TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

19-6529

FROM: 81154083
TO:
SUBJECT: Cover Page (WRIT)
DATE: 10/29/2019 10:03:37 AM

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.
FILED
OCT 24 2019
OFFICE OF THE CLERK

JAMES E. TYSON JR.

VS.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

JAMES E. TYSON JR.
FEDERAL CORRECTIONAL COMPLEX
YAZOO CITY LOW
PO BOX 5000
YAZOO CITY, MISSISSIPPI

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: Questions Presented For Review
DATE: 10/29/2019 10:01:01 AM

"Question Presented for Review":

I.) Was the district courts denial of Petitioners Rule 6 motion to unseal documents a denial of Petitioners due process rights?

II.) Was counsel constitutionally ineffective for advising Petitioner to enter a "straight up guilty plea" while failing to investigate the facts of his case; failing to object to losses and enhancements at sentencing; failing to raise guideline amendments on appeal?

III.) Did the courts commit reversible err denying petitioner's 2255 motion without conducting an evidentiary hearing to resolve the factual disputes?

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: TABLE OF CONTENTS
DATE: 10/30/2019 11:18:15 AM

Contents — Pages(s)

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: Parties to the proceedings
DATE: 10/30/2019 11:18:52 AM

James E. Tyson Jr. #81154083, Petitioner
Federal Correctional Complex
Yazoo City Low
P.O. Box 5000
Yazoo City, Mississippi 39194

Attorney for Respondent,
United States of America

Solicitor General
Department of Justice
Washington, D.C. 20530

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: Index of Authorities
DATE: 10/29/2019 09:17:20 AM

"Index of Authorities"

United States v. Gibson, 577 F. Supp. 2d 317 (D.D.C 2008)
United States v. Sain Jean, 684 F. Supp 2d 767 (W.D.Va. 2010)
United States v. Pazzati, 809, Supp. 2d 164 (S.D.N.Y 2011)
Harris v. Nelson, 394 U.S. 286 (1969)
Bracy v. Gramley, 520 U.S. 899 (1998)
McMann v. Richardson, 397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970)
Maxwell v. Florida, 479 US 972, 93 L. Ed. 2d 418, 107 S. Ct. 474 (1986)
Spivey v. Zant, 683 F, 2d 881, 885 (5th Cir. 1982)
Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)
Missouri v. Frye, 132 S. Ct. 1376, 182 L. Ed. 2d 379 (2012)
Hill V. Lockhart, 474 U.S. 52, 59
Flores-Ortega, 528 U.S., at 483
Lance v. Sellers, 139 S. Ct 511, 2019
United States v. Studley, 47F. 3d 569, 575 (2d. Cir 1999)
United States v. Glover, 531, U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 602 (2001)
Evitts v. Lacy, 469 U.S. 387, 396-97, 105 S. Ct. 830, 83L. Ed. 2d 821 (1985)
United States v. Sanders, 373 U.S 1, 19-1 (1963)
Blackledge v. Allison, 431 U.S. 63, 82-83 (1977)
United States v. Scott, 625 F. 2d 623, 625 (5th Cir. 1980)
United States v. Pitts, 763 F. 2d at 201
United States v. Birdwell, 887 F. 2d 643, 645 (5th Cir. 1989)

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT:
DATE: 10/28/2019 03:47:50 PM

Petitioner, James Tyson Jr., prays that this Honorable Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above proceeding on August 7, 2019.

No. 19-6056

I.) CITATIONS OF OPINIONS AND ORDERS IN CASE

The original judgment of conviction of Petitioner in the United States District Court for the Western District of North Carolina at Charlotte is attached hereto as Appendix "1".

The original judgment of conviction of Petitioner was appealed to the Unites States Court of Appeals for the Fourth Circuit, which affirmed the conviction and sentence in an unpublished opinion attached hereto as Appendix "2".

The opinion and order of the United States District Court for the Western District of North Carolina at Charlotte on Petitioner's Section 2255 motion is attached hereto as Appendix "3".

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is attached hereto as Appendix "5".

