NO. 21-8147

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

JOHN P. TOMKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Submitted by the *pro se* petitioner,

JOHN P. TOMKINS #19421-424
Federal Correctional Institution
P.O. Box 5000
Pekin, Illinois 61555-5000

QUESTION PRESENTED

1. Have the lower courts imposed too high of a standard on *pro se* federal prisoners who seek a certificate of appealability following the denial of a 28 U.S.C. § 2255 motion?

2. Are federal prisoners required to pay a $505.00 fee to apply for a certificate of appealability following the denial of a 28 U.S.C. § 2255 motion even when the appeal is not allowed?

LIST OF PARTIES

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

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The *pro se* petitioner, John P. Tomkins, respectfully prays that a writ of certiorari be issued to review the judgment entered below.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Seventh Circuit are unreported and are set forth in the Appendix at page 2 (denial of COA) and page 1 (denial of rehearing).

The order of the United States District Court for the Northern District of Illinois, Eastern Division denying reconsideration of the denial of the 28 U.S.C. § 2255 motion is unreported and is set forth in the Appendix at page 3-7.

The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division denying the 28 U.S.C. § 2255 motion is reported at *Tomkins v. United States*, 2018 U.S. Dist. LEXIS 67665, 2018 WL 1911805 (N.D. Ill. 04/23/18), and is set forth in the Appendix at pages 8-51.

JURISDICTION

The final judgment order of the United States Court of Appeals for the Seventh Circuit was entered on November 9, 2021. App'x page 1. This Honorable Court has jurisdiction to review this matter pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime,...nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance for his defence.

Statutory Provisions

Title 28, United States Code, Section 1913 provides:

> The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits.

Title 28, United States Code, Section 2253 provides in pertinent part:

> In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. 28 U.S.C. § 2253(a).
>
> Unless a circuit justice or judge issues a

certificate of appealability, an appeal may not be taken to the court of appeals from -- (B) the final order in a proceeding under section 2255. 28 U.S.C. § 2253(c)(1).

Title 28, United States Code, Section 2255(a) provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States...may move the court which imposed the sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a).

INTRODUCTION

Tomkins has done his best to make his case for a writ of certiorari as clear and succinct as possible. He may not have succeeded on either count. Hopefully, the Court will look beyond the inadequacies of this petition to see what Tomkins sees, even if he cannot put his vision into words. If the Court is willing to do that, there will be no question that a writ of certiorari is appropriate in this case. Thank you for your time and consideration of this petition.

STATEMENT OF THE CASE

Beginning in 2005, Tomkins mailed a series of threatening communications to investment fund managers in an unsuccessful attempt to pressure them into purchasing stock in two publically traded companies Tomkins had invested in. The nefarious scheme came to an end in 2007 after Tomkins mailed two packages

containing what appeared to be homemade pipe bombs (the component parts were present, but the devices were intentionally left inoperable). Following the mailing of the two devices, Tomkins was promptly arrested and was ultimately charged in a superseding indictment with ten counts of mailing threatening communications with an intent to extort in violation of 18 U.S.C. § 876(b); two counts of possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d); and one count of possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) and § 924(c)(1)(B)(ii). Cr.R. 109, (fn.1).

The case was heavily litigated, especially once Tomkins elected to represent himself. After Tomkins spent five years in pretrial "detention," a two week jury trial was had and Tomkins was convicted on all counts. Cr.R. 364. Once the District Court denied Tomkins' post-trial motions, Cr.R. 373, 374, and 375, Tomkins moved the Court to reappoint counsel to represent him, which the Court granted. Cr.R. 406, 408, respectively.

