Case No. 20-6052

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD R. CONWAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONALD R. CONWAY
Petitioner pro se
21792-032
Federal Medical Center
Post Office Box 14500
Lexington, Kentucky 40512

QUESTIONS PRESENTED

1. Did the Court of Appeals err or abuse its discretion when upon reading Appellate Counsel's single-issue Brief, that, in context, was a matter of law already decided in a binding Circuit decision eighteen years earlier (and ergo frivolous), that the Circuit did not consider Counsel's Brief a de facto equivalent to a "no merits" Anders Brief, where such designation sua sponte (alternatively, order to Counsel to resubmit Brief under Anders) would have provided Appellant with (a) the opportunity to raise his own issues; (b) a review of the Record by the Court of Appeals; (c) and should meritorious issues be discovered, the appointment of new Appellate Counsel, that such a failure to act sua sponte in so designating the Brief (or ordering Counsel to correct) constituted Constitutional Due Process and/or Equal Protection violations of Appellant?

2. Did the Court of Appeals err or abuse its discretion when it failed to recognize and address the Circuit's own conflicting cases as cited in the Petition for Rehearing/ Rehearing En Banc, where such conflicts directly prejudiced Appellant to understand exactly what the case law of the Circuit was, and how to adapt his issues and arguments for (a) submissions to the Court of Appeals; (b) Appellate Review; and (c) avoidance of Procedural Default?

3. As in Question Two, adding in the context of the case law and/or actual practices of the Circuit being also in conflict with the Supreme Court's rulings and case law?

4. Did the Court of Appeals err or abuse its discretion when it declined to Rehear or Rehear En Banc the instant case, whose circumstances and Order were in conflict with its own Circuit precedents and the Supreme Court, where herein the Clerk of the Court issues denial Orders of a Constitutional magnitude, beyond the ministerial duties of her Office, prejudicing Appellant of his rights as outlined in Chapman v. California, et al., in the Direct Appeal process, that has subsequently created further prejudice by limiting issues and triggering the higher bar for relief on §2255, where procedural default must be overcome, and where only Constitutional grounds, and not procedural matters, are permissible?

LIST OF PARTIES

1. DONALD R. CONWAY,
   Petitioner pro se.

2. UNITED STATES OF AMERICA,
   Respondent.

RELATED CASES

1. UNITED STATES OF AMERICA v. DONALD R. CONWAY,

   Case No. 2:17-cr-0043

   United States District Court for the Eastern District of Kentucky

2. UNITED STATES OF AMERICA v. DONALD R. CONWAY,

   Case No. 18-6260

   United States Court of Appeals for the Sixth Circuit

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Supreme Court Cases

Supreme Court Cases (continued)

Circuit Court Cases

Circuit Court Cases (continued)

District Court Cases

Constitutional Provisions

Statutes and Codes

Federal

State

United States Sentencing Guidelines

Texts

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

The opinion of the United States Court of Appeals for the Sixth Circuit in Case 18-6260 appears at APPENDIX "A", and is unpublished.

The opinion of the United States Court of Appeals for the Sixth Circuit in Case 18-6260 denying Rehearing and Rehearing En Banc appears at APPENDIX "B", and is unpublished.

The judgment and sentencing of the United States District Court for the Eastern District of Kentucky in Case 2:17-cr-0043 appears at APPENDIX "C", and is unpublished.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Order affirming the District Court judgment and sentencing on April 24, 2020.

The United States Court of Appeals for the Sixth Circuit denied the Petition for Rehearing/Petition for Rehearing Enbanc on July 29, 2020.

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

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner was charged with 21 U.S.C. 841 Possession with Intent to Distribute Heroin; 21 U.S.C. §841 Possession with Intent to Distribute Cocaine; and 18 U.S.C. §922(g) Felon in Possession of a Firearm, in the United States District Court for the Eastern District of Kentucky; Case Number 2:17-cr-0043.

2. The Office of the United States Attorney filed its Indictment and a 21 U.S.C. §851(a)(1) Notice on 11-09-2017.

3. During the District Court proceedings,

   (A) Petitioner sought new Defense Counsel via correspondence construed as a Motion;

   (B) Petitioner was granted new Counsel;

   (C) Petitioner submitted other correspondence and motions without Counsel;

   (D) Petitioner was admonished by the Magistrate Judge to not submit motions unless by and through Counsel. See, APPENDIX "D", 2:17-cr-0043, DKT. 52, 8-08-2018.

4. Petitioner proceeded to bench trial and was found guilty of Counts One and Two on 11-30-2018, and was sentenced to a term of incarceration for 192 months for each count, to be served concurrently. See, APPENDIX "B".

5. On Direct Appeal, the Sixth Circuit Court of Appeals appointed Andrew Avellano as Appellate Counsel for Petitioner on 12-11-2018, Appeal Number 18-6260.

6. Petitioner sent numerous correspondence to Appellate Counsel regarding the Brief of Appellant, cooperative effort on the Brief, suggested issues, instructions, requests, etc. The correspondence from Petitioner to Appellate Counsel were all sent by USPS Certified Mail (except one). All Certified Mail correspondence sent by Petitioner were successfully delivered, and confirmed by USPS tracking. See, APPENDIX "E".

