

Supreme Court, U.S.
FILED

MAY 17 2018

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

ORIGINAL

CASE NO. 18-7358

AARON FORD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR ISSUANCE OF A
WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

By:
Aaron Ford, pro se
#08436-104
FCI Coleman Medium
P.O. Box 1032
Coleman, FL 33521-1032

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals erred in denying to issue a certificate of appealability to review Petitioner's denied motion under 28 U.S.C. § 2255 when the sentencing court committed plain error and counsel failed to bring that error to the court's attention when it deemed Petitioner a "career offender" based solely upon the contents of a Presentence Investigation Report over defense counsel's objections.
2. Whether the Eleventh Circuit Court of Appeals erred in failing to address Petitioner's contention of ineffective counsel when it was raised and the district court and the appellate court did not construe his petition liberally enough to include such an argument.

LIST OF PARTIES

All parties to this action appear in the caption of the case on the cover page.

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Appendix A: Opinion of the Court of Appeals for the Eleventh Circuit of February 21, 2018

Appendix B: Report of the Magistrate Judge of the Southern District of Florida of July 24, 2017; Order of the U.S. District Court for the Southern District of Florida of Aug. 29, 2017; Final Judgment of the U.S. District Court of Aug. 29, 2017; Order Denying Certificate of Appealability of Aug. 29, 2017

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OPINIONS BELOW

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

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to this petition and is, to Petitioner's knowledge, unpublished.

The magistrate's report, order, final judgment, and order denying a certificate of appealability of the United States District Court for the Southern District of Florida appear at Appendix B to this petition and are, to Petitioner's knowledge, also unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided this case was February 21, 2018. No petition for rehearing was timely filed.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. V

U.S. Constitution, Amend. VI

U.S. Constitution, Amend. VIII

28 U.S.C. § 2253

28 U.S.C. § 2255

STATEMENT OF THE CASE

On December 14, 2015, Petitioner entered a guilty plea to a two-count indictment wherein Count One charged violation of 18 U.S.C. § 922(g)(1) (possession of a firearm by a convicted felon) and Count Two charged violation of 21 U.S.C. § 841(a)(1) (possession with intent to distribute a controlled substance).

The sentencing court had the U.S. Probation Office prepare a Presentence Investigation Report ("PSR"). Defense counsel filed written objections to the PSR recommending that Petitioner be deemed a "career offender" based upon two prior "serious controlled substance" convictions. The PSR set forth the two offenses as Docket Numbers 01-020493CF10A and 10-017726CF10A which were, presumably based upon the listed information in the PSR, for "possession marijuana with intent to sell" and "possession of cocaine with intent to deliver/sell" respectfully. Petitioner proceeded to sentencing on February 19, 2016.

At the sentencing hearing, the sentencing court brought up defense counsel's objections and, without any analysis or review of anything other than the PSR, the court overruled the objection. See, Sentencing Transcript of Feb. 19, 2016, at p. 4:7-9. The government presented no argument and introduced no documentary evidence to counter Petitioner's objec-

tion whatsoever. It is crystal clear that the sentencing court relied solely upon the content of the PSR in reaching its determination that Petitioner qualified as a "career offender" despite his objection to the contrary.

Petitioner timely appealed from the sentence but, upon extremely poor advise of counsel that the "career offender" designation would not be considered by the Eleventh Circuit, voluntarily withdrew his appeal.

Subsequent to Petitioner's sentencing, this Court issued its opinion in Mathis v. U.S., 136 S.Ct. 2243 (2016). Petitioner then sought relief under 28 U.S.C. § 2255 predicated upon the analysis of Mathis and its requirements, requirements which the government and sentencing court had ignored. Despite his best pro se efforts, the district court denied his Sec. 2255 motion as "procedurally barred" because Mathis did not establish a "new rule of law." A certificate of appealability was, similarly, denied. The Eleventh Circuit denied issuance of a certificate of appealability itself, holding that an incarcerated prisoner could not challenge his "career offender" status via a Sec. 2255 motion. Both the district court and the appellate court chose not to entertain Petitioner's attempted-amended argument of his ineffective representation by counsel.

Petitioner now, timely, seeks a writ of certiorari from

Honorable U.S. Supreme Court to review the erroneous decision of the Eleventh Circuit Court of Appeals in denying issuance of a certificate of appealability as to his denied Sec. 2255 motion.