II.) JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C 1254 (1)

No-19-6056

III.) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1.) The Fifth Amendment of the United States Constitution provides: "No person shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

2.) The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to... be informed of the nature of a cause of the accusation... and to have the assistance of counsel for his defense."

3.) The statute under which Petitioner sought habeas corpus relief was 28 USC 2255 which states in pertinent part:

2255 Federal Custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice 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 courts finds that the judgement 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 judgement vulnerable to collateral attack, the court shall vacate and set aside the judgement and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: STATEMENT OF THE CASE
DATE: 10/29/2019 09:16:44 AM

"STATEMENT OF THE CASE"

A.) On July 26, 2012 a grand jury sitting in the Western District of North Carolina (Charlotte Division) returned an indictment naming the Petitioner-Appellant along with others. The Indictment was superseded on or about April 18, 2013 and differed in significant material respects from the original indictment. This Superseding Indictment alleged a wide ranging conspiracy which included a time span of 2005 through 2012. Count One alleged a violation of the Title 18, United States Code, Section 1962 (d); Count two alleged a violation of Title 15, United States Code, Section 1962 (d); Count three alleged a violation of Title 18, United States Code, Section 1344; Count Four alleged a violation of Title 18, United States Code, Section 1343; Count Five alleged a violation of Title 18, United States Code, Section 1956 (h), and Count Six alleged a violation of Title 18, United States Code 371.

"STATEMENT OF THE FACTS"

B.) The petitioner, James Tyson, Jr., along with others were indicted by a federal grand jury sitting in the Western District of North Carolina on July 26, 2012. A Superseding Indictment was filed on April 18, 2013, this Superseding Indictment included additional allegations. Initially the petitioner entered pleas of not guilty to all charges based upon the advice of his counsel, C. Melissa Owen. After a detention hearing conducted by Magistrate Judge David S. Cayer, the petitioner was held in custody. Upon conversations with Counsel C. Melissa Owen, the petitioner was advised by Owen to plead "straight up guilty" to all charges in the Superseding Indictment. Following counsel's advice, the petitioner appeared along with counsel before a Magistrate Judge on December 2, 2013 and entered a "straight-up" guilty plea to the charges alleged therein the Superseding Indictment. A magistrate Judge accepted petitioner's guilty plea and thereafter ordered a pre-sentence report (PSR). On May 26, 2015 the petitioner and his counsel C. Melissa Owen appeared before the Honorable Graham C. Mullen, United States District Court Judge for sentencing. Judge Mullen, after hearing the parties position and considering various factors, the Court imposed a total sentence of 360 months imprisonment. The petitioner with assistance of counsel, submitted a timely notice of appeal and thereafter submitted briefs to the United States Courts of Appeals for the Fourth Circuit. In that appeal, the petitioner argued that his sentence was unconstitutional under Ex Post Facto Clause, as well as other issues. The Fourth Circuit affirmed. See United States v. Tyson, 672 Fed. Appx. 292, 293 (4th Cir. 2016).

"28 USC & 2255 Motion"

C.) On or about April 2, 2018 the petitioner timely submitted his Title 28, United States Code, and Section 2255 Motion to Vacate, Set Aside, or Correct Sentence. The Government submitted it's responsive pleading to petitioner's 2255 motion on or about June 11, 2018. The petitioner thereafter submitted a pleading entitled "Petitioner's Motion to Vacate, Set Aside, or Correct Sentence". In his Pro Se prepared motion the petitioner raised the following issues: (1) Defense Counsel C. Melissa Owen provided constitutionally deficient performance during pre-trial, plea and sentencing. (2) Appellate Counsel Dale R. Jensen provided constitutionally deficient performance during the direct appeal of petitioner's judgment of conviction and sentence.

"Order Denying and Dismissing 2255 Motion"

D.) By order dated October 31, 2018 the district court denied and dismissed petitioner's 28 USC 2255 motion and declined to issue a certificate of appealability. Petitioner submitted a timely motion for reconsideration which was denied on January 7, 2019. Petitioner timely submitted a notice of appeal and submitted an application for certificate of appealability to the 4th Circuit Court of Appeals.