7. Absent critical communication and cooperation from Appellate Counsel (see, APPENDIX "I", pgs. 13-14), Petitioner sought dismissal of Counsel and appointment of new Appellate Counsel, doing so in the same manner that had proven acceptable to the District Court Clerk and Magistrate Judge, and had been liberally construed by the Magistrate as a Motion, who granted same. See, Appeal 18-6260, Dkt. 31, 7-17-2019.

8. The Clerk of the Court of Appeals, and not a Judge or Magistrate, denied the request, stating in part that Petitioner stated no grounds with evidence to support his request. See, APPENDIX "F".
See also, 17. below, page 7.

9. Immediately upon receipt of the Clerk's Denial, Petitioner assembled the evidence and grounds required by the Clerk, and authored a full motion with Exhibits, and submitted same to the Court. Dkt. 48, 12/16/2019. See, APPENDIX "G"; see also, APPENDIX "E".

10. The Clerk again denied Petitioner's request for new Counsel, despite Petitioner having met the evidentiary standards set by the Clerk in the previous denial. This second denial cited reasons/grounds for denial never previously articulated in the first denial. Dkt. 50, 1-09-2020. See, APPENDIX "H".

11. Neither request/motion for new Counsel was decided by a member of the Federal Judiciary, appointed by the President, but instead was solely decided by the Clerk of the Court.

12. Appellate Counsel submitted Brief of Appellate on 11-12-2019.

13. On 2-03-2020, Petitioner filed a Motion for Reconsideration (Dkt. 53) respective to the denial of Dkt. 50 on 1-09-2020. See, APPENDIX "I".

14. The Panel decision in 18-6260 was issued on 4-24-2020. Most importantly, it stated that the single issue submitted by Appellate Counsel Avellano was a matter already decided and fully foreclosed in a binding Sixth Circuit decision dating from 2002, eighteen years ago. See, APPENDIX "A".

15. Petitioner sought Rehearing/Rehearing En Banc in a pro se motion mailed 6-01-2020 (filed 6-08-2020), Dkt. 57. See, APPENDIX "J".

16. The Sixth Circuit denied the Petition for Rehearing/ Rehearing En Banc on 7-29-2020, with no members of the Court voting for En Banc review. See, APPENDIX "B".

17. NOTE: On 3-21-2019 (Dkt. 23), and 7-17-2019 (Dkt. 31), Petitioner sent copies of his correspondence to Appellate Counsel to the Clerk of the Court, to establish for the record Petitioner's efforts in his Direct Appeal, and should the matter become an issue, to document the actions of appointed Appellate Counsel through non-response to the correspondence of Petitioner, as well as non-cooperation and inattentiveness to his client, despite his assurances to the contrary. This entire set of correspondence was in the possession of the Clerk at the time of her denial, despite her statement that, "The defendant has not demonstrated grounds for the appointment of new counsel." See, APPENDIX "F", lines 3-4, Denial of 11-25-2019. Compare to APPENDIX "E", aforementioned set of correspondence. See also, **TITLE PAGE** to APPENDIX "K" for further detail. The entire set of correspondence was again submitted to the Clerk with his second request, APPENDIX "G", and was submitted yet a **third** time in his Rehearing/Rehearing En Banc Motion. See, APPENDIX "J". Petitioner made the Circuit aware of the circumstances on four occasions without relief.

REASONS FOR GRANTING THE WRIT
(Argument/Discussion)

Petitioner appears pro se and humbly prays the Honorable Court liberally read and favorably construe the instant Motion, accepting all asserted facts as true in consideration of his lack of legal training. Haines v. Kerner, 404 U.S. 519-520 (1972); Erickson v. Pardus, 551 U.S. 89 (2007). This is the same pro se statement requesting liberal construction be applied in his motions sent to the Court of Appeals, for substitution of Appellate Counsel (answered by the Clerk, not a Judge), and the Motion for Reconsideration, as well as the Petition for Rehearing/ Petition for Rehearing En Banc following the Order in the Appeal.

The questions and the underlying events upon which they are based all arise from an interconnected set of actions and circumstances, where particular elements are applicable in more than one question. As such, some liberal construction will be necessary.

Whereas the STATEMENT OF THE CASE is a formalized chronology of events, Petitioner sets forth the following Summary, under penalty of perjury, to encapsulate the errors in his case, so as to determine where Due Process, Equal Protection, or 'Access to the Court' rights were violated, and by whom, under what circumstances, and in what context.

Summary of Events

The detailed presentation in the STATEMENT OF THE CASE, and the contents of the APPENDICES provide the documented support for the following Summary.

1. Petitioner sought substitution of Counsel at the District Court. He wrote to the Court in letter form.
2. The Clerk of the Court did not decide the matter.
3. The Clerk presented the letter to the Magistrate, who construed the letter as a Motion, and granted same.
4. Petitioner sent other letters and Motions while represented by Counsel. The Magistrate admonished Petitioner and directed him to send all Motions through his attorney.

