No. 23-7344

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Richard Champion — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals 4th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Champion; 33773-058
(Your Name)
Federal Correctional Complex Victorville #2
P.O. Box 3850
(Address)

Adelanto, California 92301
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. WHEN DETERMINGING THE TIMLINESS OF A MOTION TO VACATE PURSUANT TO 28 USC 2255, WHAT PLEADING DETERMINES THE RELEVANT PLEADING WHEN MAKING THAT DETERMINATION

II. CAN A DEFENDANT SECURE A FIFTH AMENDMENT DUE PROCESS VIOLATION RESULTING FROM PREJUDICIAL PRE INDICTMENT DELAY INCURRED IN NEGLIGENCE AND RECKLESS DISREGARD, PROVIDED THE PREJUDICE IS SUFFICIENTLY SEVERE

III. WHERE A DEFENDANT REJECTS A FORMAL PLEA IN OPEN COURT, PURSUANT TO A COURTS FRYE HEARING, DOES THAT BAR HIM FROM MAKING A VALID CLAIM PURSUANT TO THIS COURTS RULING IN LAFLER V. COOPER

LIST OF PARTIES

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

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

RELATED CASES

U.S. v. Champion, No. 1:21-cv-00018 (Mar. 2, 2022)

U.S. v. Champion, No. 1:17-cr-00046-5 (Jan. 11, 2018)

U.S. Court of Appeals (4th Cir.):

U.S. v. Champion, No. 23-6905 (Pending)

U.S. v. Champion, No. 22-6529 (Aug. 31, 2023)

U.S. v. Champion, No. 19-7330 (Feb. 19, 2020)

U.S. v. Champion, No. 18-4274 (Jun. 11, 2019)

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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

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

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

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[X] is unpublished.

The opinion of the United States district 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[ ] is unpublished.

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

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

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[ ] is unpublished.

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was August 31, 2023.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 18, 2023, and a copy of the order denying rehearing appears at Appendix A.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including May 16, 2024 (date) on February 29, 2024 (date) in Application No. 23 A 801.

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

The Fifth Amendment, United States Constitution, provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be drprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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

The Statute under which Petitioner was prosecuted was: 21 USC 841(a)(1); 21 USC 841(b)(1)(A); 21 USC 846; 18 USC 2: 21 USC 841(a)(1) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute,

or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 USC 841(b)(1)(A)(viii): Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS :849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows: In the case of a violation of subsection (a) of this section involving - 50 grams or more of methamphetamine, its salts, isomers, and salts of it isomers or 500 grams or more of a mixture of substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title, 18,

United States Code, or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS 849, 859, 860, or 861] after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under his subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 USC 846. Attempt and conspiracy. Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 USC 2. Principals. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

I. COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE NOW BEFORE THIS COURT

On August 1, 2017, in a cause pending in the United States District Court, for the Western District of North Carolina, Asheville Division, entitled United States v. Richard Champion (criminal No. 1:17-cr-00046-MR-WCM-5, [CR], DOC 39), Petitioner was charged by superseding bill of indictment, charging Petitioner in count one, conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 846; 21 U.S.C. 841(b)(1)(A); and count five, possession with intent to distribute at lease 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), and aiding and abetting the same in violation of 18 U.S.C. 2.

On January 3, 2018, Petitioner proceeded to trial by jury. On January 11, 2018, Petitioner was found guilty on both counts. (CR DOC 161).

On April 26, 2018, the court sentenced Petitioner to 262 months on each count to be served concurrently. That judgement was entered on April 30, 2018. (CR DOC 180).

Petitioner timely appealed to the Fourth Circuit Court of Appeals. (4th Cir. Case No. 18-4272, DOC 1). On June 11, 2019, the Court

affirmed both the sentence and conviction (Id DOC 50). On July 1, 2019, Champion sought a rehearing/rehearing en banc (Id Doc 57). On August 13, 2019, the Court denied rehearing (Id DOC 64).

Petitioner sought an extension of time to file a petition for Writ of Certiorari, which this Court granted up to and including January 10, 2020. 19A-504. No petition was ever filed.

