No: 22-6463 ORIGINAL

In the
Supreme Court of the United States

Supreme Court, U.S.
FILED
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SHERMAN JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

When the District Court denies a Title 28 U.S.C. § 2255, all the claims must be addressed. This Court in *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006) determined that an appeals court lacks jurisdiction to address non-adjudicated claims. With this introduction the following question is presented for review:

I. Did the Eight Circuit Court of Appeals have jurisdiction to deny or address the claims raised on Johnson's Title 28 U.S.C. § 2253 in his request for a Certificate of Appealability when the District Court did not address and/or deny the claims in the original title 28 U.S.C. § 2255.

II. Should a writ of certiorari be granted to determine if *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) if the Eight Circuit erred in not granting a Certificate of Appealability, even though the record was inconclusive on the allegations.

III. Should a writ of certiorari be granted to determine if a *Brady v. Maryland*, 373 U.S. 83 (1963) violation occurs when the government withholds a substantial number of exculpatory items that were crucial for the defense

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Eight Circuit and the United States District Court for the District of Nebraska.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Sherman Johnson, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Eight Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eight Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision in *Johnson v. United States,* No: 22-2482 (8th Cir. October 3, 2022), is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, District of Nebraska. (Rossiter, R.), whose judgment was appealed to be reviewed, is an unpublished opinion in *United States v. Johnson,* 8:16cr241 (D. Neb. June 3, 2022) is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on January 27, 2022.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant parts:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law ....

Id. Fifth Amendment

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment

Title 28 U.S.C. § 2255 provides in the 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, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE CASE

Johnson and co-defendant Sarkis Labachyan ("Labachyan") were each charged with possession with intent to distribute cocaine, 21 U.S.C. § 841(a), and conspiracy to possess with intent to distribute cocaine, 21 U.S.C. § 846. They were convicted on all charges following a jury trial. See, *United States v. Johnson*, 954 F.3d 1106, 1110 (8th Cir. 2020). Johnson filed a motion for a new trial (Fed. R. Crim. 33), which was denied. *United States v. Johnson*, 2017 U.S. Dist. LEXIS 33859 (D. Neb. Mar. 9, 2017). On September 4, 2018, Johnson was sentenced to the minimum mandatory sentence of 240 months to counts one and two to be served concurrently, along with 10 years of supervised release as to each count to be served concurrently. (Cr. Doc. 168).

A timely notice of appeal was filed and a panel of the Eight Circuit affirmed the sentence and conviction. See, *United States v. Johnson*, 954 F.3d 1106 (8th Cir. 2020); rehearing denied *en banc*, *United States v. Johnson*, 2020 U.S. App. LEXIS 17929 (8th Cir. Neb., June 5, 2020). On April 19, 2021, a writ of certiorari was denied. *Johnson v. United States*, 141 S. Ct. 2524 (2021). Johnson filed a Title 28 U.S.C. § 2255 alleging several instances of ineffective assistance of counsel. That pleading was denied. That decision was in error since several allegations of ineffective assistance of counsel were not addressed. Johnson proceeded with his

request for a certificate of appealability, which was also denied. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

I. DID THE EIGHT CIRCUIT COURT OF APPEALS HAVE JURISDICTION TO DENY OR ADDRESS THE CLAIMS RAISED ON JOHNSON'S TITLE 28 U.S.C. 2253 IN HIS REQUEST FOR A CERTIFICATE OF APPEALABILITY WHEN THE DISTRICT COURT DID NOT ADDRESS AND/OR DENY THE CLAIMS IN THE ORIGINAL TITLE 28 U.S.C. § 2255.

This claim is not a novel argument before this Court. This court in *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006) determined that the court of appeals has an independent duty to assess subject-matter jurisdiction. That decision laid the foundation that must be followed to determine whether an appellate court has jurisdiction to even address a claim in the first instance. In this case, the record shows that the Eight Circuit did not have jurisdiction to address Grounds 6 thru 8[1] of the original Title 28 U.S.C. 2255. No final order of denial was entered on those ground, thus, finality has never occurred.

