No. _____

In the
Supreme Court of the United States

BRYAN ADRIAN COPELAND,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following questions:

1. Whether the Eleventh Circuit erred in affirming the District Court and denying Copeland a Certificate of Appealability for § 2255 habeas review when the court departed from the threshold prescribed in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

2. Whether the Eleventh Circuit erred in affirming the District Court's decision that Copeland did not make a substantial showing of the denial of a constitutional right.

PARTIES TO THE PROCEEDINGS

Petitioner Bryan A. Copeland, a prisoner serving a 204-month sentence, including a 24-month mandatory consecutive penalty, FCI La Tuna Correctional Facility, was the Petitioner-Appellant in the Court of Appeals. The United States of America was the Respondent-Appellee in the proceedings below and prosecuted the case.

LIST OF THE PROCEEDINGS

Copeland v. United States
U.S. Court of Appeals
Eleventh Circuit
Case No. 19-13451-H
Decision Date: December 4, 2019

Copeland v. United States
U.S. District Court
Middle District of Florida, Jacksonville Division
Case No. 3:16-CV-699-J-34JBT; 3:11-CR-281-J-34JBT
Decision Date: July 3, 2019

Copeland v. United States
U.S. Court of Appeals Eleventh Circuit
Case No. 14-12832-C
Decision Date: March 19, 2015

Copeland v. United States
U.S. District Court
Middle District of Florida, Jacksonville Division
Case No. 3:11-CR-281-J-34JBT
Decision Date: April 24, 2014

Copeland v. United States
U.S. Court of Appeals
Eleventh Circuit
Case No. 12-13381
Decision Date: May 29, 2013

Copeland v. United States
U.S. District Court
Middle District of Florida, Jacksonville
Division
Case No. 3:11-CR-281-J-34JBT
Decision Date: June 20, 2012

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Brain A. Copeland respectfully petitions for a *Writ* of *Certiorari* to review the judgment of the District Court for the Middle District of Florida (Jacksonville) denying federal habeas relief and a certificate of appealability, as affirmed by the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Eleventh Circuit declining to issue a certificate of appealability is unpublished. App. B. The opinion of the District Court denying the Petitioner federal habeas relief can be found at *Copeland v. United States*, 2019 WL 2868964, (M.D.Fla. 2019).

JURISDICTION

The Eleventh Circuit entered its judgment on December 4, 2019. App. B. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Sections 2253(c)(1) & (2) of Title 28, United States Code, provide, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court….
>
> (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.

The Fifth Amendment states, in pertinent part: "[N]or be deprived life, liberty, or property, without due process of law …"

The Sixth Amendment states, in pertinent part: "that in all criminal prosecutions, the accused shall enjoy the right '[t]o have the Assistance of Counsel for his defense …"

STATEMENT OF THE CASE

Indictment.

In 2011, a grand jury sitting in the Middle District of Florida returned a thirty-eight-count indictment, charging Copeland with eleven counts of mail fraud violating 18 U.S.C. § 1341, (Counts One through Eleven), sixteen counts of wire fraud in violation of 18 U.S.C. § 1343 (Counts Twelve through Twenty-Seven), nine counts of aggravated identity theft in violation of 18 U.S.C. § 1028A (Counts Twenty-Eight through Thirty-Six), and two counts of making false claims against the United States in violation of 18 U.S.C. § 287 (Counts Thirty-Seven and Thirty-Eight). App. 2a.

Plea Agreement.

Copeland entered into a written plea agreement with the Government. Id. Per the plea agreement, Copeland would plead guilty to Counts Twenty-Seven, Thirty-Six, and Thirty-Seven of the indictment. Id. at 3a. Subsequently, the Government would dismiss the remaining counts in the indictment. Id. Importantly, the Government stated that Copeland should receive a downward departure and a reduced sentence under U.S.S.G. § 3E1.1 for acceptance of responsibility. Id. Given this notion, Copeland believed it was in his best interest to agree to enter a guilty plea. Id.

Sentencing.

