

No. 19-2973

21-7239

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

DEC - 8 2021

OFFICE OF THE CLERK

Michael Arrington — PETITIONER
(Your Name)

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Third Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Arrington
(Your Name)

F.C.I. McDowell, P.O. Box 1009
(Address)

Welch, West Virginia 24801
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION

Whether trial Counsel must inform the defendant of the nature of his right to testify and that the ultimate decision belongs to him?

What Standard must apply to warrant an evidentiary hearing under such circumstances governing a federal post-conviction-prisoner -- Strickland or structural error formed prejudice?

May a District deny an evidentiary hearing without face to face observation concerning exculpatory proffered testimony where trial counsel waives a defendant's right to testify without consent?

Citation of the Opinions and Orders Entered in the Case

U.S. v. Arrington, 2019 U.S. Dist. Lexis 108744 (M.D. PA 2019)

U.S. v. Arrington, 2021 U.S. App. Lexis 27130 (3rd Cir. 2021)

Basis For Jurisdiction

The Third Circuit denied Petitioner's 28 U.S.C. 2255 on September 9, 2011. A copy of this writ has been mailed to the Solicitor General and the United States Attorney.

This case involves a 4th Amendment violation, where ineffective assistance of counsel was provided to Petitioner.

Facts Material to Consideration of the Questions Presented

State and federal authorities investigated Davenport's drug conspiracy for several weeks before his arrest. When Davenport's girlfriend, Miller, was arrested she immediately identified two people by the name of "Rum" and "furruck" as being the supplier of the drugs found in her car. See (Doc. 610 pg 186-202 and pg 274-75: 1-11).

It was not until after Miller received a letter from Davenport directing her to falsely accuse Petitioner that

she accused Petitioner. See (Doc. 610 at pg 195:18-20; pg 277-80; pg 145-51).

At trial, the witnesses testimony was conflicting and internally inconsistent. Thus, Davenport testified to a drug run involving him, Petitioner and Miller, which Miller testified never happened. Compare Doc. 610 at pg 143-44 with pg 183). Miller also testified to two drug transactions involving her, Petitioner and Davenport, which Davenport testified never happened. Compare Doc. 610 at pg 133-34 with pg 163-68 and pg 184-85). Moreover, Miller's testimony about one of the drug transactions was internally inconsistent. First, she testified that she knew what was going on then she testified that she did not know "what was going on". Compare Doc. 610 at pg 163-65 with pg 169-70). See also id. at pg 144 and pg 193 for an additional contradiction. Davenport also admitted that he would lie on Petitioner. See Doc. 610 pg 146.

The entire case against Petitioner hinged exclusively on the testimony of convicted felons (Davenport, his girlfriend, and his underling, Sullivan) and Petitioner's flight from parole supervision (i.e, consciousness of guilt). See Doc. 610 pg 282.

The Petitioner wanted to testify to exculpate himself of the charges and to explain his flight from parole, but trial counsel waived Petitioner's

right to testify without the Petitioner's consent.

Basis for Federal Jurisdiction
In the Court of first Instance

A 28 U.S.C 2255 which was timely filed.

Argument Amplifying Reasons
Relied on for Allowance of Writ

Multiple Circuit and District Courts are divided on the issue of whether trial counsel must inform defendant of the personal nature of his right to testify. The rift has existed for over thirty years and should be settled by this Court. The two leading circuits in this dispute are the Ninth and the Eleventh. For example, the Ninth Circuit has essentially held that a "television" set, and not counsel, must inform a defendant of the nature of his right to testify. See *U.S. v. Martinez*, 883 F.2d 750, 761 (9th Cir. 1989). The Eleventh Circuit held otherwise. See *U.S. v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (en banc).

As was held by the dissent in *Martinez*, this is a questionable and disturbing practice: ("The majority also suggests that a court may infer appellant's knowledge of the relevant ~~rules~~ rules from the 'education'

of television... [I]t is unprecedented to stake fundamental constitutional rights on the vagaries of network programming"). See also *supra* at 770 ("To contend that an 'informed and intelligent' waiver can be made on the basis [] of general information presumed to be available to regular viewers of L.A. Law, divorces words from underlying values").

And, on the grounds of prejudice, "[] the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." See *Luce v. U.S.*, 469 U.S. 38, 42 (1982). See also, *Martinez, supra* ("[], harmless error analysis, designed to insure correct outcomes, is essentially irrelevant to a panoply of constitutional rights that protect individual dignity.") (citing *Flanagan v. U.S.*, 465 U.S. 259, 268; *Payne v. Arkansas*, 356 U.S. 560, 568 (1958)).

Second, when a Petitioner proffers exculpatory testimony in the context of a right to testify claim, the "accepted and usual course of judicial proceedings" is to hold an evidentiary hearing. Petitioner, in the context of a *pro se* petition, proffered such testimony. See Doc. 640 Declaration at paragraph 18; Doc. 654 at pg 22; Doc. 672). See also ~~████~~ *Owens v. U.S.*, 483 F.3d 48, 59 n.8 (Court remanding for evidentiary hearing where Petitioner proffered

testimony was that "he did not have any role in the murders charged").

But, the district court denied Petitioner (me) an evidentiary hearing and the Third Circuit sanctioned it. See *Machibroda v. U.S.*, 368 U.S. 487, 495 (1962) ("Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the Petitioner has carried his burden of proof and shown his right of discharge...."); *Martinez*, *supra* at 770 ("An appellate court cannot accurately determine from the cold record what impact the defendant's statements would have had on the judgments of the jury").

Wherefore, Petitioner respectfully request the Court to grant the Petition.

12-8-21