Prior to sentencing, Tomkins objected to then binding Seventh Circuit precedent that prohibited the sentencing court from considering the thirty (30) year minimum mandatory consecutive sentence for the 924(c) count when it imposed

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fn.1 - citations to the underlying criminal case, *United States of America v. John P. Tomkins*, no. 07-cr-227 (N.D. IL.), will be referred to as "Cr.R." followed by the docket entry number; citations to the 2255 motion, *John P. Tomkins v. United States of America*, no. 16-cv-7073 (N.D. IL.), will be referred to as "Cv.R." followed by the docket entry number.

sentence for the other counts of conviction. See Cr.R. 411 (arguing, *inter ala*, under 18 U.S.C. § 3553(a) the Court could consider the 30 year sentence mandated by § 924(c) when it imposed sentence on the other counts of conviction (citing among other authorities, Pepper v. United States, 132 S.Ct. 1229, 1249 (2011)).

At the sentencing hearing, the Court stated on the record that if it had discretion to consider the 30 year sentence mandated by the 924(c) count, the Court may have imposed a shorter sentence than the seven years the Court imposed on the other counts of conviction. See 5/16/13 Sent. Trans. at pg. 44 (finding it was bound by the Seventh Circuit's precedent in *United States v. Roberson*, 474 F.3d 432, 437 (7th Cir. 2007), abrogated by *Dean v. United States*, 137 S.Ct. 1170, 1176 (2017).

Because the Seventh Circuit reached the wrong conclusion in *Roberson*, and because it will not apply *Dean* to an initial 2255 motion that was filed within one year of the conviction becoming final, ***Tomkins will now spend up to an extra seven (7) years in prison based on an erroneous Seventh Circuit precedent.***

Counsel then filed a direct appeal with the Seventh Circuit arguing: 1. the government's discovery violation deprived Tomkins of his right to receive a fair trial; 2. the District Court erred when it refused to allow Tomkins to introduce his intent in constructing the devices; and 3. government agents violated the Fourth Amendment when they searched Tomkins' home and storage units. *United States v. Tomkins*, 782 F.3d 338 (7th Cir.), cert. denied at 136 S.Ct. 402 (2015).

Having exhausted his direct appeal rights, Tomkins filed a *pro se* 28 U.S.C. § 2255 motion back in the District Court. Cv.R. 1, App'x pgs. 122-188. Tomkins argued a number of constitutional violations occurred in the proceedings that required his conviction and/or sentence be vacated. The more substantive claims in the 2255 motion included:

1. Appellate counsel provided ineffective assistance when he failed to inform the Seventh Circuit that Tomkins would have accepted the government's proposed plea agreement if he would have known of the existence of the evidence that the government withheld from disclosure in violation of Rule 16 of the Federal Rules of Criminal Procedure. Cv.R. 1 at 5 - 6, App'x pgs. 135-36.

2. The government's discovery violation deprived Tomkins of his Due Process right to make an informed decision concerning his plea options. Cv.R. 1 at 18 - 21, App'x pgs 148-151.

3. Mailing a threatening communication in violation of 18 U.S.C. § 876(b) is not a crime of violence under the categorical approach, rendering Tomkins actually innocent on the 924(c) count. Cv.R. 1 at 8 - 15, App'x pgs. 138-145.

4. The "elements clause" of the definition of a crime of violence in 18 U.S.C. § 924(c)(3)(A) is unconstitutionally vague. Cv.R. 1 at 15 - 17, App'x pgs 145-147.

5. The definition of a "destructive device" found in 26 U.S.C. § 5845(f)(3) is unconstitutionally vague. Cv.R. 1 at 17 - 18, App'x pgs. 147-148.

6. Appellate counsel provided ineffective assistance when he refused Tomkins' explicit request that he raise the properly

preserved argument that the Seventh Circuit's decision in *Roberson* was wrongly decided based on the Circuit split Tomkins had already documented for counsel (the same Circuit split that led to this Court to grant certiorari in *Dean*). Cv.R. 1 at 27 - 29, App'x pgs. 151-153.

7. Appellate counsel was ineffective for refusing to raise the Speedy Trial Act violation as part of the direct appeal. Cv.R. 1 at 21 - 23, App'x pgs. 151-153.

After the District Court requested supplemental briefing due to this Court's intervening decision in *Dean*, the District Court denied Tomkins motion in its entirety and declined to issue the requested COA. Cv.R. 30, Appendix pgs. 8-51.

