No. 13-____

In the Supreme Court of the United States

MICHAEL FAXON,

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court has previously held that factual disputes pertaining to facially valid post-conviction claims must be resolved at an evidentiary hearing. In light of that procedural structure for 28 U.S.C. § 2255 review, did the court of appeals correctly find that there was no issue worthy of a certificate of appealability under 28 U.S.C. § 2253 where the district court denied a § 2255 motion without a hearing by relying on prior defense counsel's self-serving affidavit disputing that his ineffectiveness caused: his delay in filing an expert report for sentencing, where the delay led to an increased sentence, his failure to object to an unwarranted guideline enhancement, and his failure to pursue a meritorious suppression motion?

PARTIES TO THE PROCEEDINGS BELOW

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

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Petitioner Michael Faxon respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 12-16585 in that court on September 18, 2013, *Faxon v. United States*, which denied a certificate of appealability from the final order of the United States District Court for the Southern District of Florida denying 28 U.S.C. § 2255 relief.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *Faxon v. United States*, 12-16585, which denied a certificate of appealability from the final the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (1a), along with a copy of the decision denying rehearing. App. 35a

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on August 8, 2013 and rehearing was denied on September 18, 2013. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction pursuant to 28 U.S.C. § 2255. The court of appeals had jurisdiction to

hear the motion for certificate of appealability pursuant to 28 U.S.C. § 2253.

CONSTITUTIONAL PROVISION INVOLVED

Petitioners intend to rely upon the following Constitutional provision:

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; 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 defense.

STATEMENT OF THE CASE

Petitioner Michael Faxon was arrested on suspicion of possession of child pornography and questioned at length in his home in central Florida without *Miranda* warnings on June 19, 2009; officers him with more severe consequences if he failed to reveal all evidence he had of such materials. As a product of that impermissible questioning, petitioner involuntarily confessed and provided police with a computer that proved his possession of numerous images constituting child pornography. Following the arrest, petitioner was indicted on charges of transporting and possessing

child pornography, in violation of 18 U.S.C. § 2252(a). Petitioner's inexperienced retained attorney (Jose Battista) told him he had no defenses to the charges and that he should plead guilty to the indictment in that the government was not offering a beneficial plea agreement. Attorney Battista erroneously advised petitioner that he did not have a viable motion to suppress the evidence obtained from him as a result of the custodial interrogation on the day of his arrest. Following entry of petitioner's guilty plea, Battista failed to take the necessary steps to retain a psychological expert and timely present an expert report to the sentencing court so as to warrant a substantial variance from the nearly 20-year sentence called for under the sentencing guidelines. Petitioner was a good father and husband who had never harmed a child in any way (apart from the pornography possessory offense). The district court, in denying the § 2255 motion, acknowledged counsel's delay likely prejudiced petitioner, stating: "Counsel did submit a report on these mental health subject matters, but he submitted it the night before the hearing. ... Its late submission denied the District Court sufficient time to review it and take it fully into consideration [and] there is indication that the District Court would have given an even greater sentence reduction had the report been timelier." App. 19a. Petitioner's sentencing counsel also failed to object to a enhancement for using peer-to-peer file sharing where petitioner did not exchange pornographic materials for personal gain.

The district court summarily denied a certificate of appealability. The court of appeals, in a decision by a single judge, without opinion (App. 1a), also denied a certificate of appealability and, on a motion for rehearing heard by two additional circuit judges, denied the request for rehearing, finding that petitioner "offered no new evidence or arguments of merit to warrant relief." App. 35a-36a.

REASONS FOR GRANTING THE WRIT

Given the relatively petitioner-friendly standard for issuance of a certificate of appealability (COA), the Court should review whether – when 28 U.S.C. § 2255 motions are summarily denied based on disputed self-serving affidavits of attorneys who, quite naturally, are hesitant to admit that their failings resulted from ineffectiveness and inadequacy – a COA should issue unless there is no set of circumstances in which the movant's claims regarding the attorney could be true.

There is a great and fundamental need for the Court's revitalization of the statutory requirement that a certificate of appealability must issue upon a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and the Court's determination that the standard for COA issuance is met when "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, 1603-04 (2000) (internal quotation omitted). When a COA is sought on procedural grounds, it must issue when "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." *Slack*, 529 U.S. at 484, 120 S.Ct. at 1604.

