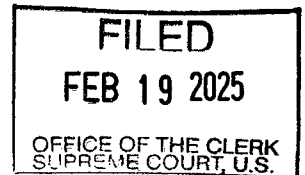


ORIGINAL

24-6888  
No. \_\_\_\_\_



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In the  
Supreme Court of the United States

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RUSSELL WAYNE DRIVER,

*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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RUSSELL WAYNE DRIVER

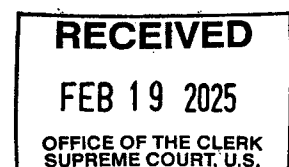
*Pro Se Petitioner*

Fed. Reg. No. 53227-509

FCI Beaumont (Medium)

P.O. Box 26040

Beaumont, Texas 77720



**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. Driver's §2255 claim that counsel was constitutionally ineffective in connection with his sentencing, on a record that did not conclusively negate the factual predicates for the claim, and where 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. Russell Wayne Driver*, No. 4:21-cr-200, U.S. District Court for the Northern District of Texas, Fort Worth Division. Judgment entered Feb. 25, 2022.
- *United States v. Russell Wayne Driver*, No. 22-10207, U.S. Court of Appeals for the Fifth Circuit. Opinion affirming entered Nov. 28, 2022.
- *Russell Wayne Driver v. United States*, No. 4:23-cv-0994, U.S. District Court for the Northern District of Texas, Fort Worth Division. Judgment entered Jul. 15, 2024.
- *Russell Wayne Driver v. United States*, No. 24-10751, U.S. Court of Appeals for the Fifth Circuit. Judgment denying COA entered Dec. 18, 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. 24-10751; *Russell Wayne Driver v. United States of America* (Dec. 18, 2024) (*Appendix - A1*).

The Order of the United States District Court for the Northern District of Texas, Fort Worth Division, denying Petitioner's motion to vacate and denying him a certificate of appealability is unpublished and may be found at USDC Case No. 4:23-cv-0994; *Russell Wayne Driver v. United States of America* (Jul. 15, 2024) (*Appendix - A3*).

**STATEMENT OF JURISDICTION**

The judgment denying Petitioner's motion for certificate of appealability was issued on December 18, 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 September 29, 2023, Mr. Driver timely filed his *pro se* § 2255 motion, alleging that he was deprived of the effective assistance of counsel in connection with his sentencing in the underlying criminal proceeding. See DE #1, p. 5; DE #2, pp. 5-14. Specifically, Mr. Driver argued that he was denied the effective assistance of counsel in preparation for and at sentencing by counsel's failure to obtain and present available evidence in support of a motion for downward variance and to demonstrate that: 1) the 20-year sentence advocated for by the prosecution constituted a statistical de facto life sentence, contrary to their representation to the court; and 2) contrary to the court's assessment, the 20-year sentence under consideration was significantly more harsh than the average or median sentence imposed in similar cases. See DE #2, pp. 5-14; DE #4, EX #1-#3. Mr. Driver made a prima facie showing that counsel was constitutionally deficient for failing to demonstrate that the sentence advocated for by the prosecution at sentencing as "a huge deal," because Mr. Driver is "probably not going to get a life sentence here today with 20 years," [Doc #55, p. 18 (Doc refers to entries to the criminal docket in *United States v. Driver*, Crim. Case #4:21-cr-200 (N.D.Tex))], in fact constituted a statistical de facto life sentence.

Mr. Driver further showed that his former counsel was deficient for failing to show the sentencing court that, rather than representing a sentencing benefit as that court reiterated at sentencing, the 20-year sentence under consideration was more severe than the average or

median sentence imposed on defendants being sentence based on the identical guideline range – prior to consideration of the statutory maximum. See, *id.*, pp. 10, 14. Mr. Driver demonstrated prejudice from counsel's deficiency, i.e., a reasonable probability that the Court would have granted a downward departure and imposed a sentence in the 180 to 208 month range or less. Thus, counsel's deficient performance, resulted in a presumptively longer term of imprisonment and was prejudicial within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984) as applied in *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001).

The Government's answer asserted that Mr. Driver's claim was insufficient in light of counsel's negotiation of what they consider a very favorable plea offer. See DE #15, p. 10. The United States' arguments – which lacked any support from Mr. Driver's former counsel, as the United States chose to forego input from Driver's former counsel – were objectively insufficient to demonstrate that Mr. Driver was conclusively not entitled to relief.

In his reply, Mr. Driver argued his statutory entitlement to an evidentiary hearing to prove his claim. See DE #16.

The district court denied this claim without holding the requisite evidentiary hearing, specifically requested by Mr. Driver. See DE #16; #17. The court's ruling denying Mr. Driver's motion for evidentiary hearing stated:

**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. Driver 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. Driver'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 counsel's acts and omissions in preparation for and during sentencing.

The district court denied Mr. Driver'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. Driver's claim would

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. Driver'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. Driver was not entitled to relief on the claim of ineffective assistance of counsel, presented in his motion to vacate. Thus, Mr. Driver enjoyed a statutory entitlement to an evidentiary hearing.

As shown in his motion to vacate and supporting papers, Mr. Driver presented a facially valid claim of ineffective assistance of counsel, based on counsel's acts and omissions in preparation for and during sentencing. Mr. Driver has made a *prima facie* showing that his former counsel was constitutionally deficient. See DE #2, pp. 6-14. This is true because no reasonable attorney would have failed to seek a downward departure under these circumstances. See, *id.* Likewise, Mr. Driver has made a *prima facie* showing of prejudice from former counsel's deficiencies. See *id.*, p. 14. The record demonstrates that absent these deficiencies there is a reasonable probability that this Court would have granted a downward departure and imposed a sentence in the 180 to 208 month range or less. See, *id.*

As the record does not conclusively negate the factual predicates for Mr. Driver's claim that his former counsel's lack of sentencing advocacy rose 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. *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). 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.

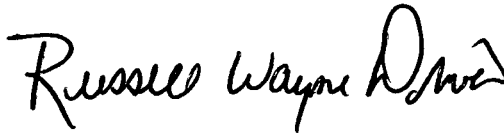
CONCLUSION

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,

Russell Wayne Driver  
*Pro Se Petitioner*  
Fed. Reg. No. 53227-509  
FCI Beaumont (Medium)  
P.O. Box 26040  
Beaumont, Texas 77720

February 10, 2025.

A handwritten signature in black ink that reads "Russell Wayne Driver". The signature is written in a cursive, flowing style.

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

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**In the  
Supreme Court of the United States**

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RUSSELL WAYNE DRIVER,

*Petitioner,*

v.

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*Respondent.*

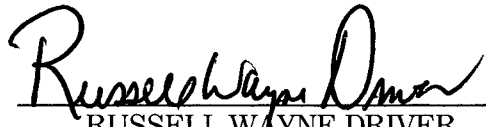
*On Petition for A Writ of Certiorari to the United  
States Court of Appeals for the Fifth Circuit*

**CERTIFICATE OF COMPLIANCE**

I, Russell Wayne Driver, Petitioner *pro se*, hereby certify that according to the word-count tool in WordPerfect, the Petition for Writ of *Certiorari*, consists of 3,061 words, including footnotes. The Petition therefore complies with Rule 33.1(g).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 10, 2025.

  
\_\_\_\_\_  
RUSSELL WAYNE DRIVER

*Pro Se* Petitioner

Fed. Reg. No. 53227-509

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