

MAR 23 2023

OFFICE OF THE CLERK

No. 23-5162

IN THE
SUPREME COURT OF THE UNITED STATES

DEMARIO B. GRIFFIN — PETITIONER, Pro Se
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

De Mario B. Griffin, Pro Se
(Your Name)

FCC Forrest City LOW
P.O. Box 9000

(Address)

Forrest City, AR 72336
(City, State, Zip Code)

N/A

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. Does Griffin have a right to counsel on his first direct appeal under the Fifth Amendment?
2. Does Griffin have a right to counsel on his first direct appeal under the Sixth Amendment?
3. Based on the fact that Griffin was not appointed counsel after the Eighth Circuit Court of Appeals recalled the Mandate of 11/18/2008 and re-instated Griffin's first direct appeal (Doc.121), was the Eighth Circuit Court of Appeals required to recall the Mandate again, re-instate Griffin's first direct appeal, and appoint Griffin counsel to correct its error in judgment?

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- United States v. Demario B. Griffin, No.07-00012-01-BCW-1, United States District Court for the Western District of Missouri. Judgment entered Sept. 17, 2008
- United States v. Griffin, No.08-3099, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Sept. 29, 2010.
- Demario B. Griffin v. United States, No.12-0209-CV-W-DW-P, United States District Court for the Western District of Missouri. Judgment entered in 2013.
- Demario B. Griffin v. United States, No.14-1591, U.S. Court of Appeals for the Eighth Circuit. Judgment entered July 10, 2015.
- Demario B. Griffin v. United States, No.14-1591, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Sept.17, 2015.
- Demario B. Griffin v. United States, 580 U.S. 1078, Supreme Court of the United States. Judgment entered January 9, 2017.
- United States v. Demario B. Griffin, No.22-1333, U.S. Court of Appeals for the Eighth Circuit. Judgment entered June 14, 2022.
- United States v. Demario B. Griffin, No.22-1333, U.S. Court of Appeals for The Eighth Circuit. Judgment entered December 8, 2022.

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APPENDIX C .. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ORDER OF JANUARY 13, 2023.

APPENDIX D .. MOTION FOR EN BANC OF THIS COURT'S DENIAL OF GRIFFIN'S MOTION TO RECALL THE MANDATE OF HIS FIRST DIRECT APPEAL AS OF RIGHT AS THIS COURT HAS MISAPPREHENDED OR OVERLOOKED HOW IT THEN FAILED TO APPOINT COUNSEL TO FULFILL GRIFFIN'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND ASSISTANCE OF COUNSEL.

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OTHER

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A1 to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 13, 2023.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 17, 2023, and a copy of the order denying rehearing appears at Appendix E.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; 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; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This case presents the questions of whether a criminal defendant has a right to counsel on first direct appeal, and if a United States Court of Appeals is required to recall a mandate when there is an error in judgment.

Here, it was an error in judgment for the Eighth Circuit Court of Appeals to not appoint Griffin counsel on his re-instated first direct appeal. The Eighth Circuit Court of Appeals forced Griffin to file pro se on his re-instated first direct appeal. Griffin raised the issue of being denied counsel on his re-instated first direct appeal in his motion under 28 U.S.C. §2255. See Page ii, Related Cases, Case No.12-0209-CV-W-DW-P. Griffin again raised his lack of counsel on re-instated first direct appeal in his successive motion collaterally attacking his conviction. Griffin's relentless due diligence on this issue is emphasized in his most recent motion to recall the mandate to, once again, shine a light on the Eighth Circuit Court of Appeal's failure to appoint him counsel on his re-instated first direct appeal.

The factual background of this issue was detailed in Griffin's Motion to Recall The Mandate. See APPENDIX B. The mandate of 11/18/2008 (Doc.119) has been recalled before. See APPENDIX F. Here, the issue remains that when the Eighth Circuit Court of Appeals recalled mandate 11/18/2008 (Doc.119) on 12/15/2008 (Doc.121), it then failed to appoint Griffin counsel on this re-instated first direct appeal. See Calderon v. Thompson, 523 U.S. 538(1998).

