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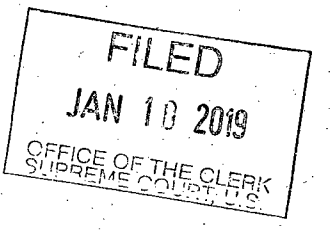

IN THE

SUPREME COURT OF THE UNITED STATES

James Howard Looman, III — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals For the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Howard Looman, III, #43786-177
(Your Name)

FCI Seagoville, P.O. Box 9000
(Address)

Seagoville, TX 75159
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Did the Fifth Circuit err when it refused to apply 28 U.S.C. §2253(c) and F.R.A.P. Rule 22(b) and follow this Court's commands regarding review of applications for certificates of appealability?

LIST OF PARTIES

[X] 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:

TABLE OF AUTHORITIES CITED

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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

[X] For cases from **federal courts**:

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[X] is unpublished.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

[X] reported at 2017 U.S. Dist. LEXIS 168442 (N.D.Tex.); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

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[ ] is unpublished.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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 20, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 19, 2018, and a copy of the order denying rehearing appears at Appendix F.

[ ] 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. § 1254(1).

(The original criminal case the judgment of which was attacked by the collateral proceedings appealed from here was No. 3:11-cr-0330-L in the U.S. District Court for the Northern District of Texas.)

[ ] For cases from **state courts**:

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

Amendment V [1791]

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 suibject for the same offence 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.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and **to have the Assistance of Counsel for his defence.**

28 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order **shall be subject to review, on appeal,** by the court of appeals for the circuit in which the proceeding is held.

* * *

(c) (1) Unless a circuig justice of judge issues a cerrtificate of appealability, an appeal may not be taken to the court of appeals from --

* * *

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right ....

28 U.S.C. §2255

(a) A prisoner ... upon the ground that the sentence was imposed in violation of the constitution or laws of the United States ... or is otherwise subject to collateral attack, may bove the court ... to vacate, [etc.]

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon ....

F.R.A.P. Rule 22(b)(2): ... If no express request for a certificate is filed, the notice of appeal constitutes a request ....

STATEMENT OF THE CASE

Looman was arrested in 2011 and sentenced in 2012 for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). His base offense level was determined under USSG §2K2.1(a)(4)(A) and, with a criminal history category of V, no acceptance-of-responsibility points and no plea agreement, Looman was sentenced within the 77-96 month range to 84 months' imprisonment. See United States v. Looman, 542 Fed. Appx. 419 (5th Cir. 10/22/2013). Looman is projected for release on 4/12/2019 (barring relief flowing from the passage of the FIRST STEP Act in Congress).

His §2255 motion raised a "Johnson" claim which caused the United States District Court for the Northern District of Texas to stay his case pending the outcome of Beckles in this Court. In 2017, the District Court denied that claim (and Looman does not maintain any interest therein) as well as Looman's ineffective assistance of counsel claims (which Looman vigorously maintains).

Those claims asserted counsel's failure to convey or seek a favorable plea agreement and failure to effectively raise meritorious and available arugments vis-a-vis the Guidelines calculations. Specifically, Looman presented evidence that counsel had discussed plea bargaining with the Government despite his never having conveyed this information to Looman, and showed that an objection to the mischaracterizsation of his prior crime to enhance his base offense level by 6 levels, as well as argument against the denial of acceptance-of-responsibility points, would have been fruitful.

Following the District Court's denial of his §2255 motion on 10/12/2017, see Appendix A (Order), Appendix B (Report & Recommendation), Looman filed a timely Notice of Appeal and was granted permission to proceed in forma pauperis. At the direction of the Clerk of the United States Court of Appeals for the Fifth Circuit, Looman submitted a request for a Certificate of Appealability raising three issues in plain language.

> I. The District Court incorrectly mischaracterized Petitioner's claims. See Order (Doc. 20) at 2. His claim regarding the application of a Guidelines enhancement is not foreclosed by the rationale in U.S. v. Faubion, 19 F.3d 226, 232 (5th Cir. 1994). Petitioner did not raise a due process claim, but argued that counsel was ineffective for failing to investigate and object to the enhancement where effective representation would have revealed that it could not apply to the facts of [his] case under law.
>
> II. Further, Petitioner's claim that counsel failed to effectively pursue available favorable plea negotiations was not "speculative" because it was supported by attorney notes comprising independent indicia of the claim's reliability. Where the claim could not be conclusively refuted by the record, [Petitioner] should have been afforded an opportunity to develop proof thereof, e.g., by deposition of trial counsel.

