

No. 22-5766

In the Supreme Court of the United States

ORIGINAL

Term 2022

Clifford Kinkade, Petitioner

v.

United State of America

FILED

JUL 11 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

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

Clifford Kinkade

Federal Id 32481-645

Ft. Worth FMC

SA Unit

Po. Box 15330

Ft. Worth, Texas 76119

Pro Se Petitioner

RECEIVED

AUG 2 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Questions Presented for Review

1. Whether the district Court's order denying a certificate of appealability for petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct the sentence on his conviction under 18 U.S.C. § 2422(b) as time barred by the one (1) year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 pursuant to 28 U.S.C. § 2255 P. 6(1) violates the *expos facto* proscription of the United States Constitution as applied in this case, and is prohibited by the *Dre process* clause.

2. Whether the Internal Operating Procedure Rules of the Eight Circuit Court of Appeals that states that a petition for rehearing is not required nor a necessary prerequisite to filing a petition for certiorari with the U.S. Supreme Court proscribed the District Court as well as the Eight Circuit Court of Appeals from denying the Petitioner a certificate of appealability as being in conflict with the U.S. Supreme Court precedent that local Court Rules have the force of law, Weil v. Neary, 160, 169, 49 S.Ct. 144, 73 L. Ed 243 (1929)

3. Whether the District Court and the Eight Court of Appeals Denial of a certificate of Appealability and allowance to processed *informe pauperis* was in direct conflict with the reasoning and rational set forth in Wilkins v. U.S., 441 U.S. 468, 60 L. Ed 2d 365, 99 S. Ct. 1829 (1979) when this Court interpreted the predecessor to Rule 13.3 of the Rules of the Supreme Court of the United States.

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Clifford Kinkade, Petitioner,

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Petition for Writ of Certiorari

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United States Court of Appeals for the Eighth Circuit

Petitioner Clifford Kinkade respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Eighth Circuit on January 31, 2022 and April 11, 2022.

Parties to the Proceeding

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

(ii)

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- Gendon v. U.S., 154 F.3d 672, 674 (7th Cir. 1998)
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- Horton v. U.S., 244 F.2d 546, 551 (7th Cir. 2001)
- Houston v. Lack, 487 U.S. 266, 270 (1988) & Fed R. App. 25(a)
- Hohn v. U.S., 529 U.S. 236, 141 LEd 2d 242, 118 S.Ct. 1969 (1998)
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C

(v)

Opinion Below

On January 31, 2022 a panel of the Eighth Circuit Court of appeals entered its order denying a certificate of appealability as to the order and final appealable judgment of the United States District Court for the Western District of Missouri-Springfield. No opinion was issued by the Court of Appeals. The motion for rehearing by the panel and en banc was denied April 11, 2022. A copy of the order denying the motion for rehearing en banc and by the panel is attached to this petition as an appendix.

Jurisdiction of the Supreme Court of the United States.

The order and judgment of the United States Court of Appeals for the Eighth Circuit denying a certificate of appealability was entered January 31, 2022; the order denying the Motion for Rehearing was entered April 11, 2022. This Petition is filed within 90 days of the denial of the Motion for Rehearing. See, SUP. Ct. R. 13.1 This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254 (1) and the precedent of Hohn v. U.S., 524 U.S. 236, 141 L. Ed. 2d 242, 118 S. Ct. 1969 (1998).

Federal Rule of Criminal Procedure Involved

The questions presented involve Federal Rules of Appellant Procedure 22(b)(2)

Statement Summary

A) Indictment returned June 13, 2017 on 3 counts - 1) 18 U.S.C. § 2251 (a) + (e) 2) 18 U.S.C. 2422(b) and 3) 18 U.S.C. § 2423 (b)

B) Challenged Plea agreement entered into only on 18 U.S.C. § 2422(b) prior to acceptance of Plea on Oct. 25, 2018 and prior to sentencing hearing on June 26, 2019

C) An Appeal for Petitioner/Appellant was filed by his counsel but dismissed w/o opinion of this court on the Government's motion to dismiss based on an appeal waiver in a plea agreement on Nov. 20, 2018

D) A motion to withdraw was filed by Petitioner's/Appellants Attorney Dec. 5, 2018 and requesting an extension to file a motion to file a petition for Rehearing by Jan 2, 2020 which was granted by the Court of Appeals.

E) No Petition for Rehearing was filed nor was any petition for cert to the Supreme Court filed.

F) On May 31, 2021 Petitioner/Appellant filed a § 2255 motion

G) A response was filed on

H) On the Government filed a response requesting it to be dismissed as untimely. The District Court dismissed Petitioner's § 2255 motion as untimely indicating a petition for Rehearing to this Court was a prerequisite to filing a petition for cert and finding the S/L for filing a § 2255 motion started

retro actively on Nov. 20, 2019 and not Jan. 2, 2021 or Jan. 14 the date a mandate was issued by this Court to start the S/L time clock. It also dismissed the § 2255 motion without addressing the merits of the § 2255 motion and denying a certificate of Appealability, also not addressing the IFD motion.

