No. _____

In the Supreme Court of the United States

_____

Joshua Paul Cox,
Petitioner,

v.

United States of America,
Respondent

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. The facts underlying Mr. Cox's ineffective-assistance claim are straightforward. His lawyer failed to object to an evidentiary dearth underlying the presentence report's relevant-conduct analysis. The failure was based on ignorance of the rules, not strategy. The district court imposed a sentence at the low end of the range affected by the PSR's faulty relevant-conduct finding. Despite these facts, the district court found no ineffective assistance of counsel and refused to issue a certificate of appealability. U.S. Circuit Judge James Graves likewise refused to issue a certificate of appealability.

The question presented is this: whether a reasonable jurist might disagree with the district court or Judge Graves about the sufficiency and effect of the lawyer's performance at sentencing.

LIST OF PARTIES

Joshua Paul Cox, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Joshua Paul Cox*, No. 6:20-CR-016-H, U.S. District Court for the Northern District of Texas. Judgment entered on June 17, 2021.

- *Joshua Paul Cox v. United States of America*, Case No. 6:21-CV-065-H, U.S. District Court for the Northern District of Texas. Judgment entered on December 4, 2023.

- *United States of America v. Joshua Paul Cox*, No. 23-11220, U.S. Court of Appeals for the Fifth Circuit. Order denying certificate of appealability entered on July 2, 2024.

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Joshua Paul Cox respectfully petitions for a writ of certiorari to review an order from U.S. Circuit Judge James E. Graves, Jr., of the Fifth Circuit Court of Appeals denying a certificate of appealability.

OPINIONS BELOW

The unreported order denying the requested certificate of appealability is reprinted in Appendix D.

JURISDICTION

U.S. Circuit Judge James E. Graves, Jr., issued an order denying Mr. Cox's request for a certificate of appealability on July 2, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 241 (1998).

RELEVANT PROVISIONS

This petition involves the standard set out for certificates of appealability at 28 U.S.C. § 2253(c)(2). That standard required Mr. Cox to make "a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

I. Mr. Cox pleaded guilty to producing an image of child pornography, and under the Guidelines Manual, was held accountable at sentencing for a prior act of distribution.

Mr. Cox pleaded guilty to producing child pornography. The first count of a four-count indictment alleged his production of a specific image, and according to the indictment, the offense began on an unknown date and concluded on or about

April 26, 2019. Mr. Cox entered into a plea agreement with the government. He agreed to plead guilty to the production offense alleged in count one. The government agreed to dismiss the three other crimes alleged in the four-count indictment.

Mr. Cox's presentence report suggested a term of imprisonment somewhere between 324 and 360 months. The PSR put his total adjusted offense level at 40. This figure was based in part on a two-level adjustment for a prior act of distribution. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2G2.1(b)(3) (Nov. 1, 2018). Section 2G2.1 of the Guidelines Manual recommends the distribution enhancement whenever "the defendant knowingly engaged in distribution." USSG § 2G2.1(b)(3). The PSR supported the enhancement with a one-sentence reference to an admission from Mr. Cox's factual resume. Mr. Cox, the PSR explained, "admitted to sending the sexually explicit images of E.J. to a male that E.J. was dating and who lived across the street from E.J." This paragraph summarized an earlier section of the PSR, which recounted E.J.'s interview with police. "On one occasion," she explained, "Cox sent some of the images/videos" she had previously produced at his behest "to a male she used to date that lived across the street." "She learned of this," the PSR continued, "when the male showed the pictures to E.J.'s sister." The factual resume summarized the same information: "Cox sent nude images of Doe to a boy who lived across the street from Jane Doe 1 because Doe was dating him." The PSR and factual resume referenced the prior act of distribution but without providing any specifics as to when the distribution

happened or the relationship between that act and the particular image charged in count one. The PSR also failed to address how the act of distribution qualified as relevant conduct to the offense of conviction.

