

24-6328

No. _____

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

DONALD EAST — PETITIONER
(Your Name)

vs.

ALEJANDRO REYES, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Donald East
(Your Name)

1412 Wood St (Mike Durfee State Prison)
(Address)

Springfield, SD 57062
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- I. Whether when a factual basis supporting a conviction pursuant to a criminal statute is verifiably false the defendant can still be convicted without a factual basis?
- II. Whether when an attorney accepts an official State position (promised Prosecutor job) as compensation that he could only receive by convincing his client to plead guilty violates the Defendants' right to have effective assistance of counsel rendering the affected proceeding fundamentally unfair and unreliable?
- III. Whether when an attorney fails to investigate an exculpatory fact it invalidates the guilty plea?
- IV. Whether when medical doctors are able to prove a Defendants' medical condition allowing them to prove with certainty that the accusations against the Defendant could not have happened demonstrates actual innocence warranting habeas relief?
- V. Whether, Appellate Court erred in denying a Certificate of Appealability and affirming the District Courts Judgments?

The Statement of any questions presented (I-V) is deemed to comprise every subsidiary question fairly included therein. If and when the Petition is granted, due to the importance of the factual issues, East respectfully requests for oral arguments before this Honorable Court.

LIST OF PARTIES

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

RELATED CASES

East v. Fluke, No. 24-cv-2997, U.S. Court of Appeals for the Eighth Circuit.
Judgment entered Dec. 11, 2024.

East v. Fluke, No. 24-cv-2997, U.S. Court of Appeals for the Eighth Circuit.
Judgment entered Oct. 29, 2024.

East v. Fluke, No. 24-cv-4030, U.S. District Court for South Dakota.
Judgment entered Sep. 18, 2024.

East v. Fluke, No. 24-cv-4030, U.S. District Court for South Dakota.
Judgment entered Feb. 16, 2024.

East v. Fluke, No. 30620, South Dakota Supreme Court.
Judgment entered Feb. 9, 2024.

East v. Fluke, No. 23-cv-3410, Minnehaha County Circuit Court for South Dakota.
Judgment entered Nov. 28, 2023.

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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 unpublished. The opinion of the United States district court appears at **Appendix C** to the petition and is reported at *East v. Fluke*, 2024 WL 4241075 (D.S.D. Sep. 18, 2024).

For cases from **state courts**: The opinion of the highest state court to review the merits appears at **Appendix E** to the petition and is unpublished. The opinion of the Minnehaha County Circuit Court appears at **Appendix F** to the petition and is unpublished.

JURISDICTION

This is a Petition for a Writ of Certiorari from a judgment from the United States Court of Appeals for the Eighth Circuit. East submits this Petition pursuant to U.S. Supreme Court Rules 10(a), 10(c), and 12(2). The Judgment of the Eighth Circuit was entered on October 29th 2024. A timely petition for rehearing was denied by the United States Court of Appeals on December 11th 2024, and a copy of the order denying rehearing appears at **Appendix B**. This petition is

timely filed pursuant to U.S. Supreme Court Rule 13(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

- I. Amendment VI to the United States Constitution, which 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.

- II. Amendment XIV to the United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- III. Title 28 Section 2254, which provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This case is one involving the crucial importance of the Sixth and Fourteenth Amendments to the U.S. Constitution. The cornerstone of this case is **whether when a factual basis supporting a conviction pursuant to a criminal**

statute is verifiably false the defendant can still be convicted without a factual basis.

This case is actually very simple. **East was arrested and accused of penile vaginal intercourse with two teenage girls. East was forced to plead guilty because of his attorney's threats. Ultimately, medical doctors have confirmed and are able to prove that the accusations against East could not have happened.**

The previous Court's rationale up to this point is despite the fact medical doctors can confirm East does not have the ability to get an erection there are other ways to commit sexual contact other than with one's genitals, therefore East procedurally defaulted.

There is a serious problem with this determination because there is no factual basis to support that conclusion. East was only accused of penile vaginal intercourse something medical doctors can prove could not have happened. Thus, East is innocent. *McQuiggin v. Perkins* made it clear that if you are innocent you can overcome any procedural barrier. 569 U.S. 383 (2013).

The Courts have overlooked the fact that the State has not opposed any of the proceedings from Circuit Court to now. East is extremely grateful that the State has been unopposed to his request to be granted habeas relief, his conviction be vacated, and the original indictment dismissed with prejudice.

The Courts have avoided any discussion of East's attorney. Counsel admitted to accepting an official State position (promised Prosecutor job) as

compensation that he could only receive by convincing East to plead guilty. *Strickland v. Washington* made it clear that a defendant must receive effective assistance of counsel with loyalties to his client not his own personal interests. 466 U.S. 688 (1984).