"Denial of Certificate of Appealability"

E.) By unpublished opinion dated May 21, 2019 the 4th Circuit Court of Appeals denied petitioners COA. Petitioner filed a petition for rehearing and rehearing enbanc on June 3, 2010. The petition was ultimately denied on August 7, 2019.

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: JURISDICTION/REASON FOR GRANTING THE WRIT
DATE: 10/29/2019 09:15:50 AM

"Existence of Jurisdiction":

Petitioner was indicted and convicted in the United States Court in the Western District of North Carolina, in a Racketeering Conspiracy under 18 USC 1962(d) amongst other violations. A section 2255 motion was appropriately made in the convicting court and subsequently denied. A timely appeal to the United States Court of Appeals for the 4th Circuit was filed.

"REASON FOR GRANTING THE WRIT":

The Court of Appeals has decided a Federal question in direct conflict with the applicable decision of this court.

1.) The Fourth Circuit Court of Appeals opinion affirming the district court's denial of petitioner's 2255 motion holding that "We have independently reviewed the record and conclude that Tyson has not made the requisite showing". Contrary to the Fourth Circuit Court's holding, the district court was wrong in denying Tyson's Rule 6(a) motion to unseal documents. Hence, pursuant to rules governing 2255 proceeding, Rule 6(a), habeas corpus petitioners are entitled to all materials relevant to claims made therein a 2255 motion. The denial was in direct conflict with the applicable decisions of this Court and is cognizable in a 2255 motion, in light of this Court's precedence. This Court should exercise it's supervisor powers over the lower courts and issue the writ.

2.) The Fourth Circuit Panel's opinion erred in affirming the district court's denial of petitioner's ineffective assistance of counsel claims because it's decision is in direct conflict with this Court's decision in Strickland, Hill, and Evitts, infra. Petitioner made a substantial and requisite showing and detailed the numerous fatal errs that prejudiced the petitioner. Petitioner asserted in the 2255 motion that he would not have plead guilty, absent counsel's erroneous and faulty legal advice. Discussed Infra.

3.) The Fourth Circuit Court of Appeals erred in affirming the denial of Petitioners 2255 motion where the district court failed to conduct an evidentiary hearing to resolve the factual disputes, which if true, warrants habeas relief and the record did not conclusively show that he could not establish facts warranting relief under 2255, which entitled petitioner to a hearing.

Petitioner respectfully urges that all aspects of the Circuit Court decision are erroneous and at a variance with this Court's decision as explained in the arguments presented.

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: ARGUMENTS AMPLIFYING REASON FOR WRIT
DATE: 10/29/2019 10:04:34 AM

I.) THE COURT OF APPEALS ERRED IN IT'S OPINION AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S 2255 MOTION BASED ON TYSON'S RULE 6(A) MOTION TO UNSEAL DOCUMENTS