I) A Notice of Appeal was filed Sept. 10, 2021

J) On Sept. 20, 2021, The District Court issued another order sua sponte modifying the Aug 13, 2021 Final entered order after being divested of jurisdiction by a Notice of Appeal pursuant to Fed. R. App. P. 22(b)(2) on Sept. 10, 2021. Appendix

K) On Oct. 19, 2021 another Notice of Appeal was filed Appendix as to the order issued on Sept. 20, 2021.

L) On Nov. 5 another sua sponte order was issued in response to the Notice of Appeal. Appendix

M) On Nov. 18, 2021 an Application out of time was filed further detailing the Reason why a (COA) should be issued to supplement the Request to this Court in filing a Notice of Appeal filed Sept. 10, 2021 pursuant to F.R. App. P. 22(b)(2)

N) On Jan 31, 2021 the three member Panel of Kelly, Gras, and Stras issued a judgment denying a (COA) w/o opinion and declaring moot the Petitioner/Appellant's IFP motion.

C
D) The notice of Appeal filed Sept. 10, 2021 acted as a request to this court for a certificate of Appeal as provided for by Rule 22(b)(2) not with standing the recetations set forth in the District Court's sua sponta orders issued on Sept. 20, 2021 and Nov. 5, 2021 to the contrary.

P) The undersigned submitted a formed expanded Application out of time for a (Coa) on Nov. 30, 2021 received by the court Dec. 6, 2021 for the Eight Circuit courts further consideration.

Q) The Eight Court of Appeals denied a certificated appealability and the ability to proceed on appeal in forma pauperis denied as moot on January 31, 2022. C
APPENDIX A-1

R) A petition for Rehearing en banc and/or the Panel was filed via mailbox Rule March 17, 2022.

S) The Eight Court of Appeal denied a timely Petition for Rehearing en banc and before the panel on April 11, 2022, APPENDIX A-2,

Reasons for Granting the Writ

1. The Eight Circuit Panel's denial of a (COA) leaves intact a District Court opinion Appendix "B-1 + B-2" that is in conflict with the Internal Operating Procedures (IOP) the Eighth Court of Appeals in Paragraph "G" of Deciding the Appeal stating that ... "A petition for Rehearing is not a prerequisite to filing a petition for a writ of certiorari with the Supreme Court." in such a case the government is allowed to refuse to play by its own rules. See Carmell v. Texas, 529 U.S. 513, 535, 146 L.Ed 2d 577, 120 S.Ct. 1620 (2000).

2. The Panel's denial of a (COA) also leaves intact sub sequant Sua sponte orders Appendix issued by the District Court that take simultaneous jurisdiction over this case with the Court of Appeals not only ruling on a procedural matter but also the merits of the § 2255 motion all in contradiction to the final entered order issued Aug. 13, 2021 by the District Court. See also 8th Cir. IOP Deciding the appeal ¶ ("Issuance of the mandate. The mandate of the Court of Appeals formally Reconfers jurisdiction on the district Court...").

3. The Panel's denial of a (COA) also leaves intact a District Court order that is in conflict with the Eight Circuit's precedent and the U.S. Supreme Court that a District Court is divested of jurisdiction to correct perceived mistakes or omissions in a judgment once a notice of appeal is filed unless the appellate court grants leave for the District Court to amend its judgment. See In re Modern Textile 900 F.2d 1184, 1193 (8th Cir 1990); See also Harvey v. McDonald, 109 U.S. 150, 157 3 S. Ct. 136, 272 L Ed. 888 (1883)

(Can appeal suspends the power of the court below to proceed further in the cause). The underlying issues of ineffectiveness of counsel parallel in great respect with the issues involved in Wilkins V. U.S., 441 U.S. 468, 99 S. Ct. 1829, 60 L. Ed. 2d 365 (1979). (Defendant 17 mo. late under predecessor of Rule 13.3 allowing Petitioner's motion for leave to proceed in forma pauperis and petition for certiorari presenting question of what remedy was available for petitioner when his court-appointed Attorney refused to file a timely petition for certiorari in defiance of petitioner's written request to do so.

4. The Panel's denial of a (Coa) ~~also~~^{fails to} further leaves intact a District Court order (Appendix B-2) that ^{that} reflects prior sister Circuit Court opinions regarding the computation of the status of limitations under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255 p. b (1) [See i.e. Gordon V. U.S., 154 F. 3d 672, 674. (7th Cir. 1998) (Statute of limitations runs from date the Court of Appeals issue its mandate) ; Horton V. U.S., 244 F. 2d 546, 551 (7th Cir. 2001) (Court of Appeals mandate issues only after the period to petition for rehearing expires when the federal prisoner decides not to seek certiorari at all) ~~the~~ ~~decision becomes final on the date the Court issues the mandate~~ that jurists of reason ^{previously} disagreed in the past on when a direct appeal was final for purposes of the one (1) year statute of limitations for pursuing relief under 28 U.S.C. § 2255, prior to Clay V. U.S., 537 U.S. 522 and Rule 13.3 of this Court.