Hill v. Lockhart made it clear that when an attorney fails to investigate an exculpatory fact it invalidates the guilty plea. 474 U.S. 52 (1985). East's attorney failed to investigate his medical condition that medical doctors would have confirmed and proved the accusations against East could not have happened. Therefore, in addition to East being innocent his plea or conviction is invalid or illegal.

I. Facts

East did not want to plead guilty and his attorney responded by telling him he gets along very well with Salter (the Judge). He continued, stating to think of your father, do you ever want to see him outside of these walls again? Or do you never want to see the light of day again? You'll get 5-7 years; 35% parole, the pending case in Nebraska would be dismissed,¹ and be out in 60 days.

Counsel unfairly held out an assurance of leniency in exchange for a false confession of guilt, such assurances were coercive, but for counsel's errors, East clearly would have gone to trial. Under these circumstances would render the guilty plea's acceptance fundamentally unfair and shocking to justice. East's

¹ The case is still pending 13 years later and East is facing 0-50 years

plea of guilty was the product of duress, misrepresentation, and fraud by counsel. It is clear that counsel intentionally mislead and withheld information.

East in this case was sentenced to the maximum 40 years, 15, 15, 10 on the charges with 6 suspended, and ran consecutively. In July of 2015, counsel told East he had accepted the promised prosecutor job² in his hometown and that he was upset because he wanted to become a Judge, but came in second.

The most important undisputable fact of this case is East has never been able to get an erection. East was born with a medical condition of myelomenigocele / spina bifida, which is a congenital neurological condition of the lower back / spinal cord. East had surgery for this shortly after birth. Due to this condition, East has a documented history of showing that he has suffered from neurological symptoms (incontinence, lower extremities weakness / decreased sensation). Males, like East, with spina bifida / myelomenigocele report significant symptoms of erectile and ejaculatory dysfunction. Thus, East has not been able to perform intercourse and could not have committed the crime he was accused of. (emphasis added).

As the U.S. District Court stated “[East] now has medical doctors who confirm that [he] has an inability to get an erection due to a congenital neurological condition of the lower back, spina bifida.” **Appendix C pp. 1-2.**

² This promised Prosecutor job was in exchange for convincing East to Plead Guilty

Counsel in this case failed to investigate East's inability to get an erection and would have discovered that multiple doctors could testify to this exculpatory fact. Counsel was more focused on how to get East to Plead Guilty in order to garner the "promised" Prosecutor job.

In this case, East was accused of having penile vaginal intercourse with two teenage girls. The medical doctors confirm this could not have happened. Therefore, the Plea is not valid because East is in fact innocent.

Counsel compounded his failure to investigate by never requesting exculpatory or favorable evidence in the State's possession. P.H. "was seen at Child's Voice in May of 2012 for an evaluation for sexual assault." **This was a little more than a month prior to the accusation against East. The State, despite being aware P.H. made a false sexual assault claim never provided this exculpatory evidence.** This false accusation bears a direct relationship to the witness' motive to lie in the present case and bears a strong resemblance to the circumstances giving rise to the allegations at issue. Elizabeth correctly stated to Police that she believed "[P.H. her daughter] was using the rape to get out of being in trouble for sneaking out as well as drinking." (emphasis added).

The Prosecution's entire case relied on Police Discovery of an alleged condom in East's outside garbage can. If East, as medical doctors confirm cannot get an erection why was there a condom to begin with?

The detective's report stated "I did end up meeting with two of the nurses from Child's Voice, at which point I did collect the sexual assault kit that had

been collected on both of the [alleged] victims in this case, both [M.C.] and [P.H.]." She then states "after finishing up at Child's Voice, I did end up leaving there and driving over to the address of [East's father's house]." **Therefore, the detective took the sexual assault kit to the alleged crime scene, instead of the Police Station.**

The detective also stated in her report that she later drove to the Police Station in her car the same time the officer took East into custody. East asserts that the detective did not come with. Either (1) she could not come because she had to stay and maintain the security of the alleged crime scene. (2) If in fact she did leave, she then failed to "maintain the security of the house" and lost the chain of custody of the property. This in turn would mean she left the house unlocked and unsecured between 1230pm when she left until 1255pm when the warrant was issued. Minimum of 25 minutes. Counsel again failed to investigate this.

The Evidence Inventory, that counsel failed to look at, shows the first thing Law Enforcement searched at 115pm on July 2, 2012 was the outside garbage can. No Police Reports or Interviews indicated anything about the outside garbage can. A condom was allegedly recovered. The Inventory does NOT state a "used" condom.