The district court adopted the PSR at sentencing and imposed a sentence at the low end of the suggested range. It began by accepting the PSR's "factual findings and legal conclusions." It then recited the advisory range suggested in the PSR. Through counsel, Mr. Cox requested a downward variance to account for his young age and interest in rehabilitation. The district court considered but rejected this request. It determined instead "that a sentence of 324 months [was] sufficient but not greater than necessary" to account for the various sentencing factors listed in 18 U.S.C. § 3553(a). This final explanation echoed the district court's earlier summary of § 3553(a)'s mandate:

> I am required by statute to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of sentencing set forth in the 3553(a)(2) and to consider all factors of Section 3553(a), which I have done.

The district court then assessed a few of those factors with reference to Mr. Cox's case. The district court expressed some sympathy for Mr. Cox's arguments in mitigation but ultimately determined that a 324-month sentence was appropriate.

II. Mr. Cox alleged ineffective assistance by trial counsel for failing to point out the evidentiary dearth underlying the relevant-conduct analysis baked into the PSR's distribution enhancement.

Mr. Cox filed a motion under 28 U.S.C. § 2255 only a few months after his sentencing hearing. He initially faulted his trial counsel, a lawyer named Fred

Brigman, for failing to consult him concerning an appeal and for ignoring his request to file an appeal. The district court referred the motion to a magistrate, and the magistrate appointed the Federal Public Defender to represent Mr. Cox at an evidentiary hearing. The Federal Public Defender then filed a motion to expand the appointment order to include two other claims of ineffective assistance. Both claims concerned Mr. Brigman's failure to object to the distribution enhancement suggested in the PSR. The first turned on the content of the image distributed. Nothing in the record, the Federal Public Defender argued, established that the image qualified as child pornography, but that fact was necessary for the act of distribution to qualify as relevant conduct. The Federal Public Defender then advanced an argument based on the Guidelines Manual's definitions for the term "relevant conduct." Since the record did not establish whether Mr. Cox's prior act of distribution met any of the applicable definitions, the Federal Public Defender's motion requested permission to address whether Mr. Brigman's failure to object on this basis was unreasonable. If either objection had been made, the motion concluded, Mr. Cox's advisory range would have been lower, and as a result, he could show a reasonable probability of a different outcome. The district court granted the Federal Public Defender's motion to expand the scope of the appointment order.

The parties elicited evidence concerning Mr. Brigman's failure to challenge the distribution enhancement at an evidentiary hearing. An attorney with the Federal Public Defender's office called Mr. Brigman as a witness. Mr. Brigman

conceded that the factual resume used the adjective "nude" to refer to the victim in the image distributed by Mr. Cox and conceded that nudity is not necessarily pornographic. He then explained why he nevertheless failed to object on this basis. Mr. Brigman feared that an objection raising the apparent mismatch might have resulted in Mr. Cox losing a three-level reduction for acceptance of responsibility. Mr. Brigman also indicated that his review of the phone containing the charged image included hundreds of pornographic images of the victim. Given that context, he feared that an objection contradicting the admission in the factual resume would be "frivolous" and might result in a higher sentence for Mr. Cox.

The claim concerning the Guidelines Manual's definition for relevant conduct received less attention, but Mr. Brigman provided some insight into his state of mind at the time he filed objections to the PSR. When asked whether an act must be criminal to count as relevant conduct, Mr. Brigman said no. When asked whether "the timing of the distribution of these pictures matter[ed]" for relevant-conduct purposes, he said he did not know.

The magistrate then heard final arguments from both parties. On the relevant-conduct claim, an attorney with the Federal Public Defender's office pointed out the various gaps in the record. Neither Mr. Brigman nor the information in his case file gave any indication when the prior act of distribution took place, but the Guidelines Manual precluded the district court from characterizing the prior act of distribution as relevant conduct based on Mr. Cox's "course of conduct" or "repetition of similar acts." That meant the government

would be required to prove that the act of distribution took place during the commission of the production offense charged in count one or in preparation for that crime. The record was devoid of relevant evidence on those points, and as a result, a "purely legal" objection concerning the evidentiary gap could not put Mr. Cox's acceptance of responsibility in jeopardy. In response, the government argued that any argument based on the definition of relevant conduct was bound to fail. The indictment alleged an offense with an unknown start date, and over the course of several years, Mr. Cox used the victim in this case to produce many images of child pornography. Since the act of distribution took place within the same timeframe, the government reasoned, it should be considered relevant conduct.