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, 337, 123 S.Ct. 1029, 1039 (2003). "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.*, 537 U.S. at 338, 123 S.Ct. at 1040.

Courts must resolve doubts about whether to grant a COA in favor of the movant, and may consider the severity of the penalty in making the decision. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997). Petitioner clearly met the governing standard.

In *Strickland v. Washington*, the Court set forth a two-part test for showing ineffective assistance counsel: (1) "that counsel's performance was deficient," defined as "representation [that] fell below an objective standard of reasonableness," and (2) "that the deficient performance prejudiced the defense" in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064, 2068 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

A petitioner must show only a reasonable probability that the outcome would have been different and "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, 466 U.S. at 693, 104 S.Ct. at 2067; *see DeLuca v. Lord*, 77 F.3d 578, 590 (2d Cir. 1996) ("The *Strickland* test does not require certainty that the result would have been different."). When evaluating this probability, "a court hearing an ineffectiveness claim must consider the totality of the evidence." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069). Application of these reasonable probability standards shows that claims that are erroneously deemed "refuted" by a self-serving affidavit of the lawyer whose efforts are challenged by the movant are precisely the type of claims worthy of a COA.

Reasonable jurists could disagree whether petitioner's § 2255 motion should have been summarily

denied without an evidentiary hearing where at least three significant components of counsel's ineffectiveness presented a basis for potential relief, yet the district court relied on the attorney's own self-serving and factually contradictory affidavit claims to deny an evidentiary hearing.

Petitioner alleged a series of failures by his former counsel in the pre-plea and sentencing phases of the case, of which three breakdowns in representation were most salient: failing to advise petitioner regarding a meritorious motion to suppress his confession and the bulk of the physical evidence against him, so that petitioner would have the opportunity to negotiate a reasonable plea offer or seek to exclude sentence-enhancing evidence; failure to timely obtain a psychological expert that resulted in an untimely and incomplete submission of psychological evidence at sentencing, an error that the district court ***expressly conceded*** likely resulted in imposition of a lengthier sentence; and failure to challenge the guideline enhancement for distributing pornography in exchange for a thing of value, where the only evidence offered by the government was that the defendant did not seek a quid pro quo exchange with others in relation to pornography.

A COA should be granted where the movant was denied an evidentiary hearing even where the movant has not shown enough *evidence* to prevail. *See Johnson v. Thaler*, 406 Fed.Appx. 882 (5th Cir. 2010) (question for review authorization is whether "jurists of reason could find it debatable whether the district

court committed a substantive or procedural error in dismissing his habeas application"); *United States v. MacDonald*, 641 F.3d 596, 612-14 (4th Cir. 2011) (granting COA as to procedural issue, where district court denied habeas claim; district court should not have prohibited expansion of record to include evidence received after trial and after filing of motion); *cf. Premo v. Moore*, 131 S.Ct. 733, 738 (2013) (evidentiary hearing granted on claim of counsel's abandonment of suppression options to obtain favorable plea deal).

The COA standards applicable to denial of an evidentiary hearing are the same here as they are in any other § 2255 case involving a summary resolution of the claims. A COA is required based on the sworn assertions ***supporting*** the motion to vacate, not on out-of-court proffers and affidavits that have not been subjected to adversarial testing.

As the Court reasoned in *Missouri v. Frye*, 132 S.Ct. 1399, 1410 (2012), where the defense "attorney did not make a meaningful attempt to inform the defendant of" the factors crucial to making an informed plea decision, there is ineffective assistance.[1] Because the law is now well established that the errors of counsel in failing to evaluate and advise the defendant as to his legal

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[1] It is important, in that regard, that the bar not be set too low in determining what is adequate representation, particularly at the plea stage, where, as the Court explained, up to 97% of cases are resolved. *Frye*, 132 S.Ct. at 1407 ("Ninety-seven percent of federal convictions ... are the result of guilty pleas.").

options – including available pretrial and trial options for the defense of charges – is actionable ineffective assistance of counsel where the defendant's plea or litigation choices were affected, the circumstances of this case warrant a certificate of appealability. *Frye*, 132 S.Ct. at 1407-08 (holding that the defendant's Sixth Amendment right to counsel extends to the plea discussion with counsel); *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) ("During plea negotiations, defendants are entitled to the effective assistance of competent counsel.") (internal citation omitted).

