

18-5996

FILED
SEP 11 2010
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SUPREME COURT, U.S.

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Jonathan Randall Curshen
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-- Petitioner Pro Se --

QUESTIONS PRESENTED FOR REVIEW

WAS THE PETITIONER DENIED HIS SUBSTANTIAL RIGHTS TO ACCESS TO THE COURTS, DUE PROCESS, AND EQUAL PROTECTION, WHEN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENIED (WITHOUT AN OPINION) HIS REQUEST FOR A CERTIFICATE OF APPEALABILITY TO REVIEW AN ORDER OF THE UNITED STATES DISTRICT COURT WHICH FAILED TO ADJUDICATE A CLAIM OF CONSTITUTIONAL ERROR PRESENTED IN A MOTION TO CORRECT PETITIONER'S SENTENCE UNDER 28 U.S.C. 2255?

LIST OF PARTIES IN COURT BELOW

Nathan Dimock, Assistant U.S. Attorney with the U.S. Department of Justice, Washington, DC, represented the respondent in the habeas proceedings below.

CITATIONS OF OPINIONS AND ORDERS

Petitioner's Motion to Vacate or Correct his sentence [28 U.S.C. 2255] was denied by the district court, and that court also declined to issue a certificate of appealability. See, *Curshen v. United States*, 2017 U.S. Dist. LEXIS 120072 (S.D. Fla. July 28, 2017) Petitioner then moved the Eleventh Circuit for the issuance of a Certificate of Appealability. That application, without opinion, was denied. See, *Curshen v. United States*, 2018 U.S. App. LEXIS 12080 (11th Cir. May 7, 2018) Petitioner sought reconsideration of the May 7, 2018 Order, and that application was denied as well. See, *Curshen v. United States*, 2018 U.S. App. LEXIS 15935 (11th Cir. June 13, 2018) This timely petition for a Writ of Certiorari follows.

JURISDICTIONAL STATEMENT

Jurisdiction in the district court was pursuant to 28 U.S.C. 2255. The U.S. Court of Appeals had jurisdiction to hear the appeal in accordance with the provisions of 28 U.S.C. 1291 and 2253(c). This Court has jurisdiction, pursuant to 28 U.S.C. 1254, to review the decisions of the court of appeals.

Petitioner seeks review of the decision denying his application for a Certificate of Appealability ("COA"), entered on May 7, 2018, and the decision denying his motion for reconsideration entered on June 13, 2018.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial of conspiracy to commit mail, wire and securities fraud, and conspiracy to commit money laundering. On May 11, 2012, Petitioner was sentenced to 240 months imprisonment. In calculating the offense level used to determine the sentence, the district court assessed a six-level enhancement, pursuant to U.S.S.G. 2B1.1(b)(2)(C), on the basis that the offense involved 250 or more "victims." The judgment was affirmed. *United States v. Curshen*, 567 F. App'x 815 (11th Cir. 2014) A petition for a Writ of Certiorari was denied on January 15, 2015.

On December 14, 2015, Petitioner moved (pro se) in the District Court to vacate or correct the sentence imposed. Petitioner subsequently moved to supplement the Section 2255 Motion with additional claims, including a claim that he was denied effective assistance of counsel when his attorney failed to object to and/or appeal from the six-level enhancement since the district court failed to find that the alleged "victims" suffered pecuniary harm as a result of the offense -- as required by both the U.S. Sentencing Guidelines and Eleventh Circuit binding precedent. Petitioner also argued that there was no pecuniary loss to more than 250 of the alleged "victims." The district court did not adjudicate the claims raised, but instead denied relief on the ground that counsel made a general objection to the six-level enhancement.

In seeking a COA, Petitioner pointed out that the district court failed to address the precise ineffective assistance of counsel claim he raised. However, Petitioner's cries fell on deaf ears with the Eleventh Circuit, twice, declining to issue a COA -- without opinion.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

PETITIONER WAS DENIED HIS SUBSTANTIAL CONSTITUTIONAL RIGHTS TO ACCESS TO THE COURTS, DUE PROCESS AND EQUAL PROTECTION, WHEN THE UNITED STATES COURT OF APPEALS DECLINED TO ISSUE A CERTIFICATE OF APPEALABILITY TO REVIEW THE DISTRICT COURT'S FAILURE TO ADJUDICATE EVERY CONSTITUTIONAL CLAIM RAISED BY PETITIONER

This Court has held that the "right to access to the courts" "is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). This Court has also observed that "the right to access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). Accordingly, the Constitution guarantees that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

In the present case, the Court of Appeals declined to issue a COA to allow for review of the district court's failure to adjudicate the claim that counsel was ineffective at sentencing, and on appeal, in failing to raise a specific objection to an inapplicable enhancement under the Guidelines. By declining to issue a COA, the Petitioner was effectively denied access to the courts. The right was first denied when the district court failed to adjudicate the ineffective assistance of counsel claim. That violation was amplified by the Court of Appeals refusal to grant a COA or to vacate the judgment on the ground that the district court failed to adjudicate the claim that was properly before, in accordance with its own binding precedent. See, e.g., *Clisby v. Jones*, 960 F.2d 925, 938 (11th Cir. 1992) ("we will vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims" where a district court fails to adjudicate all claims raised in a habeas petition); *Rhodes v. United States*, 583 F.3d 1289, 1291 (11th Cir. 2009) (applying *Clisby* to Section 2255 Proceedings).

This Court has instructed review of the denial of a COA is a retrospective inquiry into whether the movant's claims, as litigated in the district court, warrant further proceedings -- not whether there is any conceivable basis upon which the movant could prevail. Courts must ask whether "reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). They are to "look at the District Court's application of [the law] to petitioner's constitutional claims and ask whether that resolution was debatable." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Petitioner's motion for a COA was improperly denied by the Eleventh Circuit -- twice.

The Eleventh Circuit's mishandling of the application for a COA affected Petitioner's substantial right to access to the court, Due Process, and Equal Protection under the United States Constitution. These are rights which must be respected and afforded lest the denial result in a complete miscarriage of justice. Congress afforded criminal defendants the right and opportunity to seek redress from constitutional wrongs. That right was bestowed upon federal criminal defendants through the enactment of 28 U.S.C. 2255 and 2253(c). To effectively deny a criminal defendant the only means by which Congress has afforded to correct constitutional error in the criminal judgment is fundamentally unfair, and warrants the intervention and correction of this Court. Accordingly, the Court should promptly grant this petition and issue a Writ of Certiorari. In addition, the Court should appoint counsel to represent this Petitioner in all future proceedings before this Court, in the interest of justice.

CONCLUSION

WHEREFORE, for the reasons stated, this Court should grant this Petition for a Writ of Certiorari, in the interest of just and appoint counsel to represent Petitioner in all future proceedings before this Court.

Dated: Fort Dix, New Jersey

~~September 42~~, 2018

NOVEMBER 21

Respectfully submitted,



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CERTIFICATE OF SERVICE

This shall certify that a true and correct copy of this Petition for a Writ of Certiorari has been furnished upon the Office of the United States Attorney for the Southern District of Florida, Nathan Dimock, AUSA, by my having placed the same in the United States Mail, postage prepaid, this ~~12th~~ ²¹ day of ~~September~~ ^{NOVEMBER}, 2018.

JONATHAN RANDALL CURSHEN