The magistrate sided with the government. An objection based on the mismatch between nude images and pornographic images, the magistrate ruled, would have been meritless. Sufficient circumstantial evidence concerning the nature of the image would have defeated the objection, and as a result, Mr. Brigman was not ineffective for failing to raise the issue before the district court. The magistrate then found that an objection based on the Guidelines Manual's relevant-conduct definition would have also failed. The magistrate first found that the prior act of distribution, "whenever it occurred, was made 'in preparation' for Cox's later coerced extraction from Jane Doe 1 of sexually explicit images, including the one" alleged in the indictment's first count. That was true, the magistrate reasoned, because Mr. Cox repeatedly relied on threats of distribution to coerce the victim to produce sexually explicit images over the course of years. For the same reasons, the

magistrate determined that Mr. Cox had committed the prior act of distribution "during" the charged offense. As to prejudice, the magistrate found that successful objections would have changed nothing. This analysis rested primarily on the district court's detailed sentencing explanation. That explanation, the magistrate noted, focused on the facts of Mr. Cox's offense conduct, not the advisory range suggested in the PSR.

III. The district court ruled against Mr. Cox and then declined to issue a certificate of appealability.

Mr. Cox objected to the magistrate's proposed findings. In part, he faulted the magistrate for excusing Mr. Brigman's failure to object to the prior act of distribution. The distribution, Mr. Cox claimed, "was too attenuated from the offense of conviction to constitute relevant conduct." No evidence in the sentencing record, he continued, "indicat[ed] that the distribution occurred in any reasonable proximity to the offense of conviction." That was significant because to qualify as relevant conduct the distribution must have been in "preparation for the particular image named in the indictment." Nor did the available evidence establish that the act of distribution occurred at the same time as the production of the image alleged in count one. Mr. Cox then addressed the magistrate's finding on prejudice. An incorrect advisory range, he noted, "will ordinarily demonstrate a reasonable probability of a different result." See *Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016). That the district court chose to impose a sentence at the low end of the advisory range further suggested the range's effect on the sentence imposed.

The district court overruled Mr. Cox's objections to the magistrate's report. On the relevant-conduct claim, the district court found that Mr. Brigman had acted reasonably: "Cox's distribution of the images of Doe occurred alongside his continuous threats that if she did not provide him with additional sexually explicit images, he would distribute her photos." That reality, the district court, resolved the merits claim against Mr. Cox. "The nexus between Cox's threats, his act of distribution, and his continued receipt of the photos from Doe further supports concluding that the distribution was relevant conduct," the district court concluded. "Under these circumstances," Mr. Brigman reasonably chose not to object based on the Guidelines Manual's definition of relevant conduct. "Any argument as to relevant conduct would have confronted the substantial problem that Cox's distribution was the fulfillment of the threat to distribute that he used to compel Doe to continue to send him sexually explicit images and was therefore closely linked to his offense of conviction." The district court likewise overruled Mr. Cox's objection to the magistrate's prejudice finding. The "decision to impose a sentence of 324 months of imprisonment," the district court explained, "was based on factors independent of the particular guidelines range." To support the point, the district court quoted the entirety of its sentencing explanation. That "detailed discussion of the Section 3553(a) factors independent of the guidelines demonstrates that there is no reasonable probability that Cox would have received a different sentence had his attorney brought these additional objections."

The district court then declined to issue a certificate of appealability. Mr. Cox had not shown "that reasonable jurists would find" the district court's "'assessment of the constitutional claims debatable or wrong.'" *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In similar fashion, the district court concluded that Mr. Cox had not established "that reasonable jurists would find . . . 'it debatable whether the petition states a valid claim of the denial of a constitutional right.'" *Id*.