III. The District Court should have held an evidentiary hearing on these facts, and the summary rejection of [Petitioner's] claims was an abuse of discretion. See §2255(b). "Ineffective assistance claims generally require an evidentiary hearing if the record contains insufficient facts to explain counsel's actions as tactical," Gaylord v. U.S., 829 F.3d 500, 506-507 (7t hCir. 2016) (quoting Osagiede v. U.S., 543 F.3d 399, 412 (7th Cir. 2008)). The record and the law are of such a state that reasonable jurists could debate the outcome of the proceedings below.

Appendix C (emphasis in original). Looman concluded: "The Court should grant a COA and appoint counsel so as to enable Mr. Looman to effectively present his case."

On 8/20/2018 Judge Willett denied Looman's request for a COA (and his motion for appointment of counsel) on the basis that "Looman has abandoned his claims ... by not adequately briefing them," Appendix D at 2.

The Fifth Circuit's conclusion, based on two aged and inapposite cases, is wrong and deprives Looman of meaningful opportunity for review under 28 U.S.C. §2253(c). See Appendix E at 3.

Congress established the requirement that a prisoner obtain a COA in order to prevent frivolous appeals. The Court was required to review his case for "a substantial showing of the denial of a constitutional right," §2253(c)(2) -- and, despite Looman's adherence to the rules and rather efficacious provision of all that the law requires, the Fifth Circuit did something that was not as §2253 dictates.

Federal Rules of Appellate Procedure Rule 22(b)(2) expressly dictates that a bare notice of appeal suffices to invoke review under §2253(c). Looman had done this plus gone a step further, clearly identifying the issues he sought to present on appeal, see Appendix C, Appendix E at 2.

Looman's first constitutional claim under the Sixth Amendment was, he asserted, "incorrectly mischaracterized" by the District Court reviewing his §2255 petition. In stating this issue Looman clearly argued that the determination below -- that his "claim regarding the application of a Guidelines enhancement" was "foreclosed by the rationale in U.S. v. Faubion" -- was wrong (i.e., debatable) because Looman "did not raise a due process claim [about application of a Guidelines enhancement per se], but argued that ... effective representation would have revealed that [the enhancement] could not apply to the facts of [his] case under law" but for counsel's "fail[ure] to investigate and object to the enhancement." Appendix E at 5-6.

In his second issue, Looman asserted another argument against the lower court's disposition of a separate Sixth Amendment claim, to wit, "that counsel failed to effectively pursue available favorable plea negotiations." He explained that the District Court's conclusion that this ground was "speculative" was also wrong (debatable) "because it was supported by attorney notes comprising independent indicia of the claim's reliability."

He argued that, because the "claim could not be conclusively refuted by the record, Mr. Looman should have been afforded an opportunity to develop proof thereof, e.g., by deposition of trial counsel." Id. at 6.

Looman stated these two constitutional claims and described his reasoning in disputing the outcom of the proceeding below. He then argued that, "on these facts," the "summary rejection" of his claims amounted to an "abuse of discretion" under §2255(b): Because "ineffective assistance claims generally require an evidentiary hearing" in such cases as here devoid of explanation by counsel indicating that his actions could be shielded by strategy, the "record and the law are of such a state that reasonable jurists could debate the outcome ... below." Id. at 6-7.

The Fifth Circuit understood Looman's claims, see Exhibit D at 1-2, but in finding that Looman had "abandoned" them by his concise briefing thereof the Fifth Circuit seemed to hold that a full appellate briefing is needed in order to meet the pleading requirements of §2253 and Rule 22. Looman has been unable to find this requirement in any relevant statute or rule, and it appears contrary to this Court's instructions in Miller-El, 537 U.S. at 338, seeming to put the cart so far before the horse as to reek of arbitrary will and the heinous stench of disrespect for law and the rights of the people which was of such paramount concern only two hundred years ago.

