

CASE NO.: 18-6029

IN THE SUPREME COURT OF THE UNITED STATES

MALCOLM ROLAND ALLEN,
PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT(S).

PETITION FOR A WRIT OF CERTIORARI

PETITIONER SEEKS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MALCOLM ROLAND ALLEN
Reg.No.: 99119-179
UNITED STATES PENITENTIARY CANAAN
P.O.BOX 300
WAYMART, PA 18472.

QUESTION(S) PRESENTED

- I. WHETHER at the time of evidentiary hearing was granted to challenge the ineffective counsel's failure to file a Notice of Appeal per Petitioner's request and to object or investigate in disqualified career offender sentencing guideline which one of two prior convictions imposed less than 1 year term of imprisonment, should the U.S District Court appoint him another counsel to represent him to challenge his ineffective counsel's failure?
- II. WHETHER is it ineffective counsel or not based his deficient performance failed to object and investigate disqualified career offender sentencing guideline and failed to file a Notice of Appeal per petitioner's request where both failures substantially prejudiced him resulted in an increase of sentence term pursuant to §4B1.1, §4B1.2 and §3742?
- III. WHETHER is it contradicting to 18 U.S.C. §3006A and a governing Rule in Section 2255 or not? when the 4th Circuit Court and the U.S District Court denied petitioner's right to be represented at all stages of judicial proceedings and conflicting even its own precedents as well as this Court's decisions?

LIST OF PARTIES

All parties are listed in the caption.

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APPENDIX-A: Copy of the 4th Circuit Court's Order and Mandate issued denying Petitioner's COA Rehearing and Rehearing En banc petition dated on June 12, 2018. Mandate issued on 06/20/18.

APPENDIX-B: Copy of the 4th Circuit Court's Order denying COA petition dated on April 03, 2018.

APPENDIX-C: Copy of the U.S District Court's Order and Memorandum denied the §2255 Motion and COA petition dated on 12/12/2017.

APPENDIX-D: Copy of Petitioner's Reply to Government's Opposition to his §2255 motion.

APPENDIX-E: Copy of Petitioner's Rehearing and Rehearing En banc petition and other supplemental documents dated on 04/08/2018.

TABLE OF AUTHORITIES

1. Rosales-Mireles v. United States, No.16-9493 ruled 7-2 on June 18, 2018 that an error in calculating the sentencing guidelines is an error that must be addressed by resentencing the defendant, even if no one noticed the error when it occurred. The Court must correct the mistake, even if the sentence imposed falls within the correct guideline range.
2. United States v. Gonzales, 2014 U.S.App.Lexis 8503 (4th Cir.03/19/14); and United States v. Opande, 210 Fed.App.262 (4th Cir.2006):
"Given defendant's eligibility, the District Court committed reversible error by failing to appoint counsel to represent him at the evidentiary hearing. Such an appointment was mandated by R.Governing Section 2255 proceedings U.S.Dist.Cts.8(c)."

OPINION BELOW

The opinion of the U.S District Court denied petitioner's §2255 motion raised two claims of wrong sentencing guideline under §4B1.1 Career Offender guideline relying on one of two prior convictions imposed a term less than 1 year as required by a statute attached in Appendix C.

The 4th Circuit Court's dismissal of petitioner's COA petition as see in Appendix A unpublished as well as the U.S District Court's memorandum opinion denied his §2255 motion dated on 12/12/2017. The 4th Circuit Court of Appeals dismissed petitioner's COA dated on 04/03/2018 and denied his Rehearing and En banc petitions dated on 06/12/2018, then issued its mandate on 06/20/2018 as see in Appendix B.

JURISDICTION

The judgment of the 4th Circuit Court of Appeals to dismiss Petitioner's COA on April 3, 2018 and denied his Rehearing and En Banc petitions on June 12, 2018 then issued its mandate on June 20, 2018. Thus, petitioner files his petition for a writ of Certiorari in this Court timely within 90 days limitation of its rule. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 3742 : Review of a Sentence (a)(2) a defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence was imposed as a result of an incorrect application of the sentencing guidelines.

28 U.S.C. § 2255 is governing Rule 8(c) provides that: "Time of Hearing, if an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A."

