

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARD AUGUSTA FOX — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

LEONARD AUGUSTA FOX FED NO. 22427-076

(Your Name)

INMATE LEGAL MAIL
FCI MARIANNA PO BOX 7007

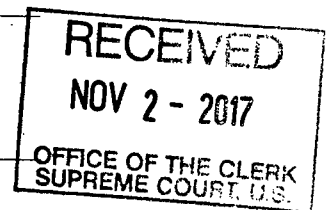
(Address)

MARIANNA, FL 32447-7007

(City, State, Zip Code)

NONE

(Phone Number)



QUESTION(S) PRESENTED

1. Whether the lower court erred denying a certificate of appealability on the basis that "Fox faced overwhelming evidence of his guilty and lacked a viable defense," on his claim that counsel advised him to take a plea bargain because the government would recommend a 10-year sentence, but counsel never told him that the government also said that there was "serious doubt" the court would even consider a 10-year sentence. Does the court's denial of a COA here contravene this Court's holding in Lee, that reversed the Sixth Circuit's rule that a movant must show likelihood of success at trial under Hill?
2. Whether the lower court erred in denying an evidentiary hearing where Mr. Fox presented affidavits from others and himself and has presented facts that are not refuted by the record that would support his claims -- especially where the affidavits create a "factual dispute." The lower court here held that no evidentiary hearing is needed because the affidavits do not show prejudice.

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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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

☐ 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☒ is unpublished.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 B 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 July 27, 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: _____, 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. § 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

United States Constitution, Amendment VI:

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.

Title 28 U.S.C. § 2255:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.[]

STATEMENT OF THE CASE

Leonard Augusta Fox filed his motion to vacate under 28 U.S.C. § 2255 September 30, 2013, through retained counsel to challenge his conviction in the Western District of Tennessee. In his timely-filed motion, Mr. Fox raised that his trial counsel was ineffective for advising him to take a plea deal where the government would recommend a 10-year prison sentence, but counsel failed to tell Mr. Fox that the government also told counsel there was "serious doubt" that the court would consider a 10-year sentence.

On January 25, 2017, the District Court denied Mr. Fox's motion. The Court ruled that Mr. Fox's affidavits from himself and others in support of his motion did lend to his lawyer's deficient performance, but could not overcome the lack of prejudice enough to require an evidentiary hearing. The Court denied a certificate of appealability ("COA") because Mr. Fox could not prevail on the merits of his claims.

On June 27, 2017, Mr. Fox filed an amended motion for a COA with the Court of Appeals for the Sixth Circuit. The Court denied Mr. Fox a COA on July 27, 2017. In its order, the Court ruled that "Fox faced overwhelming evidence of his guilt and lacked a viable defense. By pleading guilty, Fox reaped significant benefits from the government, including the dismissal of two counts of sex trafficking of minors, the ten-year sentence recommendation, and an oral agreement not to bring a superseding indictment charging additional sex-trafficking offenses. "Jurists of reason could not disagree with the district court's conclusion

that Fox failed to demonstrate prejudice." The Court ruled that Mr. Fox was not entitled to an evidentiary hearing "because there was no factual dispute as to the prejudice issue."

Mr. Fox did not seek a reconsideration of the Court's COA denial.

REASONS FOR GRANTING THE PETITION

Mr. Fox's petition should be granted because the lower court's denial of a COA was contrary to this Court's holding in its recent decision in Lee v. United States, 137 S. Ct. 1958 (June 23, 2017). In Lee, this Court held that the Sixth Circuit had erred in ruling that Mr. Lee could not show prejudice in his motion to vacate "in light of the overwhelming evidence" of his guilt. Even though Mr. Lee's lawyer gave him bad advice to plead guilty (by saying that he could not be deported), the Sixth Circuit ruled that he could not show prejudice under Hill v. Lockhart, 474 U.S. 52 (1985), because the evidence of his guilt was too much for him to say he would have gone to trial instead of pleading guilty.

The same thing happened here in Mr. Fox's case. The Sixth Circuit denied Mr. Fox a COA because "Fox faced overwhelming evidence of his guilt and lacked a viable defense." Order, at 3 (No. 17-5352). "By pleading guilty, Fox reaped significant benefits from the government, including the dismissal of two counts of sex trafficking of minors, the ten-year sentence recommendation, and an oral agreement not to bring a superseding indictment charging additional sex-trafficking offenses." *Id.*

In Lee, this Court rejected the Sixth Circuit's reasoning:

When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain. That is because, while we ordinarily apply a strong presumption of reliability to judicial proceedings, we cannot accord any such presumption to judicial proceedings that never took place.

Lee, 137 S. Ct., at 1965

The Sixth Circuit here denied Mr. Fox a COA simply because the evidence of his guilt was "overwhelming" and it was not possible he would have succeeded at trial -- a trial that never had the chance of happening because of counsel's bad advice.

Mr. Fox's lawyer told him the government was going to recommend to the sentencing court that it impose a 10-year prison sentence. Nobody refutes this; even the lower courts recognize counsel said this to Mr. Fox. The problem, though, is that the government also told Mr. Fox's lawyer that there was "serious doubt" the sentencing judge would even consider a 10-year sentence, and counsel never told Mr. Fox about this "serious doubt." So, Mr. Fox went into the plea bargain under the belief that he was really facing the 10 years the government said it would recommend. He had no idea the government told counsel there was "serious doubt" he would get that 10 years.

And he did not get the 10 years. At sentencing, the judge gave Mr. Fox 300 months, or 25 years -- 15 years above and beyond the government-recommended 10 years. The government was right about the judge; he would not even consider any sentence near 10 years for Mr. Fox.

Counsel knew all of this when he told Mr. Fox to plead guilty. The government warned counsel this would happen. But, counsel never told Mr. Fox.

Mr. Fox's claim in his motion was that he would not have pleaded guilty had he known the 10-year sentence was not even a remote possibility. This Court's holding in Lee supports that Mr. Fox should have been granted a COA and an evidentiary hearing on the matter.

The lower court also erred when it denied Mr. Fox a COA simply because "there was no factual dispute as to the prejudice issue." Order, at 4. This Court's precedent does not require there to be a "factual dispute as to prejudice," but where "evidence which could not readily have been presented to the [court in the criminal proceedings], the federal court must grant an evidentiary hearing." Townsend v. Sain, 372 U.S. 293, 317 (1963); Rules Governing Section 2255 Motions, Rule 8.

This Court has never held that there must be a "factual dispute as to the prejudice issue" in order to warrant an evidentiary hearing. The rule has always been that if facts are asserted that are not refuted by the record, a hearing must be held. See 28 U.S.C. § 2255(b). This has not changed.

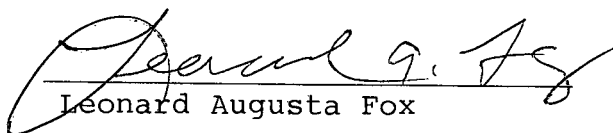
Mr. Fox provided affidavits from others and himself as to what counsel had advised which made him agree to plead guilty. The record did not refute any of the facts asserted in those affidavits. Nor did the record refute any of the facts asserted in Mr. Fox's motion. A hearing should have been granted.

The reason the Sixth Circuit refused to grant Mr. Fox a COA is contrary to this Court's precedent. Mr. Fox's petition should be granted to allow him to properly appeal under a COA the District Court's denial of his § 2255 motion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Leonard Augusta Fox

Date: October 24, 2017