There has never been any requirement that a petitioner for a COA "adequately brief" his claim in that application, and Looman happens to know other prisoners whose applications for a COA in the Fifth Circuit have been afforded far more liberal construction. To whatever extent it might be the case that more requirements exist that are not formally codified anywhere for notice to prisoners, Looman certainly met the essentials thereof when he clearly described his issues with plain references to the record below. See Appendix E at 8-9 (citing Stuart v. Gagnon, 837 F.2d 289, 290-91 (7th Cir. 1986) ("Nothing in the plain language of [] §2253 or its legislative history indicates that a petitioner ... need detail the grounds upon which the petition is based or the substantial questions to be raised on appeal," and there is "no reason to require the petitioner to restate his claims"); U.S. v. Orozco, 1996 U.S. App. LEXIS 41291 (5th Cir. 1996) (noting that a notice of appeal, even though "bare bones," may be construed as a request for a COA, and "look[ing] to [the petitioner's] other papers ... to evaluate the issues he presents," internal citations omitted)).

Looman petitioned the Fifth Circuit for rehearing and specifically for en banc consideration. F.R.A.P. Rules 35, 40, see Appendix E. He explaine that the Fifth Circuit's restrictive, ambiguous, and secretive posture not only conflicts with the law and his rights, but represents a bald and egregious departure from the transparency ordinarily so carefully tended in support of the right of the people to due process of law. Looman respectfully requested that the Fifth Circuit clarify its pleading requirements for pro se prisoner applications for certificates of appealability.

On 11/19/2018, the Fifth Circuit denied this "motion for reconsideration" without comment, Appendix F. This petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit refused to entertain Looman's apl ication for a COA despite his having complied with all legal requirements. Its rationale for rejecting Looman's application without affording due consideration is flawed to the point of being in plain violation of the law as well as demonstrably prejudicial to the rights of Looman, as well as indicative of deeper misapprehensions within that Court which threaten the rights of the people generally.

This issue is hardly unique to Looman as an individual. §2253 and Rule 22 are effectively procedural laws that apply exclusively to prisoners. All of us who exercise our rights to collateral review of the judgments which deprive us of life, liberty, or property must, when appealing a district court's denial of relief, pass through this gate. To transform this hurdle into a rubber stamp with only one word on it (six letters, starts with "D") makes the predicate right (under §2255) worthless because judges are then free to abdicate their roles as arbiters of controversies given their de facto positions as courts of first and last resort.

Although the law appears to allow even a bare notice of appeal to suffice to prompt "threshold" review of hte disposition of the collateral case below, in practice, each reviewing judge makes up her or his own rules about what suffices. We are thus prisoners not only by virtue of the judgment ostensibly under attack, but of the **arbitrary will** of men. The posture of the Fifth Circuit thus strikes at the heart of the Fifth Amendment's guarantee of due process of law. Let this cry be heard if no other: Looman petitions the Supreme Court to review this last bastion of the rights of the accused before they are so eroded as to be forgotten.

This situation cannot be palatable to officials vested with the authority of and sworn to uphold the Constitution and laws of the United States! We are entitled to the exercise of the jurisdiction vested in judges by virtue of our consent and delegation of sovereign power. When our petitions are submitted to the courts, they must be reviewed in accordance with that framework -- dispositions based on caprice are per se violative of our most fundamental and sacred rights to due process of law.

This Court in Miller-El held that the "threshold inquiry" does not permit denial of a COA "merely because [the court] believes the appellant will not demonstrate an entitlement to relief," 537 U.S. at 337 (internal citations omitted). And in Buck v. Davis, this Court repeated that the "threshold question" should be decided without "full consideration of the factual or legal bases adduced in support of the claim," 197 L.Ed.2d at 16 (internal citations omitted): "whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry," Id. at 18.

Looman submitted an application for a COA in proper form. The Fifth Circuit's refusal to entertain it in the first instance was not an exercise of judicial authority as it did not stem from any lawful font. It should be vacated.

Looman humbly begs the Court to remand his case in time for it to make a difference to him. Looman has pressed his collateral claims to §2255 relief diligently since 2015. He has raised genuine issues below which he believes entitle him to immediate release where he is serving a sentence beyond that which would properly have been pronounced but for the errors affecting his constitutional rights which remain to be addressed only because of procedural quagmires like the one presented here. These questions should have been reviewed in the original §2255 proceeding but have yet to be adjudicated not because Looman has lacked in diligence but because the courts have failed to afford the consideration to which he is by law entitled.

Looman is scheduled for release in the spring of 2019, but will remain in constructive custody during his term of supervised release and thus asserts that the controversy originally presented shall remain live. Please recognize that Looman is exemplary of a class of the persons whose rights were enshrined by the Framers, and that we are -- partly due to the concertina wire and partly due to the AEDPA, the PLRA, and the rest -- the least audible voices. This is important.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Howard Looman III

Date: January 9th 2019