Petitioner's conviction became final on January 10, 2020.

II. RELEVANT FACTS UNDERLYING THE TIMLINESS OF PETITIONERS MOTION TO VACATE, 28 U.S.C. 2255

Petitioner filed the instant motion to vacate pursuant to 28 U.S.C. 2255 on January 7, 2021. (1:21-cv-00018-MR-WCM-5, DOC 1). Using the standard form provided by the Court, petitioner set forth each ground for relief. Acover letter was submitted with the motion, notifying the Court that USP Atlanta was locked down as a result of the COVID-19 pandemic, that his forthcoming memorandum would provide the factual basis in support of each ground for relief. Five day's later, on January 12, 2021, Petitioner submitted his memorandum. (Id. DOC 6).

On January 19, 2021, the Court rejected Petitioner's motion to vacate as "insufficient" to proceed in that, it did not conform to Rule 2(b) of the rules governing section 2255 proceedings. The Court further held that "piecemeal" litigation would not be tolerated and prescr-bed 30 day's to file an amended motion (Id DOC 5).

Petitioner resubmitted the motion as directed by the Court. (Id DOC 9).

Petitioner exclusively invoked the relation back theory pursuant to Federal Rules of Civil Procedure 15(c)(1)(B), due to the fact that, as a result of the Court's rejection of Petitioner's timely filed motion, the one-year statue of limitations imposed by the Anti-Terrorism and Effective Death Penalty Act had already ran. Petitioner asserted that the amended motion related back to the original timely motion (Id DOC 10).

On March 2, 2022, the Court entered an order denying Petitioner's motion as untimely (Id DOC 20) (App. p. 9). The Court held that the motion "failed to specify any facts supporting each ground (App. p. 9). That the memorandum and amended motion to vacate were both filed outside the one-year statute of limitations. (App. p. 9). That Petitioner did not provide the Court with any facts until the statute of limitations had already expired (App. p. 10).

III. RELEVANT FACTS UNDERLYING PETITIONERS FIFTH AMENDMENT DUE PROCESS VIOLATION RESULTING FROM PREJUDICIAL GOVERNMENT PRE INDICTMENT DELAY

The relevant facts are contained in Petitioners motion to vacate (DOC 9 at 35-39). Petitioner argued that the conviction should be vacated due to a violation of the Fifth Amendment Due Process Clause resulting from pre-indictment delay. Petitioner was actually prejudiced by the loss of hotel video surveillance that would have exonerated him at trial and the loss of the video affected Petitioner's ability to mount an effective defense. The delay was not the result of a continuning investigation but was the product of government negligence and recklessness. That resulted in the failure to preserve and utilize

any video surveillance.

Count five of the indictment, and the crux of the government's case against the Petitioner, was predicated on a drug deal on September 13, 2016, at the Stone Mountain Inn and Suites in Stone Mountain, Georgia. Yet, hotel daily audit logs show that neither Petitioner nor any of the names Burt alleges were there appear on the registry. (DOC 15-1 at 280; DOC 15-2 at 128-29). The room Burt alleged she was in reflects that it was vacant (DOC 15-1 at 278; DOC 15-2 at 129).

The government called hotel manager, Ms Aviles, as a witness for the government. Her testimony established that the hotel had "16 cameras working 24 hours" and that they "cover every area" of the property with two cameras that face the registration desk (DOC 15-2 at 108-11). Suprisingly, none of that video was preserved or utilized by Stites or Leopard. (DOC 15-1 at 290-94, 309-10). Both Stites and Leopard testified at length about their expertise and resumes (DOC 15-1 at 224; DOC 15-4 at 171-72).

Testimony about the investigation established that Stites never made an attempt to investigate the "source" of methamphetamine seized days earlier (DOC 15-1 at 238, 242-43). No attempt was made to conduct any investigation into locations where money and drugs were being exchanged (DOC 15-1 at 259, 262-64, 269, 271-73). No investigation was made into the "old man" who provided Burt with the large sum of cash to purchase drugs. (DOC 15-1 at 279). No attempt was made to take any fingerprints (DOC 15-2 at 16-17).

