

24-6815

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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TANNER LANCE KING,

*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*

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**PETITION FOR A WRIT OF CERTIORARI**

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TANNER LANCE KING  
*Pro Se Petitioner*  
Fed. Reg. No. 15649-509  
FCI Beaumont (Medium)  
P.O. Box 26040  
Beaumont, Texas 77720

ORIGINAL

FILED  
FEB 18 2025

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

RECEIVED  
MAR - 5 2025  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

**QUESTION PRESENTED**

Whether the Fifth Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion by denying Mr. King's §2255 claim that counsel was constitutionally ineffective during the plea negotiation stage – because the record did not conclusively negate the factual predicates for the claim, and because no evidentiary hearing was held – is irreconcilable with controlling precedent, such that this Court should remand to the United States Court of Appeals for the Fifth Circuit with instructions to issue a certificate of appealability?

## PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

## RELATED CASES

- *United States v. Tanner Lance King*, No. 7:20-cr-330, U.S. District Court for the Western District of Texas, Midland-Odessa Division. Judgment entered June 10, 2021.
- *United States v. Tanner Lance King*, No. 21-50543, U.S. Court of Appeals for the Fifth Circuit. Opinion affirming entered Apr. 13, 2022.
- *Tanner Lance King v. United States*, S.Ct. No. 22-5105, U.S. Supreme Court. Cert. denied Oct. 10, 2022.
- *Tanner Lance King v. United States*, No. 7:23-cv-137, U.S. District Court for the Western District of Texas, Midland-Odessa Division. Judgment entered Apr. 10, 2024.
- *Tanner Lance King v. United States*, No. 24-50354, U.S. Court of Appeals for the Fifth Circuit. Judgment denying COA entered Nov. 27, 2024.

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**OPINIONS BELOW**

The Judgment of the United States Court of Appeals for the Fifth Circuit denying Petitioner's motion for certificate of appealability is unpublished and may be found at USCA Case No. 24-50354; *Tanner Lance King v. United States of America* (Nov. 27, 2024) (Appendix - A1).

The Order of the United States District Court for the Western District of Texas, Midland-Odessa Division, denying Petitioner's motion to vacate and denying him a certificate of appealability is unpublished and may be found at USDC Case No. 7:23-cv- 137; *Tanner Lance King v. United States of America* (Apr. 10, 2024) (Appendix - A3).

**STATEMENT OF JURISDICTION**

The judgment denying Petitioner's motion for certificate of appealability was issued on November 27, 2024. This petition is timely filed pursuant to Sup. Ct. R. 13. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Sixth Amendment, which provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c) provides that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—  
...

(B) the final order in a proceeding under section 2255.  
...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

**STATEMENT OF THE CASE**

On August 28, 2023, Mr. King timely filed his *pro se* § 2255 motion, alleging that counsel was constitutionally ineffective during plea negotiations. [DE #39, pp. 19-26; DE #40, pp. 3-5.] Specifically, Mr. King argued that counsel was constitutionally deficient for advising him that the prosecution's formal plea offer failed to provide any benefit. Mr. King cited to the portion of the record demonstrating counsel's deficient performance as memorialized at the change of plea hearing.

THE COURT: Were there any formal plea offers that needed to be conveyed to Mr. King?

MR. COLTON: This morning, I received the standard plea bargain agreement, which just says that the government won't oppose acceptance of responsibility.

THE COURT: Okay.

MR. COLTON: So *it's not anything that benefits my client*, your Honor.

THE COURT: That's been rejected.

MR. COLTON: Yes, your Honor.

THE COURT: Okay. Is that right,  
Mr. King?

THE DEFENDANT: Yes, sir.

DE #45, p. 7 (emphasis added).

