L.Ed. 2d 931, "to a searching review of the conclusion that a prisoner is not entitled to any relief," what results exceeds the limited nature of a 'threshold inquiry.'

To pass this threshold inquiry, Devito demonstrated "something more than the absence of frivolity" **Miller-El**, was at least debatable, when his declaration and testimony, in combination with previously retained counsel - Attorney Crouse's testimony; and trial counsel - Attorney Kovoor's deposition, all substantiated Devito's claims that pseudo counts were inadequately explained prior to plea.

However, without granting COA to engage in that debate, while also ignoring properly preserved objections from the District Court proceedings regarding these claims; the Court of Appeals adopted what lower courts have termed a **"credit counsel in case of conflict rule"** and:

> engaged in precisely the analysis Miller-El and the COA statute forbid: conducting **across more than five full pages** of the Federal Reporter, a detailed evaluation of the merits and then conclud[ed] that because [Devito] failed to prove his constitutional claim, a COA was not warranted. (See Jordan v. Fisher 576 U.S. 1071 (2015)).

The Court grounded its findings by stating many times that reasonable jurists would not debate this outcome, but neglected to acknowledge "reasonable jurists will follow controlling law" (See U.S. v. Mitchell 43 F.4th 608 (6th Cir. 2022) quoting Hamilton v. Sec'y Fla. Dept. of Corr. 793 F.3d 1261, 1266 (11th Cir. 2015)).

Following controlling law in this case, at the very least, would necessitate granting COA to allow for the extensive review, a single circuit judge conducted for **over five full pages** of factual analysis, before deciding "there was no credible evidence" (see **May 10th 2023 order - Appendix**). Worse though is that upon highlighting this issue, the Court

rather than "review the action of a single judge" (F.R.A.P. 27 (c)), quickly declined to rehear the matter after "consideration" of "any point of law or fact" (See August 23rd 2023 order - Appendix B.) When "a COA determination does not require full consideration of the factual or legal bases" **Miller-El.**

As a whole, a single judge of the Sixth Circuit placed too heavy a burden on Devito at the starting gate, barring his claims and properly preserved objections, while still giving their own lengthy opinion, presumably because this Court will not hear this case.

Devito prays that will not be the outcome here today, as this case is one of those "presumably rare cases where the jurisdictional prescription was disregarded,"which Justice Scalia spoke of in Gonzalez v. Thaler 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed. 2d 619 (2012).

ARGUMENT

1). Did the Circuit Court, initially composed of one judge, err by exceeding the "threshold inquiry" as prescribed by this Court in Miller-El?

The use of a single "screening" judge is not uncommon in defendants seeking a Certificate of Appealability. Collecting such cases in other circuits where COA is denied yields many results where judges produce form letter orders containing few, if not single, paragraphs that easily

fit Miller-El's criteria for a 'threshold inquiry' - limiting review to a "quick overview of the claims in the habeas petition,"for whether they are "debatable."

What is not common though, is for that single judge, without issuing a COA, to partake in conducting a searching five page analysis to determine Devito was not entitled to any relief. Including an adverse credibility finding, which "is treated as a finding or conclusion of fact." (See Mapouya v. Gonzales 487 F.3d 396 (6th Cir. 2007). A specific outcome cautioned against in Devito's properly preserved objections (Doc 157 pg. 4), but the Court proceeded anyway to adopt a "credit counsel in case of conflict" rule:

> which allows that in any case where the issue comes down to the bare-bones testimony of the defendant against the contradictory testimony of counsel, defendant is going to lose every time. (Gallego v. United States 174 F.3d 1196, 1198-99 (11th Cir. 1999)).

The Court took this a step further even, when it determined that what Devito "says" was not credible, and instead chose not only to accept, but then to bolster Attorney Crouse's testimony by determining what it "seems to have meant", and even defended Counsel in that it was "hardly surprising [Crouse] did not remember specifics." This was treatment that no defendant could ever expect to receive, and which clearly ran counter to the "limited nature of this inquiry".

By Devito improperly receiving 'full consideration' at a stage when "the question was the debatability of the underlying constitutional claim, not resolution of that debate," the statutory requirements were

inverted. The Court's lengthy analysis never explains how Devito "fails to meet this standard" of being reasonably debatable, only that he did, before turning to other factors to support the Court's opinion, and to ultimately find Devito's claim meritless.

The only justification for these findings was in stating "jurists of reason would agree Devito fails," but "a prisoner [who] has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable" much less that "a claim my be debatable even though every jurist of reason might agree, **after a COA has been granted** and the case received full consideration, that a petitioner will not prevail."

