No. 19-7675

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ALONZO LAMAR JOHNSON — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
for the Third Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alonzo Lamar Johnson, #21857-039
(Your Name)
FCI-Fort Dix
PO Box 2000
(Address)

Joint Base MDL, NJ 08640
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

* WHETHER the US Court of Appeals for the Third Circuit improperly denied Petitioner's request for a Certificate of Appealability by failing to grant his submissions the liberal construction owed to incarcerated pro se litigants.

* WHETHER the US District Court for the Western District of Pennsylvania committed plain error by failing to conduct an evidentiary hearing on Petitioner's Motion to Vacate pursuant to 28 USC §2255 when it had difficulty comprehending his submissions.

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 A 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[x] is unpublished.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 C to the petition and is

[ ] reported at _____; 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 September 12, 2019.

[ ] 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 26, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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).

[ ] 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

Sixth Amendment Right to Effective Counsel

STATEMENT OF THE CASE

In April, 2012, Petitioner was found guilty by a jury of a conspiracy to distribute cocaine. He was sentenced on July 30, 2013 to 300 months incarceration.

Then began a lengthy process by which Petitioner has fought to clear his name. Both his Direct Appeal and his original Petition for a Writ of Certiorari were denied. He filed a §2255 motion in 2018. That motion was denied by the District Court in January, 2019. The Third Circuit denied his application for a Certificate of Appealability in November, 2019. This petition for a Writ of Certiorari represents the last stage of this Habeas Corpus process.

REASONS FOR GRANTING THE PETITION

Courts have long recognized that the filings of incarcerated pro se litigants must be granted a liberal construction and held to a less stringent standard than those drafted by trained attorneys. See Haines v. Kerner, 404 US 519, 520 (1972) and Estelle v. Gamble, 429 US 97, 106 (1976). Indeed, "court personnel reviewing pro se pleadings are charged with the responsibility of deciphering why the submission was filed, what the litigant was seeking, and what claims he may be making." Higgs v. AG of the US, 655 F.3d 333, 339-340 (3rd Cir, 2011).

Petitioner acknowledges that his previous filings were not exactly a paragon of legal writing. He also recognizes the efforts of the District Court "to construe [his pleadings] as fairly as possible." Appx C, p.8. But here, even those efforts seem to have fallen short.

Petitioner cites two specific examples of how he was denied due process because of the lower courts' failure to hold his pleadings to the standard outlined in Kerner. First, both the District Court and the Court of Appeals erred when the fundamentally misconstrued the grounds Petitioner was raising and misconstrued both his original §2255 motion and his request for a Certificate of Appealability. Second, the District Court erred by failing to conduct an evidentiary hearing when it had difficulty understanding Petitioner's written pleadings. Such errors rise to the level of needing this Court to reverse and remand this matter for additional proceedings consistent with the obligation due under Kerner and its progeny.

by the courts. Whether it was meritorious or not is of no moment in this context. The Third Circuit and this Court have made clear that pro se pleadings must be scrupulously examined to ensure they are adequately understood. Higgs, 655 F.3d at 339. This is but one example that demonstrates Petitioner was not afforded the full range of liberal construction his pleadings were owed.

Petitioner now expands one of the examples listed above in an effort to demonstrate how such a broad interpretation would have affected the underlying §2255 motion.

A - The Denial of a Constitutional Right: At every "critical stage" of criminal proceedings, a defendant is guaranteed the right to effective assistance of counsel. Missouri v. Frye, 566 US 134, 142 (2012). When raising a claim of ineffective assistance of counsel, a petitioner "must overcome the presumtion that, under the circumstances, the challenged actions might be considered sound trial strategy." Strickland, 466 US at 689 (internal quotes omitted). When a habeas corpus petitioner's ineffectiveness claim rests on the failure to make a motion, prejudice may be shown only if he can demonstrate 1) a likelihood of success on the merits of that motion, and 2) that there is a reasonable probability the outcome of the proceeding would have been different. See Morrison v. Kimmelman, 753 F.2d 918, 922-3 (3rd Cir, 1985). However, failure to raise meritless arguments does not constitute ineffectiveness. US v. Sander, 165 F.3d 248, 253 (3rd Cir, 1999).

A careful reading of both Petitioner's original §2255 motion and his request for a COA demonstrate that he raised a ground of ineffective assistance because counsel failed to make a motion to suppress the drugs charged in Count 2 of his Indictment and subsequently introduced at his trial. See §2255 Motion and Request for Issuance of COA, p.2. He raised this ground

citing errors and gaps in the chain of custody, asserting that a serous gap of 48-hours exists during which the Ohio crime lab cannot account for the location or custody of the 8-kilograms of cocaine tested by that lab. ID.