The district court respectfully was wrong in it's conclusion to deny Tyson's Rule 6(a) motion to unseal documents needed for claims made therein his 28 U.S.C 2255. See (Case no. 3:12-cr-239-GCM-DCK-14 Doc. No. 1285 Pro Se Motion to Unseal Documents) submitted 3/29/2018. The district court did not respond to the motion until January 7, 2019 over two months after the denial of his 2255. Tyson filed a motion for reconsideration addressing the Rule 6(a) motion and the court finally issued a response to this matter see Appendix" 8 ". The documents sought by Tyson is his "Motion to Unseal Documents" was very specific as to the documents to which he sought and were relevant to his ineffective assistance of counsel claims made therein his 28 U.S.C 2255. See United States v. Gibson, 577 F. Supp. 2d. 317 (D.D.C. 2008). Tyson presented particular reasons for the unsealing of documents and requested specific documents to be disclosed that were and are relevant to the court's October 31, 2018 order denying and dismissing his 28 U.S.C 2255 motion. See United States v. Saint Jean, 684 F. Supp. 2d 767 (W.D. Va. 2010). Hence pursuant to the rules governing 2255 proceedings, Rule 6(a), habeas corpus petitioners are entitled to all materials relevant to claims made therein a 2255 motion. See United States v. Pazzati, 809 Supp. 2d 164 (S.D.N.Y 2011). Indeed, good cause for discovery exists under rule 6(a) governing section 2244 cases where specific allegations before the court showed reason to believe that the petitioner may, if the facts are fully developed, to be able to demonstrate that he is entitled to relief. See Harris v. Nelson, 394 U.S. 286 (1969); Bracy v. Gramley, 520 U.S. 899 (1998). The critical issue as to Tyson receiving information sealed by the courts from discovery is that Tyson's trial counsel in a case of this magnitude, never filed a single motion to place any discovery evidence on record. Also Tyson's trial attorney never turned over any work files relevant to Tyson's case due to her ineffectiveness. Tyson's trial counsel filed one single motion during the lengthy pretrial period. See Docket Sheet (Criminal Docket for case number: 3:12-cr-00239-GCM-DCK-14). This single motion filed by Tyson's trial counsel was a motion to waive petitioner's personal appearance. In the district courts response on January 7, 2019 to Tyson's motion for reconsideration (3:12-cr-239-GCM-DCK-14 Doc. No. 7) it stated "The standard discovery agreement used in this district prevents counsel from providing a copy of discovery to his client". The reason that this response is problematic is that even if Tyson's trial counsel did not provide a copy of discovery to Tyson she failed to uphold her obligations under the United States Constitution by not obtaining and placing proper evidence on record to prepare a fair and proper defense for Tyson in which he had a constitutional right to the effective assistance of counsel at each and every critical stage of the proceeding. See McMann v. Richardson, 397 U.S. 759, 25 L Ed. 2d 763, 90 S. Ct. 1441 (1970). The very reason that Tyson is seeking documents years later after his initial conviction, is because Tyson's counsel failed during the pre-trial phase to mount any evidence on record on Tyson's behalf. Documents that were important to Tyson's 2255 motion, and would have made a significant difference in the reduction of Tyson's sentence, were very important "FBI 302's","sentencing memorandums" and "witness statements" that corroborated Tyson's claims of not being criminally liable for a substantial amount of loss. Tyson's trial counsel referenced these documents at Tyson's sentencing, but filed late objections and failed to put the documents on record. Tyson's trial counsel admitted at sentencing that the single largest transaction that Tyson was wrongly held accountable for was a $7.5 million dollar loss to "F.M" arguing that the loss "was conduct separate from the conspiracy and that Tyson lacked criminal intent". The district court Judge expressed concerns about this transaction See (sentencing transcript) Appendix" 6 " but ultimately left it up to Tyson's counsel and the US Attorney to decide despite the facts on record. Tyson's counsel also admitted on record at sentencing that "Mr Tyson was out of the deal, according to Ms. Stallworth and the FBI 302's from Ms. Hunt as well." See Appendix " 5 " (Case no. 3:12-cr-00239-GCM-DCK document 1096 pg. 31 at 4-9). Direct evidence on record offered by the US Attorney that Tyson's trial counsel was ineffective was that the US Attorney admitted that "Tyson's trial counsel filed this objection late and it should be denied procedurally (Doc. 1096 pg. 32 at 8-16) Appendix " 6 ". The witness statements supporting Tyson's claims contesting these losses along with numerous other losses and additional documents in discovery are part of a mountain of documents that the district court denied Tyson access to fully develop a record during his 2255 proceeding. The witnesses in these particular FBI 302's and witness statements were "F.M's" transactional attorney, personal assistant, and Victoria Hunt the governments number one witness which all supported Tyson's claim of not being criminally responsible for this particular transaction which made a significant impact in Tyson's 360 month conviction. Tyson gave details in his application of certificate of appealability of the losses. See Appendix " 9 " (Case number 3:12-cr-00239-GCM -DCK-14, 3:18-cv-00175-GCM, COA brief pgs. 11-18). The documents Tyson needed to provide a requisite showing in his 2255 motion were denied by the district court and as the court stated on record, that local rules prevented Tyson's trial attorney from turning over any documents. Tyson's trial attorney also never turned over any work files to Tyson or his appellant attorney prior to his direct appeal. See Maxwell v. Florida, 479 US 972, 93 L. Ed. 2d. 418, 107 S. Ct. 474 (1986) ("the right to effective assistance fully encompasses the client's right to obtain from trial counsel the work files generated pertinent to that client's defense. It further entitles the client to utilize materials contained in these files in any proceeding at which the adequacy of trial counsels representation my be challenged"). See Spivey v. Zant, 683 F, 2d 881, 885 (5th Cir. 1982). Tyson having access to