Forensic Testing was done by Law Enforcement to substantiate the accusations being made by the alleged victims. The DNA testing revealed both

M.C.'s and P.H.'s DNA was around 99% with one of them on the inside of the condom. East was inconclusive.

Then there is hair DNA, M.C. and P.H. had hair on each other, but there was no hair of them on East or East on them. There was no hair of M.C. or P.H. on any of East's bedding where this supposedly occurred. For example, if you rub your arms, hair falls. Anyone who had sex with two girls; there would be a DNA match somewhere.³

Ultimately, this case can be boiled down to the fact medical doctors can prove that the accusations against East could not have happened. Additionally, if counsel had been interested in representing East he could have attacked the credibility of the State's case, since there should have been no condom. One thing is clear though, East did not receive competent assistance of counsel in making the decision to plead guilty and as a result, an innocent man remains in prison.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, Title 28 Section 2254(a), and Actual Innocence. The District Court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. § 1331.

³ If an individual had a erection, used a condom, had sex for around two hours, and that condom was recovered in less than 24 hours; there would be a match or hit. In this case, that is not what happened because East did not and does not have the capability to have sex with either girl

REASONS FOR GRANTING THE PETITION

I. Importance of Questions Presented

This case presents a fundamental question of the interpretation of this Court's decisions in *McQuiggin v. Perkins*, 569 U.S. 383 (2013); *Strickland v. Washington*, 466 U.S. 688 (1984); and *Hill v. Lockhart*, 474 U.S. 52 (1985). However, to East's knowledge this Court has never answered the question **whether when a factual basis supporting a conviction pursuant to a criminal statute is verifiably false the defendant can still be convicted without a factual basis and an attorney who accepts a Prosecutor job for forcing his client to plead guilty and the implications there from. Most importantly, this Court is the last chance to set an innocent man free.**

The questions presented in this case are of great public importance affecting thousands of courtrooms within all 50 states. As of right now, convictions can be upheld without a factual basis, attorneys can make deals to become Prosecutors if they convict their own client, and innocent people can remain incarcerated. In view of the large, amount of litigation over ineffective assistance of counsel and requests for writ of habeas corpus, guidance on the questions are also of great importance to defendants and petitioners, because it affects their constitutional rights and freedom.

The issues' importance is enhanced by the fact that the U.S. Court of Appeals for the Eighth Circuit and the U.S. District Court for South Dakota in this case have seriously misinterpreted East's case. This Court should take the

opportunity this case presents to discuss the full extent of the constitutional obligations of competence, communication, diligence and loyalty that all criminal defense lawyers – indeed, all lawyers – owe their clients.

A. Whether When a Factual Basis Supporting a Conviction Pursuant to a Criminal Statute is Verifiably False the Defendant can still be Convicted Without a Factual Basis

"[E]ven if East's inability to get an erection was new evidence, that new evidence would not invalidate East's pleas of guilty. The reason is that East did not plead guilty to rape. East instead pled guilty to sexual contact with a child under the age of 16 and abuse or cruelty to a minor. Neither of those crimes require sexual penetration as is required for a rape charge. Even a rape charge does not require penetration by a penis, as the rape charge can result, for example, from digital penetration." **Appendix C p. 2**

"Even if the lack of ability to get an erection was new evidence, which it is not, that evidence would not be a defense to the charges as a man does not have to be able to get an erection to be able to commit the crimes Mr. East pled guilty to." **Appendix C. p. 2**

East does not dispute that there may be other ways to commit sexual contact other than with one's genitals. The problem is the District Court based their conclusion on the statute not the factual basis of the case. The District Court's mantra is East pled guilty to sexual contact and because a man could commit this crime other than with one's genitals, the plea is valid. The Court completely disregarded the factual basis of this case, which is East was only

accused of penile vaginal intercourse something medical doctors can prove could not have happened. Thus, East is innocent.

The U.S. Court of Appeals for the Eighth Circuit affirmed the District Courts flawed conclusion. This dangerous precedent being set allows convictions and the validity of a plea to be upheld without a factual basis in support. This Court's guidance is needed to demonstrate that a valid factual basis is required to uphold a conviction, if there is undisputable proof that the factual basis is false than the plea itself is not reliable. Every precaution should be taken with careful consideration, especially in a case like this one where it is clear the petitioner is innocent.

B. Whether When an Attorney Accepts an Official State Position (Promised Prosecutor Job) as Compensation the he could only Receive by Convincing his Client to Plead Guilty Violates the Defendants' right to have Effective Assistance of Counsel Rendering the Affected Proceeding Fundamentally Unfair and Unreliable

Operating under a demonstrably prejudicial non-waivable conflict of interest, (the promised Prosecutor job), and without conducting any investigation, counsel implied threats towards East to obtain an involuntary guilty plea. Moreover, failing to vacate East's guilty plea would undermine the standards for effective assistance of counsel in criminal cases and would ignore the serious public policy principles underlying the absolute bar on accepting official State positions as compensation for getting an innocent individual to plead guilty.