[1] Counts 6 alleged that "the attorney was ineffective in failing to request that the court instruct the jury on how to properly evaluate [witness] Olson's dual role testimony; Counts 7 alleged that "Counsel was unprepared for the sentencing phase resulting in the improper application of the Title 21 U.S.C. § 851 sentencing enhancement and Counts 8 alleged that "counsel rendered ineffective assistance in his performance during the litigation of the appeal." None of these allegations were addressed in the District Court's order.

This Court has an independent duty to assess subject-matter jurisdiction. *E.g., Wachovia Bank v. Schmidt*, 546 U.S. 303, 316, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006). Once it "appears from the record that the district court has not adjudicated all of the issues in a case, then there is no final order." *Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015); *United States v. Barker*, 692 Fed. Appx. 724, 725 (4th Cir. 2017) (remanding § 2255 motion after district court failed to consider "potential claim"). There is no distinction in the type of cases the court may apply the *Schmidt* decision. Without a final order of denial, there is no judgment to review. Consequently, "even if a district court believes it has disposed of an entire case, the [Eight Circuit] lacked appellate jurisdiction where the district court failed to enter judgment on all claims." *Id.* at 696-97. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S. Ct. 2454, 2457, [**7] 57 L. Ed. 2d 351 (1978), this court determined that a final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S. Ct. 2454, 2457, [**7] 57 L. Ed. 2d 351 (1978); see also *Pan Eastern Exploration Co. v. Hufo Oils*, 798 F.2d 837, 838 (5th Cir.1986). Neither does merely labeling a judgment as final does not make it so. *See Stillman v. Travelers Ins. Co.,* 88 F.3d 911, 913 (11th Cir. 1996). In this case, there was never a mention that these claims were addressed or adjudicated. Johnson had no option at this stage. The order was not interlocutory and was not

accompanied by a Fed. R. Civ. P. Rule 54(b) certification, thus not immediately appealable under 28 U.S.C. § 1292. Nor was it an immediately appealable "collateral order" under the doctrine announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949); *Adams v. United States*, No. 19-1563, 2021 U.S. App. LEXIS 7014, at *5 (6th Cir. Mar. 10, 2021). Here, the district court did not address claims 6 thru 8 of the 28 U.S.C. § 2255, thus the appellate court, as per this Court's precedent in *Schmidt*, lacked the subject matter jurisdiction to adjudicate the same.

As such, Johnson is requesting this Honorable Court, grant, vacate and remand the case to the Eight Circuit court of appeals for further consideration.

II. SHOULD A WRIT OF CERTIORARI BE GRANTED TO DETERMINE IF, UNDER *STRICKLAND v. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052 (1984) IF THE EIGHT CIRCUIT ERRED IN NOT GRANTING A CERTIFICATE OF APPEALABILITY, EVEN THOUGH THE RECORD WAS INCONCLUSIVE ON THE ALLEGATIONS.

A. Failing to Advise Johnson of the Implications of Title 21 U.S.C. § 851.

In the original 2255, Johnson made one straightforward argument of ineffectiveness, "counsel failed to explain the sentence he faced," that "I had never heard the term 21 U.S.C. § 851 nor Notice of Information to Establish Prior Conviction until after the pleading was filed" and "we never discussed the Federal Sentencing Guidelines, the implications of a Title 21 U.S.C. § 851, nor how the

filing of such would double my minimum mandatory sentence." (8:16-cr-00241, Cr. Doc. 237, Exh. A, D. Neb.). None of those sworn statements were ever addressed. District Court cases show that Johnson was "entitled to an evidentiary hearing [u]nless the motion and the files and records of the case *conclusively show* that [he] is entitled to no relief.'" *Jackson v. United States*, 956 F.3d 1001, 1006 (8th Cir. 2020), but see, *Umanzor v. United States,* 2012 U.S. Dist. LEXIS 5364, 2012 WL 124377, at *4 (N.D. Iowa Jan. 17, 2012) (citing *Grady v. United States*, 269 F.3d 913, 918 (8th Cir. 2001)) (no hearing required "***where there is no disputed question of fact*** and the files and the records of the case establish conclusively that the petitioner is entitled to relief.") Here, the facts were undisputed. Counsel never addressed the facts that Johnson raised in his Title 28 U.S.C. § 2255.