REASONS TO GRANT THIS PETITION
LEGAL ARGUMENT

Petitioner, AARON FORD, pro se, now respectfully requests the Honorable U.S. Supreme Court grant this petition and issue a writ of certiorari to the Eleventh Circuit Court of Appeals to review its opinion denying him a certificate of appealability as to his denied motion under 28 U.S.C. § 2255. Petitioner is a layman of the law, unskilled in the law, and requests this petition be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972). Petitioner contends that the Eleventh Circuit erred in its denial because reasonable jurists could disagree as to the result from the district court premised upon this Court's holding in Mathis v. U.S., 136 S.Ct. 2243 (2016).

STANDARD

Petitioner understands that this Court has discretion as to whether to grant the instant petition and issue a writ of certiorari, and respectfully requests this Court exercise that discretion.

A petitioner satisfies the standard for issuance of a certificate of appealability by demonstrating that jurists of reason could disagree with the district court's resolution, or could conclude the issues presented are adequate to deserve encouragement to proceed further. Miller-El v. Cockrel, 537 U.S. 322 (2003). This threshold question should be decided

without full consideration of the factual or legal bases adduced in support of the claims. Buck v. Davis, 580 U.S. ___, 197 L.Ed.2d 1 (2017). This is because, if the appellate court opines on the issues, it has done so without jurisdiction. Id. Appellate courts should limit their examination to this threshold question and ask only if the district court decision is debatable. Id.

ARGUMENT ONE

The Eleventh Circuit Erred in Denying a Certificate of Appealability Because Mathis Should Have Been Applied Retroactively in a 28 U.S.C. § 2255 Motion

The Eleventh Circuit Court of Appeals opined that Petitioner could not contest his unconstitutionally imposed sentence because it "challenged" the U.S.S. Guidelines and that such a challenge cannot be brought under 28 U.S.C. § 2255. Specifically, the district court (and by extension via the denial of a certificate of appealability the Eleventh Circuit) determined that Mathis v. U.S. was inapplicable to Petitioner's instant case and, moreover, was not a "substantial change in the law" such that 28 U.S.C. § 2255(f)(3) would apply.

Petitioner's classification of a "career offender" was predicated upon two prior Florida state convictions. These convictions were deemed to be "serious drug offenses" by the sentencing court although the only information the sentencing

court had at its disposal were general descriptions of the offenses as described in the PSR, a document this Court has held is inappropriate to be used for sentence enhancement purposes. Shepard v. U.S., 544 U.S. 13 (2005). At the time, no one -- not the court itself, not the government, and not defense counsel -- brought this to the sentencing court's attention. This led directly to Petitioner's improper designation, and is the exact reason this Court held in Shepard that a PSR is inappropriate.

Yet, even absent the Shepard documentation, as this Court addressed in Mathis, the sentencing court was required to perform the necessary analyses (modified categorical approach) to have determined whether the prior convictions would validly serve as predicate offenses for a "career offender" designation. It did not. In fact, it did nothing more than accept the PSR's recommendation of such a designation.

The issue, then, is whether Mathis applied retroactively to Petitioner's case and, as such, should the Eleventh Circuit issued the certificate of appealability to consider the merits of his arguments. Interestingly enough, the Eleventh Circuit opinion does not mention Mathis even once despite the fact it was discussed at length both in Petitioner's initial petition and in the district court's order (and accompanying magistrate's report). See generally, Appendix A and Appendix B.

Jurists of reason have already disagreed on the application of Mathis in the Sec. 2255 context. For example, the district court (in the magistrate's report which was adopted by the district judge) cited to Holt v. U.S., 843 F.3d 720 (7th Cir. 2016), for the proposition that "Mathis does not establish a newly recognized rule that is retroactively applicable to cases on collateral review." Appendix B, D.E. 4, at p. 5. Holt actually said that Mathis did not apply on a second or successive motion under Sec. 2255 but that it may be used to attack the validity of a conviction with Mathis on a first Sec. 2255 motion. Holt. Other courts have held similarly. See, e.g., U.S. v. Solomon, 694 Fed. Appx. 186 (4th Cir. 2017); U.S. v. Collins, 221 F.Supp.3d 249 (D.R.I. 2016); U.S. v. Sabetta, 221 F.Supp.3d 210 (D.R.I. 2016); U.S. v. Gambill, 214 F.Supp.3d 544 (W.D.Va. 2016); U.S. v. James, 2016 U.S. Dist. LEXIS 95887 (D.Ks. 7/16/16); U.S. v. Ballard, 2017 U.S. Dist. LEXIS 105766 (E.D.Pa. 7/7/17). All of these courts have determined that Mathis is a substantial change in the law applicable to a first Sec. 2255 motion under § 2255(f)(3).