In number 3 above, Petitioner learned about the Haines v. Kerner liberal construction principle. In number 4 above, Petitioner learned about the concept of "hybrid representation" and that the Sixth Circuit directs defendants to contact the Court via Counsel and not directly.

5. Petitioner was found guilty and filed Notice of Appeal.
6. Andrew Avellano was appointed by the Circuit as Appellate Counsel.
7. Petitioner repeatedly sent correspondence to Counsel via Certified Mail. Counsel was not timely nor consistent with replies.

8. Counsel repeatedly submitted Motions for Extensions of Time. Despite this, his communication/cooperation with Appellant was negligible.

9. Petitioner sent filings to the Court consisting of his correspondence with Counsel, to establish for the record that Appellant was engaged in the process, although it was not so engaged by Appellate Counsel Avellano.[1]

10. Petitioner sent a letter to the Court requesting new Appellate Counsel.[1]

NOTE: This was the same method that was employed in the District Court, where the Clerk forwarded the Motion to the Magistrate, who, following the liberal construction standard, appointed new Counsel.

11. At the Circuit Court, however, the Clerk did not forward the request to any Judge or Magistrate.

12. The Clerk denied the request.

13. The Clerk set forth in the Order certain requirements for such a request to be granted.[1]

14. Petitioner wrote an entirely new Motion, specifically addressing the elements listed in the Clerk's denial, to include an additional complete set of the correspondence sent to Appellate Counsel up to that point, for consideration with the Motion.[1]

15. Again, the Clerk did not forward Appellant's Motion to a Judge or Magistrate.

---

1. See, Statement of the Case, No. 17 for detailed account.

16. Again, the Clerk denied Petitioner's Motion.

17. The second Motion was denied on grounds never listed in the first denial, where, had they been listed, Petitioner would have been given notice, and Petitioner would have complied.

18. Appellate Counsel submitted the Brief of Appellant.

19. The Brief contains only one issue. It is an issue that had already been decided **18 years** earlier in the Sixth Circuit (and had never been overturned).

20. The Panel denied the Appeal, and affirmed the District Court.

21. In the ORDER, the Panel stated that the argument proposed by Counsel had already been decided in 2002.

22. The single issue submitted by Appellate Counsel was the epitome of frivolous.

23. Despite the circumstances, the Sixth Circuit did not

    a. return the Brief to Counsel with instructions to either submit a new "merits" brief; or

    b. to file an Anders Brief, if the single frivolous issue was all that Counsel could determine as meritorious.

Had the Panel taken such action, which is well within their authority, the Anders procedure would have guaranteed to Petitioner that the entire Record of the Case would have been fully reviewed by the Panel, and, Petitioner would have been able to submit his own Brief, and, should other issues be detected by the Panel, new Counsel would have been appointed. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 1400 (1967).

24. Even prior to the Panel's decision, Petitioner sought to Strike the Brief after having seen the Brief for the first time, **after its submission**, when Petitioner himself had discovered the worthlessness of the Brief and its 'dead' issue. See, APPENDIX "G".

25. A Petition for Rehearing/Petition for Rehearing En Banc was filed, addressing the issues stated above, among others. The Petition contained examples of conflicts within the Sixth Circuit as well as with the Supreme Court. The Petition also addressed the Constitutional magnitude of a Clerk issuing denials on Motions of Constitutional significance, namely, the Due Process right to Counsel on Direct Appeal. The Petition stated the prejudice Petition would suffer should the Court not take action, that his claims would need to clear the "significantly higher hurdle" for relief standard on §2255 (United States v. Frady, 456 U.S. 152, 166 (1982)), where, unlike Direct Appeal, a Petitioner on §2255 collateral attack has no right to have counsel appointed. Pennsylvania v. Finley, 481 U.S. 551, 554 (1987).

26. The Petition was denied by the Sixth Circuit. No Judge voted for En Banc consideration, despite the internal Circuit conflicts, the conflicts with the Supreme Court, and the Constitutional implications.

Discussion and Argument

The situation Petitioner finds himself, and the manner by which he arrived there appears to have never previously been addressed by this Court. The situation itself should have never occured, given the robust and clear instructions from this Court, Haines v. Kerner, 404 U.S. 519-20 (1972); Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 1400 (1967); Chapman v. California, 386 U.S. 18 (1967), Penson v. Ohio, 488 U.S. 75, 85 (1988); et al. However, in Petitioner's case, Sixth Circuit case law was at times in conflict with itself, as well as the actual practice and procedures of the Sixth Circuit Court of Appeals. It is hornbook law that a collateral attack shall not be a substitute for an Appeal. Where, in this case, the de facto denial of that Appeal transpired, by means in conflict with this Court and the other Courts of Appeals, the Due Process and Equal Protection clauses of the Constitution and Petitioner's rights thereunder have been violated. This Court should, in consideration of Supreme Court Rule 10, grant the instant Petition due to the conflicts as stated above and herein, as well as the Federal question inherent in the subject matter of Federal criminal Direct Appeals.

> "The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." Lehman Brothers v. Schein, 416 U.S. 386, 393 (1974)(Rehnquist, J., concurring).

