

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Arthur Payton — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
SEEKING ISSUANCE OF A CERTIFICATE OF APPEALABILITY
FOR MOTION PURSUANT TO 28 U.S.C. § 2255(a)

~~COURT OF APPEALS FOR THE SIXTH CIRCUIT ON APPLICATION FOR CERTIFICATE OF APPEALABILITY~~
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ARTHUR PAYTON - REGISTER NO. 36747-198
(Your Name)

FCI - HAZELTON, P.O. BOX 5000
(Address)

BRUCETON MILLS, WEST VIRGINIA 26525
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Should a Certificate of Appealability be granted to Petitioner who establishes through the record that the Sixth Circuit Court of Appeals engaged into a merit analysis in it's decision to deny granting a Certificate of Appealability in violation of this Court's ruling in Buck v. Davis, 580 U.S. ___, 137 S. Ct. ___, 197 L. Ed. 21, 2017 U.S. LEXIS 1429.
2. Should a Certificate of Appealability be granted to Petitioner who ~~establishes throuh the record that both the Sixth Circuit Court of Appeals~~ on United States District Court Eastern District of Michigan did not properly apply or follow the threshold test for granting a Certificate of Appealability as established by this Court in Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 542 (2000).
3. Should a Certificate of Appealability be granted to determine whether appellate counsel's actions or inactions reaches this Court's standard of ineffectiveness as enumerated in Strickland v. Washington, 466 U.S. 684 (1984), when counsel failed to raise a preserved claim related to celebrity, mega, media star tainted, Federal Rule of Evidence 404(b) on direct appeal?
4. Should a Certificate of Appealability be granted to determine whether trial and appellate counsel's actions or inactions reaches this court's standard of ineffectiveness as enumerated in Strickland v. Washington, 466 U.S. 684 (1984), when trial counsel fails to object to inadmissible evidence presented to the jury during deliberations and appellate counsel's failure to raise the issue on direct appeal?

LIST OF PARTIES

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

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

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

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

The opinion of the United States district court appears at Appendix C to the petition and is

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

☐ For cases from **state courts**:

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

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

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

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

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 15, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 6, 2017, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows: "In all... prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI.

Writs of Habeas Corpus may be granted by the Supreme Court if a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States..." 28 U.S.C. § 2241(c)(3). "The Supreme Court... shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a Federal Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2255(a).

STATEMENT OF THE CASE

On November 5, 2012, in the case then pending in the United States District Court for the Eastern District of Michigan, entitled United States v. Arthur Payton, Criminal No.: 12-20043, Mr. Payton was found guilty by a jury on an indictment of five counts charging violations of conspiracy to commit bank robbery and aiding and abetting bank robbery. He was sentenced to a total of 540 months.

In 2013, Mr. Payton timely filed a notice of appeal. The Sixth Circuit vacated his sentence and remanded for resentencing on June 12, 2014, and the court's mandate issued on July 10, 2014.

On October 24, 2014, an order of disqualification and reassigning case from District Court Trial Judge Lawrence P. Zatkoff to District Court Judge Denise Page Hood was issued.

On February 26, 2015, the District Court conducted Mr. Payton's resentencing and imposed a concurrent sentence of 240 months within the applicable guideline range. He did not appeal the new sentence.

On February 5, 2016, Mr. Payton filed a post-conviction motion under 28 U.S.C. § 2255. The District Court denied the 2255 motion and a Certificate of Appealability on November 30, 2016.

A application for a Certificate of Appealability was filed with the Sixth Circuit Court of Appeals on January 25, 2017. The Sixth Circuit denied the COA on August 15, 2017. (No. 17-1123)

On August 24, 2017, Mr. Payton filed a Petition for rehearing en banc with the Sixth Circuit Court of Appeals and the Sixth Circuit Court of Appeals denied the Petition for Rehearing en banc on November 6, 2017.

