

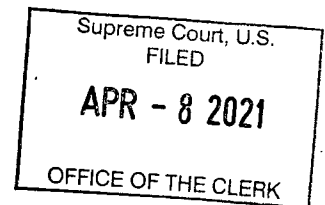
20-8024

ORIGINAL

In the
Supreme Court of the United States

no. _____

Lisa A. Biron,
Petitioner

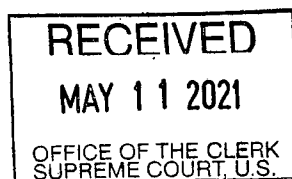


v.

United States of America,
Respondent

Petition for A Writ of Certiorari
to the
United States Court of Appeals for the First Circuit

Lisa A. Biron
Reg. # 12775-049
Federal Correctional Institution
P.O. Box 1731
Waseca, MN 56093



Question Presented

When there is no requirement to file a notice of appeal when applying for a certificate of appealability ("COA") from the circuit court and no process set forth in the Federal Code and Rules for seeking this COA in order to appeal the denial of a motion under § 2255, is the COA-seeker's Fifth Amendment right to due process violated when her COA-application is dismissed as untimely for failure to follow a non-existent, non-promulgated procedural process?

Table of Authorities

Cases

Buck v. Davis,

137 S. Ct. 759 (2016) 5, 7

Statutes

28 U.S.C. § 2253

28 U.S.C. § 2255 passim

Rules

Fed. R. App. P. 4 passim

Fed. R. App. P. 5 6, 7

Fed. R. App. P. 22 5, 6

R. Gov. Sect. 2255 Proc. 11 5, 6

R. Gov. Sect. 2255 Proc. 12 5

List of Parties

All parties appear in the caption of the case on the Cover page.

Related Cases

United States v. Biron, no. 12-CR-140-PB (D.N.H. 2013), affirmed by, no. 13-1698 (1st Cir. 2014), cert. denied by no. 14-8481 (2015)

United States v. Biron, no. 16-CV-108-PB (D.N.H. 2017)

Biron v. United States, no. 18-1705 (1st Cir. 2019) reh'g denied 2020, pet. for cert. pending

Biron v. United States, no. 18-1996 (1st Cir. 2019) reh'g denied 2020, pet. for cert. pending

Biron v. United States, no. 18-1945 (1st Cir. 2019) denying leave to file successive § 2255 motion

Petitioner, Lisa A. Biron, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, case no. 18-2226, affirming the judgment against her.

Proceedings and Opinion Below

The May 2, 2019 Judgment of the Court of Appeals for the First Circuit appears at Appendix 1 to this Petition and is unpublished.

The November 12, 2020 Order of the Court of Appeals for the First Circuit denying rehearing appears at Appendix 2 to this Petition.

Relevant Statutory Provisions

This Petition concerns the provisions of title 28 U.S.C. § 2255 & 2253.

Jurisdiction

The Judgment of the Court of Appeals for the First Circuit was issued May 2, 2019 (App'x 1), and a timely Petition for Rehearing-Rehearing En Banc was denied on November 12, 2020. (App'x 2).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and this Court's March 19, 2020 Order, no. 589.

Statement of the Case

In relevant part,¹ after Ms Biron's motion under §2255 was filed, she began to thoroughly research the procedure for filing an appeal in the event of an adverse decision by the district court. Petitioner is a formerly licensed attorney. She made law review and has published an article. She passed two bar exams concurrently. She practiced law successfully for four years before her mental collapse and synergistic meltdown, which culminated in her offense conduct and incarceration. Prior to her incarceration, she had no experience in the practice of federal postconviction law and, therefore, came to her research with no preconceived idea of the appellate process concerning §2255 motions.

On October 2, 2017, the district court denied her §2255 motion and did not issue a certificate of appealability ("COA"). Petitioner's research informed her, as detailed infra, that she could not appeal without a COA, and she found no deadline for seeking a COA from the circuit court.

After actively pursuing other options first, such as filing her motion under Rule 60(b),² and filing an attorney

1 For the sake of brevity, Ms. Biron's Statement of the Case summarizes only the facts relevant to this Petition. She has recently filed two Petitions for writs of certiorari regarding First Circuit case nos. 18-1705 and 18-1996 which have, necessarily, longer and more detailed statements of the case.

2 See Pet for Cert. regarding case no. 18-1705.

grievance against habeas counsel for his abandonment of her case, she filed an application for a COA in the circuit court. The application, mailed in the inmate legal mail on July 19, 2018, was filed on the wrong docket³, and after months of letters to and from the circuit clerk, Petitioner was informed that she had to file a notice of appeal ("NOA") and a motion to extend time to file an appeal in order to apply for the COA. She complied. Subsequently, the "appeal"—the application for the COA—was dismissed as untimely for not filing a NOA within the time prescribed by Fed. R. App. P. 4(a), and her petition for rehearing was denied.

This Court should grant certiorari to decide whether Ms. Biron's (and multitudes of other federal inmates') due process rights were violated by lack of notice of the procedure for applying to a circuit court for a COA.

³ Ms. Biron's motion under Rule 60(b) was dismissed and she immediately filed a NOA to appeal the dismissal. The application for the COA was initially mis-filed on this docket.