Ironically, if the District Court would have promptly ruled on Tomkins' 2255 motion, the Court would have been required to issue a COA on the sentencing issue based on the Circuit split that existed prior to *Dean*.

According to the District Court, it could not grant Tomkins relief on the plea issue because Tomkins had not established a plea offer had been made by the government. Cv.R. 30 at 27-29, App'x pgs 34-36. This led Tomkins to submit a motion for reconsideration asking the District Court to grant Tomkins an evidentiary hearing in accord with 28 U.S.C. § 2255(b) and binding Seventh Circuit precedent. See Cv.R. 37, App'x pgs. 115-121. The District Court granted this motion and subsequently appointed counsel pursuant to 18 U.S.C. § 3006A to assist Tomkins in fully developing his claim. Cr.R. 58, 60.

At the behest of the Court, and after consulting with Tomkins regarding privilege, former defense counsel, Mr. John M. Beal, submitted an affidavit confirming Tomkins' assertion that the government had made an oral plea offer in April 2010 that would have stipulated a minimum 20 year sentence in exchange for a guilty plea, Cv.R. 86, which Tomkins rejected because the government withheld from disclosure the ***only*** evidence showing the internal configuration of the alleged destructive device ***before*** it was demolished by the Chicago Police Department. See *United States v. Tomkins*, 782 F.3d 338 (7th Cir. 2015)(featuring a copy of the undisclosed x-ray of the device). Tomkins' ***entire defense strategy*** was predicated on the idea the government could not conclusively establish the internal configuration of the device before it was destroyed. See i.e., Cr.R. 296-3 at 2 (ATF report stating, "the exact configuration of the components could not be determined due to the condition of the evidence as a result of bomb squad render safe procedures.")

Similarly, subsequent defense counsel, Mr. Francis C. Lipuma, submitted an affidavit stating the government was still willing to enter into a plea agreement when he was appointed as defense counsel in 2011, except this plea offer was now for 30 years of incarceration. Cv.R. 63.

Having conclusively established the government's willingness to accept a stipulated plea agreement, Tomkins asked the Court to rule based on the established record. Cv.R. 88. Confusingly, while the Court previously denied Tomkins relief because he had not shown the government was willing to enter into a plea

agreement, now that Tomkins had satisfied that requirement, the District Court still refused to grant Tomkins relief or to grant him a COA. Cv.R. 99, App'x pgs. 3-7. This decision is the exact opposite of how the Seventh Circuit decided *Mackin v. United States*, 793 F.3d 703 (7th Cir. 2015). See App'x pgs 53-54, 75-78, and 135-136. See also, *United States v. Zaragoza-Moreira*, 780 F.3d 971, 980 (9th Cir. 2015)("When discovery is requested by the defendant, as was the case here, plea negotiations should be based on full disclosure of the requested evidence."); *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1997)("the discovery obligation mandated by Rule 16 contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make informed decision as to plea."); *United States v. Lee*, 573 F.3d 155, 156 (3rd Cir. 2009) ("Lee might have chosen to enter into plea negotiations with the government if he had accurate information about the strength of its case.")

This Court has correctly recognized, "the negotiation of a plea bargain, rather than the unfolding of trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 182 L.Ed.2d 379, 389-90, 132 S.Ct. 1399, 566 U.S. 134 (2002).

As far as the discovery violation depriving Tomkins of his Due Process right to make an informed decision in regards to his plea, the District Court relied on the same faulty premise about there being no "formal," i.e., written plea offer to deny the claim. Cv.R. 30 at 25, App'x pg. 32.

On the crime of violence issue, the District Court relied on

outdated Circuit precedent to deny the claim. Cv.R. 30 at 15-16, App'x pgs. 22-23 (citing *United States v. Sullivan*, 75 F.3d 297 (7th Cir. 1996)). As Tomkins pointed out in his pleadings, *Sullivan* did ***not*** employ the categorical approach when it found § 876(b) does not qualify as a "non-violent" offense for purposes of a downward departure under the then mandatory U.S. Sentencing Guidelines. Cv.R. 1 at 8 - 10, App'x pgs. 138-140.