On June 18, 2012, Copeland was sentenced to a total of 264 months imprisonment. App. 3a. Importantly, the PSI findings, which were ultimately adopted by the trial the judge, included two pre-indictment incidents. Carlos Dawson was a witness for the Petitioner at sentencing, however, he was prevented from offering mitigating evidence on

behalf of the Petitioner. App. 36c. Both of these led to the PSI, including a U.S.S.G. § 3C1.1 enhancement for obstruction of justice. Id. Moreover, the PSI did not include the U.S.S.G. § 3E1.1 adjustment as promised by the Government. Id. The PSI stated that this § 3E1.1 adjustment was not initially included because Copeland did not truthfully admit all of his conduct nor did he voluntarily assist authorities in the investigation of the crimes charged. Id. at 37c.

First Appeal.

Soon thereafter, Copeland appealed the sentence to the Eleventh Circuit Court of Appeals stating that the Government breached the terms of the plea agreement by failing to recommend a three-level guideline reduction under U.S.S.G. § 3E1.1. Id. *United States v. Copeland*, 520 F. App'x. 822, 823 (11th Cir. 2013). The Eleventh Circuit agreed and remanded the case for resentencing before a different judge. App. 3a; *United States v. Copeland*, 520 F. App'x. at 828.

Remand and Resentencing

Prior to the resentencing hearing, the Probation office revised the Presentence Investigation Report. App. 3a. Once again, the § 3C1.1 adjustment due to pre-indictment incidents. App. 4a. However, the promised § 3E1.1 downward adjustment for acceptance of responsibility was applied, which resulted in a 235-293 sentencing range. Id. Ultimately, the court varied down to a total term of imprisonment of 204 months. Id. Copeland appealed his sentence once more to the Eleventh Circuit Court of Appeals, arguing that the court erred by applying the 3C1.1 enhance for obstruction of justice stemming from pre-indictment incidents. App. 5a.

Second Appeal.

On March 19, 2015, the Court of Appeals dismissed Copeland's appeal stating that:

> Because Copeland did not challenge the district court's initial decision to apply the

> enhancement when the opportunity existed in his first appeal, that decision is law of the case, and Copeland is deemed to have waived his right to challenge the enhancement on resentencing and in this appeal (Cites omitted).

Copeland's Habeas Corpus Petition under § 2255.

On June 7, 2016, Copeland, pro se, filed a petition for habeas corpus relief under § 2255. App 35c. Specifically, Copeland argued that he received ineffective assistance of counsel in violation of the Sixth Amendment. App 38c. First, Copeland argued that he received ineffective assistance of counsel when his trial counsel promised an unrealistic sentence in order to induce a guilty plea that he would have otherwise not entered. Id. As a result, Copeland argued that he entered a plea unknowingly, involuntarily, and unintelligently. App. 42c. Specifically, Copeland informed the court that his previous counsel advised him that the maximum sentence he could receive under the plea agreement was 84 months imprisonment. App. 44c. However, according to his trial counsel, it was more likely that Copeland was going to receive closer to 60 months imprisonment given prior cases. Id. Importantly, Copeland testified to these facts in his sworn affidavit. App. 33-34c.

Second, Copeland asserted that trial counsel failed to provide advice regarding the calculation of losses and its affect on his sentencing range. Id. at 34-35c. Importantly, trial counsel led Copeland to believe that there was a verbal agreement in place that informed the applicable sentencing range. Id. Ultimately, Copeland plead guilty to three offenses carrying a potential penalty of 300 months imprisonment. Id. The plea agreement did not contain any of the information that trial counsel informed Copeland was verbally agreed upon. Id. Importantly, to Copeland's detriment, he relied on the word of his counsel. Id. Moreover, trial counsel

failed to inform Copeland that a § 3C1.1 enhancement was a possibility even though it was not in the plea agreement. Id. Copeland also contended that counsel failed to argue rehabilitation as a mitigating factor. The decision in *Pepper v. United States*, 562 U.S. 476, 131 S.Ct. 1229 (2011), and its holding that a district court can consider a defendant's post-offense rehabilitation was well established by the time Copeland was resentenced in 2014. Copeland had spent more than 29 months in prison by the time he was resentenced. During that time he engaged in post-offenses rehabilitative efforts. Defense counsel's failure to request that the Court consider Copeland's post-offense rehabilitation upon resentencing fell below an objective standard of reasonableness and permitted the Court to sentence Copeland in the absence of relevant information under § 3553(a). Accordingly, it is likely that the result of the sentencing proceeding would have been different had counsel made the appropriate arguments.

