

18-7310

IN THE
SUPREME COURT OF THE UNITED STATES

1^{ES}
ORIGINAL

KADEEM THOMAS

Petitioner

v.

Supreme Court, U.S.
FILED

DEC 03 2018

OFFICE OF THE CLERK

UNITED STATES OF AMERICA,

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT IN CAUSE NO. 17-3261

PETITION FOR WRIT OF CERTIORARI
FOR KADEEM THOMAS

Kadeem Thomas
#08552-094
FCI Yazoo City Low
2225 Haley Barbour Parkway
Yazoo City, Mississippi
39194

QUESTIONS PRESENTED

- I. Should The District Court Judge Issue Or Deny A Certificate Of Appealability When It Enters A Final Order Adverse To The Applicant.
- II. Could Reasonable Jurists Debate That Counsel Was Ineffective When Neglecting To Argue That The Supreme Court's Holding In Alleyne Applied To Thomas When Ruled On While He Was Still On Direct Review, Despite Not Being Retroactive.

LIST OF PARTIES

KADEEM THOMAS

Defendant/Appellant

United States Of America

Plaintiff/Appellee

Kim L. Chisholm
Assistant U.S. Attorney
5500 Veterans Drive, Suite 260
St. Thomas, VI 00802

Attorney for Plaintiff/Appellee

The Honorable Curtis V. Gomez
United States District Court Judge

United States Court of Appeals
for the Third Circuit
601 Market Street
Philadelphia, Pennsylvania 19106

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FOR KADEEM THOMAS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the District Court Of The Virgin Islands Division Of St. Thomas And St. John is published, 2017 U.S. Dist. LEXIS 140855:: United States v. Thomas::August 31, 2017, Civil No. 2014-56; and 2018 U.S. Dist. LEXIS 18452::United States v. Thomas::February 5, 2018, Civil No. 2014-56. Appears at Appendix A.

The opinion of the United States Court of Appeals for the Third Circuit is unpublished, United States v. Kadeem Thomas, C.A. No. 17-3261 (3rd Cir. April 30, 2018), appears at Appendix B.

STATEMENT OF JURISDICTION

The Third Circuit issued its opinion on April 30, 2018. Thomas filed a timely Petition for Rehearing and/or Rehearing En Banc which the Third Circuit denied July 9, 2017. Later, Thomas filed an application for a 60 day extension of time within which to file a petition for a writ of certiorari that extends the time to December 6, 2018. The jurisdiction of this Court is properly invoked under 28 U.S. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On January 11, 2011, Kadeem Thomas ("Thomas") and Keven Fessale allegedly committed an armed robbery of Merchants Commercial Bank in St. John, Virgin Islands. They allegedly fled in a vehicle belonging to Shevaun Browne. On January 19, 2012, a grand jury in the District Court Of The Virgin Islands Division Of St. Thomas And St. John, returned a four-count indictment against Thomas and his alleged two co-defendants. Thomas was charged with a Hobbs Act conspiracy, in violation of 18 U.S.C. § 2113(a) and (d) (count two), and possession of a firearm during commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (count four).

On March 28, 2012, a jury convicted Thomas on all three counts.¹ (D.E. 68). On September 17, 2012, the District sentenced Thomas to a term of 60 months on counts 1 and 2, to run concurrently, and a term of 84 months on count 4 to run consecutively with counts 1 and 2, a supervised release term of five years on count 2 and three years on counts 1 and 4, a \$100.00 special assessment and \$47, 529.38 in restitution. See 2d Am. Judgment at 2-5 (D.E. 114). Thomas appealed his conviction to the Third Circuit, arguing the District Court erred by denying his motion to strike Juror 93 for cause. Thomas argued in the alternative that the District Court erred by not allowing him to withdraw his final peremptory strike and use it on Juror 93. *United States v. Browne*, 525 Fed. App'x 213 (3d Cir. 2013).²

¹ Thomas's conviction followed a three-day jury trial. See Mar. 26, 2012 Trial Tr. ("TT1") (D.E. 119), Mar. 27, 2012 Trial Tr. ("TT2") (D.E. 119-1), and Mar. 28, 2012 Trial Tr. ("TT3") (D.E. 119-2).

² The Third Circuit consolidated the appeals of Thomas and co-defendant Shevaun Browne.

The Third Circuit Court of Appeals rejected Thomas's arguments and affirmed his conviction in a judgment issued on May 24, 2013. *Id.*; (D.E. 122). Thomas did not seek certiorari; thus, the judgment became final for purposes of the Antiterrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations ninety days later on August 24, 2013.³ Accordingly, the statutory period during which Thomas could timely file his petition ended on August 24, 2014.⁴ Thomas's petition, filed May 15, 2014, was recommended by United States Magistrate Judge Ruth Miller.