For notwithstanding the fact that lawyers are viewed as the agents of their clients, the real relationship between lawyer and client is one of total client dependence: lawyers have all of the knowledge of both the law and the justice system, and clients look to lawyers to guide them through the complexity of a system whose power can be overwhelming. Thus, this Court has repeatedly recognized that lawyers are required to be competent, communicate with their clients, explain the alternatives, and provide clients with candid advice – in sum, to effectively represent the client at all critical stages. (emphasis added).

As this Court has observed many times, conflicts of interest are different in degree and in kind from other failures of representation because they infect every aspect of the attorney-client relationship and inflict harms that may be difficult to objectively gauge. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (noting the seriousness of conflicts of interest, due in part to the difficulties inherent in assessing the impact of the conflict on the attorney's representation). However, the noxious effects of the conflict in this case are readily apparent.

The law has long specifically recognized (except by the Eighth Circuit) the evils inherent in and the conflicts thereby created by a lawyer accepting an official State position as compensation that could only be received by convincing his client to plead guilty.⁴

⁴ S. Dakota Rules of Prof'l Conduct R. 1.7 Conflict of Interest: "There is significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer." The comments to the rule further explain: "The lawyer's own interests should not be permitted to have an adverse affect on representation of a client." *Id.* The rule's underlying policy is "obvious"; such an agreement like in this case drives a wedge between the lawyer's own personal interests and the interests of his client

This Court's guidance is necessary to explain why the only remedy for the affected client is to have the plea vacated due to such egregious misconduct by the lawyer. The client has not only the right to have a lawyer represent him, but an effective one, which clearly did not happen in East's case.

C. Whether When an Attorney Fails to Investigate an Exculpatory Fact it Invalidates the Guilty Plea

A guilty plea may be invalidated as involuntary and unknowing due to defense counsel's failure to discover material exculpatory evidence and advise his client accordingly. *Hill v. Lockhart*, 474 U.S. 52 (1985).

1. Hill Supports the Conclusion That a Plea Entered Without Disclosure of Material Exculpatory Evidence is Involuntary

This Court's cases emphasize the role of the advice of counsel in establishing that guilty pleas are voluntarily and intelligently made. *Brady v. United States*, 397 U.S. 742, 758 (1970). The Court made clear in *Hill*, however that "[w]here, as here, a defendant is represented by counsel during the guilty plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorney's in criminal cases.'" 474 U.S. at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Thus, a plea of guilty based on upon sub-standard advice is involuntary and therefore invalid. *Id.*; *McCarthy v. United States*, 397 U.S. 459, 466 (1968).

In explicating the "prejudice" inquiry at the plea stage, *Hill* employed defense counsel's failure to uncover exculpatory evidence as an illustration.

[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendations as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of the trial.

Id. at 59. Thus, the failure of counsel to discover a particular exculpatory fact which would likely cause an attorney to advise rejection of a plea agreement violates the Sixth Amendment and invalidates the plea.⁵

Hill's Sixth Amendment analysis served to provide assurance that criminal convictions are accurate. East's conviction is certainly not accurate. As the Court explained in *Strickland*, the right to counsel represents "one of the crucial assurances that the result of the proceeding is reliable," 466 U.S. at 694, and is "critical to the ability of the system to produce a just result." *Id.* at 691-92. Reliability requires accuracy. East did not have an attorney representing him because counsel was more concerned about his promised Prosecutor job. *Hill's* recognition that *Strickland* applies to the guilty plea process demonstrates that the Sixth Amendment serves to promote accuracy of the convictions entered pursuant to such pleas. In other words, a plea entered without the discovery of material exculpatory evidence, such as medical doctors who can prove that the accusations against East could not have happened, is one upon which reliance is not justified.

⁵ Had counsel investigated East's medical condition rather than being concerned about becoming a Prosecutor he would have discovered a valid claimed defense that any reasonable attorney would have advised rejection of this plea

Given that the trial rights to effective assistance of counsel promote reliable, i.e., accurate, verdicts, it follows that the right would also promote reliable, i.e., accurate guilty pleas.⁶ For example, in *Jacobson v. United States*, 503 U.S. 540 (1992), the Court found that Jacobson had been entrapped as a matter of law into receiving visual depictions of minors engaging in explicit sexual acts due to the conduct of various government agencies in soliciting orders from him. If Jacobson had entered a guilty plea without knowing that those who solicited him were government actors, thereby foregoing his entrapment defense, the question of whether the plea was voluntary would depend on whether or not his counsel should have discovered the fact that the solicitors were government agents. If counsel should have discovered the fact, Jacobson's plea would be involuntary because he pleaded guilty without knowing a fact reasonably likely to cause him to go to trial; the availability of an entrapment defense. *Hill*, 474 U.S. at 59.