The Court dismissed Petitioner claim as procedurally defaulted. Petitioner stated that he was actually and factually innocent of count five, that he was not the source of the meth on September 13, 2016. The Court held that Petitioner argument "falls short" of the actual innocence standard. The Court further held that Petitioner had not come forward with evidence that the video ever existed. (App. p. 10).

Petitioner also argued that appellate counsel was ineffective for not raising the issue of pre-indictment delay. The Court held that the claims were meritless. (App. p. 25). The Court ruled that Petitioner had not proven actual prejudice, that the loss of video was speculative (App. p. 12). The Court went on to hold that Petitioner had not come forward with evidence "that any cameras were positioned" in the area. (App.p. 14).

It is worth noting that the Court never mentions hotel manager Aviles testimony about the cameras that were available, nor does the Court acknowledge that the hotel records exonerate Petitioner, clearly discrediting Burts testimony.

IV. RELEVANT FACTS UNDERLYING PETITIONERS INEFFECTIVE ASSISTANCE AT THE PLEA STAGE

The relevant facts can be found in Petitioners motion to vacate (DOC 9 at 8-11). Petitioner argue that the conviction should be vacated due to counsel's ineffective assistance at the plea stage. Petitioner rejected the government's plea due to the inadequacy of counsel's advice.

Petitioner repeatedly emphasized his desire to plead, urging counsel to attempt to negotiate something favorable so that Petitioner knew exactly what he was getting. Pursuant to this Court's ruling in Lafler v. Cooper, 566 U.S. 156 (2012), that plea would have been less severe than what was imposed.

The government extended a formal offer to Petitioner. That plea was an "open" plea as counsel described. The plea would have stipulated to a drug weight of 249 grams. Counsel never articulated the significance of what that meant, in that it would cap Petitioner base offense level 32. Counsel never advised Petitioner that if he proceeded to trial that he would be held accountable for any relevant conduct and that would increase the sentence exponentially. A fact that is apparent on the record (DOC 15-4 at 358).

The plea would have dismissed count five of the indictment and the enhanced penalty filed pursuant to 21 USC 851. Counsel was asked what he would serve on the ten years and counsel stated that with Petitioners prior criminal history he was looking at twenty years whether he accepted the governments plea or went to trial. Petitioner unequivocally expressed his desire to plead out to counsel. Petitioner urged counsel to apptmpt to negotiate something more favorable. Counsel refused, stating that "they won't do that."

Prior to trial, Petitioner told counsel that he was "scared as hell." That he (Petitioner) wanted to take whatever they are offering. Counsel

responded, no, "that we've come this far, we're going through with it."

The Court rejected Petitioner's claim holding that the claim was conclusively refuted by the record, where, during the Court's Frye hearing, Petitioner acknowledged he was rejecting the plea (DOC 15-1 at 57-60) (App. p. 12). The Court stated that Petitioners claim he was essentially forced to trial was contradicted by Petitioners statements in open court and that counsel was ineffective for failing to negotiate a more favorable offer was "purely speculative" and that Petitioner could not establish prejudice due to Petitioners protestations of innocence during the proceedings (App. p. 13).

The Court does not acknowledge the fact the Petitioner was forthcoming with counsel, telling counsel that he had in fact met with Burt on a "handful" of occasions during July, August of 2016. Petitioner stated that he was unequivically innocent of the September 13, 2016, sale which the government entire case and evidence rested on.

Another, perticular fact worth noting: the Court cites Petitioner PSR statement (CR DOC 178 at p. 49) that "hotel surveillance" would have corroborated hotel logs which demonstrated his innocence. (App. p. 13). Petitioner has been adoment about the video from the time of discovery. No competing affidavit was ever filed by defense counsel and the Court never awarded the Petitioner an evidentiary hearing.

V. PROCEEDINGS IN FOURTH CIRCUIT COURT OF APPEALS ON CERTIFICATE OF APPEALABILITY

Petitioner timely appealed and sought a certificate of appealability in the Fourth Circuit Court of Appeals. (4th Cir. Case No. 22-6529 DOC 1) 28 USC 2253(c)(2). Petitioner raised the issue presented in the instant petition for writ of certiorari among others, which Petitioner argued he had made the requisist substantial showing for issuance of COA. (Id DOC 8).

