No. 20-6599

IN THE SUPREME COURT OF THE UNITED STATES

RANDY DOMINGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a criminal defendant who was represented by retained counsel in district court and was convicted pursuant to his plea agreement must show that his appeal from the judgment of conviction is taken in good faith under 28 U.S.C. 1915(a)(3) in order to be granted in forma pauperis status in that appeal.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Dominguez, No. 18-cr-125 (Nov. 19, 2018)

United States Court of Appeals (5th Cir.):

United States v. Dominguez, No. 19-50083 (July 10, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 812 Fed. Appx. 244. The order of the district court (Pet. App. 7a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2020. The petition for a writ of certiorari was filed on December 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of possessing with intent to distribute at least 50 grams of actual methamphetamine, in violation of 2l U.S.C. 841(a)(1) and (b)(1)(A), and possessing a firearm in furtherance of a drug-trafficking crime, in violation of l8 U.S.C. 924(c)(l)(A)(i). Judgment 1. The district court sentenced petitioner to 300 months of imprisonment, to be followed by ten years of supervised release. Id. at 2-3. The court of appeals dismissed petitioner's appeal from that judgment as frivolous. Pet. App. 2a.

1. In 2018, the Ector County, Texas, Sheriff's Office received information from a credible source that petitioner was in possession of approximately one kilogram of methamphetamine. Presentence Investigation Report (PSR) ¶¶ 6-7. Officers then observed petitioner and approached him as he was walking to his vehicle. PSR ¶ 8. Petitioner was restrained and searched, and officers uncovered over 18 grams of methamphetamine and over $1000 in cash. Ibid. Officers also uncovered a 9mm Smith & Wesson semi-automatic pistol in petitioner's vehicle. Ibid. Petitioner admitted to purchasing one pound (about 454 grams), and selling 12 ounces (about 340 grams), of methamphetamine. PSR ¶ 9. A search of petitioner's residence, which he shared with others, uncovered additional firearms and 213 grams of methamphetamine. PSR ¶¶ 12-13, 15.

2. a. After petitioner's arrest on federal charges, a federal magistrate judge initially appointed counsel to represent petitioner. 4/25/18 Order. After petitioner retained counsel, petitioner then moved to substitute his retained counsel for his appointed counsel, stating that he "no longer desires to be represented by [appointed counsel]." Mot. to Substitute Counsel 1 (June 18, 2018). The district court granted petitioner's motion. D. Ct. Docket Entry (June 19, 2018).

Represented by his retained counsel, petitioner entered a written plea agreement in which he agreed to plead guilty to, and agreed with the factual basis for, both counts on which he had been indicted. Plea Agreement ¶¶ 2, 4, 22 (July 18, 2018); cf. Indictment 1. In that agreement, petitioner expressly waived his right to appeal his sentence "on any ground." Plea Agreement ¶ 6. Petitioner also expressly waived his right to contest his sentence "in any post-conviction proceeding, including * * * a proceeding pursuant to 28 U.S.C. § 2255," except for claims of "ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension." Id. ¶ 7.

The district court accepted petitioner's guilty plea. 7/31/18 Order. On November 19, 2018, the court entered judgment against petitioner, sentencing him to 300 months of imprisonment, to be followed by ten years of supervised release. Judgment 1-2.

b. Under the Federal Rules of Appellate Procedure, as relevant here, "a defendant's notice of appeal [in a criminal case]

must be filed in the district court within 14 days after * * * the entry of either the judgment or the order being appealed." Fed. R. App. P. 4(b)(1)(A)(i). "Upon a finding of excusable neglect or good cause, the district court may * * * extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed" by Rule 4(b). Fed. R. App. P. 4(b)(4). "If an inmate files a notice of appeal" by using a system designated for legal mail at the institution at which he is incarcerated, the "notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing" if, for instance, it is accompanied by "evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid." Fed. R. App. P. 4(c)(1)(A)(ii).

On January 28, 2019, 70 days after the entry of judgment, petitioner, acting pro se, filed two documents in district court dated January 21, 2019, by mailing the documents in an envelope postmarked January 22, 2019 (64 days after judgment). D. Ct. Docs. 46 and 47 (Jan. 28, 2019). The first document, a notice of appeal, stated that petitioner appealed "the Judgment of the district court." D. Ct. Doc. 47, at 1. The second document, a motion for leave to file the notice of appeal out of time, acknowledged that the notice of appeal was untimely but argued that the belated filing should be excused on the ground that the post-sentencing performance of petitioner's counsel was constitutionally deficient

and prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), because, petitioner stated, "[a]fter instructing counsel to file the notice of appeal, and telling counsel of the desire to appeal, counsel ignored the request and failed to consult with [petitioner]." D. Ct. Doc. 46, at 1-2.