5. The Panel's denial of a (Coa) also leaves intact a District Court orders that is in conflict with the Eighth Court's local (IOP) as noted in Paragraph 1 and 2 above which is also in conflict with the Supreme Court's opinion regarding local rules of lower courts i.e. "So long as such rules do not conflict with rules prescribed by the Supreme Court, congressional enactment's or constitutional provisions, they have the force of law See Weil V. Neary, 278 U.S. 160, 1169, 173 L. Ed. 243, 49 S. Ct. 144 (1929); See also, Frazier V. Heebe, 482 U.S. 641, 645-646, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987).

6. Neither the Panel nor the District Court addressed the only question of whether the Petitioner herein showed that "Jurists of reason could disagree with the district court's resolution of the detailed constitutional claims or could conclude the issue presented were adequate to deserve encouragement to proceed further when a defendant claims his counsel's deficient performance deprived him of a trial by causing him to accept a plea, asserted by the Petitioner/Appellant in his §2255 motion, a denial of his 5th & 6th Amendment rights and due process would seem to have demonstrated a reasonable probability, that but for counsel's errors no plea of guilty would have been entered and a trial would have been insisted upon instead, See Lee V. U.S., 137 S.Ct. 1958, 1964-66, 198 L. Ed. 2d 476 (2017). See also, Miller-El V. Cockrell, 537 U.S. 322, 336, 125 S.Ct. 1029, 154 L. Ed. 4931 (2003);

Ⓒ
Buck v. Davis, 580 U.S. —, 137 S.Ct. 759, 197 L. Ed. 2d 1, 25 (2017).

Setting the beginning of the ADEA statute of limitations retroactivity is tantamount to a *non est* order intended to prevent a review of the merits of the Petitioner's constitutional claims, and operates precisely like an *ex post facto* law and is prohibited by the Due process clause.

C 7 Copies Being Served on the Government & this Court:

Hon. Teresa A. Moore

U.S. Atty

AHW: Aml Harshad Miller AUSA

901 St. Louis Street, Suite 500

Springfield, Missouri #65738

Solicitor General of the United States

Room 5616

Department of Justice

950 Pennsylvania Ave.

N.W. Washington, DC #20530-0001

C Clerk of the United States Supreme Court

1 First Street N.E.

Washington, DC #20543

Conclusion and Relief Requested

1. The Petitioner/Appellant requests that all filings in case 19-2387 and the filings in the District Court below in this case be judicially noticed and incorporated here in via Pacer as an Appendix by reference in lieu of hard copies being attached hereto due to the limitations on Petitioner/Appellant's access to copying facilities at Ft. Worth FMC. The same request is made to the District

C Court filings in Crim. No. 17-03073-01-CRS-MDH, which is the subject of the Appeal in Case No. 19-2387.

See also Cruz V. Havide, 404 U.S. 59, 30 L.Ed. 217, 92 S.Ct. 313 (1971) (suggesting that even in the civil context the constitutional right to court access and due process require an appellate court to review de novo a trial courts certification that an in forma pauperis (IFP) is not taken in "good faith") (Douglas, J. concurring)

2. These Pro se pleadings and papers are requested to be liberally construed, although assisted by a fellow inmate as allowed by the Supreme Court, See Shawn V. Murphy, 532, U.S. 223, 231 n.3 (2001) (under our right of free access precedents, inmates have a right to return legal order from other inmates ... when it is necessary for ensuring reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to courts.) "in order to prevent errors in draftmanship from barring justice to the undersigned. See, Richie V. United Mine Workers of America, 410 F.2d 827, 833 (6th Cir. 1969) (citing F.R. Civ. P. 8(F)).

3. Petitioner/Appellant respectfully further requests that this Court issue the requested certificate of Appealability on all the issues set forth in this Application and the §2255 motion be allowed to proceed in forma pauperis reverse and remand this case for new trial, and consider the relief granted in US. V. Warren, 2021 U.S. App. Lexis 23558 (6th Cir. Aug 9., 2021) including but not limited to assigning the case to a different district court judge, appoint an attorney to represent the undersigned in this

matter and such other relief as he may show himself entitled on an evidentiary hearing if ordered, not inconsistent with the relief granted in Wailkens V. US., 468, 469-70, 99 S.Ct. 1829, 60 L.Ed. 565 (1979).

Dated: 7/11/22

Respectfully Submitted

Clifford Kinkade

Clifford Kinkade #32481-045

Ft. Worth FMC, S.A. Unit

Po Box 15330

Ft. Worth, TX #76119

Declaration

I declare under penalty of perjury that the foregoing is true and correct.

Clifford Kinkade

Clifford Kinkade #32481-045