On August 31, 2023, the Fourth Circuit Court of Appeals dismissed Petitioners application for COA using the standard boilerplate language. (App. p. 2).

On november 28, 2023, Petitioner filed for a rehearing and rehearing en banc, asking the Court to establish a bright line rule in the circuit regarding the timliness of his motion and that he alleged sufficient facts on his IAC claim during the plea stage which entitled him to a hearing (4th Cir. Case 22-6529, DOC 19).

On December 18, 2023, the Court Denied rehearing (Id. DOC 21).

ARGUMENT FOR ALLOWANCE OF WRIT

I. WHEN DETERMINGING THE TIMLINESS OF A MOTION TO VACATE PURSUANT TO 28 USC 2255, WHAT PLEADING DETERMINES THE RELEVANT PLEADING WHEN MAKING THAT DETERMINATION

The advisory committee notes to Rule 2 of the rules governing section 2255 proceedings for the United States District Courts ("2004 Amend-

ments"), deleted the language that provided courts to return a motion that did not conform to Rule 2 or 3 of the rules governing section 2255 proceedings. See 2004 Amendments Discussing Former Rule 2 (d); See also Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice And Procedure, 7th Edition, section 15.1; 41.5(a). (App. p. 27, 34). As the Advisory Committee notes explain, "the rules were revised in order to guard against the potentially preclusive effect that return of a defective petition or section 2255 motion may have as a result of AEDPA's statutes of limitations. (App.p. 27).

The trial court rejected Petitioners motion as insufficient to proceed in that it did not conform to Rule 2 of hte rules governing section 2255 proceedings. The Court, knowing tha the statute of limitations imposed by AEDPA's had already expired. This is precisely the safeguard that the Advisory Committees 2004 Amendments were put into effect to prevent. Yet the Court clearly ignored this fact. See Stewart v. Rapelje, 2010 U.S. Dist LEXIS 139453, at 3-7 (E.D. Mich., Jan 22, 2010).

The Court held that Petitioners amended motion and the memorandum were both filed outside AEDPA's one-year statute of limitations (App. p. 10). Yet, the Seventh Circuit Court of Appeals has answered this stating that "it is the initial motion, not subsequently filed memorandum or brief in support of a petition, which determines whether a petition is time barred under AEDPA's statute of limitations. Mahaffey v. Ramos, 588 F.3d 1142, 1144-45 (7th Cir. 2009); Stewart

v. Rapelje, 2010 U.S. Dist. LEXIS 139453, ct 3-7 (E.D. Mich., Jan 22, 2010).

Furthermore the Federal Judiciary Advisory Committees "Notes to Decisions" are selected case law cherry picked by the committee and meant to guide courts in how to interpret a particular rule or law. The committee selected Carpenter v. U.S., 492 F. Supp. 20 912 (N.D. Ill. 2007), and placed into Rule 2 of the rules governing section 2255 proceedings, notes to decisions.

In Carpenter, a federal defendant filed a motion to vacate pursuant to 28 USC 2255, which asserted that his forthcoming memorandum would provide the factual basis for his claims. The Court found that the motion was in fact timely, even though the memorandum was not filed until after the one-year statutary time frame imposed by AEDPA had expired. Carpenter, 492 F. Supp. 2d at 918. (citing 2004 Amdndments to Rule 2 of the rules governing 2255 proceedings).

The fact that the committee hand selected the Carpenter case and implemented the case into its "Notes to Decisions" to Rule 2 of the rules governing section 2255 proceedings is clear evidence that the committee anticipated the issue and has made clear to Courts how to interpret the rule.