STATEMENT OF THE CASE

1. On 10/30/2009 petitioner pled guilty to one count of possession with intent to distribute fifty grams or more of cocaine basd and methamphetamine in violation of 18 U.S.C. § 841(a)(1).
2. On 05/11/2010 the U.S District Court imposed a sentence of term 216 months upon him. Subsequently Petitioner filed his §2255 motion which the U.S District Court granted in part, permitting him to file an appeal to the 4th Circuit Court to claim his ineffective counsel but rejected his claim of misapplication of U.S.S.G. §4B1.1 career offender sentencing guideline. See Allen v. United States, Nos. RDB-08-0222; RDB-11-1143, 2013 WL 1247658 (D.Md.Mar. 25, 2013).
3. Then Petitioner appealed that U.S District Court's decision which the 4th Circuit Court affirmed. See United States v. Allen, 567 Fed. App'x. 175 (4th Cir. 2014).
4. On 04/28/2011, Petitioner filed his first Motion to Vacate argued that his counsel was ineffective for failing to file a timely notice of appeal, second he is entitled to resentencing under the Fair Sentencing Act of 2010, Pub.L.No.111-220, 124 Stat. 2372, and third his career sentencing guideline under U.S.S.G. §4B1.1 application to his sentence is inappropriate based on one of two prior convictions imposed a term less than 1 year as required by §4B1.1. See Allen v. United States, Nos. RDB-08-0222; RDB-11-1143, 2013 WL 1247658 (D.Md.Mar. 25, 2013).
U.S.S.G. § 4B1.1(a): A prior felony conviction is defined as an adult charge for a federal or state crime "punishable by death or imprisonment for a term exceeding one year...

5. However, the U.S District Court denied his claim under the Fair Sentencing Act of 2010. As to Petitioner's ineffective assistance of counsel claim, the U.S District Court ordered that an evidentiary hearing be held to determine whether Petitioner asked his counsel to file a Notice of Appeal, not other two issues raised in his claims.

6. Subsequently, at the evidentiary hearing after the U.S District Court warranted such hearing, to challenge with his ineffective counsel as a pro se defendant stood before the court and side by side with his ineffective counsel, the Court did not appoint him another counsel to assist him in this challenge at the evidentiary hearing process.

7. The Court seriously yelled at him during the pro se debate with his ineffective counsel when he conducted not appropriately before the court by not using properly legal terms in the courtroom while his father witnessed this entire evidentiary hearing and asked the court why it did not appoint his son a lawyer during this critical time of hearing.

8. At last, the U.S District Court conceded and determined that his ineffective counsel had failed to file a Notice of Appeal on behalf of Petitioner. It granted ultimately in part and denied in part of his first §2255 motion to vacate. See Allen v. United States, Nos.RDB-08-0222; RDB-11-1143, 2013 WL 2490568 (D.Md.June 7,2013).

9. Accordingly, the U.S District Court vacated its original judgment and ordered the clerk to enter an amended judgment so that Petitioner could file an appeal.

10. On appeal to the 4th Circuit Court, it affirmed Petitioner's sentence, see United States v. Allen, 567 Fed.App'x 175 (4th Cir.2014), for one ground of his prior convictions used for career offender is not

proper because one of them imposed the prison term less than 1 year not complied with the U.S.S.G. §4B1.1 requirement. The 4th Circuit Court rejected his argument that "the fact that Allen served less than a year in jail is not dispositive of the issue." by citing United States v. Kerr, 737 F.3d 33, 38 (4th Cir.2013).

11. Later Petitioner filed his first petition for a writ of certiorari in this Court which was denied, see Allen v. United States, 135 S.Ct. 300 (2014)(Mem). A year later in 2015, the U.S District Court granted Petitioner's Motion for a Sentence Reduction pursuant to 18 U.S.C. §3582 (c)(2) due to a lowered guideline sentencing range made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. §994.

12. Petitioner's sentence was reduced to 180 months. However, on 04/06/2015, Petitioner filed his second motion to vacate argued that the U.S District Court erred by failing to appoint him a counsel during his evidentiary hearing where he wished to raise the Career Offender issue also, not just the counsel failed to file a notice of appeal. However, the District Court failed to appoint him another counsel to raise such issue as a failure of his ineffective counsel including his failure to file a notice of appeal.