It is exceptionally clear that when the U.S. Courts of Appeal disagree as to whether Mathis is applicable to the case at bar, and the district courts are issuing contrary rulings throughout the country, one can say that jurists of reason would disagree with the district court's resolution herein.

Just because the panel of Eleventh Circuit jurists who reviewed Petitioner's petition for a certificate of appealability happen to agree with the district court's resolution should not preclude the standard of Miller-El from being met. In fact, it is obvious from the opinion issued by the Eleventh Circuit that it did not limit itself to the threshold question necessary but, instead, reached a decision on the merits of Petitioner's 2255 argument without the jurisdiction to do so.

Given the contrast of the status of Mathis' applicability in the framework of a Sec. 2255 motion, Petitioner contends a certificate of appealability should have been issued by the Eleventh Circuit and in failing to do so constituted error. Petitioner requests the Honorable U.S. Supreme Court issue a writ of certiorari to review the Court of Appeals opinion in this matter, and vacate his unconstitutionally imposed sentence.

ARGUMENT TWO
The Eleventh Circuit Court of Appeals Erred
in Failing to Address Petitioner's
Ineffectiveness of Counsel Argument

In the case at bar, neither the district court (via the magistrate's report) nor the Eleventh Circuit address Petitioner's claim of ineffectiveness of counsel. Petitioner contends this was erroneous.

The question is whether the district court (and the magistrate judge) afforded Petitioner's Sec. 2555 motion the liberal construal it deserved. See, Haines. Petitioner may not have brought the specific language of ineffective counsel to the court's attention directly until his attempted supplement, but the content and concept was discussed to some extent in the initial motion.

The seminal case regarding counsel's ineffective representation is Strickland v. Washington, 466 U.S. 668, (1984); and its progeny. The question presented is, but for counsel's ineffective assistance, would the case have had a different outcome. There can be no doubt that is the case herein.

At sentencing, counsel raised an objection to Petitioner being deemed a "career offender." He brought this objection solely for purposes of "preserving the issue" for appellate review. See Sentencing Transcript of Feb. 19, 2016, at p. 4:2-9 ("preserving it for further appellate review").

Petitioner subsequently filed his direct appeal, including this issue. However, counsel advised Petitioner that he was "going to lose" on appeal because Eleventh Circuit precedent was inapposite to Petitioner's position. He further advised Petitioner to voluntarily withdraw the appeal, an act which Petitioner ultimately did.

Upon filing his Sec. 2255 motion, however, Petitioner

learned from both the government's response and the magistrate judge's report that he, supposedly, was procedurally barred from raising the issue in his Sec. 2255 motion because he withdrew his appeal. The issue, however, appears to have been contestable if the appellate court had ruled, even if it were against him. This, in essence, may have totally jeopardized Petitioner's ability to raise the argument. That can only be said to constitute "ineffective" counsel.

Counsel's effectiveness (or ineffectiveness) is measured against an objective standard: would a reasonable defense attorney have pursued the course of action as done in the instant case. Counsel undertook specific measures in the trial court at sentencing to preserve the issue for appeal purposes of whether Petitioner qualified as a "career offender." He then counseled Petitioner to abandon those arguments to his detriment. This further, potentially, precluded him from raising these arguments in his Sec. 2255 motion, clearly prejudicial to Petitioner. This action meets the Strickland standard without doubt, and the Eleventh Circuit should have consented to review the district court's determinations via a certificate of appealability because Petitioner's Sixth Amendment right to counsel was impinged.

CONCLUSION

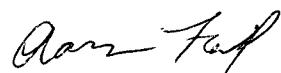
The U.S. judicial system is the bastion of defense of an

individual's rights among which are the right to effective counsel and the right to be sentenced appropriately (and not in excess of what is necessary). It is the institution designed as a shield against the executive branch overreaching through the prosecution of an individual. It is the body that embraces fairness on both sides of a dispute. For a U.S. court to claim that what was done in sentencing an individual to a sentence with a "career offender" status was done properly despite the obvious oversights and missteps is disheartening. For an appellate court to, essentially, rubber stamp those erroneous actions is horrific. That the Eleventh Circuit Court of Appeals chose not to even review the district court's and counsel's errors herein is worse -- it is unforgivable that such a blind eye could be turned to such actions.

Petitioner hopes and prays that this Honorable U.S. Supreme Court will accept the need to address the Eleventh Circuit's errors and failures, grant his instant petition, and issue a writ of certiorari to review the Eleventh Circuit Court of Appeals opinion below.

DATED: 5-10-2018

Respectfully Submitted,



Aaron Ford
#08436-104
FCI Coleman Medium
P.O. Box 1032
Coleman, FL 33521-1032