information that he has a right to, would have provided critical evidence that would have changed the outcome of Tyson's case and significantly lowered his sentence.

II.) THE COURT OF APPEALS ERRED BY DETERMINING THAT PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS DID NOT MEET THE STANDARDS SET FORTH BY THIS COURT IN STRICKLAND AND HILL

Petitioner asserted in his 2255 motion as grounds for relief that: He does not claim that his counsel's performance was rendered deficient because counsel failed to advocate a certain plea bargain. Rather, petitioner argued that trial counsel provided constitutionally deficient performance in her advice to Tyson to enter a "straight up" guilty plea to each of the six counts alleged therein the Superseding Indictment, when that advice was given by counsel without the benefit of research and pretrial investigations into defenses that Tyson may have had to the charges and allegations. The Supreme Court addressed the standard for showing ineffective assistance during the plea bargaining stage in Lafler V. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), and Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). In Lafler, the Court held that the Sixth Amendment right to counsel applies to the plea bargaining process and prejudice occurs when absent deficient advice, the defendant would have accepted a plea. Hence, this Honorable Court in Lee v. United States, No. 16-327 (2017) addresses a case involving advice of an attorney in the guilty plea context. The Lee case revolved around deportation of the defendant. However, the High Court made clear that "When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. "Citing Hill v. Lockhart, 474 U.S. 52, 59. Moreover, the High Court pointed in it's Lee progeny, that "The Sixth Amendment" guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding", including when he enters a guilty plea. Citing Lafler and Hill. Tyson's counsel advised him to plead "straight up guilty" as a strategy and that she would present discovery evidence as well as hire experts and forensic accountants to testify and provide mitigating evidence that Tyson should not have been held accountable for certain losses and acts that occurred during the full scope of the conspiracy in which he as charged. Tyson was very specific as to evidence that his attorney could have presented to the Courts to mitigate his culpability. The district court dismissed this claim and in it's response stating "Petitioner does not specify what evidence counsel did not obtain that might have shown a defense to charges. See Appendix " 3 " (Case no. 3:18-cv-00175-GCM Doc. No. 5 pg 16). Tyson specifically explained in his 2255 motion that his trial Attorney could have placed on record years of "accounting records" seized from the CPA Firm Boatsman and Gilmore as well as "transaction and legal documents" seized from the Corporate Law Firm "The Bray Law Firm" professionals which represented the alleged companies for years. These records would have revealed that there was not any disguising and concealing transactions as the government repeatedly alleged, enhanced, and charged Tyson with. Also the FBI 302's and witness statements that Tyson's trial counsel should have sought would have contradicted the governments allegations as Tyson's trial counsel admitted at sentencing on record. Prior to the indictment these legal professionals were trying to defend the alleged companies but were forced to turn over records by the government. Tyson's trial counsel should have sought witness statements from the legal professionals in Tyson's defense but failed to do so due to her ineffectiveness. Tyson's trial counsel's deficient performance arguably led not to a judicial proceeding of disputed reliability but rather the forfeiture of a proceeding itself. Flores-Ortega, 528 U.S., at 483. When a defendant alleges his counsel's deficient performance led him to plead guilty rather than go to trial. The question is not whether had he went to trial, but whether the results of that trial would have been different than the result of a guilty plea. This is so because the Supreme Court has ordinarily applied a strong presumption of reliability to judicial proceedings. Furthermore no such presumption can be made to a judicial proceeding that never took place: Id at 482-483. Rather, the Supreme Court has instructed lower courts to instead consider whether the defendant was prejudiced by the denial of his entire judicial proceeding... To which he had a right. Id at 483. Tyson's trial attorney's promises never occurred and Tyson received a 30 year sentence with a criminal history category I with no prior history of fraudulent crimes which was 22 more years than his co-defendant Victoria Hunt received charged with the same identical crimes. If Tyson had went to trial as he intended. He would have received a much lower sentence than 360 months, because evidence that his attorney should have used pre-trial would have affected the outcome. Tyson's trial counsel's failure to retain experts and perform a complete investigation as well as place evidence or record as she promised Tyson prior to trial was the result of Tyson pleading guilty. Tyson's trial counsel promised his liaison Anya Perriloux that if Tyson plead guilty, she would in fact retain experts to help her understand the complexity of his case as well as to provide mitigating evidence to the Courts. As a result of this advice Tyson plead guilty. See "Appendix" 13 " Attorney C. Melissa Owen email correspondence to Anya Perilloux discussing retaining experts to prepare for trial. Tyson presented this evidence along with other materials to the district court in his 2255 motion. See..Lance v Sellers, 139 S. Ct 511, 2019 (Ineffective assistance of counsel and failure to investigate or present mitigating evidence). Tyson's counsel chose to not put any evidence on record whatsoever. See (Case Docket Sheet).