Mr. Cox filed an appeal and asked the Fifth Circuit to issue a COA on the relevant-conduct claim. The motion focused solely on whether Mr. Brigman "render[ed] ineffective assistance by ignoring the Guidelines Manual's plain text and failing to point out the evidentiary dearth underlying the PSR's relevant-conduct analysis." Motion for Certificate of Appealability at 1, *Joshua Paul Cox v. United States of America*, No. 23-11220 (5th Cir. Mar. 21, 2024). The brief in support of Mr. Cox's motion highlighted Mr. Brigman's apparent ignorance of the normal rules of relevant conduct and his failure to provide a strategic reason to forgo the objection. *See* Brief in Support of Motion for Certificate of Appealability at 13-19, *Joshua Paul Cox v. United States of America*, No. 23-11220 (5th Cir. Mar. 21, 2024). Reasonable jurists, he argued, could debate whether Mr. Brigman's failure to contest the PSR's relevant-conduct analysis fell below an objective standard of reasonableness. *See id*. at 17-19. Reasonable jurists could likewise debate whether Mr. Brigman's failure to object affected the outcome given the district court's

apparent anchoring of the sentence imposed in an advisory range affected by the PSR's unsupported relevant-conduct finding. *See id*. at 19-22.

In a two-page order, U.S. Circuit Judge James Graves denied Mr. Cox's request for a COA. The order cited the correct standard. "To obtain a COA," Judge Graves noted, Mr. Cox "must make 'a substantial showing of the denial of a constitutional right." Order at 2, *United States of America v. Joshua Paul Cox*, No. 23-11220 (5th Cir. July 2, 2024). From there, the order summarily denied Mr. Cox's COA request after declaring that he had not "made such a showing." *Id*. The order provided no reasoning in support of this conclusion. *See id*.

REASONS FOR GRANTING THIS PETITION

I. Mr. Cox's ineffective-assistance claim deserved a closer look.

On the same or similar facts, other judges have recognized the obvious—a petitioner like Mr. Cox has "made a substantial showing of a denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). By his own admission, Mr. Cox's lawyer did not understand the normal rules of relevant conduct, and this ignorance likely affected his ability to spot a meritorious objection to the PSR's offense-level calculations. An effective lawyer would have alerted the district court to the evidentiary gap underlying the PSR's relevant-conduct analysis, and in similar circumstances, even the Fifth Circuit Court of Appeals has recognized the failure to object as presumptively unreasonable. *United States v. Culverhouse*, 507 F.3d 888, 897-98 (5th Cir. 2007). Trial counsel, in turn, never identified an appropriate strategic reason for overlooking this "purely legal" objection to a glaring evidentiary

gap. As for prejudice, the objection would have resulted in a reduced sentencing range, and as the Fifth Circuit has previously recognized, an error that shifts the advisory range "can, and most often will be, sufficient to show a reasonable probability of a different outcome." *See United States v. Perez*, 43 F.4th 437, 445 (5th Cir. 2022) (citing *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016)). The district court's conclusions as to both performance and prejudice are thus reasonably debatable, and on the same or similar facts, other petitioners have sought and received COAs. In denying Mr. Cox a certificate of appealability, Judge Graves therefore misapplied *Buck v. Davis*. This Court should grant certiorari to review the erroneous order and give Mr. Cox's claim the closer look it deserves.

a. In denying a certificate of appealability, Judge Graves misapplied *Buck v. Davis*.

Petitioners with ineffective-assistance claims virtually indistinguishable from Mr. Cox's have twice sought and received certificates of appealability in the Eleventh Circuit Court of Appeals. In *Diaz v. United States*, the petitioner was convicted for producing child pornography and received a certificate of appealability concerning his lawyer's failure to challenge a relevant-conduct finding under § 2G2.1 of the Guidelines Manual. 799 F. App'x 685, 687 (11th Cir. 2020). The Guidelines Manual recommends a two-level bump whenever "the offense involved . . . the commission of a sexual act." *See* USSG § 2G2.1(b)(2)(A). The PSR applied the enhancement against Mr. Diaz based on the fact that he had touched two of his victims, but those acts "appear[ed] to have occurred weeks to months after the photographs" underlying the counts of conviction. *See* Order at 2, *Joseph Michael*

Diaz v. United States, Case No. 18-15316 (11th Cir. Apr. 10, 2019). Circuit Judge Elizabeth Branch granted Mr. Diaz a COA concerning his lawyer's failure to object. *Id*. at 2. "[R]easonable jurists," she found, "could debate whether counsel was ineffective for not objecting . . . on the grounds that the potentially relevant conduct did not occur 'during the commission of the offense[s] of conviction.'" *Id*. In similar fashion, Judge Branch determined that "reasonable jurists could debate whether Diaz was prejudiced by his counsel's failure to challenge the enhancement because he was potentially subjected to a higher advisory guideline range." *Id*. at 3. A three-judge panel eventually ruled against Mr. Diaz on the merits after declaring the relevant-conduct authority "unsettled." *Diaz*, 799 F. App'x at 690.