On February 1, 2019, the district court denied petitioner's motion. 2/1/19 Order. The court stated that, under Rule 4(b) of the Federal Rules of Appellate Procedure, a notice of appeal must be "filed within 14 days of the judgment appealed from" and that that Rule 4(b) permits a court to extend that filing deadline up to 30 days. Id. at 1. The court also stated that although the notice-of-appeal filing deadline "is not jurisdictional, it is mandatory," and that "[c]ourts cannot extend the time period beyond the 44-day time period prescribed by Rule 4(b)." Id. at 1-2. The court observed that, in this case, petitioner filed his notice of appeal "at the earliest on January 21, 2019" in light of the "prison mailbox rule" but that the court could not "grant time beyond the 44-day limit, which would have been Wednesday, January 2, 2019." Id. at 2-3. At the same time, however, the court "encourage[d] [petitioner] to timely file a Motion to Vacate pursuant to 28 U.S.C. § 2255 raising this exact same * * * failure of counsel to file a notice of appeal issue." Id. at 3.

Petitioner did not file a notice of appeal with respect to the order denying his motion to appeal his criminal judgment out of time.

c. More than two months later, in April 2019, petitioner mailed to the court of appeals a pro se motion to proceed in forma pauperis (IFP) on appeal, which the clerk of the court of appeals rerouted to the district court with a request to notify the court of appeals once the district court had acted upon the motion. D. Ct. Doc. 49, at 1-3 (Apr. 15, 2019); see Pet. App. 9a-10a (motion dated April 8, 2019, stamped received Apr. 15, 2019).

On May 23, 2019, the district court denied petitioner's IFP motion and "certified that [petitioner's] appeal [wa]s not taken in good faith," Pet. App. 7a. See id. at 7a-8a. The court stated that under 28 U.S.C. 1915(a), a "district court may deny leave to proceed in forma pauperis if an appeal is not taken in good faith" and that a "movant must demonstrate the existence of a non-frivolous issue for appeal," which requires that the appeal "present[] an arguable issue on the merits." Pet. App. 7a. The court then denied petitioner's motion on the ground that petitioner "wholly fails to present a good faith, non-frivolous, arguable issue for appeal." Ibid. The court added that petitioner could challenge its "certif[ication] that the appeal is not taken in good faith" by "filing a separate motion to proceed IFP on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order." Id. at 7a-8a.

Petitioner did not file a notice of appeal with respect to the order denying his motion for IFP status on appeal.

3. a. On July 15, 2019, petitioner, acting pro se, filed in the court of appeals a financial affidavit in support of his IFP status. C.A. Docket entry (July 15, 2019). In August 2019, petitioner, again acting pro se, moved the court of appeals to appoint appellate counsel. Pet. App. 5a-6a.

The court of appeals denied without prejudice petitioner's request to proceed IFP on appeal and granted his motion to appoint counsel "for the limited purpose of assisting [petitioner] in filing a motion for leave to proceed IFP on appeal." Pet. App. 4a. The court ordered appointed counsel to file "either a motion on [petitioner's] behalf to proceed IFP on appeal along with an appellant's brief so that the court can determine whether the appeal has been taken in good faith" or, "alternatively, a motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967), and an accompanying Anders brief." Ibid.

Petitioner, represented by the Federal Public Defender, subsequently moved the court of appeals to proceed IFP, arguing that, even if petitioner must "show that his appeal is taken in good faith, meaning that it presents a nonfrivolous issue, he can do so." Pet. C.A. Mot. to Proceed IFP on Appeal (Apr. 8, 2020). In his brief supporting that motion, petitioner argued that (1) petitioner need not prove that his appeal is taken in good faith, and is not frivolous, to proceed IFP; and (2) petitioner's appeal presented a non-frivolous argument, namely, that the district court should have construed his pro se motion for leave

to file an out-of-time appeal as a motion under 28 U.S.C. 2255 presenting a claim of ineffective assistance of counsel based on his counsel's failure to file a timely notice of appeal. Pet. Corrected C.A. Br. in Supp. of Mot. for Leave to Proceed IFP 9-14 (Apr. 16, 2020). Although petitioner thus argued that the district court erred in a postjudgment order, petitioner did not identify any basis for his appeal from the judgment of conviction itself. See id. at 9-15.

b. The court of appeals determined in an unpublished per curiam opinion (Pet. App. 1a-2a) that petitioner had "not shown that his appeal is taken in good faith" because he had failed to identify "any nonfrivolous issue that he seeks to raise in his appeal of the judgment of conviction" and had, instead, argued only that the district court had erred in denying petitioner's post-judgment "motion for leave to file an out-of-time appeal." Id. at 2a. The court accordingly denied petitioner's "motion for leave to proceed IFP on appeal" and dismissed petitioner's "appeal of the [district court's] criminal judgment * * * as frivolous pursuant to Fifth Circuit Rule 42.2." Ibid.

