

No. 18-A1335

IN THE
SUPREME COURT OF THE UNITED STATES

Jonathan Aleman,

petitioner,

v.

United States of America,

respondent.

ON A PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Appeal No. 18-15342

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.**

QUESTIONS PRESENTED

1.

This Court provides that a defense attorney must consult with a criminal-case defendant concerning the defendant's right to appeal and the consequences of waiving that right. Jonathan Aleman pleaded guilty. After sentencing, Mr. Aleman filed a pro se notice of appeal. Thereafter his attorney filed a motion to dismiss the an appeal, in less than five minute the defense attorney convinced Mr. Aleman that he should not appeal because he could get more time and that he could always attack the sentence collaterally. The defense attorney never spoke with Mr. Aleman again.

- Was defense counsel's advice constitutionally inadequate?

2.

In the § 2255 motion, Mr. Aleman alleged that his defense attorney failed to advise him that in the absence of a direct appeal, his valid sentencing challenge could not be heard—the claims are incognizable in collateral review. Defense counsel said he should dismiss the appeal because he might get more time. A quanta of advice that is objectively inadequate because the court decided Mr. Aleman could not show prejudice. The district court never conducted an evidentiary hearing.

- Should the district court have conducted an evidentiary hearing to evaluate the adequacy of counsel's out-of-court, off-the-record advice concerning the direct appeal?

3.

- The Court of Appeals denied a certificate of appealability based on its merits analysis that Mr. Aleman could not show prejudice. Did the Eleventh Circuit Court of Appeals exceed its subject-matter jurisdiction by deciding the merits of the ineffective-assistance-of-counsel claim before granting a certificate of appealability?

LIST OF PARTIES

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IN THE
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PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case March 20, 2019. No petition for rehearing was timely filed in my case.

An extension of time to file the petition for a writ of certiorari was granted to and including August 17, 2019 on June 20, 2019 in Application 18A1335. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(2): A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2255(b): Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

On May 27, 2015, a federal grand jury returned an indictment charging Jonathan Aleman with one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(5)(B), two counts of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B), and one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B). (Crim. Doc. 11).

On July 9, 2015, defense counsel Augustus Sol Invictus motioned the court under 18 U.S.C. §§ 4241 and 4243 for \$2,500 to pay Psychiatrist Jeffrey Danziger for an examination to determine whether Mr. Aleman was mentally competent to waive his Miranda rights at the time of his arrest. (Crim. Doc. 27). At the July 22, 2015 hearing on the Motion for Exam, (Crim. Doc. 102), Mr. Invictus said that an examination would "be beneficial to see whether [Mr. Aleman] is competent to enter a plea[.]" (Id. at 4). The court concluded that Mr. Aleman had not "made a reasonable showing of the need to expend CJA funds for the services of a mental health professional," and the Motion for Expert was denied. (Id. at 6).

On February 12, 2015, based on Mr. Aleman's guilty plea the district court sentenced Mr. Aleman to 151 months in prison. On March 18, 2016, Mr. Aleman filed pro se "Notice of Appeal for Reduction of Sentence." (Crim. Doc. 66). On June 1, 2016, Mr. Aleman's court-appointed appellate counsel, H. Kyle Fletcher, filed a motion in the Eleventh Circuit Court of Appeals to withdraw the Notice of Appeal "so that [Mr. Aleman] can expeditiously go forward with a Rule 2255 post-conviction proceeding." (§ 2255 Doc. 5-1 at ¶ 4). Attached to the Motion to Withdraw Appeal was a notarized handwritten letter from Mr. Aleman giving "permission to withdraw my appeal and close my case with the Eleventh Circuit. I believe this decision is in my best interest and relieve H. Kyle Fletcher of any fault in my decision." (Id. at 6). On June 14, 2016, the Eleventh Circuit

granted the Motion to Withdraw Appeal and dismissed Mr. Aleman's appeal. (Crim. Doc. 100).

In 2017, Mr. Aleman filed a motion to vacate his sentence under 28 U.S.C. § 2255. In his § 2255 motion, Mr. Aleman argued that (1) the sentencing court erred by denying his motion for a psychiatric examination; (2) his sentencing counsel was ineffective for allowing the court to enhance his sentence for the distribution of pornography, pursuant to U.S.S.G. § 2G2.2(b)(3)(F), when the file-sharing program he used automatically allowed others to download and transfer materials without his knowledge; and (3) his appellate counsel was ineffective for advising him to dismiss the direct appeal of his sentence. Following a response and reply, the district court denied the § 2255 motion.