13. Thus, the U.S District Court's failure to appoint him another counsel to challenge the essential issues which the ineffective counsel failed to perform is substantially prejudice to petitioner. Thus, he should be represented in the court's evidentiary hearing to eliminate the doubt that if he had a counsel to debate instead of he himself as a pro se defendant stood before the court to raise those essential issues without any legal knowledge and experience. The result the U.S District Court yelled at petitioner in front of his father who attended that hearing.

14. As a result, the U.S District Court denied his second §2255 motion, as see in Appendix C attached, on 12/12/2017.

15. Not happy with its decision to deny his second §2255 motion when his right to counsel during the evidentiary hearing was deprived already, seeking for fundamental fairness in the 4th Circuit Court, Petitioner Allen filed a "COA" petition in the U.S District Court, then the COA was denied also, and then he filed the COA petition in the 4th Circuit Court was denied and appeal was dismissed on April 03, 2018, as see in APPENDIX A attached herewith.

16. Later within time limitation, Petitioner filed his petition for rehearing and rehearing en banc and was denied on June 12, 2018, as see in Appendix B attached herewith.

17. Herein, petitioner files his petition for a writ of certiorari in this U.S Supreme Court seeking for its approval or granting as alleged in the reasons for granting page attached next to this page.

REASONS FOR GRANTING THE WRIT

I. As his question presented on page 1, when petitioner's evidentiary hearing based on the ineffective counsel's failure to file a notice of appeal due to Section 3742 because of disqualified career offender enhancement, not just granting the evidentiary hearing based on failure of filing appeal, but the evidentiary hearing based on §4B1.1 as well. Therefore, appointment of new counsel to challenge those essential issues (ineffective counsel and U.S.S.G. §4B1.1), the U.S District Court should appoint him a counsel to eliminate all doubts concerning about those issues in questions.

Otherwise, the U.S District Court deprived his right to a counsel during the evidentiary hearing as required by Section 2255 governing the Rule 8(c): "Time of hearing, if an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. §3006A."

II. Contradicting to Section 2255 governing Rule 8(c) as well as its own precedents in *United States v. Gonzales*, 2014 U.S.App.Lexis 8503 (4th Cir. March 19, 2014) and *United States v. Opana*, 210 Fed.App.262 (4th Cir. 2006) held that: Given defendant's eligibility, the District Court committed reversible error by failing to appoint counsel to represent him at the evidentiary hearing. Such an appointment was mandated by Rule 8(c) governing Section 2255 proceedings U.S. Dist. Cts. 8(c). This Court vacated district court's order denying defendant's motion for reconsideration and remanded the case back to the district court, with directions that it should appoint counsel and should hold a new evidentiary hearing on the Section 2255 motion.

III. Instead it assumed Allen was able to muddle through the evidentiary hearing to receive a favorable outcome, however, the trained counsel would have been in a position to present the evidence that would have likely expanded the scope of the Court's Order.

IV. Thus, even if only 1% chance exists that the outcome of the evidentiary hearing would have been different in some measurable with the advocacy of counsel, the integrity of the judicial process commands that a new hearing be held whereby Allen can be aided by counsel to challenge the ineffective counsel and other issues in questions.

CONCLUSION

WHEREFORE, based on the above mentioned reasons for granting this Certiorari petition along with factual statements, this United States Supreme Court should grant this petition because of its issues of importance beyond the particular facts and parties involved and the Court should set this case as an example of an important question of federal law in a way that conflicts with relevant decisions of this Court under Section 2255 governing Rule 8(c) and §3006A.

VERIFICATION

I am Malcolm Roland Allen acting as a pro se litigant hereby certifying that the foregoing statements, reasons, and factual standing points which I made in this petition for a writ of certiorari is true and correct.

Respectfully executed and submitted on July 24, 2018.



MALCOLM ROLAND ALLEN, PRO SE PETITIONER

#99119-179

USP CANAAN

P.O.BOX 300

WAYMART, PA 18472.