Lastly, Copeland asserted that his counsel failed to object to a violation of the Ex Post Facto Clause, U.S. Const., Art. I, § 9, cl. 3. App. 46c. Specifically, Copeland asserted that given that the latest date of charged criminal activity was August 21, 2009, the 2008 Sentencing Guidelines should have governed his case. Id. Instead, the 2009 Guidelines were applied, and the new definition of "victim" enhanced his sentence. According to Copeland, because the government charged him with multiple counts rather than a single continuing offense, the district court violated ex post facto clause. Copeland contended that in a separate count indictment the district court erred in extending the controlling date in violation of the ex post facto clause, as the latest date of the offending conduct controls. Therefore, the indictment in Copeland's case was multiplicitous. *United States v. Zagari*, 111 F.3d 307 (1997), stating that a sentencing court may not consider uncharged, acquitted conduct in determining the last date of the offense. Id.

District Court's Denial of § 2255 and COA.

The district court reviewed Copeland's habeas corpus petition on July 3, 2019. App. 29a. The court reviewed the merits of Copeland's claim under the purview of *United States v. Addonizio*, 442 U.S. 178, 184-86 (1979), which calls for a fundamentally defective error that causes a complete miscarriage of justice to warrant review. Id.

In their review, the district court applied *Strickland v. Washington*, 466 U.S. 668, 687 (1984) to determine the merits of Copeland's ineffective assistance of counsel claim. Ultimately, the district court denied Copeland's ineffective assistance of counsel claim stating:

> Copeland's sworn statements during the plea colloquy affirmatively refute his allegations. Copeland alleges that he pled guilty because his attorney told him his maximum sentence was 7 years in prison, but Copeland acknowledged at the hearing that that the Court could impose a sentence of up to the maximum term of 27 years in prison. Copeland alleges that he pled guilty because his attorney told him his sentence would be in the range of 60 months, but he acknowledged at the hearing that his sentence could be more severe than any sentence estimated by his attorney, and that he was not relying on any promise of a low sentence. Copeland alleges that he pled guilty because his attorney failed to explain how his Guidelines range would be calculated, but Copeland stated at the hearing that he and his attorney had discussed the Sentencing Guidelines. Moreover, as noted above, Copeland stated that he wished to plead guilty even after acknowledging that the Court could impose up to the cumulative maximum sentence of 27 years in prison, and that his sentence could be more severe than any estimate given by his attorney. Thus, counsel's alleged failure to explain how his Guidelines range would be calculated, even if true, could not have affected his decision to plead guilty. Finally, Copeland alleged that he

> pled guilty because his attorney told him that counsel and the government had reached a verbal agreement about the sentence, but Copeland affirmed under oath that he was not relying on any promises or understandings outside the terms of the Plea Agreement.

App 12-13a.

Additionally, the district court addressed Copeland's assertion that the improper sentencing guidelines were applied, and his counsel failed to object to a violation of the Ex Post Factor Clause, U.S. Const., Art. I, § 9, cl. 3. App. 13a. The district court concluded that the plea agreement stated that Copeland commissioned criminal activity through January 2010. App. 20a. Subsequently, in this regard, the court ruled against Copeland.

Finally, the district court ordered:

> 1. Petitioner Bryan Adrain Copeland's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Civ. Doc. 1) is **DENIED**.
>
> 2. The Clerk is directed to enter judgment in favor of the United States and against Copeland, and close the file.
>
> 3. If Copeland appeals the denial of the petition, the Court denies a certificate of appealability. Because this Court has determined that a certificate of appealability is not warranted, the Clerk shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

App. 29a.

Eleventh Circuit Court of Appeals Denial of COA.