Mr. Aleman applied to the Eleventh Circuit Court of Appeal for a certificate of appealability. The Eleventh Circuit refused to issue a COA. In reaching that decision the court of appeals conducted a merits analysis and overlooked this Circuit's precedent on when the law requires an evidentiary hearing.

In order to rectify the Eleventh Circuit's departure from established law, Mr. Aleman commenced this opinion.

This petition followed.

REASONS FOR GRANTING THE WRIT

1. **The district and appellate courts applied the wrong standard for prejudice in the context of the denial of the right-to-appeal claim.**

This Court holds that a presumption of prejudice exists when an attorney fails to file a direct appeal or properly consult with a defendant even though the defendant's plea agreement contained an appeals waiver, *Idaho v. Garza*, 139 S. Ct. 738 (2019), and this is so even if the defendant's chances of appellate success are small. See *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). After sentencing, Mr. Aleman asked his attorney to appeal the sentence, defense counsel did not but Mr. Aleman filed a pro se notice of appeal. The newly appointed appellate counsel then had a single conversation about the length of the sentence, and that § 2255 was available to fight the sentence. Counsel's answer was wrong he did not instruct Mr. Aleman on the benefits or detriments of appealing or not appealing. He did not tell Mr. Aleman that sentencing claims were generally incognizable in § 2255. He simply convinced Mr. Aleman to dismiss the appeal without briefing. Despite the out-of-court off-the-record nature of these factual allegations the district court denied Mr. Aleman's ineffective assistance claims without an evidentiary hearing (for effectively failing to file a direct appeal). More disturbing, the district court predicated its decision on the wrong rule "Likewise, Petitioner has not demonstrated a reasonable probability that he would have prevailed on his appeal, and he cannot demonstrate ... prejudice." (Appx. "2" at 13). In addition to the previously discussed procedural mistake (no evidentiary hearing), the district court either applied the wrong legal standard (prejudice should have been presumed) or misapprehended the factual record (that is the unresponsive nature of the attorney's answer).

On the verified record, Mr. Aleman states that he abandoned his direct appeal because his attorney's misadvice concerning consequences of abandoning a direct appeal. Counsel's perfunctory dismissal of Mr. Aleman's desire to challenge the sentence is per se deficient performance, and the prejudice is presumed since counsel's error prevented Mr. Aleman from receiving any appellate review. See **Roe v. Flores-Ortega** 528 U.S. 470 (2000)

Furthermore Mr Aleman states that if he had been advised about the consequences of not pursuing a direct appeal (e.g. procedural default, transcripts availability), then he would have insisted on an appeal. Instead, the government does not contravene these allegations, let alone conclusively refute them. The government attempts to deflect the analysis by begging the question—it states that Mr. Aleman agreed to dismiss the appeal thus there is no prejudice. The claim however, is that Aleman agreed to dismiss the appeal because of the attorney's bad advice. On the record, the district court never heard what the advice was. Nonetheless, the district court summarily denied the \$ 2255 motion. The appeals court affirmed that decision by denying certificate of appealability.

This Court recently pronounced that an accused's subjective motives were salient to establishing prejudice **Lee v. United States** 137 S. Ct. 1958 (2017). That is, even if the person's objective chances of success were minute, a subjective belief that the consequences of a guilty plea were too harsh. Sufficient to establish prejudice. **Id.**

Applying this rule in the habeas context, it is irrelevant whether the district court agrees with the defendant's motive; the only relevant question is whether the defendant would have appealed if accurately informed. Correspondingly, jurists of reason would find debatable the district court's conclusion: Mr. Aleman's unrefuted allegations were insufficient to establish prejudice. (Appx. "2" at 13).

