

No. 20-5988

ORIGINAL

Supreme Court, U.S. FILED SEP 22 2020 OFFICE OF THE CLERK
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IN THE
SUPREME COURT OF THE UNITED STATES

ZIYAD YAGHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Whether this Court should GVR the lower court's decision denying a Certificate of Appealability in this case because its denial violates principles of Due Process of law inherent in Petitioner's Sixth Amendment right to the effective Assistance of counsel related to the plea process

IN THE
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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to this petition and is unpublished.

The opinion of the United States District Court for the Eastern District of North Carolina appears at Appendix B and is unpublished.

JURISDICTION

The date of which the United States Court of Appeals decided my case was

A timely petition for rehearing was denied by the United States Court of Appeals for the Fourth Circuit on April 28, 2020, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution, Amendment V - Due Process

United States Constitution, Amendment VI - Right to Counsel

Title 28 U.S.C. §2253(c)

Title 28 U.S.C. §2255

STATEMENT OF THE CASE

On October 2, 2015, petitioner filed a pro se motion under 28 U.S.C. §2255 challenging his conviction and sentence in the United States District Court for the Eastern District of North Carolina. Several days later, an attorney filed a notice of appearance in the case, and subsequently filed a memorandum supporting collateral relief by leave of the court.

The government filed its opposition, in the form of a motion to dismiss, or in the alternate, for summary judgment, along with an appendix. Included with its opposition was a declaration from this petitioner's trial attorney. Contained in trial counsel's declaration was a misstatement concerning the plea offer presented by the government. Consequently, due to a serious disagreement with his habeas attorney, petitioner moved to discharge counsel and to proceed pro se.

The magistrate subsequently issued a report and recommendation (R&R) to which petitioner timely objected to filing therewith his very own declaration countering that of his trial counsel's. In the declaration filed by petitioner, he specifically contradicted that of his trial counsel averring that content of the conversation between him and petitioner concerning the government's plea offer did not include requiring him to enter a plea with the government without also cooperating.

The district court granted the government's motion for summary judgment and denied petitioner's §2255 motion without resolving the conflicting facts in the competing declarations of petitioner and his counsel. (See Appendix B). The district court similarly

found that a certificate of appealability (COA) was not warranted under this Court's Miller-El standard, and declined to issue a COA in petitioner's case. (Id.). Petitioner filed a timely notice of appeal in the district court, and acquired the assistance of counsel in seeking a COA in the Fourth Circuit court of appeals.

In the informal brief filed by counsel, petitioner sought a COA for the specific issue pertaining to the ineffective assistance of his trial counsel, for failing to accurately communicate the terms of the government's plea offer, along with two other ineffective issues.

Acknowledging the need for a COA, a panel of the Fourth Circuit issued a per curiam opinion that blanketly denied petitioner a COA by a simple recitation of the general standard necessary for obtaining a COA. The appellate panel simply stated that after having conducting an independent review of the record, it concluding that petitioner had not made the requisite showing. (See Appendix A).

Petitioner moved for rehearing with suggestion for rehearing en banc, based on the panel decisions usurpation of his due process rights to an opportunity to be heard by blanketly denying him a COA. Rehearing was denied on April 28, 2019¹ by the panel of appellate judges assigned to hear the case; (see Appendix C), and now petitioner seeks certiorari review by this Court.

¹ This Court issued an Order on March 19, 2020 extending the time in which litigants for 90 days up to 150 days due to the COVID-19 pandemic; see Supreme Court Order Lexis 1643, making petitioner's petition for a writ of certiorari in this case timely if filed on or before September 23, 2020. (See Appendix D).

REASON FOR GRANTING PETITION

This Court should GVR the lower court's decision denying a Certificate of Appealability in this case because its denial violates principles of the Due Process of law inherent in Petitioner's Sixth Amendment right to the Effective Assistance of counsel related to the plea process.

It is long recognized that this Court has the power to grant, vacate and remand (GVR) to a lower court its decision essentially when it may be shown that such decision may have been made without consideration of law established by this Court. See e.g., Lawrence v. Chater, 516 U.S. 163, 170 (1996)(reasoning that a GVR order may issue when recent events cast substantial doubt on the correctness of the lower court's summary disposition).

A criminal defendant has long enjoyed the right to the effective assistance of counsel under the Sixth Amendment. Gideon v. Wainwright, 372 U.S. 335, 343 (1963)(quoting Johnson v. Zerbst, 304 U.S. 458 (1938)(stating the Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not be done")).

This Court has extended the Sixth Amendment right to the plea bargaining process, when a defendant does not accept a plea and proceeds to trial. See Lafler v. Cooper, 566 U.S. 156, 163 (2012); Missouri v. Frye, 566 U.S. 131, 145 (2012). In this case, petitioner did just that i.e., rejected a favorable plea offer due to his counsel's misrepresentation of the contours of the plea offered by the government. Consequently, the actual plea offer which did not include petitioner being required to cooperate as counsel had informed petitioner he would have to do, was not revealed until his

attorney submitted a declaration for the government that it provided along with its answer to his §2255 motion.²

Based on this revelation, petitioner filed a declaration of his own along with his objection to the magistrate judge's report and recommendation (R&R). However, the lower court simply did not address the conflicting declarations of petitioner and his counsel. Significantly, an issue similar to petitioner's was previously addressed by Fourth Circuit court of appeals. See United States v. Robinson, 238 Fed. Appx. 954 (4th Cir. 2007).