The guideposts to Direct Appeals are well-settled. The United States Constitution makes no express mention of criminal appeals or any rights thereto. Martinez v. Court of Appeals of California, 528 U.S. 152, 160 (2000)(no Constitutional right to appeal a criminal conviction); Goeke v. Branch, 514 U.S. 115, 119-20 (1995)("due process does not require a State to provide appellate process at all."). However, when it does provide such a right to Appeal, it cannot discriminate against the poor by failing to provide the necessary transcript. Griffin v. Illinois, 351 U.S. 12 (1956). Furthermore, counsel must be appointed on appeal of right for indigent criminal defendants. Douglas v. California, 372 U.S. 353 (1963) In 1964, the Criminal Justice Act was enacted, partially to fulfill this right for indigent criminal defendants, in part by earmarking funds for the remuneration of appointed counsel. Where counsel is appointed for appeal but concludes there are no nonfrivolous issues for appeal, he must file a brief in accordance with Anders v. California, 386 U.S. 738 (1967). Counsel on appeal is not required to argue every nonfrivolous issue (Jones v. Barnes, 463 U.S. 745, 751-52 (1989)), and should "'winnow[] out weaker arguments on appeal and focus[] on' those likely to prevail." Id. (quoting Smith v. Murray, 477 U.S. 527, 536 (1986). There is no Constitutional right to self-representation on appeal (Martinez, 528 U.S. at 160), and a defendant cannot be forced to proceed in an appeal without counsel. Penson v. Ohio, 488 U.S. 75, 85 (1988). Due Process guarantees effective assistance of counsel on first appeal of

right. Evitts v. Lucey, 469 U.S. 387, 403 (1985)(once a state grants the right to appeal it must follow procedures comporting with Due Process clause of 14th Amendment). Lastly, both Smith v. Murray, 477 U.S. 527 (1986) and Jones v. Barnes, 463 U.S. 745 (1989) provide that the analysis from Strickland v. Washington, 466 U.S. 668 (1984) is the appropriate method to determine and ineffective assistance of Appellate Counsel within a collateral attack.

Nowhere within the cases cited above does this Court expressly (or impliedly) designate appointment of appellate counsel dicisions to the Clerk of the Appellate Court. In the above cases, the plain reading is that the Supreme Court has tasked the Courts of Appeals to take action to uphold Constitutional rights of those on appeal, and to safeguard against any violation of the rights of a defendant on appeal. Should a Court of Appeals reassign these duties to a Clerk, it is incumbent upon that Court to the provisions of the Constitution as elucidated in the cases above are fully protected. The Clerk of the Court of Appeals is, in effect, an agent of the Court of Appeals. Errors or failures by the Clerk are not his or her personal failures, but instead are errors made on behalf of the entire Court of Appeals.

Submissions made to the court by a non-attorney are entitled to liberal construction. Haines v. Kerner, 404 U.S. 519-20

(1972); see also, Erickson v. Pardus, 551 U.S. 89 (2007). To the best of Petitioner's understanding, these cases also are instructive cases from this Court, to provide guidance and direction to the lower courts. In this instance also, it is the Court itself, the Judiciary, and not its employees or staff who are the recipients of this Court's instructions. Any permission, license, or rule provided by a Court of Appeals or a District Court to its Clerk is merely a reassignment of the task, not the responsibility of compliance or fulfillment. It is the Court that is responsible for the correct application of Haines or Erickson, for example, where either the submitting defendant invokes pro se construction[1], or where the Court recognizes same without citation and sua sponte applies liberal construction through the Court's discretionary authority.[2, 3] Neither Haines nor Erickson charge any Clerk directly with any duties expressly. Impliedly, however, such a citation by a pro se litigant should inform a Clerk of the Court to be cautious, and present the submission to a sitting judge or magistrate. Even in the cases where Clerks may be experienced and well-versed in particular matters, they must be conscious of the fact that they are not Presidentially-appointed members of the Judiciary, they are employes, valuable employees in the justice system, but with limited powers and authority.

1. See, e.g., APPENDICES "G", "I", "H", 18-6260.
2. See, e.g., APP. "D" Magistrate Order of 8-08-18, 2:17-cr-0043.
3. In either event, the Clerk must have first presented the submission to the Judge or Magistrate.

In arguendo, if the Sixth Circuit made provisions under Circuit Rule 45 for the Clerk to dispositively process or deny motions (unknown to pro se Petitioner with limited prison resources), Petitioner contends that same Rule or license under same must, in practice, not offend the Constitutional rights of Appellants, must not contradict the rulings of this Court, Congress, the Federal Rules, and the Judicial Council. See, e.g., United States v. Young, 424 F.3d 499, 508 (6th Cir. 2005)

> "The bottom line is this: where Congress has provided a specific panopoly of rules that must be followed, the [] court's discretionary powers simply do not come into play."

Also, United States v. Cole, 496 F.3d 188 (2nd Cir. 2007)(standing orders must be consistent with Federal Rules), and United States v. Zingsheim, 384 F.3d 867, 870 (7th Cir. 2004)(standing orders by Circuit must be approved by Judicial Council).