TRULINCS 81154083 - TYSON, JAMES JR - Unit: YAZ-C-B

FROM: 81154083
TO:
SUBJECT: ARGUMENT AMPLIFYING REASON FOR WRIT (Continued)
DATE: 10/29/2019 09:52:37 AM

The district court also erred in deciding Tyson's ineffective assistance of counsel claims at sentencing. The Courts stated "Additionally any mortgage fraud losses sustained by entities other than a financial institution constituted "relevant conduct" Accordingly, counsel was not deficient and petitioner cannot show prejudice from any failure to raise these objection to the loss amounts". See Appendix " 3 " (Case no 3:18-cv-00175 Doc. No. 5 pg. 30). This response was not a fair and independent response from the district court. This response was an identical copy and paste of the governments view. See Appendix " ".

The issues that Tyson argued in his 2255 motion in relation to his mortgage fraud claims that Tyson's appellate attorney should have brought up on direct appeal, that the district court erred in holding Tyson criminally liable for all non financial institution mortgage transactions as relevant conduct without resolving unresolved objections to the PSR pertaining to particular mortgage transactions was wrong. Rule 32 (c)(1), is to rule on any unresolved objections to the PSR. On controverted matters, the court is to make either a finding on the allegation or a determination that no finding is necessary. The district court did not rule on any of the unresolved mortgage fraud transactions at sentencing neither did Tyson's trial counsel object to the unresolved PSR transactions at sentencing. To provide this honorable court further evidence. Tyson's trial counsel objected to two specific mortgage transactions in the PSR phase stating "the losses from properties at 5020 Oxfordshire Road and 1625 Lookout Circle should not have been included "See (PSR Doc. No 872, 1001) which were one of the only six objections that Tyson's counsel made in the PSR. The combined total of these two mortgage transactions in addition to the $7.5 million dollar loss as to F.M. was a total of $9,480,000 that Tyson was held criminally liable for. This amount matters because along with other additional transactions would have made a difference in Tyson's case and reduced Tyson's guidelines calculation by 2 points from these losses alone. Also while Tyson was on direct appeal the 2015 guidelines were amended in November 2015 the year that Tyson was sentenced, and could have reduced Tyson's calculation even more to 4 points which takes years off of Tyson's sentence. Due to the district courts failure to address these relevant conduct transactions at sentencing, as well as Tyson's trial counsel's failure to object at sentencing caused Tyson to be severely sentenced. Tyson's trial counsel and the district court violated his due process by failing to perform duties as required by law during "critical stages of the proceedings" as required by Rule 32 (c)(1). The $7.5 million dollar transaction was addressed during sentencing for restitution purposes only and should not have been included in the loss calculation or restitution order. See Appendix "11 and 12" (Sentencing Transcript). The Fourth Circuit held "a sentencing court, in applying 1B1.3 (relevant conduct), must first determine the scope of the criminal activity a particular defendant "agreed to jointly undertake". Indeed, the fact that a defendant is aware of the scope of the over-all operation is not enough to hold him accountable for the whole operation. See United States v. Studley, 47 F. 3d 569, 575 (2d. Cir 1999). Instead, a sentencing court, in order to hold a defendant accountable for the conduct of his alleged co-conspirators, should of course upon timely and proper objections, make particularized finding with respect to sentencing guidelines 1B1.3 (a)(1)(B). As to Tyson, no such findings were ever made on the scope of his involvement pertaining to the referenced transactions in the conspiracy as charged or his allegedly "jointly agreed undertaken" of that conspiracy. Further more the $7.5 million F.M. transaction included individuals from another company that was not associated with Tyson or charged as co-conspirators in this case nor