Hill, makes clear that a plea is not voluntary if the defendant, like East, is kept in the dark as to material exculpatory facts. *Id.* at 56. if defense counsel is at fault, like in this case,⁷ than the Sixth Amendment provides relief under *Hill* due to the failure of the system to produce a "just result." *Strickland*, 466 U.S. at 685.

2. Negotiated Guilty Pleas are not "Foolproof"

⁶ See *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993) (*Strickland* guarantee rights that "have the effect of ensuring against the risk of convicting an innocent person")

⁷ Counsel failed to investigate East's medical condition which would have led to medical doctors proving that the accusations against East could not have happened

This Court has recognized that no guilty plea framework is "foolproof," *Brady*, 397 U.S. at 758, and that "no procedural device for the taking of guilty pleas is so perfect in design and exercises as to warrant a *per se* rule rendering it uniformly invulnerable to challenge." *Blackledge v. Allison*, 431 U.S. 63, 73 (1977) (quoting *Fontaine v. United States*, 411 U.S. 213, 215 (1973)).

Thus, even though *Allison* explicitly denied that any promises had been made to induce his plea at the time he entered it, the Court permitted him to assert a later claim that there were such promises and that they went unfulfilled. "The barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable." *Id.* at 74. In short, "if, as *Allison* alleged, he was advised by his counsel to conceal any plea bargain, his denial that any promises had been made might have been a courtroom ritual more sham than real." *Id.* at 78. If a defendant may seek to conceal the promises he received to secure the benefit of his bargain, it follows that he might also falsely declare his guilt, particularly if he receives advice that a favorable plea offer can only be accepted by making such statements.⁸

This Court has acknowledged that it cannot "say that guilty plea convictions hold no hazards for the innocent." *Brady*, 397 U.S. at 757.

This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so whether the conviction is by plea

⁸ In return for a plea of guilty East was promised the Nebraska case would be dismissed and he would only get 5-7 years in the South Dakota case. Both of which did not happen, i.e., breach of agreement. Moreover, at the time of the plea counsel was interested in advancing his own career rather than defending East

or trial. We would have serious doubts about this case if the encouragement of guilty pleas by offer of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectation that courts will satisfy themselves that pleas of guilty are voluntarily made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crime with which they are charged.

The Court's confidence in guilty pleas is based on two assumptions: that defendants receive "adequate advice of counsel," and "that there is nothing to question the accuracy and reliability of the defendants' admissions." *Id.* Both of which are relevant to this case.

3. East's Lawyer Violated his Duty to Investigate

In order to provide a defendant with constitutionally effective assistance, "counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how to best represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). This investigation must include "an independent examination of the relevant facts, circumstance, pleadings and laws." *Foster v. Dugger*, 823 F.2d 402, 405 n.9 (11th Cir. 1987).

It is without question, East's medical condition was a relevant fact, especially when he was accused of penile vaginal intercourse. Counsel failed to attempt to investigate this exculpatory fact and thereby did not provide competent and diligent representation. The reason was, as counsel admitted to, he was promised the Prosecutor job if he got East to plead guilty.

The ethical rules and case law go to great lengths to ensure counsel diligently investigates a defendant's case. These admonitions are useless if counsel did not even bother to investigate East's medical condition. The decision whether to plead or go to trial is probably the most important single decision in any criminal case and as this Court has noted, given the number of cases that end in plea bargains, plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

Here, there is no evidence that East's lawyer did anything at all to investigate his medical condition or his case, to be informed as to the applicable law, or to assist his client in assessing whether to go to trial or to plead guilty. All the evidence is to the contrary. East's lawyer did not inspect the State's discovery materials. By failing to even attempt any investigation, East's lawyer did not merely violate his most fundamental obligation as East's lawyer, he set himself up to violate all of his obligations as his lawyer.