Further, the District Court refused to address Tomkins' argument that a "threat to injure" in § 876 includes threats of psychological injury as demonstrated by the disparate language between § 871, which prohibits only threats of "bodily injury" or "death," whereas § 876 prohibits the much broader "any threat to injure." Cv.R. 1 at 14, App'x pg. 144. As this Court has stressed repeatedly, "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.CT. 296, 78 L.Ed.2d 17 (1983).

As an example of the conduct included under this broader definition, Tomkins cited *United States v. Ellis*, 622 F.3d 784, 797-800 (7th Cir. 2010), which found an extortionate threat to disinter a widow's recently deceased husband's body unless she paid $200.00 was a "threat to injure." Cv.R. 1 at 12 - 14, App'x pgs. 142-144.

Likewise, the District Court refused to address the fact that the government had prosecuted defendants under § 876(b) when

the defendants only made threats of "self-harm." Thus, there was no threat of physical force against the "person of another" as required for a crime of violence. Cv.R. 37 (citing *Portee v. United States*, 941 F.3d 263, 273 (7th Cir. 2019)).

On the issue of the constitutionality of the "elements clause" of the definition of a crime of violence, the District Court first attempted to sidestep the issue by erroneously claiming Tomkins was challenging the "residual clause." Cv.R. 30 at 11, App'x pg 18. To the extent the District Court did address the merits of Tomkins' claim, it relied on *dicta* from a non-precedential case where the Seventh Circuit was not even asked to address the constitutionality of the elements clause. Cv.R. 30 at 12, App'x pg. 19 (citing *Clark v. United States*, 680 Fed. App'x 470, 473 (7th Cir. 2017)).

For the challenge to a definition of a "destructive device," the District Court latched onto Tomkins' concession that in other cases, the courts have declined to find the definition unconstitutional in order to avoid addressing the merits of Tomkins' argument. Cv.R. 30 at 36 - 37, App'x pgs. 43-44. Just because some courts have found § 5845(f) constitutional does not automatically make it constitutional in this case.

The District Court also found appellate counsel could not be faulted for failing to anticipate this Court's ruling in *Dean*. However, as the Seventh Circuit recognized after the District Court denied Tomkins' 2255 motion, "counsel may be required to anticipate arguments foreshadowed but not yet adopted by existing case law." *Bridges v. United States*, 991 F.3d 793, 803 (7th Cir.

2021). Considering there was an existing Circuit split on this issue, it was sufficiently foreshadowed for counsel to have raised it as part of the direct appeal as Tomkins requested.

Lastly, the District Court excused appellate counsel's refusal to raise the Speedy Trial Act violation as part of the direct appeal. Cv.R. 30 at 31-32, App'x pgs. 38-39. The District Court incorrectly found the Seventh Circuit's ruling that 18 U.S.C. § 3164 had not been violated when Tomkins appealed his continued pretrial incarceration as dispositive that a violation of § 3161 could not have occurred. *Id.* (citing *United States v. Tomkins*, 2012 App. LEXIS 21890 (7th Cir. 02/02/2012). The District Court's ruling is simply wrong. Unlike § 3161, § 3164 requires that the contested delay occur "through no fault of the accused or his counsel." As this Court has explained about § 3161, "the Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate v. United States*, 559 U.S. 196, 211-12, 130 S.Ct. 1345, 176 L.Ed.2d 51 (2010)(citing *Zedner v. United States*, 574 U.S. 489, 506, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006)). Therefore, contrary to the District Court's ruling the lack of a violation of § 3164 does not preclude a violation of § 3161.

Another critical factor demonstrating appellate counsel's ineffective assistance on this issue was the Seventh Circuit's statement indicating a violation of § 3161 had already occurred when they ruled on Tomkins' § 3164 appeal:

> In *Bloate* the Supreme Court held that a continuance that extends the deadline to file pretrial motions is not automatically excluded under § 3161(h)(7). ***Judge Lindberg made no such findings***, which is not surprising because

> under then-current precedent the continuances where (sic) automatic under § 3161(h)(1)(D). *United States v. Tomkins*, 2012 App. LEXIS 21890 (7th Cir. 02/02/2012).