The court of appeals further determined that it would lack "jurisdiction to consider" petitioner's contention that the district court erroneously denied his "motion for leave to file an out-of-time appeal," because petitioner "has not filed a notice of appeal or any document that could be construed as a timely notice of appeal from the district court's order denying [that] motion."

Pet. App. 2a. The court accordingly stated that "[t]o the extent [petitioner] is appealing the district court's denial of his motion for leave to file an out-of-time appeal, the appeal is DISMISSED for lack of jurisdiction." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-11) that the court of appeals erred in requiring that he show that his appeal from the criminal judgment in his case was taken in good faith in order to obtain IFP status for that appeal. The court of appeals' appointment of appellate counsel to present any good-faith bases for appeal, followed by the dismissal of petitioner's appeal from the criminal judgment as frivolous, moots the question of petitioner's IFP status. Petitioner fails to identify any relevant circuit conflict, and this case would for multiple reasons be an unsuitable vehicle for the Court to consider the question of what requirements must be met for IFP status in such an appeal. No further review is warranted.

1. Petitioner seeks this Court's review of the court of appeals' denial of his motion, filed in the court of appeals, for IFP status on appeal. See Pet. 8-11.[1] But because petitioner's

[1] Although the district court denied petitioner's earlier motion, filed in district court, seeking IFP status on appeal, Pet. App. 7a-8a, petitioner did not file a notice of appeal from that order, which the court of appeals therefore did not review on appeal. See id. at 2a. The court of appeals instead denied petitioner's "motion for leave to proceed IFP on appeal" that petitioner later filed in the court of appeals itself in connection with his appeal from the judgment of conviction. Ibid.

appeal has now been fully resolved on the merits in a disposition that petitioner does not challenge, the question of petitioner's IFP status in his (dismissed) appeal is moot.

a. The court of appeals resolved petitioner's appeal from the district court's criminal judgment by dismissing it "as frivolous pursuant to Fifth Circuit Rule 42.2." Pet. App. 2a. Although the court cited cases involving IFP status in support of its determination that the appeal failed to present any "nonfrivolous issue" and was therefore not "taken in good faith," ibid., a Rule 42.2 dismissal is a dismissal "on the merits." Baugh v. Taylor, 117 F.3d 197, 202 n.24 (5th Cir. 1997) (discussing local Rule 42.2); see United States v. Guerrero, 870 F.3d 395, 396-397 (5th Cir. 2017). The court had appointed appellate counsel for petitioner's "appeal from his convictions and sentences" in an order that specifically instructed that, if counsel chose to file a motion for petitioner to "proceed IFP on appeal," counsel must also submit "an appellant's brief so that the court can determine whether the appeal has been taken in good faith." Pet. App. 3a-4a. In response, counsel filed a brief in support of petitioner's motion for leave to proceed IFP on appeal, which failed to identify any argument challenging the criminal judgment resulting from petitioner's own guilty plea. See pp. 7-8; supra; see pp. 4-5, supra (discussing notice of appeal).

Petitioner has never identified any basis for any appeal from that judgment, and petitioner has not meaningfully disputed in

this Court that his appeal was correctly dismissed under Circuit Rule 42.2. Petitioner states (Pet. 11) in passing that if he had been granted IFP status, "[a]ny concerns about frivolousness would have been addressed through the Anders process." But the court of appeals used that process by appointing appellate counsel with the instruction that counsel must either file an appellant's brief identifying good-faith arguments on appeal or to move to withdraw with "an accompanying Anders brief." Pet. App. 4a. The court did not view counsel's filing as inadequate, and petitioner identifies no error, much less one warranting this Court's review, concerning in that process in this case.

Moreover, even if petitioner had filed an appellant's brief through counsel as instructed (rather just a brief in support of his IFP motion), the government would have been entitled to file a brief as appellee in which it could have argued not only that the district court's judgment should be affirmed but also that the appeal should be dismissed on the ground that petitioner's appeal was untimely. See Fed. R. App. P. 28(b), 31(a)(1). No dispute exists that petitioner's notice of appeal was, in fact, untimely under the 14-day deadline set by rule, which can be extended by no more than 30 days. See Fed. R. App. P. 4(b)(1)(A), (4), 26(b)(1); pp. 4-5, supra. A court would then be obligated to treat that rule-based deadline as a "mandatory claim-processing rule" that, unless the government has waived or forfeited it, imposes a "'mandatory'" "'duty to dismiss the appeal.'" Manrique v. United

States, 137 S. Ct. 1266, 1271-1272 (2017) (quoting Eberhart v. United States, 546 U.S. 12, 18 (2005) (per curiam)); see United States v. Plascencia, 537 F.3d 385, 389 n.14 (5th Cir. 2008) (explaining that Rule 4(b)'s time limits, while "not jurisdictional," are "mandatory" and "inflexible"). Thus, even if the court of appeals had called for full briefing, petitioner's appeal would have been dismissed as untimely.