A petitioner named Charles Friedlander sought and received a COA for a similar claim from Eleventh Circuit Judge Adalberto Jordan. A jury voted to convict Mr. Friedlander for attempted enticement of a child. Motion for Certificate of Appealability at 2, *Charles Jackson Friedlander v. United States*, Case No. 13-10439 (11th Cir. Feb. 27, 2013). After losing in the district court, he sought a COA from the Eleventh Circuit concerning his appellate lawyer's failure to challenge one of the district court's relevant-conduct findings. *Id*. at 16-17. The district court had held Mr. Friedlander responsible for other criminal acts as part of the same "course of conduct" as the offense of conviction, but the relevant-conduct section of the Guidelines Manual precluded this analysis for his offense of conviction. *Id*. Mr. Friedlander lost at the district-court level, but Judge Jordan granted him a COA. *See* Order at 2, *Charles Jackson Friedlander v. United States*, Case No. 13-10439

(11th Cir. Feb. 27, 2013). A three-judge panel ultimately rejected the claim on the merits after finding that any error had no effect on the sentence imposed. *Friedlander v. United States*, 570 F. App'x 883, 887 (11th Cir. 2014). A meritorious objection would have resulted in a one-level reduction under the Guidelines Manual, but at sentencing, the district court said it would impose the same sentence either way. *Id*.

Judges Adalberto and Branch, appropriately applied this Court's guidance from *Buck v. Davis*. On their faces, the ineffective-assistance claims advanced by Mr. Diaz and Mr. Friedlander were "reasonably debatable," and as a result, both petitioners received the COAs they deserved. *Buck v. Davis*, 580 U.S. 100, 117 (2017). Both challenged a lawyer's failure to object to their PSRs based on undisputed facts and a straightforward application of the Guidelines Manual's plain text. Both recognized the necessary relationship between the uncharged act's timing and the offense of conviction. Whatever the ultimate resolution on the merits, these claims of ineffective assistance were inherently plausible, and the records did not provide obvious answers on the questions of deficient performance or prejudice. In light of those facts, both petitioners correctly received the COAs they sought.

The order from Judge Graves, by contrast, is impossible to square with *Buck v. Davis*. The "initial determination" should have turned entirely on whether Mr. Cox's claim of ineffective assistance was "reasonably debatable." *See Buck v. Davis*, 580 U.S. 100, 117 (2017). It clearly was. The record was devoid of evidence

concerning when the uncharged act of distribution took place, but some evidence as to timing was necessary for the district court to consider the distribution as relevant conduct. To make matters worse, Mr. Brigman's failure to object appears based on ignorance, not strategy. The district court's selection of a sentence at the low end of the advisory range rendered debatable its conclusion that a meritorious objection would have had no effect on the sentence imposed. At the very least, these facts clear the relatively low bar set by statute for issuance of a COA. *See* 28 U.S.C. § 2253(c)(2). Judge Graves nevertheless denied the COA but without explaining how or why he reached that conclusion. Under *Buck*, a look ahead to the merits would be inappropriate, *see* 580 U.S. at 117, but that possibility provides the only explanation for the cursory order entered below.

Mr. Cox's claim deserves a closer look. He ""made a substantial showing of a denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Judge Graves denied the COA, but on the facts presented, that denial is impossible to square with the low bar set at this stage in the litigation. That petitioners with ineffective-assistance claims virtually indistinguishable from Mr. Cox's have sought and received certificates of appealability further cements Judge Graves's misapplication of *Buck* to the claim presented below. This Court should grant certiorari to ensure the proper application of its own authority.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari to review the order denying the requested certificate of appealability.

Respectfully submitted September 30, 2024.

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