As explained in the Statement of the Case, Summary, and as evidenced in APPENDIX "D", irrespective of any Circuit or District Court Rule, the Clerk of the District Court, upon receipt of the Petitioner's submission of 12-6-2018 (new counsel) gave same to Magistrate Candace J. Smith, who applied the Haines v. Kerner, standard of liberal construction. See, Dkt. 17, 2-8-2018:

> "Defendant's 2/6/2018 letter **is construed** as a motion for appointment of new counsel....Signed by Magistrate Judge Candace J. Smith...." (emphasis added)

And again at Dkt. 19, 2-14-2018, "Defendant's **construed** Motion for New Counsel is GRANTED." (Magistrate J. Smith)(emphasis added).

The Clerk of the District Court correctly forwarded the letter of Petitioner to the Magistrate Judge. The Clerk did not reject the letter due to Petitioner already having been appointed an attorney, nor did the Clerk of the District Court rule on the letter in the manner of a Judge or Magistrate. The Magistrate having received the submission, construed the letter correctly, and despite Petitioner already having been appointed counsel at that point, saw fit to appoint new counsel, in an abundance of caution, no doubt, given the Constitutional and Due Process implication. In other words, the system worked as it should work.

By comparison, Petitioner's first submission to the Court of Appeals concerning dismissal of Appellate Counsel and the appointment of new representation, was not forwarded to a Judge, and therefore was not given liberal construction by a Judge. Furthermore, the Order denying the appointment of new counsel was not made by a Judge, but rather by the Clerk of the Court of Appeals. See, APPENDIX "F". It is important to note that the Order stated, "The defendant has not demonstrated grounds for the appointment of new counsel." The record shows otherwise. On 3-21-2019 (Dkt. 23), and 7-17-2019 (Dkt. 31), Petitioner had provided to the Clerk (for Court submission) copies of the correspondence Petitioner had with Appellate Counsel, documenting the increasing problems in the preparation of the Brief, despite Petitioner's best efforts. If the Clerk made the decision in APPENDIX "F" denying appointment of new counsel (11-25-2019),

the Clerk did not properly construe the previous submissions in context with the submission requesting appointment of new counsel. Had the submissions been submitted to a Judge or Magistrate, the liberal construction standard would have applied, and the Court may have construed the matter in toto, given Petitioner's lack of legal training, construing the previous submissions as the 'grounds' upon which the request for new counsel was based. Where the District Court Clerk's actions were fair and neutral, those of the Appeals Court Clerk were prejudicial and violated the Due Process and Equal Protection rights of Petitioner[4], irrespective of any underlying Circuit Rule. Did the Circuit, in its formulation of Circuit Rule 45 envision a circumstance such as Petitioner's, where liberal construction (not a duty of the Clerk) would intersect with a request or submission (such as one of Constitutional significance, i.e., representation on appeal) that would, by its nature be squarely located outside the ministerial/clerical realm of duties of the Clerk? It can be argued that the Circuit believed that the Clerk would exercise correct judgment in situations such as Petitioner's, but in actuality, it did not occur.

When, on 12-16-2019 (Dkt. 48) Petitioner submitted a new Motion, to meet the threshhold of "new grounds" stated by the Clerk, he resubmitted all of the previously submitted correspondence, as EXHIBITS with the Motion. A full Summary of the correspondence was also newly typed and included, as Petitioner could not be sure whether the Clerk (or the Court) would recall the

4. When a Clerk of the Court blocks access to a member of the Judiciary, the First Amendment 'access to the courts' right is implicated.

original submissions (they were not recalled during the most recent submission). The Motion was 16 pages, and with the Correspondence and Correspondence Summary, over 60 pages. The Motion also contained a declaration of pro se status, citing Haines and Erickson, and specifically requesting liberal pro se construction. See, APPENDIX "G". Irrespective of Petitioner's particular pro se liberal construction request, the Motion was denied by the Clerk on 1-09-2020 (Dkt. 50), without any Judicial review or construction.

It is important to note, for context, and for understanding of Petitioner's actions in first sending the sets of correspondence and then submitting a letter (with some trepidation), rather than a Motion for new counsel. On the one hand, sending a letter at the District Court level was forwarded to the Court, and the letter was construed, and the request was granted. A later submission to the Court was also sent. It too, was forwarded by the Clerk to the Court. The response, as stated above, instructed Petitioner to not submit things to the Court because he had (as he read it, "new") counsel. Petitioner investigated why this would be forbidden. His research led him to McKaskle v. Wiggins, 465 U.S. 168, 183 (1984)(no Constitutional right to "hybrid representation"). This, in turn led him to United States v. Mosely, 810 F.2d 93 (6th Cir. 1987)(Sixth Circuit discourages "hybrid representation"). (Cited on page 1 of APPENDIX "G"). On page 15, Childress v. Booker, U.S. App. LEXIS 11015 @ 3 (6th

Cir. 2015);(The "court also has the discretion to allow hybrid representation."). At the time of Petitioner's APPENDIX "G" Motion, he believed that perhaps the "hybrid representation" issue had partially caused his correspondence submissions to not be filed, as they did not come from the attorney himself. By citing Childress v. Booker, Petitioner sought to advocate that he could make a submission of a "true" Motion, and when he cited the pro se standards, that the Motion would not be subject to non-Judicial review or 'gatekeeping'. This was not to be the case. As explained above, this Motion was also denied. See, APPENDIX "H". APPENDIX "I" was a Motion for Reconsideration, and that was also denied, but in a bizarre way, some solace could be taken that there was evidence of the Circuit itself — this Order was not issued by the Clerk.