Here, several instances of ineffectiveness and disputed questions of fact existed in the Title 28 U.S.C. § 2255. Johnson alleged, (without challenge) that "...had [pre-trial counsel] Kahler explained the possibility that the government could file such a notice [851] and have my mandatory minimum sentence doubled to 20 years, I would have never proceeded to trial and would have pled guilty to the initial indictment" and "had Kahler taken the opportunity to review with me the Federal Sentencing Guidelines, which I had never heard of before this case, and explain how my sentence would be affected if the filing of a 21 U.S.C. § 851

occurred, *I would have accepted an open plea to the initial indictment without a need for the filing of a superseding indictment or the filing of a 21 U.S.C. § 851.*" (Cr. Doc. 237 at 47). These statements clearly show that Johnson was not explained the "repercussions of the guidelines" nor the devastating effects of the filing of a Title 21 U.S.C. § 851. By pleading guilty to a straight plea, there would have been no superseding indictment and no Title 21 U.S.C. § 851 filings. These actions were critical to Johnson's determination to proceed, are not disputed by the record of the District Court, and were denied without the benefit of a hearing.

Also, the district court's analysis of denial was in error, requiring a remand. The court determined that "accepting that as true, Johnson cannot show he was prejudiced by his counsel's alleged failure. Johnson continuously maintained his innocence, and there is no indication Johnson would have taken a plea instead of proceeding to trial." (Cr. Doc. 239 at 5). That position is mistaken. Johnson was clear in his affidavit that he would not have proceeded to trial, had pre-trial counsel explained the guidelines and the 21 U.S.C. § 851 enhancements.

All the statements alleging pre-trial counsel's failure to address the guidelines and the application of the 21 U.S.C. § 851 all addressed conversations that were not part of the records and files of the case. The Third Circuit in *United States v. Marzgliano*, 588 F.2d 395, 396 (3d Cir. 1978) applied this theory. "Defendant was entitled to a hearing on the voluntariness of his guilty plea because he had made a

sufficient showing of matters outside the record which, if true, cast serious doubt upon his plea's voluntariness." *Id.* at 396. Whether a formal plea was offered or not, Johnson had the right and desire to take a straight plea and avoid a 20- year mandatory sentence. *Id.* (Cr. Doc. 247 at 47) ("I would have accepted an open plea to the initial indictment without a need for the filing of a superseding indictment or the filing of a 21 U.S.C. § 851.") Without a hearing, the lower court's conclusions of law were in error, and subject to review.

B. Failing to Provide Adequate Assistance of Counsel and Denial of the Allegations of Ineffectiveness When Counsel Failed to Prepare a Defense.

Johnson asserted his trial counsel was ineffective because he failed to investigate and otherwise prepare a defense for trial. More specifically, Johnson argued his trial counsel failed to (1) request certain photographs taken at the scene of the June 2016 arrest, (2) investigate the records from the April 2016 traffic stop, and (3) obtain the body camera footage from the April 2016 traffic stop. Johnson argues his counsel's lack of investigation into these matters was objectively deficient and he was prejudiced because his counsel could have discovered impeachment evidence to use at trial. These allegations all strike at the heart of the counsel's failure to prepare for the case in general.

1. The Failure to Request a Response to the Title 28 U.S.C. § 2255 as Mandated by Rule 5(a) Violates Johnson's Rights to an Adequate Proceeding Requiring a Remand.