charged in relation to the losses in the transaction. The transaction was managed by a third party attorney in Canada not associated with Tyson. See Appendix "5, 6, 12" (Sentencing Transcript). The district court still held Tyson accountable for the loss for loss and restitution purposes. The cause for the Court's failure to make particularized findings as to Tyson's involvement was his attorney's constitutional ineffective assistance and deficient performance in not making both timely and proper objections. Thus, Tyson has established prejudice under Strickland based upon his attorney's unprofessional errors. See Glover v. United States, 531 U.S. 198, 203, 121, S. Ct. 696, 148 L. Ed. 2d 602 (2001). Indeed, there can be no reasonable application to conduct which Tyson's counsel never contested.

The district court could also have decided Tyson's claim differently in it's decision to rule against Tyson's trial counsel's failure to object to certain sentencing enhancements. The district courts order was just an identical recitation of the governments response that "Tyson's counsel raised these objections on appeal and they were rejected, and Tyson cannot re-litigate these issues here. See (Case number 3:18-cv-00175-GCM Doc. No. 3 at 35). The issue with the district courts response is that the Court of Appeals stated in it's order that it would not rule on any ineffective of assistance of counsel claims, See Appendix " 2 " (4th Circuit Court of Appeal Decision). The circuit court could not rule on any enhancements that were not objected to by Tyson's trial attorney so the district courts erred in the accepting the governments response to these sentencing issues in the denial of his 2255 motion. Tyson's counsel did not object to the sophisticated means enhancement, $1 million or more in gross receipts, leadership role, money laundering enhancement, and the 50 or more victims enhancement at sentencing which made any reasonable appellate review moot because of Tyson's trial counsel's ineffectiveness. Tyson's appellate counsel appealed under the very high bar of ineffective of assistance standard on direct review without any established record which made appellate review very limited without any established record. See Appendix " 2 " (United States v. Tyson, 672 F. App'x at 297 (4th Cir). Also further evidence in which the government admitted in it's response to Tyson's direct appeal that Tyson's counsel

provided constitutional ineffective assistance of counsel, See Appendix " 7 " (4th Cir. No. 15-4323 Doc. No. 98 pg. 15). "The district court did not plainly err in calculating Tyson's advisory guideline range. The district court's finding that a loss of more then $20 million was reasonably foreseeable to Tyson, there were more than fifty victims, that Tyson used sophisticated means in committing his crimes, and that Tyson derived more than $1 million in gross receipts from one or more financial institutions was supported by the facts summarized by the facts summarized by the probation officer and to which in relevant part, Tyson did not object". In it's own words the government provided clear evidence that Tyson's trial counsel failed to challenge these enhancements at sentencing and clearly was ineffective. The objection to these enhancements would have changed the outcome because if a proper objection was done to the losses that Tyson should not have been held accountable would have been under 20 million which would have warranted a 2 pt reduction. If the "victim count" was properly challenged there would not have been more than 50 victims. The sophisticated means enhancements should not have been applied and was amended and clarified in November 2015 which would have reduced the guidelines another 2 pts. The money launder enhancement and leadership enhancement were not properly applied because Tyson's counsel objected in the Presentence Investigation Report, but failed to pursue these enhancements at sentencing and the district court never provided reasoning for the enhancements on record at sentencing. The district court also erred in not holding an evidentiary hearing on these valid claims alone. Tyson has again shown clear prejudice.