The Eleventh Circuit Court of Appeals denied Copeland's certificate of appealability because "he

has failed to make a substantial showing of the denial of a constitutional right." App 31b.

REASONS FOR GRANTING THE PETITION

I. THE PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE ELEVENTH CIRCUIT DENIED HIS COA PETITION FOR A PROCEDURALLY DISMISSED § 2255 HABEAS WITHOUT PERFORMING THE MANDATORY § 2253(c) THRESHOLD INQUIRY.

To show that a Certificate of Appealability (COA) should be issued under 28 U.S.C. § 2253(c), Copeland need only make a substantial showing that jurists of reason could disagree with the District Court's resolving his constitutional claims. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003). Courts of Appeal ask only if the District Court's decision was debatable. *Id.*; *see also Bradshaw v. Estelle*, 463 U.S. 880, 893 n.4 (1983). A determination related to a Certificate of Appealability is a separate proceeding, one distinct from the underlying merits. *See Miller-El*, 537 U.S. at 342, *citing Slack v. McDaniel*, 529 U.S. 473, 481 (2000).

To cross this low threshold, Copeland need not show that his "appeal will succeed," and the Eleventh Circuit should not deny him a certificate of appealability just because the court might believe he will not show he is entitled to relief under § 2255. *See Miller-El*, 537 U.S. at 337. Copeland needed only to demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Instead, the Eleventh Circuit repeatedly rejected Copeland's claims based on its determination that the claims would not succeed on appeal. As such, this Court should grant Copeland's petition for writ of certiorari to rectify the lower court's erroneous analysis of his *Strickland v. Washington* claims.

Importantly, a Petitioner is not required to prove before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Certainly, a claim can be debatable even though every jurists of reason might agree after the COA has been granted, and the case has received full consideration that a Petitioner will not succeed. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

According to *Lawrence v. Chater,* 516 U.S. 163, 167 (1996), when there is a reasonable probability that the decision to deny the certificate of appealability rests upon a premise that the lower court would reject if given the opportunity for further consideration and where it appears that such a redetermination may decide the ultimate outcome of the litigation, then the petition may be granted, and the judgment vacated and remanded to consider if *Martinez v. Ryan*, 566 U.S. 1 (2012) gives "cause" to excuse the procedural default. This question was addressed in the District Court, but the application for a certificate of appealability failed, without explanation, to consider that Petitioner's *Martinez v. Ryan* claims constituted a denial of a constitutional right. In addition, *Miller-El v. Cockrell*, 537 U.S. 322 (2003) describes the standards for denying a certificate of appealability. Pursuant to *Miller-El,* a certificate of appealability should be granted when a substantial showing can be made "by demonstrating that jurists of reason could disagree with the District Court's resolution … or that jurists could conclude the issues egnted are adequate to deserve encouragement to proceed further." The District Court erred in failing to provide such analysis when it denied Petitioner's certificate of appealability. The Eleventh Circuit placed a heavy burden on Petitioner that did not follow the procedures of 28 U.S.C. § 2253(c)(2). According to the Eleventh Circuit, the Petitioner failed to make the ultimate showing that his claim is meritorious. However, this does not logically mean that the Petitioner failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court inverts the statutory order of operations and 'first decides the merits of an

appeal, . . . then justifies its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage. *Miller-El*, 537 U. S., at 336–337. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253.

II. THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION THAT COPELAND DID NOT MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

A. The Eleventh Circuit Court of Appeals' decision directly conflicts with the Court's rule, stated in *Harris v. Nelson*, 394 U.S. 286, 291 (1969), requiring § 2255 movants be given a fair opportunity to develop evidence in support of their petition.

This Court has affirmed that "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). The Eleventh Circuit's Order conflicts with that duty of care by preventing Copeland from having a fair opportunity to "develop the evidence needed to support in necessary detail the facts alleged in his petition" and creating for him, instead, a "procedural morass." Id. Copeland made very specific allegations, based upon clear record evidence and sworn affidavits, that deserve further development:

> *[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.*

Harris, 394 U.S. at 300 (emphasis added).