Mr. King argued that counsel's misadvice during the plea negotiation stage deprived him of the right to make an informed decision whether to accept the proposed plea agreement or enter an open plea. *See, Hill v. Lockhart*, 474 U.S. 52, 56-57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *see also Boyd v. Waymart*, 579 F.3d 330, 353 (3d. Cir. 2009) (A defendant "cannot make a reasonably informed decision about a plea in the absence of counsel's advice about the advantages and disadvantages of the plea offer, or how it compared to the options of entering an open plea or going to trial."); *see also, Teague v. Scott*, 60 F.3d 1167, 1170 (5th Cir. 1995) ("In determining whether or not to plead guilty, the defendant should be made aware of the relevant circumstances and likely consequences so that he can make an intelligent choice"). Included within the requisite knowledge counsel must convey is the comparative sentence exposure between the accused's various options. *Boyd*, 579 F.3d at 353; *see also United States v. Day*, 969 F.2d 39, 40, 43 (3d. Cir. 1992) (holding that a facially valid claim of ineffective assistance of counsel was presented by the defendant's allegations that, although his counsel informed him about a plea offer extended by the prosecutor, he did not adequately advise

him about the potential sentencing implications).

As to prejudice, Mr. King pointed out that the record established a reasonable probability that had counsel provided him with the required advice, that the prosecution's stipulation that he should receive a three-level reduction in offense level for acceptance of responsibility was a substantial benefit offered by the proposed plea agreement, Mr. King would have accepted the United States' plea offer. Specifically, Mr. King pointed out that the importance he placed on the three-level reduction in offense level for acceptance of responsibility was clear from his inquiry at the conclusion of the change of plea hearing. [DE #54, pp. 12-13 (citing to DE #45, p. 18)]. Mr. King set forth under penalty of perjury that had he been advised that the plea offer conferred a benefit he would have accepted that offer and he noted that the record supported a finding that his sentence would have been less severe had he accepted the formal offer. [Id., pp. 13-15 (citing to DE #44, pp. 17-18)].

The Government's answer asserted that Mr. King failed to show that counsel's advice was inaccurate or that he was prejudiced by such advice. [DE #58, p. 3]. This was based on the prosecution's argument that the plea offer they extended would have provided Mr. King with "no benefit," and that even were Mr. King to have received advice to accept there is no certainty his sentence would have been less severe. [Id., pp. 5-7].

In his reply, Mr. King argued his statutory entitlement to an evidentiary hearing to prove his claim. [DE # 59].

The district court denied this claim without holding the requisite evidentiary hearing, specifically requested by Mr. King. [DE #59; #60]. The court's ruling denying Mr. King's motion for evidentiary hearing stated:

Defendant [sic] sole claim is that his counsel failed to provide him with "accurate advice concerning the benefits and consequences of accepting or rejecting the United States' formal plea offer." The Court starts (and ends) with Strickland's prejudice prong.

\* \* \* \* \*

[T]he Court would have withheld any acceptance of responsibility reduction regardless of the Government's offer because the Court's reasoning for denying acceptance of responsibility was due to Defendant's disciplinary problems at the Rolling Plains Detention Center. Indeed, Defendant's PSR even removed acceptance credits because of those incidents. And the Court was quite clear about this fact in response to counsel's objections to its exclusion at sentencing. In short, Defendant cannot show it is

"reasonably likely" that his sentence would have been different, and thus Defendant cannot show he was prejudiced. As a result, Defendant's § 2255 motion must fail.

DE #60, pp. 3-4.

On April 29, 2024, Mr. King timely filed his notice of appeal. [DE #62].

On November 27, 2024, the United States Court of Appeals for the Fifth Circuit denied COA, [*App. A, A1*]. This petition is timely submitted, within 90 days of the Fifth Circuit's judgment denying COA. [*App. A*].

### REASONS FOR GRANTING THE WRIT

This Court should grant the writ of *certiorari*. At a minimum, this Court should order summary reversal because in denying a certificate of appealability, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This is true because the district court's procedural ruling, denying Mr. King the evidentiary hearing to which he was statutorily entitled – where his entitlement to relief on his claim of ineffective assistance of counsel was not conclusively refuted – is irreconcilable and in direct conflict with 28 U.S.C. § 2255, and was thus clearly debatable amongst jurists of reason under controlling precedent. Additionally, Petitioner's claim of ineffective assistance of counsel provided the required constitutional dimension for a certificate of appealability.

Specifically, Mr. King's §2255 presented a claim that he was deprived of his right to the effective assistance of counsel, enshrined in and guaranteed by the Sixth Amendment to the United States Constitution, by trial counsel's misadvice during plea negotiations, and that absent such misadvice, Mr. King would have accepted the prosecution's formal plea offer and received a less severe sentence.