For the Rehearing / Rehearing En Banc, Petitioner cited to the Circuit its conflicting holdings regarding whether or not "hybrid representation" was or was not permitted, and if so, under what circumstances. And, were these holdings, like McKaskle itself, concerned primarily with such representation, as it existed at trial, and even if so, did that extend to a Brief without Oral Argument on Appeal? Mosely was decided in 1987, and if the Sixth Circuit obeyed its own self-imposed policy, namely, that no Panel decision can be overturned by another Panel, but only by a decision by the Circuit sitting En Banc, the

matter of "hybrid representation", and subsequently, Petitioner's understanding on how to process would have been more clearly informed. See, Salmi v. Sec'y of Health and Human Services, 774 F.2d 685, 689 (6th Cir. 1985)(panel decisions are binding on later panels, and only a Rehearing En Banc may overturn a binding panel decision).[5]

The relevance to this, and to Petitioner's need to communicate with the Circuit, and to effectly communicate in order to obtain new appointed counsel becomes strikingly clear when an examination of Appellate Counsel's single-issue Brief is made. Even if the issues of non-communication from Counsel is set aside and his effectiveness, as matters better addressed on Ineffective Assistance of Appellate Counsel claims on §2255, the stupifying audacity of Counsel to have submitted a "merits brief" on a matter decided in a panel decision 18 years earlier is another affair entirely. In consideration of the Brief, Appellate Counsel should have either continued to search for a meritorious issue, or submitted the one he had chosen under an Anders v. California framework. The matter, in other words, is greater than mere incompetence, it is the undermining of the Chapman v. California protections and the Anders v. California guarantees thereof.

5. Mosely (1987) and McMeans v. Brigano, 228 F.3d 674, 684 (6th Cir. 2000)("**No hybrid**"); United States v. Delgado, 350 F.3d 520 527 and United States v. Angel, 355 F.3d 462, 465 (6th Cir. 2003)("**Yes hybrid**"); then Miller v. United States, 561 Fed Appx 485, 488 (6th Cir. 2014)"**No**" again; then Childress, (2015) "**Yes**"

When the Direct Appeal process began, and once Petitioner learned who the appointed attorney was, he sent his first (of many) communications to him via Certified Mail on 2-13-2019. From this first letter, Petitioner made clear his concerns about the "hybrid representation" issue, claims to be made on appeal, and his eagerness to cooperatively work with Appellate Counsel. See, APPENDIX "E", first letter. Little did Petitioner know at that time, that his documented concerns would bear out.

> "I have heard horror stories from fellow inmates that tell of Direct Appeals being submitted on the final date before due without the Appellant ever having seen any working draft and/or without any cooperative effort between Appellate Counsel and Appellant. To say it another way, I want to see a rough draft, for purposes of accepting or rejecting it prior to submission, so that if I cannot endorse it, I can take steps to obtain different Counsel before the Brief is formally put before the Court. I want a Brief of Appellant, co-authored by you and I, with my contributions and issues addressed, and not a Brief for Appellant written without my cooperation and/or consent."
> -correspondence of 2-13-2019, page 2.

The remaining contents of APPENDIX "E" show that Petitioner was at all times attempting to be contributory partner in his Appeal efforts, but to no avail. At the time, Petitioner knew the following, from his experience at the District Court with the Magistrate, and his reasearch that, (1) if Salmi was the rule, then Mosely was the binding Circuit position on "hybrid representation, and therefore, other than a request for new counsel, he could not submit any substantive Motions, to include a substitute Brief of Appellant, and (2) because Martinez stated there was no

Constitutional right to self-representation on appeal, Petitioner would need to have counsel of some sort in order to file any Brief at all.

For the purposes of this case, the most relevant quote from Douglas v. California, 372 U.S. 353 (1963 is as follows:

> "[T]he rich man, who appeal as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent... is forced to shift for himself."

It was from this background that the Anders v. California protocols emerged, to ensure that those reliant on appointed appellate counsel would receive a minimal standard of representation and advocacy.

> "[Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and **time allowed him to raise any points that he chooses;** the court —— not counsel —— then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal....
>
> On the other hand, if it finds any of the legal points arguable on the merits (and therefore not frivolous) it **must**, prior to decision, afford the indigent the assistance of counsel to argue the appeal." Anders, 87 S.Ct. at 1400. (emphasis added).

In Penson v. Ohio, 488 U.S. 75, 82-82 (1988), this Court reaffirmed Anders and stated that when Appellate Counsel files an Anders Brief, it represents Counsel's objective professional determination that there are no "non-frivolous" issues to appeal, and that after such a Brief is filed, the Court of Appeals is required to conduct an independent review of the record. Conversely, when a "merits brief" is filed, there is no such review requirement. See, e.g., Pacheco v. Ryan, U.S. Dist LEXIS 174007, at 9 (Dist. of AZ, 2008)("This was not an Anders brief. As a result, Petitioner was not entitled to Anders review and the [] court did not err by failing to conduct such a review.").