Counsel must provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial. An attorney's responsibility is to investigate and to evaluate his client's options in the course of the subject legal proceedings and then to advise the client as to the merits of each. To impart such an understanding to the accused, counsel must, after making an independent examination of the facts, circumstances, pleadings and laws involved, offer his informed opinion as to the best course to be followed in protecting the interests of his client. *Walker v. Caldwell*, 476 F.2d 213, 217 (5th Cir. 1973) (citing *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322 (1948)).

The § 2255 motion in this case alleged, with support from multiple affidavits by petitioner and his family, that he received ineffective assistance of counsel throughout the case, including: counsel's failure to

understand and advise petitioner as to a valid motion to suppress evidence and of other litigation options relevant to the decision to enter a guilty plea and waive his right to seek to suppress evidence; counsel's failure to timely seek expert assistance and present expert evidence to the Court in connection with sentencing; and counsel's failure to present valid sentencing guideline objections. .

The district court's findings that there was potential merit to an available motion to suppress (that the attorney failed to present and mistakenly advised petitioner had no merit, even as he advised petitioner to plead guilty to the indictment) and that counsel's dilatory submission of expert evidence at sentencing adversely affected the sentencing outcome are sufficient in themselves to show that an evidentiary hearing should have been granted. Notably, the district court "accept[ed] as true that [it] found [counsel's] late submission of the mental health report as a reason to limit the extent of the downward variance." App. at 12a; *see* App. at 20a ("The Movant does make a reasonable argument that the District Court may have given an even greater downward departure were the report timelier."); App. at 17a ("accepting as true petitioner's allegation of a *Miranda* violation"); App. at 32a (finding "counsel was active at steering the Movant through the decision whether to plead guilty").

The district court's concession that counsel's failure to timely present psychological evidence material to sentencing was a factor that may have increased the

sentence imposed warrants, on that basis alone, an evidentiary hearing to resolve the factual dispute as to the attorney's blame for the error, where the district court denied relief based on a contested, and ostensibly self-serving, affidavit that the lawyer submitted on behalf of the government. The expert did not conduct all the tests needed, was not a psychologist, had no opportunity for followup or verification, and was, like the lawyer, shooting from the hip to an extent that lessened the impact of his conclusions for the consideration of the district court at sentencing.

With respect to the district court's decision to reject the allegations of the § 2255 motion, disputing claims made in the affidavits of the movant and his wife and finding credible the untested affidavit of the counsel whose representation is in question, acceptance of uncross-examined assertions by the attorney and rejection of sworn allegations by the movant and his wife were premature, absent an evidentiary hearing.

The district court should not have reached legal conclusions as to whether the errors of counsel could be viewed as strategic decisions – as opposed to decisions based on delay and lack of investigation – without resolving the direct conflict between the sworn allegations in affidavits submitted on petitioner's behalf. The performance of counsel – involving failing to file a meritorious motion to suppress, failing to present sentencing objections and arguments, and failing to present a complete psychological expert, instead presenting an untimely and incomplete report by a social worker – cannot be justified as either

strategic or harmless, and the issue cannot fairly be deemed resolved by a self-serving affidavit. Given the denial of an evidentiary hearing (and the denial of any hearing at all on the § 2255 motion), such that the sworn allegations submitted on behalf of petitioner must be deemed true, jurists of reason could readily come to a different conclusion as to whether the claims raised were facially invalid.

The record shows that a motion to suppress was supported by the law and the facts; that petitioner wanted some form of litigation action by counsel in order to obtain better (or any) plea terms; that there were valid sentencing objections that counsel ignored, including that there was no evidence that petitioner traded pornography for a thing of value; that counsel's failure to ever obtain a qualified psychological expert, and failure to timely obtain any other form of expert, were manifestly ineffective; and that counsel's failure to properly present significant factual and legal matters to the Court at sentencing left petitioner in an unduly disadvantaged position that prejudiced him.