Similarly to Buck v. Davis, 137 S.Ct. 759, 778, 197 L.Ed. 2d 1 (2017).

> Here, the [Sixth] Circuit phrased its determination in proper terms. But it reached its conclusion only after essentially deciding the case on the merits, repeatedly faulting [Devito] for having failed to demonstrate [his constitutional claims].

As such, the Sixth Circuit exceeded the limited scope of the COA analysis.

2). Did the Circuit Court, by concluding no COA should issue, given "reasonable jurists will follow controlling law", err by failing to consider the claim was related to a failure to follow or apply the Sixth Circuit's controlling law in Schock?

While the Court discussed Attorney Crouse's application of pseudo counts, in the frame of deficient performance, it never questioned the applicability of those pseudo counts as a matter of law.

The circuit judge only determined that to prove his claim and obtain COA, "it is essential to Devito's argument that he show that Attorney Crouse inadequately explained pseudo counts to him."

Notably, the AEDPA does not require a petitioner to prove before the issuance of COA that some jurists would grant his petition. **Miller-El.** Aside from this, without issuing COA, without addressing preserved district court objections, and after deeming what Devito "says" as incredible, he was left with little ability to show the Court anything, let alone that pseudo counts were inadequately explained....

However, the Court, in its lengthy analysis grounds its findings in that "reasonable jurists" would agree with its findings. This itself is debatable, **"because reasonable jurists will follow controlling law"** (see U.S. v. Mitchell 43 F.4th 608 (6th Cir. 2022)).

Controlling law in the Sixth Circuit related to pseudo counts is U.S. v. Schock 862 F.3d 563 which found:

> **the government has not established that Schock's conduct with respect to Victim 1 occurred during the offense of conviction** under 1B1.3(a)(1). Thus...the district court erred by finding on this record that Schock's exploitation of Victim 1 constituted relevant conduct under 1B1.3(a)(1). Therefore, the district court necessarily erred in applying the §2G2.1 enhancement.

In Devito's case, the Circuit Court highlights:

> the production count involved "a minor", but Devito agreed to a Statement of Facts that provided that the offense involved at least 25 other minors...[that] resulted in 25 pseudo counts under U.S.S.G. §2G2.1(d).

It's worth mentioning here that the habeas proceedings brought new evidence that the prosecutor refused to change this portion of the stipulation, against Devito's request and against U.S.S.G. §6B1.4, casting doubt on Devito's "agreement" in a rush where the government induced a plea on the same day the district judge scheduled pending motions to be heard.

That said, in an appeals context, challenging the pseudo counts, would necessarily challenge whether a "stipulation was insufficient substitution for actual evidence" Herndon v. U.S. 359 Fed.Appx 241 (2nd Cir. 2010) as the government was still required to prove temporal overlap of the pseudo counts with the offense of conviction. (See U.S. v. Schock , citing Wernick 691 F.3d 108 114-17 (2nd Cir 2012) **"even if it were sufficient, the government has not established temporal overlap of Victim 1's exploitation and the offense of conviction.)**

Reasonable jurists debating Devito's case and following Schock would appropriately conclude:

> none of the pseudo count conduct occurred during the commission of the conviction offense and the pseudo counts involved different victims, discrete incidents, occurred at different times and were carried out by different means and therefore [were] not relevant conduct (see Direct Appeal No. 19-3525).

Pairing this with Attorney Crouse's testimony of what specifically she explained to Devito regarding pseudo counts:

> I don't remember anything more specific than saying because there are additional victims that there is this enhancement.

Reasonable jurists, "follow[ing] controlling law" would appear hard pressed to agree with the Circuit Court judge in accepting Crouse's testimony as an adequate explanation of pseudo counts. If none of the pseudo counts occurred during the offense of conviction (i.e. August 6th to August 11th, 2016), then pseudo counts did not apply and Attorney Crouse gave an inadequate explanation of pseudo counts by improperly stating this enhancement applied to Devito as she encouraged a plea with this stipulation. This amounted to ineffective assistance of counsel where this deficient performance prejudiced Devito's defense, to the extent that without pseudo counts, the result would be different.

3.) Did the Circuit Court err in finding previous counsel's single statement "adequately explained" or satisfied counsel's 'duty to investigate' pseudo counts under Strickland?

As discussed supra, the circuit court deemed previously retained (not trial) counsel as having adequately explained pseudo counts to Devito, with just one statement:

> "...because there are additional victims that there is this enhancement."

In essence, this single statement rendered Devito incredible and left no credible evidence to warrant a certificate of appealability in the Court's view.