4. Having Conducted no Investigation, East's Counsel Failed in his Duty to Offer Informed Opinion

In representing a client considering a plea or going to trial, a lawyer must evaluate pertinent legal criteria, weigh the advantages and disadvantages of each potential outcome, and understand and convey to the client all important potential consequences. In a proposed guilty plea offer, would include (1) a full explanation to the client of the legal predicament the client faced; (2) the risks

of alternative courses of action like going to trial; (3) the benefits of accepting or rejecting a guilty plea offer; and (4) the legal requirements for entering a plea.⁹

Lawyers, moreover, are required to provide objective advice to clients. All prevailing professional standards acknowledge this duty of counsel, particularly in the context of accepting or rejecting a guilty plea offer. *S. Dakota Rules of Prof'l Conduct R. 1.1 Competence*. The advice given must be an honest reflection of the lawyer's best judgment. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A client is entitled to straightforward advice expressing the lawyer's honest assessment.

Under this Court's jurisprudence, a lawyer's failure to render such advice, which was obvious in East's case, constitutes deficient performance within the meaning of the Sixth Amendment. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("[c]ounsel must, after making an independent examination of the facts, circumstances, pleadings and laws involved, offer his informed opinion as to what plea should be entered.")

For example, a total failure to inform the accused of a plea offer would be less insidious than an attorney who gives incompetent advice regarding the chances of success at trial.¹⁰ This is because a defendant ignorant of a plea

⁹ Counsel did not do any of the four requirements and instead made threats to induce East to plead guilty

¹⁰ East was not informed of his chances at trial; even counsel did not know since he did no investigation into East's case. Moreover, counsel was only concerned about getting East to plead guilty in order to be compensated with a "promised" Prosecutor job

offer nonetheless may have a perfectly well-informed assessment of his chances at trial, whereas a defendant who accepts a plea offer on the basis of unreasonable advice not only has lost his opportunity to prove his innocence, he also is embarking upon a plea agreement with a fundamentally distorted view of his prospects, just like East's case.

Because East's lawyer breached his duty to investigate, he also necessarily abdicated his responsibility to offer East "his informed opinion as to what plea should be entered." *Von Moltke*, 332 U.S. at 721. To put a finer point on it, East's lawyer had no informed opinion and did not even go through the motions of offering one.

This Court's guidance is necessary to explain why the only remedy for a defendant is to have the plea vacated due to an attorney's failure to discover or investigate an exculpatory fact.

D. Whether when Medical Doctors are able to Prove a Defendants' Medical Condition Allowing them to Prove with Certainty that the Accusations Against the Defendant could not have Happened Demonstrates Actual Innocence Warranting Habeas Relief

The most important undisputable fact of this case is East has never been able to get an erection. East was born with a medical condition of myelomenigocele / spina bifida, which is a congenital neurological condition of the lower back / spinal cord. East had surgery for this shortly after birth.

MD Maria Stys is an "extraordinary exculpatory" witness. The exculpatory testimony she was willing to provide the Court proves East's medical condition affects his ability to get an erection.

Growing up, East had to have MRI's every other year on his spinal cord due to the severity of his spina bifida. Due to this medical condition, East has a documented history showing he has suffered from neurological symptoms (incontinence, lower extremities weakness / decreased sensation, etc.). Males, like East, with spina bifida / myelomenigocele report significant symptoms of erectile and ejaculatory dysfunction.

This medical evidence reveals undisputable facts underlying East's clinical condition at the time of the alleged crime. The functional neurological deficits that counsel utterly failed to explore or present at any phase of the criminal proceedings were not just those of a "back injury" like a transitory back spasm from a childhood football game. Rather they are the consequences of a man since birth having an extensive history of physical and neurological ailments. Those ailments have denied East the ability to obtain an erection and multiple doctors have confirmed that because of East's condition he could not have done what he was accused of which was penile vaginal intercourse.

This Court's guidance is necessary to explain why the only remedy for a Defendant is to have the conviction vacated, set a side, and the original indictment dismissed when Medical Doctors can prove with certainty that the accusations against the Defendant could not have happened meaning the Defendant is actually innocent.

E. Whether, Appellate Court Erred in Denying a Certificate of Appealability and Affirming the District Courts Judgments

East reincorporates what was stated in Sections A-D as to why the Appellate Court erred in Denying a Certificate of Appealability and Affirming the District Courts Judgments. Moreover, as articulated below an innocent man is being unjustly incarcerated.

1. Protecting the Actually Innocent from Unjust Incarceration is a Paramount Goal of the Criminal Justice System

The questions presented in this case must be evaluated in light of the crucial and fundamental importance of protecting actually innocent people from unjust incarceration. “[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.” *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). As this Court has recognized, an innocent person has a “powerful and legitimate interest” in obtaining release from incarceration. *Kuhlman v. Wilson*, 472 U.S. 436, 452 (1986); *Schlup*, 513 U.S. at 324. ([T]he individual interest in avoiding injustice is most compelling in the context of actual innocence.”). This individual interest is reflected in our society’s “fundamental value determination … that it is far worse to convict an innocent man than to let a guilty man go free.” *Schlup*, 513 U.S. at 324 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

2. Petitioner’s Rarely Claim Actual Innocence

As Judge Friendly remarked more than 50 years ago: “the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.” *Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 145, 145 (1970). This Court acknowledged

in *Schlup* that Judge Friendly's insight "remains largely true today." 513 U.S. at 322.