Reasons for Granting this Petition

Ms. Biron was not allowed to seek a COA from the circuit court in order to appeal the district court's denial of her § 2255 motion. The Circuit Court held that she should have filed a NOA within the time limits prescribed in Fed. R. App. P. 4(a) in order to apply for a COA. But nowhere in the Federal Code and Rules is this process promulgated, and, therefore, Ms. Biron's right to due process of law and fair notice, secured by the Fifth Amendment to the United States Constitution, was violated. And many, many federal prisoners' due process rights and COA-applications have suffered the same fate because of this lack of notice. (See Pet. for Cert. regarding 1st Cir. case no. 18-1996, pp. 8-10 (collecting cases regarding allegedly untimely appeals)).

Analysis of a Procedure that Does Not Exist

The district court did not issue a COA. The analysis begins, of course, with the text of the applicable statutes. Title 28 U.S.C. § 2255(d) states "[a]n appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on an application for a writ of habeas corpus." 28 U.S.C. § 2255(d). Under chapter 153, Habeas Corpus, title 28 U.S.C. § 2253, Appeal, states, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals" 28 U.S.C. § 2253(c)(1) (emphasis added). Neither statute mentions

filing a NOA or any time limits. From these statutes it is clear that the circuit court has no appellate jurisdiction without the issuance of a COA. Indeed, this Court has clearly held that an application for a COA is not an appeal, and the circuit court's consideration of the application is cursory and not coextensive with a merits analysis. See Buck v. Davis, 137 S. Ct. 759, 773 (2016). Finding no other applicable statutes, the analysis moves on to the rules.

Rule 12 of the Rules Governing Section 2255 Proceedings states, "[t]he Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Fed. R. Gov. Sect. 2255 Proc. R. ("§2255 Rules") 12. Neither the Fed. R. Civ. P. nor the Fed. R. Crim. P. address the procedure for seeking a COA.

Rule 11(a) of the §2255 Rules states, "[i]f a court denied a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure ('F.R.A.P.') 22." §2255 Rules, 11(a). Rule 11(b) of the §2255 Rules, "time to appeal," states that F.R.A.P. 4(a) "governs the time to appeal. . . . A timely [NOA] must be filed even if the district court issues a [COA]." §2255 Rules, 11(b).

The text of §2255 Rule 11(a) covers COA-seekers-parties without a COA issued by the district court. These parties

"may not appeal", but must consult F.R.A.P. 22 on seeking a COA.

The text of §2255 Rule 11(b) covers the "time to appeal" for parties with a COA, directing them to file a NOA according to F.R.A.P. 4(a).

Ms. Biron clearly falls within §2255 Rule 11(a): she is without a COA and may not appeal and must turn to F.R.A.P. 22. F.R.A.P. 22, Habeas Corpus and Section 2255 Proceedings, states, "the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability, . . ." Fed. R. App. P. 22(b)(1) (emphasis added). The section continues by informing the district court clerk of the procedure "if an applicant files a notice of appeal," (id.) (emphasis added), but nowhere therein states that an applicant must file an NOA before applying for a COA, and it does not prescribe any time limits or make any reference to the procedure for seeking a COA. Nor does it direct the applicant to any other code or rule that sets forth the procedure for applying for a COA.

Ms. Biron next consulted F.R.A.P. 5, appeal by permission to see if it might apply. The §2255-COA-applicant is not directed to this rule and its text covers "request[ing] permission to appeal when an appeal is within the court of appeals' discretion . . ." Fed. R. App. P. 5(a)(1). It directs that a "petition [for permission to appeal] must be filed

within . . . the time provided by Rule 4(a) for filing a notice of appeal," Fed. R. App. P. 5(a)(2). But an application for a COA is not an appeal, see Buck, 137 S. Ct. at 773, nor is it a petition for permission to appeal. When considering an application for a COA, the circuit court conducts a basic review to determine "if the applicant has made a substantial showing of the denial of a constitutional right." Id. quoting 28 U.S.C. § 2253(c)(2). In such a case, the circuit court is constrained by § 2253; it does not have discretion to permit an appeal. Thus, F.R.A.P. 5 is inapplicable to the procedure for applying for a COA.

And Ms. Biron's analysis ends here, with the well-reasoned conclusion that the Federal Code and Rules do not provide any time limits⁴ for seeking a COA and do not require the filing of a NOA when applying for a COA. If Congress or this Court intends that a NOA be filed by a § 2255-COA applicant, or intends specific deadlines to apply, a statutory amendment or an amendment to the rules is necessary. In the meantime, the dismissal of Ms. Biron's application for a COA for failure to follow a non-promulgated procedure violated her right to due process.

⁴ Whether the doctrine of laches might apply to bar a party's application is beyond the scope of this petition.

Conclusion

Wherefore, Ms. Biron respectfully requests this honorable Court grant certiorari to consider this important constitutional question, which concerns all § 2255-COA-applicants, to vacate the judgment of the First Circuit and order it to consider her application for a COA.

Respectfully submitted,

4/8/21

Date

Lisa Biron

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Declaration of Timely Filing

I, Lisa Biron, declare, under the penalty of perjury, that this Motion for Leave to Proceed In Forma Pauperis and Petition for A Writ of Certiorari were timely filed by depositing them for mailing in the inmate legal mail system, postage paid certified mail, return receipt requested.

4/8/21

Date

Lisa Biron

Lisa A. Biron