Thomas raised two grounds for post-conviction relief, both asserted under the theory of ineffective assistance of trial counsel. The issues raised were as follows:

- I. Whether Thomas Was Denied His Sixth Amendment Right To Effective Assistance Of Counsel When Counsel Failed To Preserve And Raise The Alleyne Issue At Sentencing And On Appeal.
- II. Whether Thomas Was Denied His Sixth Amendment Right To Effective Assistance Of Counsel When Counsel Failed To Object To Inadmissible Hearsay Admitted By The Sixth Amendment's Confrontation Clause.

³ A "judgment of conviction becomes final" under § 2255 when the Supreme Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or, if the prisoner does not seek certiorari, when the time for filing a certiorari petition expires. See *Gonzalez v. Thaler*, 132 S. Ct. 641, 653 (2012); *United States v. Thomas*, 713 F.3d 165, 174 (3d Cir. 2013) (explaining when a petitioner does not pursue appeals through the United States Supreme Court, his judgment becomes final after the time for pursuing direct review in either the Supreme Court or in state court expires.) (citing *Gonzalez*, 132 S. Ct. at 641); *Johnson v. United States*, 2013 U.S. Dist. LEXIS 66189, at *7 (D.N.J. May 9, 2013) ("A federal prisoner's conviction becomes final when certiorari is denied or when the time for filing a petition for certiorari expires, which is ninety (90) days from the entry of judgment or denial of a rehearing petition.") (citations omitted); SUP. CT. R. 13(1), (3) ("[A] petition for a writ of certiorari ... is timely when it is filed ... within 90 days after entry of the judgment.... The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate[.]").

⁴ The AEDPA establishes a one-year statute of limitations period for § 2255 motions, "running from the latest of" four specified dates. 28 U.S.C. § 2255(f). As in most 2255 cases, here, the relevant date is "the date on which the judgment of conviction becomes final." *Id.*

On December 8, 2015, United States Magistrate Judge Ruth Miller offered an Order denying Thomas's first claim on the basis that the Supreme Court decided Alleyne prior to the judgment of his direct appeal becoming final on August 24, 2013 and Thomas is not constitutionally entitled to the assistance of counsel in preparing petitions for certiorari. (D.E. 147, Report And Recommendation, pg. 7).

Additionally, on Thomas's second claim, United States Magistrate Judge Ruth Miller offered that "the Court finds that counsel did not act in an objectively unreasonable manner by failing to raise a Confrontation Clause challenge to Crites' testimony." Nor did the Court find that "Thomas was prejudiced by counsel's failure to raise this claim because [Thomas] has not pointed to any evidence to rebut the claim that Merchants was FDIC-insured." (D.E. 147, Report And Recommendation, pg. 9).

Later, Thomas filed objections to the Magistrate Judge's report and recommendation; and subsequently filed a supplement to his 28 U.S.C. § 2255, arguing that *Johnson v. United States*, 135 S. Ct. 2551 (2015) compels the Court to vacate the portion of his sentence related to his conviction for Possession of a Firearm During the Commission of a Crime of Violence.

On August 31, 2017, District Judge Curtis V. Gomez offered his order adopting the Magistrate Judge's recommendation regarding Thomas's first two arguments. On Thomas's supplemental claim (the court offered that even assuming arguendo that Johnson renders 18 U.S.C. § 924(c)(3)(B) unconstitutional, Johnson does not compel the result Thomas seeks. Further explaining that, "Bank robbery has an element that requires proof beyond a reasonable doubt of the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C. § 2113(a)

("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association").'" Lastly, the explained that even without 18 U.S.C. § 924(c)(3)(B)'s language, the mandatory minimum would still apply to Thomas as a result of his conviction for the crime of bank robbery. (D.E. 174, Order, pg. 7-8). Thomas's motion for reconsideration to this order was denied on February 5, 2018 as well. (D.E. 178, Order).⁵ Thomas filed a timely notice of appeal to the Third Circuit.

On April 30, 2018, the Third Circuit denied his request for a certificate of appealability. (D.E. 179).⁶ Subsequently, Thomas's petition for a rehearing and/or rehearing en banc was denied on July 9, 2018.

REASONS FOR GRANTING THE WRIT

I. Should The District Court Judge Issue Or Deny A Certificate Of Appealability When It Enters A Final Order Adverse To The Applicant.

Pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings, "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

The record reflects that District Judge Curtis V. Gomez's August 31, 2017 and February 5, 2018 order of the court never reflect whether to issue or deny a certificate of appealability adverse to Thomas.

⁵ District Judge Curtis V. Gomez never issued or denied a certificate of appealability.

⁶ As a result of the district court judge's failure to issue or deny a certificate of appealability Thomas raised this claim in the Third Circuit, along with his claim that counsel was ineffective for his failure to raise his Alleyne issue while he was still on direct review.