Nevertheless, it is common misconception that all prisoners – even those who are undeniably guilty – maintain their innocence, and that their claims of innocence risk burdening busy courts. Research, however, suggests otherwise.

A study of federal habeas petitions, which examined more than 1,500 non-capital habeas cases filed by state prisoners, concluded that fewer than 4% of petitioners raised "new evidence of innocence of the offence of conviction – either DNA or non-DNA." Nancy J. King et. al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 15-18, 30 (2007), available at <https://www.ncjrs.gov/pdffiles/nij/grants/219559.pdf>. Among capital cases, in which the stakes are undeniably higher, that number rises to a still-small 10.8%. *Id.* at 29. These numbers cohere with anecdotal evidence that the number of prisoners who insist on their innocence is small. See Jim Petro & Nancy Petro, *False Justice: Eight Myths that Convict the Innocent* (2010) at ix, 217-19 (presenting anecdotal evidence from Lauren McGarity, mediator and prison educator, that of the "nearly one thousand" convicted felons that she has known, only two have said they are innocent).

3. The Development of Post-Trial Evidence is Imperative to Ensure That the Claims of Innocent Individuals can be Heard

The concerns raised about are not just abstract. East's case exemplifies all of them. Authorities rushed to judgment, disregarding elementary investigating standards, and forced a suspect for a crime that never occurred. These

deficiencies intersected with counsel's failure to investigate obvious leads or to challenge evidence through cross-examination and independent expert analyses. Only supplementation of the record following post-trial investigation revealed these defects.

East is not alone, rather, based on exonerations of innocent individuals, there are numerous examples of wrongfully convicted individuals who were able to demonstrate counsel's inadequacy only by supplementing the record following post-trial investigation. A few salient examples follow below.

Lisa Marie Roberts was charged with the murder of a woman with whom she was involved in a love triangle. *Roberts v. Howton*, 13 F. Supp. 3d 1077, 1082 (D. Or. 2014). She pleaded guilty to manslaughter in 2004 due to ineffective assistance. *Id.* at 1082, 1103. Namely, after confronted with the prosecution's preliminary analysis of cell tower evidence,¹¹ her trial counsel failed to obtain an expert analysis of that evidence, and then provided deficient advice to Roberts. *Id.* at 1098, 1103. In reality, the cell tower evidence was inconclusive and did not actually inculpate Roberts. *Id.* at 1101. After the district court Robert's procedural default under *Martinez*, *Id.* at 1099, expert reinvestigation of the phone records led to the conclusion that cell tower data was incapable of pinpointing Robert's location, *Id.* at 1102-03. Ms. Roberts was later exonerated. Lisa Roberts, Nat'l Registry of Exonerations' <https://tinyurl.com/hcn9wszu> (last updated June 9, 2014).

¹¹ Similar to the alleged condom in East's case

Daniel Larson was convicted of felony possession of a dagger and sentenced to 28 years to life. *Larsen v. Adams*, 718 F. Supp. 2d 1202, 1206-07 (C. D. Cal. 2010), *aff'd sub nom. Larsen v. Soto*, 742 F.3d 1083 (9th Cir. 2013). Although he did not raise ineffective assistance on direct review, the district court excused the default under *Schlup* and held an evidentiary hearing, at which Larsen supplemented the record with documentary evidence and exculpatory testimony from multiple witnesses.¹² *Id.* at 1211-19. The Court determined that trial counsel prejudiced Larsen in failing to locate reasonably reachable and "extraordinary exculpatory" witnesses, and in failing to bring a motion for a new trial after Larsen notified counsel about the witnesses. *Id.* at 1228. The Court granted Larsen's habeas petition, and he was later exonerated. *Daniel Larsen, Nat'l Registry of Exonerations'* <https://tinyurl.com/4mtk523c> (last updated Dec. 15, 2017).

Randy Liebich was convicted of first-degree murder of Steven Quinn, a two year old child, and sentenced to 65 years in prison. *People v Liebich*, 2016 IL App (2d) 130894U, ¶ 3. He raised an ineffective assistance claim in a post-conviction petition. *Id.* at ¶ 4. In support, Liebich's post-conviction counsel obtained affidavits from doctors¹³ explaining why Steven's cause of death could not have been attributed to Liebich-based on new evidence of Steven's medical records and histological slides. *Id.* ¶¶ 7, 65. Finding a reasonable basis to conclude that Liebich's trial counsel was ineffective for failing to present such

¹² Similar to the witnesses in East's case

¹³ Similar to the medical doctors in East's case

Evidence at trial, the appellate court reversed the trial court's dismissal of the ineffective assistance claim and remanded. *Id.* ¶¶ 107-09. The State eventually dropped the charge. *Randy Liebich, Nat'l Registry of Exonerations'* <https://tinyurl.com/47cw4b8y> (last updated Apr. 30, 2020).