Although "ordinary" gaps in the chain of custody merely address the weight of evidence, see Melendez-Diaz v. Massachusetts, 577 US 305, 311 N.1 (2010), "serious gaps may render a chain of custody do deficient that exclusion is required." US v. Rawlins, 606 F.3d 73, 82 (3rd Cir, 2010). Here, a 48-hour gap in the chain of custody is serious, more so when there are also serious questions about the handling of those drugs during that period. The report from the Ohio crime lab indicates that they tested "8 compressed brick" of cocaine. Request for COA at p.3. But when presented at trial, the drugs arrived as 12 freezer bags full of cocaine. Id. No testimony was elicited at trial from that drug lab. Id. No testimony from the Pittsburgh crime lab either. Id. In fact,, at no time during trial did counsel object to the authentication of the narcotic evidence despite this glaring omission. See Fed. Rule Ev. 901(a) and US v. Howard-Arias, 679 F.2d 363, 366 (4th Cir, 1982) ("The chain of custody rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence.")

Moreover, this is precisely the kin of issue that should have been discovered by counsel during preparation for trial. "While counsel is entitled to substantial deference with respect to strategic judgment, an attorney must investigate a case, when he has a cause to do so, in order to provide minimally competent professional representation." US v. Kaufman, 109 F.3d 186, 190 (3rd Cir, 1997). Here, that did not happen.

"Trial counsel has a duty to investigate evidence related to the defense strategy he or she pursues at trial." US v. Kelly, 2017 US Dist LEXIS 119204 at *24 (EDPA, 7/27/17) citing Jacobs v. Horn, 395 F.3d 92, 104 (3rd Cir,

2005). See also Rompilla v. Beard, 545 US 374, 387 (2005) (defense counsel has a duty to investigate facts relevant to the merits of the case). Failure to investigate such an obvious and serious gap in the chain of custody related to the drugs introduced at trial falls far afield of the broad window of what constitutes an objective standard of reasonableness. Any competent practitioner would have realized that failing to challenge the potential tampering with this crucial evidence could never be deemed a valid strategy. It therefore falls outside the zone of "reasonable trial strategy" and forfeits its presumption of deference.

Counsel's failure to authenticate the drugs at trial and his failure to move for suppression of those drugs based on the serious gap in the chain of custody violated Petitioner's right to effective assistance of counsel. This demonstrates the issuance of a COA is warranted.

B - Reasonable Jurists Could Disagree: The District Court should have issued a COA because their decision is debatable and wrong. Here, Petitioner has raised a credible challenge to the authentication/need for suppression of the drug evidence in his trial because of the probability of tampering. In US v. Ray, 2016 US DIST LEXIS 137432 (MDPA, 10/2/19), the Middle District of Pennsylvania held that the inclusion of tampered evidence in a new trail would "impact the decision of a reasonalbe jury." ID at *13. This alone demonstrates that reasonable jurists could disagree with the decision of this District Court.

Ground II
The Court Erred by Failing to Hold an Evidentiary Hearing

When the lower court had difficulty deciphering Petitioner's pro se pleadings, it had an obligation under both statutory and common law to conduct an evidentiary hearing to appropriately ascertain the grounds actually being raised. Failing to do so here was error.

A court reviewing a habeas corpus petition is required to hold a hearing "unless the motion and the files and records of the case conclusively show the prisoner is entitled to no relief." 28 USC §2255(b). See also US v. Day, 969 F.2d 39, 41-42 (3rd Cir, 1992). Also, the Third Circuit has made clear that although a district court does have "discretion whether to order a hearing when a defendant brings a motion to vacate pursuant to §2255, our caselaw has imposed limitations on the exercise of that discretion." US v. Booth, 432 F.3d 542, 545 (3rd Cir, 2005). That means a court in the Third Circuit is required to hold a hearing when that motion "alleges facts warranting §2255 relief that are not clearly resolved by the record." US v. Tolliver, 800 F.3d 138, 141 (3rd Cir, 2015). Other courts have arrived at similar conclusions. See e.g. Engelen v. US, 68 F.3d 238, 240 (8th Cir, 1995) (a §2255 motion can be dismissed without a hearing only if "1) the defendant's allegations, accepted as true, would not entitle him to relief, or 2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or are conclusions rather than facts.")

Here, the motion was (admittedly) far from clear. But that should only have increased the court's understanding that a hearing was necessary. The two examples cited in Ground I above demonstrate this to a fine point. The court itself admitted it was difficult to decipher Petitioner's "lengthy and rambling submissions". Appx C, p.8. But the court also improperly ignored

grounds it knew Petitioner had raised but mistakenly believed he had not sufficiently supported. One such example was when the court refused to respond to a specific Ineffective Assistance of Counsel claim by stating only "[Petitioner] did not explain why counsel was ineffective in failing to call co-defendant Alford as a witness." Appx. C, p.19. Not only is this patently untrue (Petitioner spent several pages outlining his need for Mr. Alford's testimony) but this rationalization fails to meet the test for dismissal without a hearing. That ground was not inherently incredible, it was not contradicted by the record. The court simply was having a difficult time finding the information in Petitioner's pleadings. That was something easily remedied by holding an evidentiary hearing and sussing out what Petitioner meant and what exactly he was claiming.

This is but one example of many that demonstrates the lower court was deficient for failing to hold an evidentiary hearing. This was error and must be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: February 10, 2020