2. The Eleventh Circuit effectively conducted a merits analysis in order to deny a Certificate of Appealability

A federal court should grant a habeas petitioner a certificate of appealability when the petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); **Miller-El v. Cockrell**, 537 U.S. 322 (2003); **Slack v. McDaniel**, 529 U.S. 473 (2000). A petitioner makes the substantial showing by demonstrating that reasonable jurists would find the district court's ruling on the merits debatable or wrong. **Tennard v. Dretke**, 542 U.S. 274, 282 (2004)(citing **Slack**, 529 U.S. at 484). A petitioner can also make the substantial showing by demonstrating that jurists of reason would find that that "issues presented deserve encouragement to proceed further " **Miller-El**, 537 U.S. at 336 (quoting **Barefoot v. Estelle**, 463 U.S. 880, 893, n.4 (1983)).

The certificate of appealability stage involves only a threshold inquiry entailing a cursory examination of the factual or legal basis adduced in support of the questions to be certified. **Miller-El**, 537 U.S. at 336. In other words, a petitioner need not show that he would succeed on the merits, but only that the questions are worthy of debate. The Supreme Court emphasizes that a court "should not decline the application for a certificate of appealability merely because the application will not demonstrate an entitlement to relief." *Id.* at 338. If there is any doubt regarding whether to grant a certificate of appealability the matter should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making the determination. Cf. **Shinisday v. Quarterman**, 511 F.3d 514, 520 (5th Cir. 2007).

When a district court denies a § 2255 claim on procedural grounds, a petitioner must demonstrate not only that the substantive claim is valid, but also that reasonable jurists would find the procedural ruling debatable or wrong. **Slack**, 529 U.S. at 484.

3. The district court refused to conduct an evidentiary hearing and refused to allow third-party witness statements into the record. These rulings were wrong and they prevented Mr. Aleman from proving his ineffective assistance grounds.

Governing decisional and statutory authority entitled a § 2255 movant to an appointed attorney and an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief." 28 U.S.C. § 2255(b); see *Townsend v. Sain*, 372 U.S. 293 (1963). Stated otherwise, a petitioner need only allege—not prove—reasonably specific non-conclusory facts that, if true, would entitle him to § 2255 relief in order to receive an evidentiary hearing. *Schriro v. Landrigan*, 550 U.S. 464, 473-75 (2007).

Operatively, this requires the reviewing court to presume the movant's allegations are true unless conclusively refuted by the record, or scientifically impossible, or merely unsupported conclusory generalization. See *Fontaine v. United States*, 411 U.S. 213, 215 (1973).

The district court did not apply this presumption; it did not presume Mr. Aleman's allegations to be true. For example, Mr. Aleman stated that if he had known that he could not challenge his sentence in § 2255, then he would have continued with the appeal. (Appx. "2" at 6). Also, Mr. Aleman alleged that his counsel did not inform him that failing to appeal placed difficult, and sometimes insurmountable barriers to subsequent challenges to the conviction or sentence. If Mr. Aleman had known, then he would have continued the appeal. Further, Mr. Aleman declared that if he had known about the procedural default or non-retroactivity effects of not appealing, then he would have appealed. (See Appx. "2" at 11). If these allegations are presumed true, then Mr. Aleman is entitled to relief.

Should the district court not presume Mr. Aleman's allegations true, then the law requires the district court to afford Mr. Aleman the opportunity to adduce proof, that is, an evidentiary hearing. 28 U.S.C. § 2255(b). Nevertheless, the district court summarily denied Mr. Aleman's § 2255 motion; even though neither the government nor former counsel disputed Mr. Aleman's allegations. The district court departed from established law when it failed to conduct evidentiary proceedings. See 28 U.S.C. § 2255(b).

Jurists of reason would find the district court departure debatable, and these same reasonable jurists would find plain wrong the Eleventh Circuit's refusal to grant a COA. This Court should grant the writ and direct the Eleventh Circuit to grant a COA in order to realign the Eleventh Circuit with the rest of the Court of Appeals, this Court's precedent, and Congress's statute. See also, S.Ct. Rule 10(a)(court of appeals "standard...a lower court departure" from the "accepted and usual course of judicial proceedings.").

CONCLUSION

This Court should grant the writ and remand the cause to the Eleventh Circuit Court of Appeals to consider whether a certificate of appealability should issue in the light of this Court's recent ruling in *Idaho v. Garza*, 139 S. Ct. 738 (2019), which extend naturally to Mr. Aleman's circumstances; and such other relief as this Court deems appropriate or fair.

Respectfully submitted on this 26 day of July, 2019, by:

Jonathan Aleman
Jonathan Javier Aleman