These profiles illustrate the substantial risk and irreparable harm or wrongful conviction that criminal defendants face from ineffective assistance of counsel.

CONCLUSION

Ultimately, as the Federal District Court stated "[East] now has medical doctors who confirm that [he] has an inability to get an erection due to a congenital neurological condition of the lower back, spina bifida." **Appendix C pp. 1-2.** Thus, East does not have the ability to perform intercourse since birth. These medical doctors are able to prove that the accusations against East could not have happened because of this medical condition.

Keeping this iron-clad evidence in mind when carefully reviewing what East was accused of proves an innocent man is in prison for a crime he did not and could not have committed. The following is from the police reports:

Naomi stated that once her and her friend got back to her house, she had gone down into [M.C.'s] room [her daughter]. She heard the girls talking outside. She opened the curtains and saw the girls out there. She told them that they needed to get "their fucking asses inside" ... Naomi stated that at one point she told them to get in the car; she was going to take them to JDC. [Juvenile Detention Center]

Naomi stated on the way to JDC that [P.H.] was sitting in the front and [M.C.] was sitting in the back. Naomi stated that she has tried to protect [M.C.] from things like this happening and Naomi stated at one point her and [P.H.] began to argue because Naomi had made a comment to [M.C.] that she didn't want her hanging out with people like [P.H.] as

Naomi believed that they had done drugs and they obviously snuck out. She and [P.H.] began to argue. At one point [P.H.] called her a "bitch".

Naomi stated then [P.H.] began to calm down; told her that she cuts herself and that there have been other issues in her life. Naomi stated that [P.H.] then said, "well, if we're being honest" ... that is when [P.H.] proceeded to tell her that they were both held down and raped.

[P.H. stated that East] had sex with her [for] about two seconds. She stated that he was on top of her, put his penis inside of her vagina. She stated that she was out of it; she stated that it went on for about two seconds. She advised that her underwear was moved to the side. [P.H.] advised that [East] used a condom. She didn't know where the condom came from and was unable to describe it. She stated that she was lying on her back when his penis went in her vagina. She stated that when she went to the bathroom he went and had sex with [M.C.].

[M.C.] stated that her and [East] were just sitting there and he tried pulling her pants off. She stated she fell back and he got on top of her. She stated that she couldn't move. She advised that she told [East] no, something bad was going to happen and he said it was okay because he had a condom.

She stated that [East] moved her underwear to the side and put his penis inside of her. [M.C.] advised that she said no, no and it got to the point where she couldn't fight anymore. She stated that finally she pushed him off and he got up. She stated that when [East] got off she said that he said that "see that wasn't so bad". [M.C.] advised that he then moved on to [P.H.] and he started doing the same thing to [P.H.] She stated that [P.H.] was not fighting and then [P.H.] said something similar to no, she couldn't cheat on Landon.

There was no physical evidence in this case as the physical exams of P.H. and M.C. revealed no redness, no bruises, etc. Both hymens were intact and/or normal. There was no DNA evidence in this case linking East. There was not one body hair of either girl in East's bedding and clothing. There was not one body hair of East in any of the girls' clothing. The only evidence the prosecution had to make an attempt to convict Mr. East was the statements above. Which we

now know because of the medical doctors that those statements were in fact lies and there is absolutely no reason to believe anything these girls said.

The Eighth Circuit says it is okay, the Statute that East involuntarily plead guilty to allows "a man" to commit the violation of sexual contact other than with his genitals. This Court needs to intervene and disband this new precedent.

Tragically we know what happened on that night in 2012. These two teenage girls got caught sneaking back into their house. They were on their way to JDC and in order to get out of being in trouble they claimed they were raped by penile vaginal intercourse. P.H. had a history of doing this as a month earlier she accused a different man of sexual assault in order to get out of being in trouble. As a result Mr. East suffered the consequences of the girls' lies.

It is clear in this case that no reasonable juror could have found East guilty of penile vaginal intercourse, which is what East was accused of. Therefore, it is without question East is an innocent man. Horrifically, as of right now he is subjected to a 40 year prison sentence and given his serious health issues an innocent man may be condemned to a de facto life sentence for a crime he physically could not have done.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: December 30th 2024