

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL R. JOHNSON

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Pro Se

QUESTION PRESENTED

I. DOES ASKING THE DISTRICT COURT TO REOPEN THE HABEAS PROCEEDING TO CONSIDER ALL ISSUES PRESENTED CONSTITUTE A SECOND OR SUCCESSIVE §2255 MOTION?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States court of appeals decided my case was May 1, 2018.

No petition for rehearing was filed.

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

STATEMENT OF THE CASE

Petitioner filed a MOTION TO VACATE, SET ASIDE, or CORRECT SENTENCE pursuant to 28 U.S.C. §2255 in the United States District Court for the Western District of Missouri, Western Division in 2017. Petitioner argued that counsel had rendered ineffective assistance of counsel in failing to file a notice of appeal following sentencing, counsel rendered ineffective assistance of counsel in failing to communicate with him during pretrial proceedings, and counsel rendered ineffective assistance of counsel in failing to file a motion to suppress. On October 25, 2017 the court entered an Order denying the motion following an evidentiary hearing on one issue that counsel had rendered ineffective assistance of counsel in failing to file a notice of appeal. Petitioner thereafter filed a motion requesting the district court to reopen the habeas proceeding under Fed.R.Civ.P. 60(b)(6). Petitioner asked the court to reopen the habeas proceeding because in deciding whether counsel had been ineffective in failing a notice of appeal, the court did not consider all of the relevant evidence. And in relation to the two remaining ineffective assistance of counsel claims the court failed to address them entirely, thus Petitioner requested reopening of the habeas proceeding to decide the remaining two unaddressed claims of ineffective assistance of counsel. On Jan-

uary 12, 2018 the district court entered an Order and Judgment denying the Rule 60 motion and a Certificate of Appealability finding the motion was a second and successive motion to vacate. Petitioner applied to the United States Court of Appeals for the Eighth Circuit for a certificate of appealability. The court denied the application on May 1, 2018 without opinion. Petitioner did not file a petition for rehearing.

REASONS FOR GRANTING THE WRIT

DOES ASKING THE DISTRICT COURT TO REOPEN THE HABEAS PROCEEDING TO CONSIDER ALL ISSUES PRESENTED CONSTITUTE A SECOND OR SUCCESSIVE §2255 MOTION?

Petitioner filed a Motion To Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255. Petitioner raised three grounds of ineffective assistance of counsel. First, Petitioner argued that counsel had been ineffective in failing to file a notice of appeal. The district court appointed counsel and held an evidentiary hearing on the issue. The court subsequently found against Petitioner and denied the motion. However, also included in the motion Petitioner raised ineffective assistance of counsel in failing to communicate with him during pretrial proceedings and that counsel had been ineffective in failing to file a motion to suppress. In denying the motion to vacate, the court failed to consider all of the relevant evidence in relation to ground one and failed to address the remaining two claims in their entirety. Petitioner asked the court to reopen the proceeding to address all the evidence in relation to ground one and to address the issues in grounds two and three. Specifically, in relation to ground one the court found that Petitioner did not clearly communicate his desire to pursue a direct appeal. Petitioner argued that under Roe v Flores-Ortega 528 U.S. 470 (2000), counsel had a constitutional duty to consult with the defendant about an appeal when there is reason to think either (1) that a

rational defendant would want to appeal ... or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Petitioner argued in the Rule 60 proceeding that through counsel he had objected to matters contained in the PSI that were overruled by the court. Immediately following the overruling of the objections Petitioner advised counsel that he wanted to appeal. This type of conduct is consistent with a rational defendant, a person who is demonstrating a desire to appeal based on his disagreement with the district court's overruling his objections to the PSI. Moreover, the court found that immediately following sentencing Petitioner consulted counsel about appeal. Thus, it seems very plausible that it was debatable among jurists of reason as to whether or not a claim based on Flores-Ortega that the district court did not consider all of the evidence in deciding the habeas claim is indeed a new claim or is it indeed a true Rule 60 claim that it is a defect in the integrity of the habeas proceeding in reaching a decision on whether or not Petitioner communicated to counsel he wanted to appeal if the court does not consider all of the evidence. Likewise, it was debatable among jurists of reason as to whether or not a defect in the integrity of the habeas proceeding occurred when the court failed to address the remaining two claims argued in the motion to vacate of ineffective assistance of counsel. In the Rule 60 decision the court simply found that Petitioner

was challenging the scope of the evidentiary hearing and further found there was no basis for relief under Rule 60. If the claims raised in the Rule 60 proceeding are not matters that create defects in the integrity of the habeas proceeding then they are surely not new claims attacking the underlying conviction. Thus, they must pass through the gateway of a Rule 60 proceeding. A certificate of appealability is appropriate only where the petitioner has established that "reasonable jurists could debate whether (or, for that matter, agree that) the petition would 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 (2000); Buck v Davis 137 S. Ct. 759 (2016).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: June 29, 2018



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