The district court made a series of findings on disputed issues of fact that should have awaited an evidentiary hearing:

- "[T]he record confirms the attorney's [affidavit] assertion that he conducted wide-ranging interviews and sought good sources regarding the Movant's background." App. at 11a. The record did not support this speculative findings; the mere fact that the lawyer called witnesses at sentencing does not show that he

investigated or conducted interviews; he simply presented witnesses without prior consultation.

- "The Movant states that after sentencing, his attorney admitted that his assistance had been ineffective. The Movant presumably is referring to the same discussion that his wife recalls in her affidavit. ... This Court construes what the attorney said (as recounted by the Movant's wife) as legal advice, not necessarily an admission of wrongdoing." App. at 12a. Contrary to the district court's belief, the lawyer met with petitioner alone and admitted he had been ineffective and undermined petitioner 's opportunity to receive the appropriate level of downward variance that the lawyer had believed was in order. He told petitioner he would admit his failings in a § 2255 motion, but has failed to do so. The district court's contrary conclusion is premature without an evidentiary hearing. The fact that the district court misconstrued two conversations with different participants to be just one joint conversation shows that evidentiary questions regarding the credibility of the former counsel and his affidavit remain unresolved.
- The district court found that "a defendant/movant must overcome the deference given to counsel, especially to counsel's strategic-based decisions." The district court's reliance on former counsel's self-serving affidavit to find strategic failures that had no real excuse was at least premature where an evidentiary hearing was not conducted. Further, a finding of strategy can only excuse counsel error if the strategy is the product or consequence of counsel's undertaking

the necessary research and investigation. Only when counsel has actually made a strategic choice based on an adequate understanding of the law and facts is strategy relevant. Most importantly, there is ***no*** strategy exception to the rule that counsel must provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012). The plea process is so central to the criminal justice system that, criminal justice has been described as "a system of pleas, not trials." *Lafler*, 132 S.Ct. at 1388; *Frye*, 132 S.Ct. at 1407.

The constitution requires effective assistance of counsel in relation to guideline sentencing. Thus, in *Glover v. United States*, 531 U.S. 198, 203 (2001), the Court held that even if the lawyer's representation had caused a sentencing error amounting to only 6 months of jail time, that minimal effect on the sentence was sufficient to warrant relief. *See Lafler*, 132 S. Ct. at 1386 (citing *Glover* for the proposition that " "any amount of [additional] jail time has Sixth Amendment significance.") (alteration in original). Counsel's failures that cause greater imprisonment are not acceptable failures where simple compliance with regular practice and rules would avoid such harms.

- "The Movant furthers that his counsel did not even advise him that he was waiving the opportunity to [suppress evidence] by pleading guilty. However the Movant's own affidavit belies this particular

contention. His affidavit indicates that his counsel at least to some extent did discuss the motion to suppress issue with him, advising against pursuing it." App. at 15a. By denying an evidentiary hearing, the district court foreclosed explanation of how counsel misled petitioner by advising that there was no meritorious motion to be filed. Also, the motion to suppress was waived at the plea only to a limited extent: petitioner lost his ability to exclude the principal evidence against him at trial, because he waived the right to a trial. The plea did not bar presenting the motion as a means to exclude the introduction of evidence at sentencing, albeit counsel never advised petitioner of that fact. Second, the discussion between petitioner and former counsel regarding the motion was merely counsel's preclusive, and erroneous, advice that the motion was meritless. Petitioner had no basis to carry on a legal argument with former counsel regarding the merits of the motion. The contrary factfinding is premised instead on speculation and acceptance of the contested affidavit of former counsel.

- The district court speculated that an independent investigation might have led to the discovery of material of which the officers learned in the impermissible custodial interrogation. But without an evidentiary hearing, there is no basis to believe that evidence revealed by movant in custodial interrogation would have been otherwise uncovered, nor did the government make such a suggestion at sentencing.
- "Movant cannot deny that there was a strategic decision not to file [the motion to suppress]. That is,

the risk of losing the Government's acquiescence to applicable favorable sentencing terms, whether it be the offered written plea agreement or the three level reduction for acceptance of responsibility." App. at 17a. The district court mistakenly assumed a strategic reason for the non-filing of a motion that the attorney did not know was meritorious. Strategy, however, can excuse error only when the strategy is premised on an adequate understanding of the relevant law and facts. Former counsel's representation as to suppression does not meet that standard. More importantly, strategy for non-filing of the motion is not a defense to counsel's failure to properly advise petitioner of his legal options prior to pleading guilty. It was not for the attorney to decide whether to plead guilty and waive a motion to suppress, it was for petitioner; and the waiver for purposes of this issue is one that is not entrusted to an attorney alone. Nor was failing to discuss a conditional plea strategic. Counsel discounted the merits of the suppression motion simply because he lacked an understanding of *Miranda* law, as his affidavit reveals.