In Robinson, the defendant presented a claim that his attorney "failed to communicate a plea offer" which included an advantageous factual proposal, that was not "explicitly raised...for the first time" until defendant's response to counsel's affidavit filed in "his objection to the magistrate judge's recommendation." Robinson, at 954. The Robinson panel granted him a COA on this very issue, then later vacated and remanded the issue to the district court for further proceedings. Id.

Following long established Fourth Circuit law, the panel recognized that "when a movant presents a colorable Sixth Amendment claim showing disputed facts involving inconsistencies beyond the record a hearing is mandated. Id. (citing United States v. Magini,

² Because petitioner was represented by counsel, he was prevented from initially challenging this revelative declaration by trial counsel, until he discharged habeas counsel and proceeded in a pro se capacity. Importantly, without the assistance of counsel, petitioner was entitled to have his pleadings liberally construed. See Haines v. Kerner, 404 U.S. 519 (1972); Erickson v. Pardus, 551 U.S. 89 (2009).

973 F.2d. 261 (4th Cir. 1992); Raines v. United States, 423 F.2d. 526, 530 (4th Cir. 1970) ("There will remain...a category of petitions, usually involving credibility, that will require an evidentiary hearing in open court")).

Moreover, this principle has been recognized by the Fourth Circuit in other unpublished cases following this Court's decision in Lafler v. Cooper, *supra* and Missouri v. Frye. See United States v. Mitchell, 541 Fed. Appx. 286 (4th Cir. 2013) and United States v. Woodard, 748 Fed. Appx. 498 (4th Cir. 2018).

In Mitchell, the Fourth Circuit granted a COA and remanded the case for an evidentiary hearing to determine if counsel "fully convey[ed] to defendant] his options to plead guilty. See United States v. Mitchell, 484 Fed. Appx. 744 (4th Cir. 2012). Following remand, "the district court found that counsel had sufficiently informed [defendant] regarding his plea options, specifically an option to plead guilty without cooperation with the Government." Mitchell, 541 Fed. Appx. 286. On a subsequent appeal, the Fourth Circuit affirmed the district court decision following an evidentiary hearing, in which the defendant was given the opportunity to prove his claim. Id.

In Woodard, the Fourth Circuit again granted a COA, vacating and remanding the case on similarly consistent grounds concerning an ineffective assistance claim based on plea negotiations, and whether an evidentiary hearing was required. See Woodard, *supra*. Certainly, the contours of petitioner's ineffective assistance of counsel claim in the lower courts, and the contrary ruling in the Fourth Circuit implicates serious due process concerns.

This Court has long established that the due process concerns

contains the fundamental requirements of notice and the opportunity to be heard.³ See Mathews v. Eldridge, 424 U.S. 319 (1976). Under the circumstances of this case, it cannot be confidently said that petitioner was afforded the due process of law in this case at varying stages of his criminal prosecution and collateral review process. Especially when, in the lower rung of the ladder of the postconviction process, the law as established by this Court and followed by lower courts explicitly support—in the least his obtaining a COA under the modest Barefoot standard. See Morris v. Woodford, 279 F.3d. 775, 781 (9th Cir. 2000)(any claims that satisfy th[e] modest standard must receive a COA)(quoting Lambright v. Stewart, 220 F.3d. 1022, 1027 (9th Cir. 2000)).

This Court has long assured and repeatedly admonished lower appellate courts for sidestepping or trampling upon the COA process necessary to appeal the denial of habeas related motions under the exceedingly low standard. See Barefoot v. Estelle, 463 U.S. 880, n. 4 (1983)(setting the standard necessary to obtain a CPC and assuring that no demonstration of prevailing needed to appeal); see also, Slack v. McDaniel, 529 U.S. 472 (2000)(applying the Barefoot standard to the ADEPA new COA requirement); Miller-El v. Cockrell, 537 U.S. 322 (2003)(admonishing lower courts for using the COA to denial appeals without jurisdiction); Tennard v. Dretke, 524 U.S. 274 (2005)(rejecting courts paying lipservice to principles which apply to addressing the COA inquiry); Buck v. Davis, 580 U.S. _____

³ A litigants right to be notified of certain matters associated with the loss of liberty at the hands of the government, necessarily include being correctly informed during the plea negotiation process. See United States v. Cronic, 466 U.S. 648, 650 (1984); Padilla v. Kentucky, 559 U.S. 356, 373 (2010)

(2017)(reaffirming that at the COA stage the only question is whether an applicant meets the Barefoot standard).

It is clear that in this case, the trend of violating a habeas litigant's due process rights in the postconviction process must be squarely addressed; see Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 293 (1998)(Stevens, J., concurring in part, dissenting in part)(stating that when postconviction proceedings are established "these proceedings must comport with due process"), and his opportunity to be heard must be restored through this Court's GVR power. Therefore, based on teh foregoing petitioner seeks this Court to grant this petition, vacate the Fourth Circuit's denial of a COA, and remand the case to the lower court to address his Sixth Amendment claim of ineffective assistance of counsel in the plea context consistent with the law. Due to the fact that failing to do so violates clearly established due process principles which support this petitioner's opportunity to be heard under the Sixth Amendment on the effective assistance of counsel during the plea process.

CONCLUSION

This petition for writ of certiorari should be granted, and the case GVR'd to the lower appellate court.

Respectfully submitted,

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