The idea that Judge Dow can enter a *nunc pro tunc* order excluding time that Judge Lindberg failed to exclude years earlier because Judge Lindberg believed the continuances were automatically excluded is a direct violation of this Court's precedent, "the Act is clear the findings must be made, if only in the judge's mind, ***before granting the continuance.***" *Zedner*, 574 U.S. at 506 (alterations adopted, internal quotes and citations omitted, emphasis added).

The District Court's ruling is also in direct conflict with binding Seventh Circuit precedent, "the district court's *post hoc* rationalizations do not cure the error. A judge may not grant an ends of justice continuance *nunc pro tunc*, providing after the fact justification for unauthorized delays." *United States v. Ramirez*, 788 F.3d 732, 736 (7th Cir. 2015)(internal quotation marks omitted).

Considering a finding of a Speedy Trial Act violation during the direct appeal would have resulted in the vacature of Tomkins' conviction, there is no legitimate excuse for counsel to have refused Tomkins' explicit request that he raise this issue during the direct appeal, especially considering some of the arguments he did raise would, in counsel's own words, "go nowhere." Cv.R. 1 at Exhibit 2, ¶ 2, App'x pg. 186.

After the District Court issued its final ruling, Tomkins filed a notice of appeal, Cv.R. 100. This resulted in the Clerk of the Court notifying Tomkins that he would be required to pay

$505.00 in filing and docketing fees. Cv.R. 104. Tomkins responded by asking if this fee was required given that he was indigent. He also asked whether the fee was required even if a COA was not granted. See Appeal No. 21-1615 docket entry 2. The response to both questions was yes he would be required to pay the fee in full regardless. *Id.* at docket entry 3. This led Tomkins to ask his family to pay the fee so he would not have to deal with the burden of being placed in the Bureau of Prisons' Inmate Financial Responsibility Program again. (Tomkins previously paid the $1,200 court assessment following his conviction through FRP and was overcharged in the process.)

Tomkins then filed an application for a COA, App'x pgs. 65-114. The Seventh Circuit declined to grant Tomkins a COA on any of his constitutional claims even though the District Court's ruling conflicts with a number of established precedents; establishes questionable new legal authority; and refused to address the merits of some of Tomkins's properly raised claims. App'x pg. 2.

While Tomkins was waiting for the Seventh Circuit to rule on his COA application, Tomkins discovered the Tenth Circuit Court of Appeals had reviewed the District Court's ruling of his 2255 motion. According to the Tenth Circuit, "***the Tompkins*** (sic) ***court mistook Lynn's definition of alternative phrasing for a definition of divisibility.***" *United States v. Mjoness*, 4 F.4th 967, ___ (10th Cir. 2021)(referring to the District Court's erroneous interpretation of *United States v. Lynn*, 851 F.3d 786, 797 (7th Cir. 2017), when it ruled § 876(b) is divisible). This

led Tomkins to ask the Seventh Circuit to rehear its denial of his request for a COA. App'x 52-64. Incredibly, the Seventh Circuit still refused to grant Tomkins a COA. App'x pg. 1. (Tomkins cannot help but wonder if the panel, much less the *en banc* court, even reviewed his rehearing motion as it was filed on 11/8/21 at 3:35 p.m. and the denial was entered on the docket at 2:36 on 11/9/21. In the 15 years of litigation in this case, this is the fastest ruling on record.)

Tomkins now seeks a writ of certiorari from this Court to not only correct the miscarriage of justice in this case, but to insure federal prisoners across the country are given a free and fair opportunity to secure relief from potentially unconstitutional convictions and/or sentences.

REASONS FOR GRANTING THE WRIT

1. Certiorari Should Be Granted Because The Lower Courts Are Placing Unreasonable Demands On *Pro Se* Federal Prisoners For The Issuance Of A Certificate Of Appealability.