Mr. Payton now files this Petition for Writ of Certiorari for the sole purpose of seeking a Certificate of Appealability to allow his claims brought under 28 U.S.C. § 2255 full adjudication on the merits by the 6th Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

- A. **A Certificate of Appealability should be issued where the decision of the Sixth Circuit conflicts with decisions of this Honorable Court pertaining to the issuance of COAs.**

In its order dated August 15, 2007, after conducting a merits analysis, see Appendix B ppg. 2-5, the Sixth Circuit ruled that Mr. Payton's application for a COA should be denied because reasonable jurists would not debate his trial counsel's decision not to object to the admission of unadmitted transcripts given to a jury upon request during deliberation. Nor would reasonable jurists debate appellate counsel's decision to not raise the issue on direct appeal. Nor would reasonable jurists debate appellate counsel's decision to not raise a fully briefed pre-trial preserved for direct appeal issue related to the use of mega star, Oprah Winfrey, under the guise of 404(b) evidence to unfairly prejudice the jury against the defendant. (see Appendix D ppg. 1-2)

This Court has set the threshold test for granting a COA. Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). A COA is required to appeal the denial of a motion to vacate sentence under 28 U.S.C. § 2255. A court may grant a COA if there is a "substantial showing of the denial of a constitutional right." Treesh v. Bagley, 612 F.3d 424, 439 (6th Cir. 2010) (citing 28 U.S.C. § 2253(c)(2)). To obtain a COA under this standard, the applicant must show that "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." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)).

This Court repeatedly emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." Miller-El v. Cockrell, 537 U.S.

322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

In relation to the denial of an ineffective assistance of counsel claim raised in the District Court, this Court in Buck v. Davis, 580 U.S. ___, 197 L. Ed. 2d 1, 137 S. Ct. ___, (2017) has stated that "[t]he Certificate of Appealability (COA) inquiry is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the Districtt Court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encourage to proceed further." Id., (quoting Miller-El v. Cockrell, 537 U.S. 322 (2003)). This Court went on to state that "[w]hen a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Buck, supra., (quoting Miller-El, supra). In this instance the Sixth Circuit engaged into a merit analysis in its decision to not grant a Certificate of Appealability and ignored the Slack v. McDaniel standard. (see Appendix B ppg. 2-5) This placed too heavy a burden on Mr. Payton at the COA stage. Judicial precedent flatly prohibits such a departure from the procedure prescribed by 28 U.S.C. § 2253.

B. A Certificate of Appealability should be issued whereas the decision of the District Court was predicated upon a Sixth Circuit case which conflicts with decisions of other Circuits.

In his motion to vacate, Mr. Payton argued that he received ineffective assistance of counsel because during deliberations his trial counsel failed to renew his previous trial objection to the district court's admission of transcripts not in evidence when the jury sent a note to the Court requesting the transcripts (see Appendix C ppg. 15-16). During trial Mr. Payton objected to the accuracy of the transcripts through his attorney's objection to the government's use of the related recording and transcript because of illegal tampering with/of the recording device itself. In denying Mr. Payton relief on this claim the District Court

cited United States v. Scarborough, 43 F. 3d 1021, 1025 (6th Cir. 1994) which makes an allowance for jury members to possess transcripts not admitted into evidence during deliberations. Contrary, the Seventh Circuit in United States v. Berry, 92 F.3d 597 (7th Cir. 1996) which Mr. Payton cited in support of his arguments ruled in relation to a jury being in possession of transcripts not entered into evidence during deliberations could present a reasonable possibility that the evidence had a prejudicial effect upon the jury's verdict. The result was Berry being granted a new trial. Whereas, the District Court believed that the jury's use during its deliberations of a transcript identifying the defendant was ~~unfairly-prejudicial-because-of-the-central-importance-of-the-recording~~ (and transcript) to the guilty verdict.