The district court could have also decided differently in it's order as to the ineffective assistance of Tyson's appellate counsel on direct appeal. Evitts v. Lacy, 469, U.S. 387, 396-97, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), held that Due Process of Law requires that a defendant receives effective assistance of counsel on direct appeal. Tyson's appellate counsel pursued an ineffective of assistance claim on direct appeal which is a very high bar to pursue being that Tyson's trial counsel failed to establish any viable record during pretrial or sentencing proper for direct review. Tyson argued in his COA that appellate counsel should have raised the "November 2015 Guideline Amendments 2B1.1 (b)(10)(C)" on direct appeal which sought to clarify most of the enhancements used to enhance Tyson's sentence. Tyson argued these claims therein his 2255 motion and the district court rejected those claims stating that "the amendments are not retroactive which was the exact response incorporated in the district courts orders which was a recitation of the governments response to Tyson's 2255 motion. See Appendix " 9 " (COA Brief 4th Cir pg.22). The amendments went into effect November 1, 2015 when Tyson was on direct review. It is well settled in the Court of Appeals that a defendant may urge the appellate court to consider amendments to the United States sentencing guidelines that were not effective at the time of the commission of the offense or at sentencing if they are intended only to clarify, rather than effect substantive changes. Amendment 2B1.1 (b)(10)(C) seeks to clarify the enhancements instead of making substantive changes.

III.) THE COURT OF APPEALS ERRED AFFIRMING THE DENIAL OF PETITIONER'S 2255 MOTION WHERE THE DISTRICT COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO RESOLVE THE FACTUAL DISPUTES

Section 2255 provides that 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 therein, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C 2255 (2000). See e.g., Fontaine v. United States, 411 U.S. 213, 215 (1973) (reversing summary dismissal and remanding for hearing because "motion and the files and records of the case [did not] Conclusively show that the petitioner is entitled to no relief); Sanders v. United States, 373, U.S. 1, 19-1 (1963). Tyson's 2255 petition alleged facts that if proved, entitled Tyson to relief. See Hill v. Lockhart, 474 U.S. 52, 60 (1985) and Blackledge v. Allison, 431 U.S. 63, 82-83 (1977). Tyson asserted that he would not have pleaded guilty had his trial counsel not misrepresented that she would hire experts and forensic accountants as well as file pre trial motions to present mitigating evidence, and fight enhancements as promised. Tyson would have proceeded to trial because he ultimately was held accountable for everything alleged in the indictment contrary to the actual statements his trial attorney admitted to on record. Thus, petitioner was entitled to an evidentiary hearing. See, United States v. Scott, 625 F. 2d 623,625 (5th Cir. 1980); Pitts v. United States, 763 F. 2d at 201; United States v Birdwell, 887, F.2d 643, 645 (5th Cir. 1989) (evidentiary hearing warranted if petition contains "specific factual allegations not directly contradicted in the record)".

CONCLUSION:

Tyson has been deprived of basic fundamental rights guaranteed by the Fifth and Six Amendments of the United States Constitution and seeks relief in this court to restore those rights. Based on the arguments and authorities presented herein, Tyson's "straight up guilty plea" was sustained in violation of due process and not voluntarily or intelligently entered because he did not understand the consequences of his plea based on erroneous advice by counsel throughout pre trial and sentencing. Tyson was deprived of his right to effective assistance of counsel in the district court and appellate court. Petitioner prays this Court will issue a writ of certiorari and reverse the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted on this 25 day of October