1. Certificate Of Appealability

Thomas may appeal the denial of a § 2255 motion only if the district court or court of appeals issues a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); see also *Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in *Slack*:

- / To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that 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."

529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, Thomas must show, "at least, that 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." *Id.* at 484. However, without the district court judge first considering whether to issue or deny a certificate of appealability in these 28 U.S.C. § 2255 proceedings the Third Circuit Court of Appeals did not have jurisdiction to entertain this cause.

More importantly, it appearing that the District Judge Curtis V. Gomez has not issued a certificate of appealability or stated reasons why a certificate of appealability should not issue pursuant to

Fed. R. App. P. 22.2 the District Court is required to make a determination as to whether a certificate of appealability should issue at the time a final order is issued; it must be hereby ORDERED that this matter is REMANDED to the District Court for the sole purpose of either issuing a certificate of appealability or stating reasons why a certificate of appealability should not issue. *Woodham v. Vacano*, 2012 U.S. App. LEXIS 22542 (3rd Cir. October 24, 2012).

II. Could Reasonable Jurists Debate That Counsel Was Ineffective When Neglecting To Argue That The Supreme Court's Holding In Alleyne Applied To Thomas When Ruled On While He Was Still On Direct Review, Despite Not Being Retroactive.

The Supreme Court has held that "final" means "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); see also *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999) ("we hold that a 'judgment of conviction becomes final' within the meaning of § 2255 on the later of (1) the date on which the Supreme Court affirms the conviction and sentences on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires.").

Thomas argues that his counsel - who served as both trial and appellate counsel - rendered ineffective assistance in failing to preserve at sentencing and raise on appeal a future-change-in-the-law argument. In particular, Thomas claims that counsel rendered ineffective assistance by failing to preserve a challenge to and appeal the judicial finding during sentencing that Thomas brandished a firearm, which increased his

mandatory minimum sentence.

Thomas's conviction included using or carrying a firearm during a crime of violence (here, robbery). See Jury Verdict (D.E. 68). At trial, the jury was not charged with determining whether Thomas had brandished his firearm during the commission of the robbery. At sentencing, however, the District Court found Thomas had brandished a firearm during the commission of robbery. This judicial finding resulted in an increased mandatory minimum sentence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii).⁷ Thomas offers that his sentence runs afoul of the United States Supreme Court's holding in *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151 (June 17, 2013), and offers that counsel was constitutionally deficient for failing to anticipate the *Alleyne* holding and preserve it for direct review.

Here, oral argument was held for *Alleyne* in January 2013 (four months before Thomas's appeal was decided); the Third Circuit affirmed all claims raised in his appeal on May 24, 2013; the Supreme Court decided *Alleyne* June 17, 2013 (67 days before the time ended to file his petition for a writ of certiorari), however, Thomas suffered prejudice when counsel not only refuse to preserve his *Alleyne* claim before the Third Circuit affirmed his direct appeal, but even when the Supreme Court finally resolved this matter a month after Thomas's appeal was denied counsel still neglected to bring this dead bang winner to the Supreme Court's

⁷ A conviction for using or carrying a firearm in relation to a crime of violence carries a five-year (60 months) mandatory minimum sentence, 18 U.S.C. § 924(c)(1)(A)(i), that increases to a seven-year (84 months) mandatory minimum sentence "if the firearm is brandished." 18 U.S.C. § 924(c)(1)(A)(ii).

attention while Thomas was still pending direct review.⁸

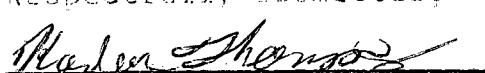
Lastly, the Criminal Justice Act of 1964 ("CJA"), embodied in title 18 of the United States Code, provides that a person whose federal conviction has been affirmed is entitled to a lawyer's help in seeking certiorari in the Supreme Court. *Wilkins v. United States*, 441 U.S. 468, 469, 99 S. Ct. 1829, 1830, 60 L. Ed. 2d 365 (1979). Each federal circuit provides in its rules, or in plans adopted pursuant to the CJA, "that a court-appointed lawyer must, if his client wishes to seek review in [the Supreme Court], represent him in filing a petition for certiorari." *Id.*

The decision-maker(s) in this court must compel the Third Circuit to order counsel to show cause in writing, why he should not be sanctioned for his failure to file petition for writ of certiorari as required by Chapter 3(b) of the Third Circuit's Criminal Justice Act Plan.

CONCLUSION

The petition for writ of certiorari must be granted, vacated or remanded.

Respectfully submitted,


Kadeem Thomas
#08552-094
FCI Yazoo City Low
2225 Haley Barbour Parkway
Yazoo City, Mississippi 39194

I declare under the penalty that the foregoing is true and correct.

⁸ After Thomas's direct review process was over with counsel responded back to one of Thomas's letter's regretting arguing the Alleyne issue. See Appendix.