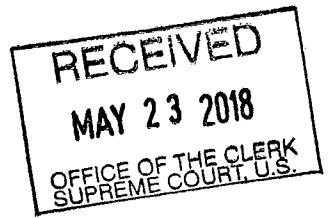


No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Charles Byers — 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 Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Charles Byers
(Your Name)

P.O Box 1500
(Address)

Butner, N.C 27509
(City, State, Zip Code)

(Phone Number)

ISSUE ONE

QUESTION(S) PRESENTED

Whether the Fourth Circuit erred in denying Petitioner's Motion To Recall Mandate When Counsel Failed to Notify Him of his Right to seek review from the Supreme Court in violation of this Court's decision in Wilkins v. United States, 441 U.S. 468 (1979) and its own precedence. See Profitt v. United States, 549 F.2d 910, 912 (4th Cir. 1976) (remanding 2255 claim alleging failure to advise of right to petition for certiorari).

ISSUE TWO

Whether this Fourth Circuit erred in denying Petitioner's motion to recall mandate when it overlooked this Court's recent decision in Class v. United States, No. 16-424 (2018).

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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STATUTES AND RULES

21 U.S.C § 846

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 to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[^X] is unpublished.

The opinion of the United States district 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[] is unpublished.

[] For cases from **state courts**: N/A

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 April 13, 2018.

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 C.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (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**: N/A

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

18 U.S.C § 3006A

STATEMENT OF THE CASE

On January 31, 2002, Petitioner Charles Byers was named in a twenty three count indictment, relevant to this matter, conspiracy to distribute and Possess with Intent to Distribute a kilogram or more of heroin, 50 grams or more of cocaine base, and 5 kilograms or more of cocaine, in violation of 21 U.S.C § 841(a)(1). After executing a plea agreement with the United States, on February 27, 2003, Petitioner appeared before the Honorable J. Fredrick Motz, Senior United States Judge, and entered a guilty plea to Count one of the Superseding Indictment. The plea agreement included a waiver of a right to appeal various portions of his sentences, but did not include a right to raise constitutional violations.

On April 18, 2003, Petitioner appeared before the District Court and was sentenced to 420 months imprisonment. (D.E 402). Petitioner timely filed a notice of appeal. However, before Petitioner even had the chance to submit a claim he intended to raise on appeal, the government filed a motion to dismiss the appeal based on plea waiver. On September 3, 2003, the Fourth Circuit dismissed the appeal. (D.E 428, 432).

Although Petitioner Byers filed his own pro se notice of appeal and appointed counsel had sought to be removed due to a conflict of interest, counsel subsequent to the adverse dismissal of the appeal, never filed a motion to withdraw from the case, nor advised Petitioner in writing of his right to seek a petition to the United States Supreme Court.

Subsequently, Petitioner filed a motion to vacate under 28 U.S.C § 2255, which was denied on May 23, 2005. Petitioner has also filed a motion for Retroactive Application of Sentencing Guidelines to Crack Cocaine Offense pursuant to 18 U.S.C § 3582(c). Petitioner has also submitted a writ of habeas corpus under 28 U.S.C § 2241, one which was denied and another that's pending.

On April 13, 2018 the Fourth Circuit received a pro se motion to recall mandate based on this Court's decision of Class v. United States, No. 16-424 (2018) and Wilkins v. United States, 441 U.S 468 (1979). On the same business day the Court received the motion it was summarily denied. Petitioner filed a timely petition for rehearing. It was as well denied on May 2, 2018.