II. CAN A DEFENDANT SECURE A FIFTH AMENDMENT DUE PROCESS VIOLATION RESULTING FROM PREJUDICIAL PRE INDICTMENT DELAY INCURRED IN NEGLIGENCE

AND RECKLESS DISREGARD, PROVIDED THE PREJUDICE IS SUFFICIENTLY SEVERE

The seminole cases regarding when pre indictment delay deprives a defendant of due process are U.S. v. Marion, 404 U.S. 307 (1971), and U.S. v. Lovasco, 431 U.S. 783 (1977). In Lovasco, the brief for United States conceded, and this Court has approvingly noted, that, "a due process violation might be made upon a showing of prosecutorial delay that incurred in reckless disregard of circumstances, known to the prosecution, suggesting there existed an appreciable risk that delay would impair the ability to mount an effective defense." id at 795 n. 17; See also U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8850) in U.S. Currency, 461 U.S. 555, 563 (1983).

The Fourth and Ninth Circuits have intepreted Marion and Lovasco as establishing a two-pronged inquiry. First, a court must assess whether the defendant has suffered actual prejudice, and the burden of proving such prejudice is clearly on the defendent. If this threshold is met, then the Court must then consider the reason for the delay. U.S. v. Automated Medical Labratories, Inc., 770 F.2d 399, 403-04 (4th Cir. 1985); U.S. v. Moran, 759 F.2d 777, 781-82 (9th Cir. 1985). Both circuits have acknowledged that a due process violation may be established based on merely negligent delay, provided the prejudice is sufficiently severe. Moran, 759 F.2d at 781-82; Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990).

The Petitioner has established "actual" prejudice. The loss of the

video was fatal to Petitioners defense. The only other comparable evidence, the hotel audit log, corroborates the fact that either Burt was not at the hotel, where she alleges the Petitioner delievered the quantity of meth, or that she was there meeting somebody else whose identity she is protecting. Had that video been preserved then Petitione would have been exonerated.

In California v. Trombetta, 467 U.S. 479 (1984), Officers failed to preserve breath samples and defendant's argued that the failure to preserve those samples violated their due process rights. This Court held that the officers were acting in "good faith and in accord with their normal practice." Id. at 488-89. In the Petitioners case, the officers clearly weren't acting in good faith nor were they acting within their normal practice.

Video surveillance is without a doubt the go-to in any criminal investigation. Stites and Leopard have a combined 40 years experience in both electronic and physical surveillance (DOC 15-1 at 224; DOC 15-4 at 170-73). When asked about why he made no inquiry into the video to try and corroborate anything Burt or the other co-defendants said, Stites merely replied "the thought definitely crossed my mind" (DOC 15-1 at 291). The hotel logs were not even requested until November 1, 2017. (DOC 15-1 at 277; DOC 15-2 at 124). Petitioner was already picked up from Atlanta and transported to North Carolina for trial, and had been awaiting trial for 83 day's before any information was requested from Stone Mountain Inn.

In Arizona v. Youngblood, 488 U.S. 51 (1988). This Court held that "unless a criminal defendant can show bad faith on the part of the police, a failure to preserve evidence does not constitute a denial of due process. Id. at 58. Court's have indicated that bad faith may be a dishonest purpose, implied concious wrongdoing and even negligence to the extent it is a breech of known duty.

Considering the value and the exculpatory nature that the video possessed, it's easy to find a breach of duty and negligence that surpasses anything Petitioner has found in Lexis Nexis system. In every case the video is the first thing law enforcement utilizes.

III. WHERE A DEFENDANT REJECTS A FORMAL PLEA IN OPEN COURT, PURSUANT TO A COURTS FRYE HEARING, DOES THAT BAR HIM FROM MAKING A VALID CLAIM PURSUANT TO THIS COURTS RULING IN LAFLER V. COOPER

In Strickland v. Washington, 466 U.S. 668 (1984), this Court held that a defendant claiming ineffective assistance of counsel must establish both that his counsels performance was deficient and that he was prejudiced by it. Id. ct 693-94. In order to prove prejudice, a defendant must show a "reasonalbe probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694.

In Lafler v. Cooper, 566 U.S. 156 (2012), this Court addressed "how

to apply Strickland prejudice test, where ineffective assistance results in a rejection of a plea offer and the defendant is convicted at the ensuing trial." Id. at 163. where "having to stand trial is the prejudice alleged," then a "defendant must show that but for the ineffective advice of counsel" that there is "a reasonable probability that the plea offer would have been presented to the Court, that the Court would have accepted it's terms, and that the conviction, the sentence, or both, under the offers terms would have been less severe than the judgement imposed." Id. at 164.