Although the Sixth Circuit has addressed circumstances where Appellate Counsel has filed no Brief at all[6], it has not squarely addressed the circumstances that faced Petitioner, neither in past cases, nor the instant case. This is not to say that the Circuit only applies the rule-of-thumb approach in Anders-type matters. Where a particularized analysis of the situation is warranted, the Circuit has in past cases taken note. See, e.g., United States v. Gutierrez, U.S. App LEXIS 20647, at 2 (6th Cir. 2017)(Counsel moved to withdraw, post-Anders brief, then withdrew that motion anticipating the ruling in Beckles v. United States, 137 S.Ct. 886 (2017). When his argument was foreclosed by that decision, "counsel ha[d] therefore again moved to

6. See, e.g., Allen v. United States, 938 F.2d 664, 666 (1991) (failure to file Anders gives rise to presumption of prejudice); Ludwig v. United States, 162 F.3d 456, 459 (6th Cir. 1998) (failure is prejudicial "without regard to the probability of success on appeal").

withdraw." The Sixth Circuit did address, in part some of the issues affecting Petitioner, namely, communication with appointed counsel, incarceration, and so forth in 1974.

> "In the context of this case, appellant's right to appeal could have been denied either by refusal or neglect of the attorney in perfecting the appeal, or by his failure to make himself available to the appellant so that the merits of an appeal could be discussed and the appellant afforded an opportunity to make an informed decision.... [Counsel] has the duty to communicate [] opinion[s] to his client in a timely manner so that the **client might consult another attorney** or **call the matter to the attention of the court.** The duty of an attorney to communicate with his client fully **and promptly** is particularly compelling when the latter is incarcerated."
> Boyd v. Cowan, 494 F.2d 338, 339 (6th Cir. 1974) (emphasis added)

This case has never been overturned by an En Banc ruling, and if the Circuit is to be held to its own Salmi standard, it means that Boyd v. Cowan is valid law. Focusing on the conduct of Petitioner, the Clerk, and the Court of Appeals, Petitioner did "call the matter to the attention of the court", repeatedly. Correspondence forwarded to the Clerk on two early occasions, the letter/submission requesting new counsel, a second such motion of 64 total pages, a Motion for Reconsideration, and finally, the Petition for Rehearing/Petition for Rehearing En Banc. The Court failed to take notice, either due to the Clerk's own conduct in denying motions and/or failing to forward them to the Court, or of its own failure to ensure the Due Process and Equal Protection Rights of Petitioner, in consideration of its own decisions in earlier cases, its precedents, and/or the rulings of the Supreme Court. In fact, only the third of these is needed:

> "As we have repeatedly emphasized, however, circuit precendent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Kernan v. Cuero, 199 L.Ed 2d 236, 242 (2017)(citing Glebe v. Frost, 574 U.S. ___, 190 L.Ed 2d 317 (2014)(quoting 28 U.S.C. §2254(d)(1)).

Other Circuits Have Addressed Circumstances Similar To Appellant's

Although the Sixth Circuit has not, and the Supreme Court has never entertained the question, other Circuits have encountered and addressed the matter. That is, the Due Process implications when an Appellate either cannot sever himself from the Counsel appointed to him (because he has no right to self-representation on appeal, and cannot afford to retain counsel), and the insufficient "merits brief" filed without his knowledge or consent.

In the Eighth Circuit, United States v. Meeks, 639 F.3d 522 (8th Cir. 2011) concerned a merits brief where Anders-type issues were argued, rather than presenting those same issues within a true Anders Brief, affording the Appellant the other provisions incorporated in Anders procedures to ensure the Appellant's Due Process rights. The Eighth Circuit encountered the same type of circumstances shortly thereafter, and held to their position from Meeks.

> "This Court notes that 'the presentation of so-called Anders issues' within a merits brief is inconsistent with the process established in Anders." United States v. Borought, 649 F.3d 887, 890 (8th Cir. 2011)(citing Meeks).

The Seventh Circuit, in the case quoted below, comes closest to the brief portion of Petitioner's circumstances (even if it does not address the Clerk's conduct or that of the Circuit in supervising the Clerk or failing to address the matter on Rehearing).

> "[T]he argument [Counsel] presented was a certain loser. We suspect this exercise in futility was effectively a substitute for an Anders brief. Because [Counsel] made a single argument that any reasonable attorney would have recognized as dead on arrival, we have a situation close to the one described in Smith v. Robbins, where counsel erroneously refrains from filing a merits brief at all." Shaw v. Wilson, 721 F.3d 908, 915 (7th Cir. 2013)(referencing Smith v. Robbins, 528 U.S. 259 (2000)).