- "In short, the Movant makes no persuasive showing that but for an instance of ineffective assistance of counsel, he would have persisted in a plea of not guilty. Nor does it seem plausible, and the Movant does not assert, that he actually would have persisted in a plea of not guilty and preferred going to trial. The Government had a strong case against him, including a reasonable argument against a *Miranda* violation." App. at 18a. By ruling without holding an evidentiary hearing the district court ignored that petitioner

asserted, *without contradiction*, that he would not have entered the plea to the indictment if he knew he was waiving the right to a valid motion to suppress (the validity of which motion was assumed by the district court).

- "[T]he situation was not that the attorney simply had been remiss and dilatory in gathering the evidence and passing it along to the Court." App. at 19a. It is for the evidentiary hearing to test the excuses of the lawyer for failing to pursue his client's fundamental rights diligently; that petitioner's wife failed to do the lawyer's job for him does not mean that he was not remiss in seeking more time for sentencing ***if*** he really needed it to obtain an expert: just because he lost a motion to continue the trial did not mean that he could not obtain a sentencing extension for a necessary psychological examination
- "The evidence is uniform that the attorney was trying to find a reliable psychological expert, a task which was proving difficult, even if the Movant now says that counsel should have moved faster." App. at 21a. This finding is unsupported by the § 2255 record. Instead, the evidence is undisputed that the attorney now *claims* difficulty in finding an expert and used that excuse to put petitioner's wife in the untenable position of trying to find an adequate expert. The record simply leaves open: What attorneys with knowledge in this field did counsel consult? What reference works did he consult? Did he consult the NACDL expert service and web site? The district court's deference to and acceptance of untested excuses

for the inaction and failures of counsel was intensely disputed and warranted an evidentiary hearing. The level of inaction by counsel is seen in the fact that the expert found by petitioner's wife did not even have available to him the polygraph report showing that petitioner has ***never*** harmed a child – the passed polygraph test was not even mentioned at sentencing.

- "The evidence is uniform that the report's late submission was not entirely the fault of the attorney under the circumstances. Lastly the attorney's instruction to the expert to prepare a 'bottom line' or 'bare bones' report was the product of a purposeful, strategic decision." App. at 21a. The record does not support this finding, nor is the evidence is uniform, for two reasons: first, the ineffectiveness in failing to contract an expert was solely the attorney's fault; no one else had that responsibility, and the attorney's office location is no excuse; second, the notion that untested affidavit claims by the lawyer constitute undisputed evidence is both logically erroneous and flies in the face of the competing affidavits submitted on petitioner's behalf.
- "Pressing the issue [of the abundant mitigating factors] too far could have provoked the Government to emphasize certain countervailing, non-mitigating factors of his offense." App. at 22a. This finding has no support in the case law or the facts of this case; there simply was no stressing of facts that the government could have engaged in beyond the guidelines themselves.

- The district court's treatment of the error in the enhancement of the sentence based on a false premise of distribution for value also warrants a hearing. There is no evidence to support the theory that the petitioner ever traded pornography for a thing of value; the one exchange in this case was from the defendant for free, according to the undercover agent. There was no quid pro quo demanded or obtained. The agent did not send pornography to petitioner. The government failed to meet its burden of proof as to the distribution for gain issue; but counsel waived the issue by failing to file an objection.

The issues in this case are not similar to those in cases where a district court can simply review a cold record and see there was no prejudice. The district court acknowledged attorney error that adversely affected the sentence. At a minimum, jurists could disagree about whether evidence at a hearing could assign to former counsel the blame for the breakdowns in representation in this case.

Certiorari is warranted in this case to address whether the court of appeals correctly relied on a contested self-serving affidavit to deny a 28 U.S.C. § 2255 evidentiary hearing

CONCLUSION

The Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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