With regard to adequate performance though, **Strickland** outlined parameters of what it describes as counsel's 'duty to investigate.' Pertinent here are "choices made after thorough investigation of law and facts" (see Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

In the Sixth Circuit, "counsel is required to conduct investigation at least to the extent necessary to determine that no further investigation is necessary" (see Brown v. McKee 460 Fed.Appx 567 (6th Cir. 2012)). Sister circuits offer a more succinct definition in that "counsel is required to research facts and law and raise meritorious arguments based on controlling precedent." (See U.S. v. Fields 565 F.3d 290 (5th Cir. 2009).

By either definition, Attorney Crouse was obligated to provide more than "there is this enhancement" to adequately explain pseudo counts to Devito. While the Circuit Court accepted Crouse's testimony of "standard practice for calculating and explaining the sentencing guidelines" to be sufficient..."guidelines are not law" Beckles v. U.S. 580 U.S. 256 137 S.Ct. 886, 197 L.Ed. 2d 145 (2015).

This testimony does not provide evidence Crouse adequately explained pseudo counts through the required investigation of law and facts, as much as it shows that Crouse (similarly to the Circuit Court) inverted

her duties. Failing to conduct any [such] investigation of law at all before she chose to calculate Devito's guidelines and encourage a plea. The Strickland standard does not allow counsel to fail to conduct any investigation [of law] at all (see Williams v. Taylor 529 U.S. 362, 120 S.Ct. 1495 146 L.Ed. 2d 389 (2000).

In sum, Arguments two and three together highlight errors so serious that counsel was not functioning as counsel per the guarantee of the Sixth Amendment. Yet this single circuit court judge allowed these errors of law to pass through a single statement it found adequate to explain pseudo counts to the extent that Devito was denied any relief or which at least could have allowed the issue to proceed further.

4.) Did the Circuit Court panel, upon denying a request for panel rehearing, err by giving careful consideration...[to] any point of law or fact in issuing the order, doing so without jurisdiction as proscribed by Miller-El?

Upon denial of his Certificate of Appealability, Devito timely filed a request for panel rehearing and rehearing en banc.

On August 23, 2023, one day after the Court confirmed it received Devito's Pro se filing, a three-judge panel issued an order which stated:

> "upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and accordingly, declines to rehear the matter." (See Appendix B).

Miller-El provides that at the COA stage, "this threshold question should be decided **without full consideration of the factual or legal bases** adduced in support of the claims." Yet, it would appear that even in trying to salvage a "quick overview" the Court still exceeded the threshold inquiry, rather than considering only the debatability of Devito's constitutional claims.

Devito hoped for the panel to "review the action of a single judge" F.R.A.P. 27(c); he did not expect the Court to so quickly reaffirm a single judge whom Devito alleged inverted the statutory order of 28 U.S.C. 2253, by issuing a much longer and extensive analysis than is typical.

Given these circumstances, "a hearing panel may sua sponte expand a COA even where as here a single member of the Court has declined to do so" (Malone v. Sherman 412 Fed. Sppx. 803 (2011)). Without a panel's meaningful review of Devito's claims or even the Court's original order, though, and instead by summarily "announcing its conclusion that the original application was **properly denied.**" (See Appendix C), the Sixth Circuit Court of Appeals outcome in this case does not demonstrate the well settled recognition that decisions made by individual circuit judges remain subject to review and/or correction by the entire Court of Appeals.

Instead, it seems to demonstrate, perhaps because of the subject matter involved, that as long as a panel phrases its denial in properly

accepted terms, the individual judges' actions are insulated, escaping further review, even if they are alleged to have conducted a prohibited analysis.

Undoubtedly an affirmance of a judgement is to be considered an adjudication by the appellate court (Mutual Life Ins. Co. v. Hill 193 U.S. 551 48 L.Ed. 778 24 S.Ct. 538 (1904)).

Accordingly, "when a court sidesteps (the COA) process by first deciding the merits, **and then justifies its denial of COA based on its adjudication of the actual merits,** it is in essence deciding on appeal without jurisdiction." **Miller-El**.

Thus Devito stands by his assertion that the Circuit Court misapplied the standard for granting **or denying** a COA.

CONCLUSION

Based on the foregoing, this Court should grant Richard Lee Devito a Writ of Certiorari.

Respectfully submitted ,

Certificate of Compliance with Supreme Court Rules
14, 21, 24, and 34

I hereby certify that this brief conforms to the rules contained in S.Ct. 14, 21, 24, and 34 for content, format, and general requirements. The length of the brief does not exceed 9000 words.

Respectfully submitted this 1st day of December, 2023.

x 

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