Everyday federal prisoners, generally proceeding *pro se*, face an almost insurmountable barrier when it comes time to seek a COA following the denial of the habeas corpus petition they filed pursuant to 28 U.S.C. § 2255. It seems like no matter how many times this Court has "had to remind lower courts not to unduly restrict this pathway to appellate review[,]" the lower courts continue to be "too demanding in assessing whether

reasonable jurists could debate the District Court's denial of [a defendant's] habeas petition." *McGee V. McFadden*, 139 S.Ct. 2608, 2611 (2019) and *Jordan v. Fisher*, 135 S.Ct. 2647, 2651 (2015), respectively. See also, *Slack v. McDaniel*, 120 S.Ct. 1595 (2000); *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003); *Tennard v. Dretke*, 124 S.Ct. 2562 (2004); *Tharpe v. Sellers*, 138 S.Ct. 545 (2018); and *Buck v. Davis*, 137 S.Ct. 2608 (2019).

Since 1908, a State prisoner seeking to appeal a federal district court's denial of petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 was required to obtain a certificate of probable cause (CPC). In 1996, in response to perceived delays in State death penalty cases caused by "frivolous" habeas appeals in federal court, Congress enacted the Anti-terrorism and Effective Death Penalty Act (AEDPA). The AEDPA made sweeping changes to the federal habeas statutory scheme. Pub. L. No. 104-132, 110 Stat. 1214, 1217-18 (April 24, 1996)(codified in scattered sections of Title 28 of the U.S. Code). Congress included among those changes that, for the first time, federal prisoners would now be required to obtain a COA. 28 U.S.C. § 2253(c)(1)(B).

The effect of imposing the COA requirement on federal prisoners has been, and continues to be, a tremendous obstacle for federal defendants who are attempting to obtain relief from potentially unconstitutional convictions or sentences.

By way of comparison, in a State prosecution, a defendant is tried before a State court. The defendant then has the right to file a direct appeal with the State Court of Appeals and to

petition the State Supreme Court. This is followed by the option to file a petition for a writ of certiorari with this Court. When the State defendant's direct appeal rights are exhausted, the State prisoner can file a § 2254 motion ***with the United States District Court for an independent review of the State proceedings.*** The State prisoner can then request a COA from the U.S. Court of Appeals, which has had no previous dealing with the case. If denied there, the State prisoner can then, again, petition this Court for relief.

For federal prisoners it is a much different story. The defendant starts out in the U. S. District Court. The defendant then has the right to appeal to the U.S. Court of Appeals followed by asking this Court to grant a writ of certiorari. After the federal prisoner exhausts these direct appeal rights, he or she can file a § 2255 motion ***with the same U.S. District Court that convicted him or her to begin with.*** 28 U.S.C. § 2255(a). Following the denial of the 2255 motion by the District Court, the prisoner can apply for a COA ***from the same court of appeals*** that denied the direct appeal. To be blunt, the Court of Appeals feels no obligation to grant a COA because it knows the odds this Court will grant certiorari to a *pro se* prisoner in a 2255 proceeding is exceedingly rare. Thus, the case ends with them and they know it.

This case presents a perfect example of how the COA process is patently unfair to federal prisoners. Here, Tomkins presented at least four issues that were worthy of a COA:

1.) ineffective assistance of appellate counsel in several areas;

2.) the government's discovery violation violated Tomkins' Due Process right to make an informed plea;

3.) whether §876(b) is categorically a crime of violence; and

4.) whether the "elements clause of the definition of a crime of violence is unconstitutionally vague.

The Seventh Circuit's refusal to grant a COA to resolve these valid constitutional claims exemplifies the unfortunate reality faced by many federal prisoners throughout the United States. As this Court has noted, "The Fifth Circuit was too demanding in assessing whether reasonable jurists could debate the District Court's denial of [a defendant's] habeas petition." *Jordan v. Fisher, supra.* It is time for this Court to once again "remind lower courts not to unduly restrict this pathway to appellate review." *McGee v. McFadden, supra.*

2. Certiorari Should Be Granted To Resolve The Circuit Split Concerning The Assessment Of Filing Fees Even When The Appeal Is Not Allowed To Proceed.

"Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained." Therefore, "to interpose any financial consideration between an indigent prisoner" and his "right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett,* 365 U.S. 708, 709-14, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961).

Tomkins could reasonably argue the assessment of any filing fee, much less a $505.00 fee on a federal prisoner who generally

earns less than that amount for a year's worth of prison wages, to appeal a habeas petition is unconstitutional. However, that is not Tomkins' focus -- Tomkins would gladly pay ten times that amount just to have his appeal heard. Instead, Tomkins is questioning the Seventh Circuit's practice of assessing the $505.00 in fees even when the appeal is ***not*** heard. *Thomas v. Zatecky*, 712 F.3d 1004 (7th Cir. 2013). This policy appears to conflict with this Court's precedent and Rule 5(d)(1) of the Federal Rules of Appellate Procedure. "Within 14 days after the entry of the order *granting permission to appeal*, the appellant must" pay the fee. *Id.* (emphasis added).

The Seventh Circuit's fee policy also contravenes its own rules. "A docketing fee will ***not*** be charged for the docketing of a petition for permission to appeal under FRAP 5, *unless the appeal is allowed.*" Seventh Circuit Rule 45(e)(1)(emphasis added). See also, 28 U.S.C. § 1913 - Court of Appeals Miscellaneous Fee Schedule, "There is no docketing fee for an application for interlocutory appeal under 28 U.S.C. § 1292(b) *or other permission to appeal under Fed. R. App. P. 5, unless the appeal is allowed.*" (emphasis added).

Like the Seventh Circuit, the Sixth and Tenth Circuits appear to assess the $505.00 in fees even when the appeal is not allowed. *United States v. Motoya-Gonzalez*, 599 Fed. App'x 351, 352 (10th Cir. 2015)(denying a COA, but holding "Appellant is ordered to pay the filing fee to the district court forthwith."); *Samarripa v. Ormond*, 917 F.3d 515 (6th Cir. 2019)(discussing the applicability of the filing fee).

On the other side of the Circuit split, the Third, Fifth, and Eleventh Circuits appear to have found the filing fees do not apply to applications for a COA. See, *Santana v. United States*, 98 F.3d 752, 754-56 (3rd Cir. 1996); *Garza v. Thaler*, 585 F.3d 888, 889 (5th Cir. 2009)(ordering the return of the partially collected fees); and *Anderson v. Singeltary*, 111 F.3d 801, 802 (11th Cir. 1997).

Tomkins cannot state definitively how the other Circuits handle filing fees when an appeal is not granted, but the Circuit Rules for the Fourth (Cir. Rule 5), Ninth (Cir. Rule 3-1), and District of Columbia (Cir. Rule 45) all indicate the fee is only applicable when the appeal is allowed.

This Court's intervention is urgently needed because the imposition of the filing fees when an appeal is not allowed is a violation of 28 U.S.C. § 1913:

> The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and ***uniform in all the circuits***. 28 U.S.C. § 1913 (emphasis added).

The Seventh Circuit's practice of charging prisoners who seek a certificate of appealability from the court of appeals $505.00 in filing fees even when the appeal is not heard is contrary to this Court's precedent, statutory authority, and the Federal Rules of Appellate Procedure. As such, it is respectfully submitted this Court needs to take prompt action to correct this illicit practice.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Honorable Court should grant the *pro se* petitioner, John P. Tomkins, a writ of certiorari to answer the questions:

1. Have the lower courts imposed too high of a standard on *pro se* federal prisoners who seek a certificate of appealability following the denial of a 28 U.S.C. § 2255 motion?

2. Are federal prisoners required to pay a $505.00 fee to apply for a certificate of appealability following the denial of a 28 U.S.C. § 2255 motion even if the appeal is not allowed?

Respectfully submitted this 27th day of January 2022 by:

John P. Tomkins #19421-424
Federal Correctional Institution
P.O. Box 5000
Pekin, Illinois 61555-5000