

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2020

Omar S. Williams,

Applicant-Petitioner,

v.

United States of America

Respondent.

ON APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO
THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Application for Certificate of Appealability

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Application for a Certificate of Appealability

To the Honorable Brett M. Kavanaugh, Circuit Justice for the United State Court of Appeals for the Sixth Circuit:

Mr. Williams seeks a certificate of appealability under 28 U.S.C. 2253 (c)(1). A COA has been denied by the Sixth Circuit. See Order of December 2, 2020, Ex. A.

Mr. Williams pleaded guilty in 2017 to conspiracy to possess with intent to distribute six kilograms of cocaine and to being a felon in possession of a firearm. The District Court sentenced Mr. Williams to 210 months in prison (17 ½ years).

In 2018, Mr. Williams filed a motion under 28 U.S.C. 2255 alleging his attorney was constitutionally ineffective at sentencing. He supplemented his motion while it was pending with new authority. See Doc. #166; filed 6-7-19; Case No. 1:17 CR 00083; PageID# 1514. Citing United States v. Burris, 912 F.3d 386 (6th Cir. 2019)(en banc).

The District Court denied relief without citing to Burris or discussing the significance of the en banc decision and Williams' conviction for Felonious Assault and its impact on his sentence. See Order, Doc# 211 filed August 14, 2020. Exhibit B.

Mr. Williams filed a motion for certificate of appealability concerning, among other things, whether his conviction for Felonious Assault, qualified him under the Sentencing Guidelines as a career offender under Burris. The Sixth Circuit denied a COA on December 2, 2020 and failed to discuss or cite to Burris. See Doc. 10-2, page 2. Exhibit A.

In this application, the primary issue is whether Williams had two predicate offenses to qualify as a career offender under 4B1.1(a) of the U.S. Sentencing Guidelines. Under 4B1.1(a), one must have “a felony that is either a crime of violence or a controlled substance offense” and at least two prior convictions that also meet either condition.

The point in dispute here is whether the applicant’s prior conviction for felonious assault in Ohio qualifies as a “crime of violence” under Sixth Circuit and U.S. Supreme Court precedent. The lower court failed to proper analyze whether the felonious assault as charged in Williams’ prior Ohio conviction was under the (A)(1) or (A)(2) section of the statute. See page 2 of Order, December 2, 2020. Exhibit A.

Federal law imposes longer prison sentences on certain violent career criminals. As relevant here the United States Sentencing Guidelines (“Guidelines”) impose longer prison sentences on certain defendants who have a criminal record containing multiple previous violent felonies. See USSG §§ 4B1.1.

Since 1990, the Supreme Court has instructed federal sentencing courts to use the “categorical approach” to determine whether a defendant’s previous state or federal felony convictions “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another.” See Deschamps v. United States, 570 U.S. 254, 260-61 (2013) (citing Taylor v. United States, 495 U.S. 575, 600 (1990)) (“Taylor adopted a ‘formal categorical approach’ in the ACCA context); see also United States v. Ford, 560 F.3d 420, 421-22 (6th Cir. 2009) (“we apply a ‘categorical’ approach” in the Guidelines context).

Ohio’s felonious assault statute is too broad to categorically qualify as violent felony predicates under the Guidelines enumerated offense clause. Burris at 400.

Mr. Williams' Ohio conviction for Felonious Assault stems from Count One of an indictment returned in Cuyahoga County Common Pleas Court, CR 460493, in 2004. The language of this charging instrument, to which Williams pled guilty, is the exact language of O.R.C. 2903.11(A)(1) and NOT (A)(2). See Exhibit C, copy of True Bill Indictment.

The U.S. Sixth Circuit has clearly held that Ohio's felonious assault statute is too broad to qualify categorically as a violent felony predicate under the Guidelines. In fact, only the (A)(2) section of Ohio Revised Code 2903.11 (Felonious Assault) qualifies as a violent felony which would then trigger the career offender section of the U.S. Sentencing Guidelines under 4B1.1(a).

United States v. Burris, 912 F.3d 386 (6th Cir. 2019)(en banc).

Mr. Williams was NOT convicted or charged under the (A)(2) section of Ohio's felonious assault statute. Instead, Mr. Williams was convicted under the (A)(1) section of the statute and should not therefore have been labeled a career offender under the Sentencing Guidelines.

COA Standards

In order to make the showing required to obtain a COA, Mr. Williams "need not show that he should prevail on the merits...rather he must demonstrate that the issues are debateable among jurists of reason; that a court could resolve the issues [in a different manner]; or that questions are 'adequate to deserve encouragement to proceed further.'" Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). See also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

A certificate of appealability should issue if the claims are not "squarely foreclosed by statute, rule or authoritative court decision orlacking in any factual bases in the record." Barefoot at 894.

Mr. Williams must simply prove “something more than the absence of frivolity” or the mere “good faith” on his part. Miller-El at 338.

As held recently

The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." [citations omitted] This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." [citations omitted]. "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

Buck v. Davis, 137 S. Ct. 759, 773 (2017)

In this case, the December 2, 2020 order from the Sixth Circuit completely fails to distinguish whether Mr. Williams was convicted under the (A)(1) or (A)(2) section of the Ohio felonious assault statute. (Page 2 of the order) In fact, Williams was convicted under the (A)(1) section and thus he does have the necessary two qualifying predicate offenses to warrant a sentencing enhancement as a “career offender” under the Sentencing Guidelines.

Further, even if it was unclear in the District Court whether Williams was convicted under the (A)(1) or (A)(2) section of the statute, then any doubt is resolved in Williams favor. See Burris at 406. But the documents in this case conclusively demonstrate that Williams was convicted under the (A)(1) section and thus the career offender enhancement does not apply.

Conclusion

This Court must either grant a COA so the Sixth Circuit can properly apply binding precedent and otherwise resolve this case or summarily reverse and remand for a new sentencing hearing without the career offender sentencing enhancement.

Respectfully submitted,

/s/John P. Parker

Counsel for Mr. Williams

Service

A copy of the foregoing document was served this 23rd day of April 2021 on Mr. Brendan Damien O'Shea, Office of the U.S. Attorney, 2 S. Main Street, Suite 208, Akron, OH 44308 on this 23rd day of April 2021 via U.S. Mail postage prepaid.

/s/John P. Parker

Counsel for Mr. Williams