

19-6221
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

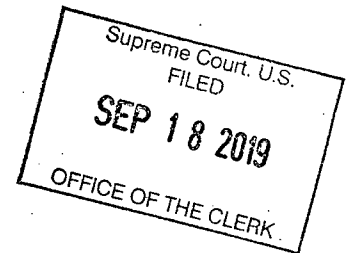
GEORGE E. BROWN

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent



ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE E. BROWN #32507-044
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Pro Se

QUESTION PRESENTED

WHEN A DEFENDANT MEETS THE REQUIREMENTS FOR ISSUANCE OF A
CERTIFICATE OF APPEALABILITY (COA) IS HE THEN ENTITLED TO
ISSUANCE OF THE CERTIFICATE OF APPEALABILITY?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

The court of appeals Rehearing Order appears at Appendix C to the petition and is unpublished.

The opinion of the U.S. district court (motion to vacate) appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the United States court of appeals decided my case was April 30, 2019.

The petition for rehearing was denied by the United States court of appeals on June 20, 2019.

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

STATEMENT OF THE CASE

Petitioner filed a motion to vacate, set aside, or correct sentence in the district court arguing among other things that he had been denied the right to effective counsel on direct appeal when counsel failed to argue on direct appeal that Petitioner was denied the right to self-representation during the pretrial phase of his criminal prosecution. In deciding the issue the district court applied a harmless error analysis. Petitioner then asked the district court to reopen the proceeding because a defect in the integrity of the proceeding occurred with the application of harmless error analysis. This request was made in a proceeding under Rule 60(b). The district court found that the request was frivolous, denied relief, and would not issue a COA. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit seeking a COA. That court denied relief and dismissed the appeal.

REASONS FOR GRANTING THE WRIT

A certificate of appealability is required to appeal the denial of any motion that effectively seeks habeas relief. Such a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A "substantial showing" under this section is a showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack v McDaniel 529 U.S. 473, 484 (2000). The COA inquiry is not co-extensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." The threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims" and ask "only if the district court's decision was debatable." Buck v Davis 137 S. Ct. 759 (2016); Miller-El v Cockrell 537 U.S. 327 (2003). As stated above Petitioner argued in a motion to vacate, set aside, or correct sentence that he had been denied the right to self-representation during the pretrial phase of his criminal prosecution and that appellate counsel had been ineffective for failing to raise the issue on direct appeal. In deciding the issue the district court applied a harmless error analysis and found that Petitioner had suffered no prejudice by anything that trial counsel did. Petitioner ask-

ed the district court to reopen the habeas proceeding because the application of a harmless error analysis caused a defect in the integrity of the federal habeas proceeding under Rule 60(b). The district court found that the request was frivolous but cited no caselaw in support of its position. This Court's precedents in Faretta v California 422 U.S. 806 (1975); McKaskle V Wiggins 465 U.S. 168 (1984) did not agree with the district court's resolution of the issue. "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." There is no "harmless error" defense to a denial of the right either to representation by counsel or to self-representation. United States v Davila 133 S. Ct. 2139, 2149 (2013). Although these cases were not decided on pretrial denial of self-representation, all of these people who decided these cases and issues were jurists of reason and not only did they hold the right to self-representation had been denied, not one even mentioned it was a frivolous argument, or that harmless error application could or should be applied. See United States v Lee 760 F. 3d 692 (7th Cir. 2014). In Lee the court considered a claim of denial of self-representation during the pretrial phase of the criminal prosecution and issued a full opinion on the matter and held that the right had been violated but did not even hint at the argument was frivolous or subject to harmless error analysis. Based on these court's de-

cisions and more it is clear that the district court's resolution of the issues were beyond debate as the higher courts handled the issues differently. Thus, further supporting a finding that the district court abused its discretion during the Rule 60 proceeding and court of appeals should have issued the COA. In determining the habeas issue the district court applied a harmless error analysis and concluded Petitioner had not been prejudiced by anything initial counsel did. However, to the contrary, the district court did not consider whether or not the fact that the magistrate held a two-day suppression hearing wherein Petitioner was not allowed to speak, question witnesses, or participate in any way, was prejudicial to Petitioner even though after the suppression hearing was completed the magistrate recommended in his Report and Recommendation that Petitioner be allowed to represent himself. However, Petitioner had requested to proceed pro se every time he appeared before the magistrate well before the suppression hearing that lasted two days. Applying the harmless error analysis and the failure to consider all of the evidence created a defect in the integrity of the federal habeas proceeding and Rule 60 allows the court to reopen the habeas proceeding to remedy defects. Although the court of appeals did not issue an opinion on the COA application it stated that it had reviewed the district court record and affirmed. This is akin to conduct in Buck, deciding an appeal without jurisdiction.

EXTRAORDINARY CIRCUMSTANCES

In determining whether extraordinary circumstances are present during a Rule 60 proceeding, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." In case at bar, the district court's conduct during the habeas proceeding in applying a harmless error analysis and failing to consider all of the evidence is a disturbing departure from a basic premise of our criminal justice system and poisons public confidence in the judicial process. The departure from basic principle was exacerbated because it concerned guarantees by the United States Constitution. It thus injures not just the defendant, but "the law as an institution ... the community at large, and ... the democratic ideal reflected in the processes of our courts. Such concerns are precisely among those that have been identified as supporting relief under Rule 60(b)(6). Based on the decisions of the courts above the district court's Rule 60 proceeding conduct was an abuse of discretion and debatable. Thus every angle of the proceedings in the district court satisfy issuance of a COA. The Magistrate's denial of numerous unequivocal requests to proceed pro se during pretrial is debatable because this Court has handled this very same issue differently. This circumstance is extraordinary because after a two-day suppression hearing the Magistrate issued a Report and Recommendation in relation to a motion to sup-

press and within the Report the Magistrate recommended to the district court that Petitioner be allowed to represent himself. This is ironic because all the circumstances that were present during the numerous requests for pro se representation that were denied were still present when the Magistrate recommended Petitioner be allowed to represent himself at trial. It is almost impossible to fathom how the Magistrate could reach such a spinning decision that Petitioner should be allowed to represent himself at trial a much more complex proceeding but not allowed to represent himself during pretrial a less complex proceeding. It says that the Magistrate's decision to not allow Petitioner to represent himself during pretrial was arbitrary and capricious. It is debatable whether the district court caused a defect in the federal habeas proceeding by applying a harmless error analysis to decide whether Petitioner had been denied effective assistance of appellate counsel when he failed to argue on appeal that Petitioner had been denied the right to self-representation and failed to consider all the evidence during the habeas proceeding related to that issue because this Court has handled this very same issue differently. It is extraordinary because structural errors are not amenable to a harmless error analysis.

It is debatable whether the district court abused its discretion in failing to reopen the habeas proceeding during the Rule 60 proceeding where defects in the integrity of the federal habeas proceeding had occurred because courts-jurists of reason have handled the issue differently. It is extraordinary because the

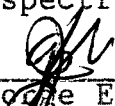
wheels of justice demand and normally under such circumstances a court would want to if not obligated to correct such errors as it is known common knowledge that we are all human and anyone is subject to mistake or making a error at anytime. Since the district court would not do it, then an appeal should be allowed to provide review by the appellate court. If not the wheels of justice fail Petitioner.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: August 26, 2019

Respectfully submitted,



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