REASONS FOR GRANTING THE PETITION

It's Petitioner's contention that this Court should either grant the writ of certiorari or a grant, vacate and remand, as the United States Court of Appeals for the Fourth Circuit in its decision denying Petitioner's motion to recall mandate, see Appendix A, conflicts with this Court's decisions in Wilkins v. United States, 441 U.S 468 (1979); Schreiner v. United States, 404 U.S 67 (1971), and its own decisions of Profitt v. United States, 549 F.2d 910, (4th Cir. 1976)(remanding 2255 claim alleging failure to advise of right to petition for certiorari); United States v. Masters, No. 91-6100, 1992 WL 232466 at * 3 (4th Cir. 1992)(unpublished)

In Wilkins this Court provided relief, under the Criminal Justice Act ("CJA"), for an out of time pro se petitioner whose counsel never filed a petition for certiorari despite assurances that a petition was filed. It stated that "the Court of Appeals for all of the Circuits provide in their rules or in plans adopted pursuant to the Criminal Justice Act that a court appointed lawyer must if his client wishes to seek further review in this Court, represents in filing a petition.

In Schreiner, this Court held that counsel should advise the defendant of his right to initiate a further review by filing a petition for certiorari, and to file a petition if requested by the Defendant. *Id.*

The Fourth Circuit's plan states in relevant part:

If the judgment of this Court is adverse to the defendant, counsel shall inform the defendant in writing, of his right to petition the Supreme Court for a writ of certiorari. If the defendant, in writing, so request and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall prepare and file a timely petition for certiorari and transfer a copy to the defendant. Plan, Part V, § 2. The remedy for a breach of this duty is re-entry of the judgment on appeal to permit the defendant, with the assistance of counsel, to file a timely petition for certiorari. Wilkins, 441 U.S at 470. See Profitt at 912.

However, despite Fourth Circuit law requiring that in the absence of a notice from an attorney to his client advising him of his right to petition for certiorari, a defendant can move to recall the mandate for entry of a new judgment; and Petitioner submitting an affidavit that he was never advised by counsel of his right to petition for certiorari, the Fourth Circuit the

REASONS FOR GRANTING THE PETITION

very same day that it received the motion to recall the mandate issued a denial, which suggests the motion was never seriously entertained by the Court. See Appendix B (motion to recall mandate).

Numerous other Courts have followed the same course when an attorney fails to notify a defendant in writing. See Nnebe v. United States, 534 F.3d 87, 91 (2nd Cir. 2008)(recalling mandate and reentering judgment so that timely petition for certiorari might be filed); United States v. Howell, 37 F.3d 1207, 1210 (7th Cir. 1994)(same); United States v. James, 990 F.2d 804, 805 (5th Cir. 1993). This Court must vacate the judgment in this case because it's clear court appointed counsel never notified Petitioner of his right, a contention the lower court never investigated.

Also, Petitioner noted this Court has held that despite a petition for certiorari by pro se petitioner never applying for relief from the Appeals Court, as well as filing over 17 months late, relief was still and reentry was still required. Wilkins, supra at 68.

Based on the foregoing, Petitioner respectfully request for the reasons stated above, this Court either grant certiorari, or issue a grant, vacate and remand order to this claim.

REASONS FOR GRANTING THE PETITION

It's Petitioner's contention that the Fourth Circuit in summarily dismissing his motion to recall mandate, overlooked this Court's recent decision in Class v. United States, No. 16-424 (2018), which held that a guilty plea itself does not bar a federal defendant from challenging the constitutionality of his statute of conviction on direct appeal.

It's clear that the Fourth Circuit in dismissing petitioner's appeal relied on an appeal waiver not any different than the defendant in Class, which waiver didn't prevent this Court from vacating Class' judgment. This Court held that Class agreement said nothing about the right to challenge on direct appeal the constitutionality of the statute of conviction.

In the Fourth Circuit below, before allowing briefing as to which issues Petitioner intended to raise, summarily dismissed the appeal. See Appendix D (Dismissal of Appeal). Such action presumes the Court was acting under the belief that a guilty plea and a general plea waiver similar to Class', waived constitutional claims.

Because Petitioner's appeal was dismissed prior to Petitioner submitting his constitutional and jurisdictional claims, that the District Court acted without jurisdiction and in violation of the Sixth Amendment when it convicted and sentenced him, the Fourth Circuit should have gave more consideration to this Court's decision in Class.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: 5-16-18