Petitioner has not argued otherwise. Although petitioner argued in the court of appeals that the district court erroneously denied his motion for leave to file his notice of appeal out of time, petitioner's argument was that the district court should have construed that motion as a motion to vacate, set aside, or correct petitioner's sentence under 28 U.S.C. 2255 raising an ineffective-assistance-of-counsel claim. See pp. 7-8, supra. Even if petitioner had been correct on that point, his argument would have simply suggested that the motion should have initiated a new Section 2255 proceeding in district court; the motion would not have by itself salvaged petitioner's untimely appeal from his original judgment of conviction. In any event, because petitioner has not challenged in this Court the court of appeals' conclusion that it lacked jurisdiction to consider an appeal from the "district court's denial of [petitioner's] motion for leave to file an out-of-time appeal" in light of petitioner's failure to "file[] a notice of appeal" to challenge that post-judgment order, Pet. App. 2a, that issue is not before this Court. Cf. Manrique,

137 S. Ct. at 1271-1272 (holding that a criminal defendant must file a notice of appeal after a post-judgment ruling in order to appeal from that decision; declining to decide whether that requirement is "jurisdictional" because it is "at least a mandatory claim-processing rule").

b. Because petitioner's ongoing effort in this Court to secure IFP status for his now-dismissed appeal would provide petitioner no effective relief, his IFP claim is moot. IFP status can result in the appointment of counsel for a criminal defendant on appeal. See 18 U.S.C. 3006A(c). But the court of appeals appointed counsel to identify and file a brief presenting "good faith" arguments in petitioner's appeal from his criminal judgment, Pet. App. 4a, and considered counsel's arguments before dismissing petitioner's appeal on its merits as frivolous, id. at 2a. IFP status can also allow a defendant to avoid "prepayment of fees" for a criminal appeal, 28 U.S.C. 1915(a)(1), but it does not allow a prisoner like petitioner to avoid liability for "the full amount of [the] filing fee," 28 U.S.C. 1915(b)(1), or to avoid the payment of the relevant costs when his appeal is resolved against him, 28 U.S.C. 1915(f)(2)(A); cf. Fed. R. App. P. 39(a) (providing that "costs are taxed against the appellant" "if an appeal is dismissed" or the "judgment is affirmed," unless "the court orders otherwise").

In short, nothing in petitioner's appeal was affected by the court of appeals' denial of his motion for IFP status on appeal,

and nothing now turns on such status in the now-dismissed appeal. And because courts "cannot grant 'any effectual relief whatever' in favor of [petitioner]" on his claim to IFP status, that claim is moot. Calderon v. Moore, 518 U.S. 149, 150 (1996) (per curiam) (quoting Mills v. Green, 159 U.S. 651, 753 (1895)). In all events, a decision by this Court in petitioner's favor concerning his IFP status in his (dismissed) appeal would not have any practical effect that would warrant this Court's review. See Padilla v. Hanft, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of a writ of certiorari) (noting that, "[w]hatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power" where, even if the Court were to rule in the petitioner's favor, it would not affect him).

2. Petitioner suggests (Pet. 11) that he would have been granted IFP status in the Second, Ninth, and Tenth Circuits, which do not require that a criminal defendant seeking IFP status show that his direct appeal is taken in good faith. But petitioner has failed to show that those courts would grant IFP status in a case in a procedural posture like the posture here, where a court of appeals has dismissed the appeal based on its determination that the appeal was frivolous. The courts that petitioner contends would have reached a different result have themselves declined to grant motions to proceed IFP on the ground that such motions are moot once the underlying appeal had been dismissed. See, e.g.,

Reed v. Cashman, No. 18-2733, 2019 WL 4527680, at *1 (2d Cir. Feb. 26, 2019) (dismissing appellant's appeal "because it 'lacks an arguable basis either in law or in fact'" and denying the IFP motion as moot); United States v. Davis, 628 Fed. Appx. 619, 621 (10th Cir. 2016) (dismissing criminal defendant's appeal of the denial of relief under 28 U.S.C. 2255 and denying defendant's motion to proceed IFP on appeal as moot); Cummins v. Arizona, No. 96-16125, 1997 WL 556334, at *1 (9th Cir. Aug. 29, 1997) (dismissing pro se appeal for lack of jurisdiction and explaining that appellant's motion to proceed IFP was moot because "[e]ven assuming that the district court erred by denying [appellant's] motion for IFP status as untimely, [appellant's] appeal from the denial of her IFP motion is moot because no effective relief can be granted") (citing American Casualty Co. v. Baker, 22 F.3d 880, 896 (9th Cir. 1994)). Those decisions, which in effect reach the same outcome as that reached by the court of appeals in this case, underscore that no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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