REASONS FOR GRANTING THE PETITION

A. Griffin had a Fifth Amendment right to counsel on first direct appeal.

On 12/15/2008 the Eighth Circuit Court of Appeals granted Griffin's motion to recall the Mandate of 11/18/2008 (Doc.119). After recalling that Mandate, the Eighth Circuit Court of Appeals re-instated Griffin's first direct appeal. The Eighth Circuit Court of Appeals then failed to appoint Griffin counsel, which is an egregious error in judgment in violation of Griffin's Fifth Amendment right to counsel and the Equal Protection under the law. See U.S. Const. Amend. V. See also Steele v. united States, 518 F.3d 986,988(8th Cir.2008)("[T]he Fifth Amendment due process clause governs the right to counsel for appellate proceedings.",citing Ross v. Moffitt,417 U.S. 600,610-11(1974). A criminal defendant has a constitutional right to counsel on the first direct appeal. Id., citing Douglas v. California, 372 U.S. 353,357-58(1963). This "encompasses the right to effective assistance of counsel." Id., citing Evitts v. Lucey,469 U.S. 387,396-400(1985)..

On 1/9/2023 Griffin filed a motion to recall the Mandate of 11/18/2008 (Doc.119). See Appendix B. On 1/13/2023 the Eighth Circuit Court of Appeals denied the motion. See Appendix C. On 1/18/2023 Griffin filed motion for En Banc review of the denial of his motion to recall the Mandate of 11/18/2008 (Doc.119). See Appendix D. The Eighth Circuit Court of Appeals denied En Banc review on 2/17/2023. See Appendix E.

The Eighth Circuit Court of Appeals violated Griffin's Fifth Amendment right to counsel by failing to appoint Griffin counsel on his re-instated first direct appeal back in 2008. Once the Eighth Circuit Court of Appeals re-instated Griffin's first direct appeal Griffin was left without counsel. The Eighth Circuit Court of Appeals forced Griffin to prepare and argue his first direct appeal, without an

attorney, from the prison cell of a United States Penitentiary.

As stated in Gideon v. Wainwright, "lawyers in criminal courts are necessities, not luxuries." Gideon, 372 U.S. 335, 344(1963). The Court docket is clear that after the Eighth Circuit Court of Appeals granted Griffin's attorneys to withdraw from his case (Doc.120) that Griffin was without counsel in violation of his Fifth Amendment right to counsel on appeal. See Appendix F. Griffin was required, as a matter of right, to have counsel on his first direct appeal and the Eighth Circuit Court of Appeals failed to secure that right in violation of his Fifth Amendment right to Due Process and Equal Protection under the law. See United States v. Cronic, 466 U.S. 648(1984) ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial."); See also Roe v. Flores-Ortega, 528 U.S. 470(2000) ("the same is true on appeal.").

The docket record is evidence of the constitutional error in judgment by the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals violated Griffin's Fifth Amendment right to Due Process and Equal Protection under the law by not ensuring Griffin had counsel on his first direct appeal. This error in judgment is why Griffin filed motion to recall the Mandate of 11/18/2008. The Eighth Circuit Court of Appeals clearly made an error in judgment by failing to secure Griffin counsel on his first direct appeal, yet refused to recall the Mandate (Do.119) to correct that error in judgment. Griffin has been denied counsel on his first direct appeal since 2008. The Eighth Circuit Court of Appeals has violated Griffin's Fifth Amendment right to counsel since 2008. When Griffin called the Clerk's office at the Eighth Circuit Court of Appeals on 1/18/2023 even Amy Smith acknowledged that he had no counsel on record.

B. Griffin had a Sixth Amendment right to counsel on first direct appeal.

On 12/15/2008 the Eighth Circuit Court of Appeals granted Griffin's motion to recall the Mandate of 11/18/2008 (Doc.119) After recalling that Mandate, the Eighth Circuit Court of Appeals re-instated Griffin's first direct appeal. The Eighth Circuit Court of Appeals then failed to appoint Griffin counsel, which is an egregious error in judgment in violation of Griffin's Sixth Amendment right to counsel. See U.S. Const. Amend. VI. See also Smith v. Robbins, 528 U.S. 259(2000) ("denial of counsel altogether...warrants a presumption of prejudice.").

On 1/9/2023 Griffin filed a motion to recall the Mandate of 11/18/2008 (Doc.119). See Appendix B.. On 1/13/2023 the Eighth Circuit Court of Appeals denied the motion. See Appendix C. On 1/18/2023 Griffin filed motion for En Banc review of the denial of his motion to recall the Mandate of 11/18/2008(Doc.119). See Appendix D. The Eighth Circuit Court of Appeals denied En Banc review on 2/17/2023.. See Appendix E.