While the court did not address all the additional allegations of ineffectiveness, the district court did attribute the lack of counsel's performance to "strategy decisions." (Cr. Doc. 239 at 5). However, counsel did not provide any defense to the allegations. It is unknown how that conclusion was reached. There was no affidavit provided by trial counsel to establish that any strategy was followed. In *Michel v. Louisiana*, 350 U.S. 91, 101 (1955) this Court determined that "actions or omissions by counsel *that might be considered sound trial strategy* do not constitute ineffective assistance of counsel." The key wording is "that might be considered sound trial strategy." Any assumption that counsel followed a trial strategy is just that, an assumption. The *Michel* decision made it clear that actions or omissions *must be determined to have been a strategy* or that one existed. Absent any statement from counsel that a strategy existed, this Court cannot reach such a conclusion. The Court is not absolved from holding an evidentiary hearing, even if an affidavit was filed. *See Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990); *United States v. Giardino*, 797 F.2d 30, 32 (1st Cir. 1986) and *Lindhorst v. United States*, 585 F.2d 361, 365 (8th Cir. 1978). The Supreme Court's *Michel* decision was clear that they could not "infer *lack* of effective counsel from this circumstance alone." *Id* at * 100. Same as in this

analogy, the court cannot construe that counsel was not ineffective without inquiring from counsel. See, *Byrd v. Delo*, 917 F.2d 1037, 1040 (8th Cir. 1990) (court should not construct strategic defenses which counsel does not offer.") In sum, "courts may not deny claims of ineffective assistance of counsel based on justifications created by the court rather than by counsel." *Id. Delo* at 1040. See also, *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (reviewing court should "not construct strategic defenses which counsel does not offer") (citing *Kimmelman v. Morrison*, 477 U.S. at 386); *United States v. Acklen*, 47 F.3d 739, 743-44 (5th Cir. 1995) (remanding for an evidentiary hearing where there was nothing in the record to indicate counsel's failures were attributable to strategic choice among all plausible alternatives available for defense); *United States v. Dawson*, 857 F.2d 923, 929 (3rd Cir. 1988) (absent evidence in the record, "this court will not speculate on trial counsel's motives"); *Nichols v. United States*, 75 F.3d 1137 (7th Cir. 1996). Thus, absent a hearing or an affidavit from trial counsel, the court was precluded from determining that the allegations raised by Johnson were not attributable to ineffective assistance of counsel. This argument and the court's conclusion encouraged to proceed further with a certificate of appealability that was not addressed by the Eight Circuit. A writ of certiorari should be granted and the case remanded to the Eight Circuit.

Johnson was wearing adult diapers to forego having to stop to use the restroom during the drug trafficking drive. However, cross-examination of the officers would have revealed that if the missing 122 photographs were provided as part of the discovery, no diapers would have been shown on any photograph. None of the released photographs supported the government's version that "adult diapers" were worn at any stage and quite possibly neither do the 122 photographs that the government withheld. The missing photographs were crucial to the defense, but there was never any request from counsel for the additional photographs. However, regardless of how deficient the failure to request the photographs may be, the government still had a duty to disclose the photographs, regardless of their contents. The Brady obligation applies *regardless of whether the defendant requests this information* or whether the information would itself constitute admissible evidence. Id. at *1; *United States v. Seys,* 27 F.4th 606, 609 (8th Cir. 2022) (holding it violates due process for the government to suppress requested material evidence that is favorable to the accused, regardless of whether the government acted in good or bad faith). However, even if the district court noted that counsel was not ineffective, the court cannot overlook the *Brady* violation.

The district court considered the photos cumulative, however, the court does not know the contents of the photos. (Cr. Doc. 239 at 4). Just as the court cannot "speculate as to any future particularized prejudice" *Patterson Dental Supply v.*

Pace, 2020 U.S. Dist. LEXIS 256767, at *20 (D. Minn. Nov. 5, 2020), neither can the court speculate that Johnson cannot establish prejudice from the missing 122 plus photographs. Regardless of the contents of the missing photographs, notwithstanding the "cumulative effect theory" that the court addressed, the result is a *Brady* violation that could have reasonably affected the outcome of the trial. With the granting of a writ of certiorari and a remand, this court can have the matter addressed.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Eight Circuit.

Done this 20, day of December 2022.

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