The district court denied Mr. King's motion to vacate without holding the evidentiary hearing to which he was statutorily entitled, by virtue of the reality that his claims

were neither refuted by the record, palpable incredible or conclusory, and where if proven Mr. King's claim would entitle him to vacation of his conviction and sentence.

Mr. King's claim of ineffective assistance of counsel is of constitutional dimension as it states a violation of the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984).

The lower courts' resolution of Mr. King's claim is debatable amongst reasonable jurists, as shown herein. Specifically, the district court's decision to deny Mr. King's claim, without holding an evidentiary hearing, where he made a *prima facie* showing of ineffective assistance of counsel, is debatable amongst jurists of reason and deserves encouragement to proceed further. The Fifth Circuit's cursory adoption of the district court's rationale to deny Mr. King the COA to which he is entitled should be summarily reversed by this Court.

**A. The Certificate of Appealability Standard.**

To obtain a certificate of appealability, a *habeas* petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must '[s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted).

“[A] COA does not require a showing that the appeal will succeed.” *Id.* at 337. As this Court has explained: “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Reasonable jurists could debate the merits of Petitioner's ineffective assistance of counsel claim and his entitlement to an evidentiary hearing on the same. The legal arguments, set forth below, demonstrate that Petitioner has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are "debatable among jurists of reason." *Miller-El*, 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

**B. Reasonable Jurists Could Debate or, for that Matter, Agree that an Evidentiary Hearing was Statutorily Mandated.**

The district court erred and abused its discretion by denying Mr. King's §2255 motion without holding an evidentiary hearing where his entitlement to relief on his claim was not conclusively refuted.

Title 28 U.S.C. § 2255 provides that "[u]nless the motion and files and records of the case *conclusively* show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (Emphasis added). The Fifth Circuit has held that when facts are at issue in a § 2255 proceeding, a hearing is required if: (1) the record, as supplemented by the trial judge's personal knowledge or recollection, does not conclusively negate the facts alleged in support of the claim for § 2255 relief; and (2) the movant would be entitled to post-conviction relief as a legal matter if his factual allegations are true. See

*Friedman v. United States*, 588 F.2d 1010, 1015 (5th Cir. 1979); *see also, United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991).

An objective review of the record before the district and appellate courts reveal that nothing conclusively established that Mr. King was not entitled to relief on the claim of ineffective assistance of counsel, presented in his motion to vacate. Thus, Mr. King enjoyed a statutory entitlement to an evidentiary hearing.

As shown in his motion to vacate and supporting papers, Mr. King presented a facially valid claim of ineffective assistance of counsel, based on counsel's misadvice concerning a more favorable plea offer, where he followed counsel's advice and pleaded guilty without securing the available benefits of the earlier plea offer. [DE #54, pp. 9-11]. Mr. King demonstrated a *prima facie* showing of prejudice, in that absent such failure he would have accepted the formal plea offer, enjoyed the benefit of a stipulation for acceptance points, and where – notwithstanding Judge Counts' *post hoc* statement to the contrary – there exists a reasonable probability of a less severe sentence. [Id., pp. 12-15].

As the record does not conclusively negate the factual predicate for Mr. King's claim that his plea was the result of misadvice rising to the level of ineffective assistance of counsel, as required for denial without an evidentiary hearing, the district court abused its discretion in denying this claim without holding an evidentiary hearing and the Fifth Circuit erred in denying COA. Both the district

court's erroneous ruling and the Fifth Circuit's cursory denial of COA are unsupportable on the record. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to this question.

**C. This Court Should Summarily Reverse the Fifth Circuit's Denial of COA.**

This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. Summary reversals are "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was "contrary to" established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was "plainly wrong"). The Fifth Circuit's order denying Petitioner's motion for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit, vacate the Fifth Circuit's order denying COA and remand the matter to the Fifth Circuit with instructions to grant COA.

Respectfully submitted,

Tanner Lance King  
*Pro Se Petitioner*  
Fed. Reg. No. 15649-509  
FCI Beaumont (Medium)  
P.O. Box 26040  
Beaumont, Texas 77720

February 18<sup>th</sup>, 2025.