The Eighth Circuit Court of Appeals violated Griffin's Sixth Amendment right to counsel by failing to appoint Griffin counsel on his re-instated first direct appeal back in 2008. Once the Eighth Circuit Court of Appeals re-instated Griffin's first direct appeal Griffin was left without counsel. The Eighth Circuit Court of Appeals forced Griffin to prepare and argue his first direct appeal, without an attorney, from the prison cell of a United States Penitentiary. It is well established that the Sixth Amendment guarantees the right to the assistance of counsel on direct appeal. See Evitts v. Lucey, 469 U.S. 387,396-97(1985); see also Douglas v. California, 372 U.S. 353,357-58(1963). In Penson v. Ohio, 488 U.S. 75, 88-89(1988), the Supreme Court established as a separate violation the failure to advise an indigent defendant of his right to appointed counsel on direct appeal.

The docket record is evidence of the Constitutional error in judgement by the Eighth Circuit Court of Appeals. The court docket is clear that after the Eighth Circuit Court of Appeals granted Griffin's attorneys to withdraw from his case (Doc.120) that Griffin was without counsel in violation of his Sixth Amendment right to counsel on appeal. See Appendix F. Griffin was required , as a matter of right, to have the assistance of counsel on his first direct appeal and the Eighth Circuit Court of Appeals failed to secure that right in violation of his Sixth Amendment right to Assistance of Counsel.

The Eighth Circuit Court of Appeals violated Griffin's Sixth Amendment right to the assistance of counsel by not ensuring Griffin had counsel on his first direct appeal. This error in judgment is why Griffin filed motion to recall the Mandate of 11/18/2008 (Doc.119). The Eighth Circuit Court of Appeals clearly made an error in judgement by failing to secure Griffin counsel on his first direct appeal, yet refused to recall the Mandate (Doc.119) to correct that error in judgment. Griffin has been denied counsel on his first direct appeal since 2008. The Eighth Circuit Court of Appeals has violated Griffin's Sixth Amendment right to counsel since 2008. See APPENDIX A.

C. The Eighth Circuit Court of Appeals was required to recall the Mandate to correct its error in judgment.

Griffin was denied counsel on his first direct appeal. Griffin has been denied this counsel since 2008. Griffin has spent the last 15 years pleading with the United States District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals that his Fifth and Sixth Amendment rights have been violated due to being denied counsel at a critical stage in court proceedings. This denial of counsel has resulted in no meaningful adversarial testing. Griffin has suffered prejudice because he was not allowed appellate counsel at all.

Griffin was abandoned by counsel in 2008. That is why the Eighth Circuit Court of Appeals re-instated his first direct appeal on 12/15/2008 (Doc.121). But the Eighth Circuit Court of Appeals made a grave error in judgement: it failed to appoint Griffin counsel. Under the duress of imprisonment, untrained in the law, and forced by the Eighth Circuit Court of Appeals to file pro se, Griffin's appeal was affirmed. On 1/9/2023 Griffin filed a motion to recall the Mandate of 11/18/2008 (Doc.119) due to the Eighth Circuit Court of Appeals failure to appoint him counsel on his first direct appeal. Griffin's motion to recall the Mandate was denied. His motion for En Banc review was also denied.

Was the Eighth Circuit Court of Appeals required to recall the Mandate of 11/18/2008 (Doc.119) due to the error in judgment of failing to appoint Griffin counsel on his first direct appeal? It is a fact that the Eighth Circuit Court of Appeals did not appoint Griffin counsel on his first direct appeal. It was an error in judgement for the Eighth Circuit Court of Appeals to not appoint Griffin counsel on his first direct appeal. The fact that the Eighth Circuit Court of Appeals proceeded through Griffin's first direct appeal while Griffin did not have counsel violated Griffin's Fifth Amendment right to Due Process and Equal Protection under the law, and his Sixth Amendment right to the Assistance of Counsel. See U.S. Const. Amend. V & VI.

The nature of a recall of a Mandate is not discretionary. When an error in judgment has occurred the Mandate must be recalled and the appropriate remedy provided. It is what the Fifth Amendment requires. It is what the Sixth Amendment requires. Here, the Eighth Circuit Court of Appeals made an error in judgment and was required to recall the Mandate of 11/18/ 2008 (Doc.119) again as the Eighth Circuit Court of Appeals denied Griffin counsel on his first direct appeal, then. See Appendix B. This not only violated Griffin's Fifth and Sixth Amendment rights but prejudiced the entire appellate proceedings. See 11th Circuit,Cir.R.41-1.

CONCLUSION

For the foregoing reasons, Griffin respectfully requests that this Court issue a writ of certiorari and order the Eighth Circuit Court of Appeals to recall the Mandate of 11/18/2008 (Doc.119), re-instate Griffin's first direct appeal, and appoint Griffin counsel.

Respectfully submitted,

D. Mario B. Griffin

Date: March 23, 2023