"if the parties produce evidence disputing material facts with respect to non-frivolous habeas allegations, a court must hold an evidentiary hearing to resolve those disputes." U.S. v. White, 366 F.3d 291, 297 (4th Cir. 2004); See 28 U.S.C. 2255(b). An evidentiary hearing is especially warranted when allegations in a section 2255 motion "relate primarily to purported occurences outside the courtroom and the record could, therefore, cast no real light, and where the ultimate resolution rest on credibility determination." White, 366 F.3d at 302.

The trial Court rejected Petitioners claim because it found that petitioner rejected the plea. During the Court's Frye proffer. The Court apparently misapprehends that Frye dealt with whether or not defense counsel actually communicated an offer to a defendant, in the event a formal plea was extended. Missouri v. Frye, 566 U.S. 135, 145 (2012). The fact that Petitioner rejected the plea in open court does

not reflect the adequacy of counsels advice. Fulton v. Graham, 802 F.3d 257, 263-64 (2nd Cir. 2015).

In U.S. v. Brannon, 48 F. App'x 51 (4th Cir. 2002), the fourth Circuit in that case held that, "where the case was strongly against Brannon, counsel's failure to pursue plea negotiations or to effectively communicate the plea offer would in fact be objectively unreasonable." Id at 53 (citing Paters v. U.S. 159 F.3d 1043, 1047-48 (7th Cir. 1998)). The fact that Petitioner actually told counsel that he had met with Burt in the past, counsel was clearly ineffective for not seeking a more favorable plea for Petitioner as opposed to letting him go to trial. All of Petitioners co defendants arranged for extremely favorable plea agreements, ranging from 380 day's to 92 months. The Petitioner, arguably the least culpable, wound up with 262 month sentence. In light of the fact that all Petitioner co-defendants were willing to testify, counsel had a duty to advocate for a better deal. U.S. v. Pender, 514 F. App'x 359 (4th Cir. 2013).

Had the Petitioner received competent advice and effective counsel, Petitioner would have unequivocally plead out. Had petitioner plead he would not have been subject to the enhanced penalty pursuant to 21 USC 851. The stipulation to the drug weight would have capped Petitioner base offense level at 32, 210 -262 months. He would have received the two level reduction further reducing his sentence to 168 -210 months. Substantially less than the 262 months Petitioner recieved after the ensuing trial.

IV. THE QUESTIONS PRESENTED IN THIS PETITION ARE IMPORTANT AND REQUIRE THIS COURT TO EXERCISE ITS SUPERVISORY POWERS TO RESOLVE THE ISSUES

In accordance with Supreme Court Rule 10(c), the Fourth Circuit Court of Appeals has decided two important federal questions that have not been, but should be settled by this Court:

1) The Fourth Circuit erred by affirming the denial of Petitioners motion to vacate as untimely. The Courts adverse decision directly conflicts with the Federal Judiciary Advisory Committees interpretation of Rule 2(b) of the rules governing section 2255 proceedings.

2) The Fourth Circuit erred by affirming the denial of Petitioners motion to vacate regarding the Fifth Amendment due process violation. Petitioner proved actual prejudice and that prejudice resulted form negligent conduct that was sufficiently severe.

In accordance with Supreme Court Rule 10(a), the fourth Circuit Court of Appeals has sanctioned the departure of accepted and usual course of judicial proceedings:

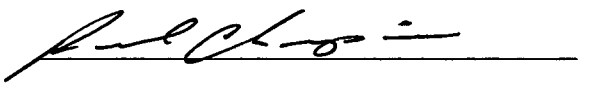
1) The Fourth Circuit erred by affirming the denial of Petitioners motion to vacate by finding he had understood the plea where, in open court, pursuant to the court's Frye hearing, Petitioner rejected the plea. Petitioner alleged sufficient disputed factual

matter warranting an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: April 21, 2024