The division among these courts establishes that reasonable judges do/could disagree/debate as to whether transcripts not admitted into evidence should not be in the possession of a jury during deliberations in relation to the possibility of prejudice depending upon the specifics of each case. Therefore, under this Court's standard in Slack, a COA should issue so that the court of appeals can decide the unique specific issues pertaining to whether Mr. Payton's trial counsel rendered ineffective assistance by failing to renew his objection to the jury's use of unadmitted transcripts during deliberations as well as appellate counsel's failure to raise the issue on appeal.

C. A Certificate of Appealability should be issued whereas the decision of District Court is in conflict with the decision of this Honorable Court.

In his motion to vacate, Mr. Payton argued that he received ineffective assistance of counsel because his appellate attorney did not raise a paramount issue involving prejudicial Rule 404(b) evidence on appeal even though it was fully briefed pretrial and specifically preserved for direct appeal. (see Appendix D ppg. 1-2) Special Agent Brett Leatherman testified at trial that he viewed an Oprah Winfrey show episode titled "Men Who Coerced Women Into Robbing Banks" in which Mr. Payton made an appearance

and confession in 1994 from prison in relation to a prior case. Trial counsel objected pretrial via motion to exclude inadmissible 404(b) evidence. Appellate counsel did not raise the issue on appeal.

Under Federal Rule of Evidence Rule 404(b) "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." but "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." The government has ~~not articulated any purpose or relevance as to the other robbery evidence, and~~ the district court can discern none, other than to support the prohibited inference that Mr. Payton is more likely to have committed the charged offense simply because he has a character for breaking robbery laws generally. As such, it is subject to exclusion under Rule 404.

In denying Mr. Payton relief on this claim the district court ruled that it was not persuaded that the government's use of the national celebrity and star power of the Oprah Winfrey name nor Petitioner's related televised in jail interview and confession which was widely aired on a national level 18 years earlier in reference to a prior conviction of bank robbery, amounted to reversible jury prejudice.. (see Appendix C ppg. 10-12)

As an analogy, this Court's ruling in Rideau v. Louisiana, 373 U.S. 723 (1963). Whereupon it reversed, presuming prejudice when televised interview of defendant's confession from prison has been widely aired and ruled the jury should not have been exposed the interview. Payton submits that he was exposed to anti-defendant influence when the jury heard testimony about his appearance on the Oprah Winfrey Show. Because of the national recognition and influence that mega star Oprah Winfrey has on society, this exposure subjected Mr. Payton to hostility and anti-defendant influence on the jury.

Accordingly, the district court erred when it allowed testimony regarding the details of Mr. Payton's appearance on the Oprah Winfrey Show to be

introduced to the jury. And, appellate counsel's failure to raise the issue on appeal has prejudiced the outcome of the proceeding. Whereas defendant asserts the likelihood of his conviction being vacated at the time his sentence was vacated was substantial.

The division among these courts establishes that reasonable jurists could debate issues relating to the prejudicial impact a widely aired televised interview of a defendant's confession can have on trial proceedings.

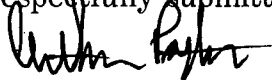
Accordingly, this issue or "Oprah" effect on the jury identifies what ~~is tantamount to a question of first impression which warrants issuance~~ of a COA whereas such a novel issue merits further judicial consideration. See United states v. Espinoza-Saenz, 235 F.3d 501, 502 (10th Cir. 2000). Again at center is the government's use of "Oprah's" national celebrity and star power under pretext of 404(b) evidence to prejudice the jury against Mr. Payton when it had other means of presenting its case available. Mr. Payton has not been able to locate a single case citation where a mega star's celebrity star power has been used in such a way as to prejudice a jury against a defendant. (see Appendix D ppg. 1-2)

- (1) For the foregoing reasons Mr. Payton has established by compliance with the Slack v. McDaniel standard that a "substantial showing of the denial of a constitutional right has been met. (2) That "reasonable jurists could debate whether or not his petition brought under 28 U.S.C. § 2255 should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

CONCLUSION

The petition for a writ of certiorari should be granted, for the specific purpose of issuance of a Certificate of Appealability.

Respectfully submitted,



Arthur Payton

Date: January 1, 2018