In both Circuits, the approach was to catch the error and correct it immediately, not simply deny the appeal, and leaving the matter of a possible Ineffective Assistance of Appellate Counsel claim to an indigent prisoner who under Pennsylvania v. Finley will not have a right to appointed counsel on §2255, not to mention the numerous other 'higher bar' obstacles faced on collateral attack as opposed to Direct Appeal.[7] The relegation of Petitioner to the limited collatral attack, when the error at the Circuit is apparent and the circumstances plain, is an obvious prejudice that is avoidable and is within this Court's power to correct by addressing the Circuit split and/or

7. "It has been said by a thousand courts and a thousand judges that alleged errors and irregularities [] can not be inquired into on habeas corpus.... No matter how flagrant the error, the party must prosecute his appeal, writ of error, or certiorari; his remedy is not by habeas corpus." William S. Church, Treatise on Writ of Habeas Corpus, §363, (2013 Ed.).

further explain the meaning of Anders and its requirements in such situations, for the purpose of ensuring uniformity throughout all Circuits.

Turning to the Circuit's Order of 4-24-2020 (APPENDIX "A"), the evidence of the "dead on arrival" issue filed by Appellate Counsel is found on pages 2-3, where United States v. Wright, among additional cases, is cited to conclusively show that the issue has been well-settled. "(43 Fed. Appx. 848, 852-53 (6th Cir. 2002)('concluding that section 2925.03(A)(2) is a "controlled substance offense" under USSG §4B1.1))".

On that same page, the Circuit cited United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006) for the proposition that "Conway's 'right to court-appointed counsel on appeal...does not include a right to counsel of choice.'" The power of granting substitute appointed counsel on appeal, however, does exist in the supervisory power that the Circuit has over its own Court. There is evidence of this power being exercised by the Circuit.

> "Petitioner in the present case was represented at all stages by Counsel. Petitioner did not attempt to change attorneys until after the briefing was completed. This request was granted.... Thus Petitioner was not denied the counsel of his choice on appeal." Carpenter v. Morris, U.S. App LEXIS 155555, at 6 (6th Cir. 1990).

Compare this case to Petitioner. Petitioner attempted, repeatedly, to "change attorneys" before the brief was filed and afterwards

as well (Carpenter only after), but where Petitioner was repeatedly denied in his requests, Carpenter's request was granted. Petitioner's Due Process and Equal Protection rights, case-specific to him, were violated, when the exercise of discretionary authority and power of the Circuit favored Carpenter (as well as the other conflicting cases vis-a-vis Petitioner's treatment), and the opposite decision by the Circuit, by being opposite, was prejudicial. Furthermore, by basing their decision upon Gonzalez-Lopez, it becomes more clear that their actions were an abuse of discretion, and not an overt break with the Supreme Court in that case. The break comes from the other cases cited herein, individually and cumulatively, such as Douglas, where the wealthy man can retain, dismiss, and retain new counsel when Counsel does not communicate or submits an Anders-quality brief disguised as a merits brief. And also the pro se construction cases, Haines and Erickson, that are meant to provide Due Process and access to the court safeguards for non-attorneys. Obviously also in Anders itself, which corrected the problem of attorneys not filing any brief at all, doubly protecting those appellants that (1) counsel must file a merits or Anders brief, and (2) if it is the latter, (2a) the appellant may submit a brief, (2b) the Court investigates the Record, and (3) if issues are located, new counsel is appointed. Appointment of new appellate counsel is not necessarily the same thing as "counsel of choice". In

Petitioner's case it was to obtain an attorney who would do basic research, and discover that "his" issue was not tenable, but then fulfill the Anders requirements, and not submit a bogus merits brief. By not addressing these matters, the Sixth Circuit not only endorses such conduct by appointed attorneys, it fails in its duty to uphold the Constitution and the rulings of this Court for appellants.

As to the other case cited in the Opinion (APPENDIX "A"), Greer v. Mitchell, 264 F.3d 663, 676 (6th Cir. 2001), it appears that the case follows the line of Smith v. Murray, 477 U.S. 527, 536 (1986) and Jones v. Barnes, 463 U.S. 745, 751-52 (1989). If so, Petitioner asserts that both Smith and Jones do not encompass Petitioner's circumstances. Therein, appellants wanted issues raised along with valid issues raised in the merits brief. Petitioner's merits brief was that only in name, not content. Petitioner's brief as authored by appointed Counsel was nothing but frivolous. There was no "winnowing out" (Id.) process at all. Greer, as cited by the Panel states that "appointed counsel has no obligation to raise issues that he or she deems lack merit." The issue Counsel did deem meritorious was anything but that.

Petitioner filed his Notice of Appeal at the District Court. Cumulatively, the Clerk of the Court of Appeals, the Panel, and the Circuit Court constructively denied him of that appeal.

Conclusion

Wherefore, in consideration of the Constitution, law, facts, circumstances, and case law cited herein, the Honorable Justices of the Supreme Court of the United States should GRANT the instant Petition for Writ of Certiorari, alternatively, REMAND the case back to the Sixth Circuit with Order to remove the Decision and Mandate, and reinstate Petitioner's Direct Appeal, appointing new Appellate Counsel, and any other Relief to which the Honorable Justices deem Petitioner is entitled. It is so prayed.

Respectfully submitted on this 7th day of ~~September~~ October, 2020. D.C

Donald R. Conway

DONALD R. CONWAY

Address:
DONALD R. CONWAY
21792-032
Federal Medical Center
Post Office Box 14500
Lexington, KY 40512