In addition to conflicting with *Miller-El*, The lower court's Order directly conflicts with *Harris*. The standard applied for COA is unfairly and erroneously truncated, preventing a proper finding that the issues deserve encouragement to proceed further. An evidentiary hearing is usually required for further proceeding when the § 2255 Motion "states a claim based on matters outside the record or events outside the courtroom." It is disingenuous to find that "no evidence" supports issues raised, when a mandatory rule of this Court would have required the trial court to allow development that could have led to relief, and the very thing of which the petitioner has complained is that the trial court unfairly blocked that development. It is impossible to say that Copeland's trial counsel's comments and remarks were not the result of ineffective assistance of counsel.

B. The Eleventh Circuit's premature rejection of undeveloped ineffective assistance of counsel claims on their merits frustrates the purpose of *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984) and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), this Court sets out an exeption for defaulted claims due to ineffective assistance of counsel. Relying on its recent decision in *Martinez*, this Court in *Trevino* held that "the failure to consider a lawyer's ineffectiveness during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." 133 S. Ct. at 1921. Accordingly, the Court found that the Petitioner had not procedurally defaulted and was not barred from bringing the § 2254 petition. Id.

In the instant case, the Court held that Copeland's contention to § 3C1.1 application in his sentencing was barred because his counsel did not

raise the issue during the initial appeal. This clearly falls within the intent of *Martinez* because Copeland's trial counsel's ineffectiveness deprived him of certain constitutional guarantees.

Copeland was denied his Sixth Amendment right to effective assistance of counsel during his trial and during his subsequent collateral proceedings. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. See *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984). The right to counsel is the right to the effective assistance of counsel. Id. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Id. The presence of counsel at trial alongside the accused is not enough to satisfy the constitutional command. Id. "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. Id. Counsel can deprive a defendant of the right to effective assistance by failing to render "adequate legal assistance." Id at 686; see also *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Effective assistance entails certain basic duties. Id at 699. Counsel's function is to assist the defendant. Id. Counsel owes an overarching duty to advocate the defendant's cause and "bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id.

Copeland was not afforded the protections under the Sixth amendment right to effective counsel at the plea-bargaining stage and the post-sentencing stage. At the very least, Copeland was entitled to an honest, forthcoming attorney. Moreover, Copeland was entitled to counsel that sought his best interests and vigorously defended him during the appeal stage. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces

of the State does not constitute due process. *Strickland*, 466 U.S. at 711

The right to effective assistance of counsel applies at every critical stage of the prosecution, including guilty pleas. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *White v. Maryland*, 373 U.S. 59, 60 (1963).

> A guilty plea . . . is an event of signal significance in a criminal proceeding. By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is itself a conviction, and the high stakes for the defendant require the utmost solicitude.

Florida v. Nixon, 543 U.S. 175, 187 (2004) (citations omitted).

The "petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). "To establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness." Id. "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Id. These norms "extend to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).

Here, trial counsel fabricated a story which, unfortunately, fooled Copeland into a guilty plea. Trial counsel ensured Copeland that his sentence would be drastically shorter than what was initially charged. In *Miller v. United States*, 2014 U.S. App.

LEXIS 6205 *1 (6th Cir.), the court vacated a sentence and remanded for an evidentiary hearing when the defendant was not informed of certain enhancement he faced after the plea bargain. Similarly, trial counsel failed to advise Copeland on several enhancements that were ultimately weaponized against him. The lower court asserts that because Copeland stated that the plea bargain was the full agreement and he understood the implications of it, that his ineffective assistance of counsel claims should fail. This rigid ruling forgets the practicalities of the client-lawyer relationship. First, Copeland answered in that manner because he trusted his attorney. The fact that trial counsel was misleading grants credence to the fact that Copeland unknowingly entered this plea bargain. Moreover, it is improper for a court to assume that a lay person, with ill-advisement, understands the intricacies of parol evidence. As this Court has mentioned, professional norms apply in the plea-bargaining phase. As a matter of course, honesty and transparency is required and expected of all legal counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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