No: 23 - 5573

In the
Supreme Court of the United States

LASHAUN TRACY TINNEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In light of the facts of this case, was the defense counsel ineffective in light of this court's precedent in *Strickland v. Washington,* 466 U.S. 668 (1984)?

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 Fourth Circuit and the United States District Court for the Eastern District of North Carolina.

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

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

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, was entered on May 25, 2023, an unpublished decision in *United States v. Tinnen,* 2023 U.S. App. LEXIS 12976 (4th Cir. May 25, 2023), is reprinted in the separate Appendix A to this Petition.

The opinion of the Eastern District of North Carolina, whose judgment is herein sought to be reviewed, was entered on March 30, 2022, an unpublished decision in *Tinnen v. United States,* No. 18cr290 (E.D. North Carolina, August 30, 2022), is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on May 25, 2023. 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:

> 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.

Id. Fifth Amendment.

STATEMENT OF THE CASE

On August 1, 2018, Tinnen was formally charged in the Eastern District of North Carolina with (1) conspiracy to distribute and intent to distribute five kilograms of cocaine, and (2) possession with the intent to distribute cocaine, as documented in (DE:1). Tinnen entered a guilty plea for both charges on October 11, 2018 (DE:23). Subsequently, on April 17, 2019, the court handed down a sentence of 262 months for the first count and 240 months for the second count, with both sentences to run concurrently. Additionally, Tinnen received supervised release terms of 5 years for the first count and 3 years for the second count, also to run concurrently (DE:62). A special assessment of $200.00 was further imposed by the court. Tinnen proceeded on appeal, however, on November 18, 2019, the Fourth Circuit affirmed his sentence and

conviction. See, *United States v. Tinnen*, No. 19-4302, 2019 U.S. App. LEXIS 34296 (4th Cir. Nov. 18, 2019). No writ of certiorari was sought.

On February 16, 2021, Tinnen filed a motion pursuant to 28 U.S.C. § 2255, seeking to vacate, amend, or correct his 262-month sentence [Doc. 80]. In response, on April 30, 2021, the government submitted a motion to dismiss Tinnen's § 2255 request and alternatively requested summary judgment [Doc. 92], accompanied by a supporting memorandum [Doc. 93]. Tinnen countered with an opposition on August 5, 2021 [Doc. 99], which was subsequently rejected on March 30, 2022. Tinnen requested a Certificate of Appealability in the Fourth Circuit which was denied.

STATEMENT OF THE FACTS

The DEA, in conjunction with the Raleigh Police Department, orchestrated a sting operation to buy eighteen ounces of cocaine from Tinnen. This operation was documented in (Doc. 44, ¶-7). They agreed to conduct the transaction at Crabtree Valley Mall in Raleigh, North Carolina. When Tinnen got there, he positioned his car next to a covert vehicle used for the operation. As law enforcement moved in for the arrest, Tinnen tried to speed off. A defense specialist later observed that Tinnen seemed to be trying to avoid the van rather than collide with it,

as noted in (Doc. 70 at p. 40). However, after making contact with the van, three uniformed officers emerged and apprehended him. (Doc. 70 at p. 15).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT COURT OF APPEALS HAS 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

IN LIGHT OF THE FACTS OF THIS CASE, WAS THE DEFENSE COUNSEL INEFFECTIVE IN LIGHT OF THIS COURT'S PRECEDENT IN *STRICKLAND V. WASHINGTON,* 466 U.S. 668 (1984)?

Tinnen requested a certificate of appealability from the Fourth Circuit Court of Appeals in line with 28 U.S.C. § 2253(c)(1)(B) and Fed. R. App. P. 22(b)(1). This is because the District Courts' decision regarding the claim of ineffective counsel is arguably "debatable" among rational jurists. This perspective is supported by several cases, including *Buck v. Davis*, 137 S.Ct. 759 (2017), which re-emphasizes the standard for granting a COA. Other cases like *Tennard v. Dretke*, 542 U.S. 274 (2004); *MillerEl v. Cockrell*, 537 U.S. 322 (2003); and *Slack v. McDaniel, 529* U.S. 473 (2000) echo this sentiment. Furthermore, *Sorto v. Davis,* 672 F. App'x 342 (5th Cir. 2016) suggests that a defendant needs to show that the issues at hand are "worthy of further exploration." Additionally, *Rosales v. Dretke*, 133 F. App'x 135 (5th Cir. 2005) and *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997) emphasize that any uncertainty about granting

a COA should lean in favor of the petitioner. See also *Booker v. United States*, 2014 U.S. Dist. LEXIS 176778 (W.D.N.C. Dec. 22, 2014) (any doubts about issuing a COA should be resolved to benefit the petitioner.)

To secure a COA, one doesn't need to provide definitive proof of an error. Quite the opposite. As articulated in *Miller-El*, even if every rational jurist might concur that the petitioner won't succeed after a full review, the claim can still be considered "debatable" (537 U.S. at 338). Succinctly, § 2253(c) sets a relatively low bar for the issuance of a COA, as highlighted in *Buck v. Davis*, 137 S.Ct. at 773–75. The court emphasized: "At the COA stage, the appellate court should primarily focus on a preliminary examination of the claim's underlying merit, questioning merely whether the District Court's ruling was open to debate." *Id.* at 774, referencing *Miller-El,* 537 U.S. at 327, 348.

A. "Substantial Showing of Denial of a Constitutional Right" –Ineffective assistance of counsel when counsel failed to object to an improper firearm enhancement absent sufficient nexus to support a firearm enhancement.

One of the foundational rights guaranteed by the U.S. Constitution is the right to effective legal representation. When this right is compromised, it can lead to a denial of a constitutional right. In the

context of this case, the claim revolves around the alleged ineffective assistance of counsel, specifically when the counsel did not raise objections to a potentially unwarranted firearm enhancement.

For a firearm enhancement to be validly applied, there must be a clear and substantial connection or "nexus" between the firearm and the underlying offense. Without this nexus, the enhancement could be seen as arbitrary or excessive. If the counsel failed to challenge this enhancement despite the absence of a clear nexus, it could be argued that the defendant did not receive effective legal representation, thereby potentially violating their constitutional rights.

The question then becomes whether this failure on the part of the counsel had a material impact on the outcome of the case. If it can be demonstrated that the outcome might have been different had the counsel objected to the firearm enhancement, then there's a substantial showing of the denial of a constitutional right.

1. Ineffective Assistance of Counsel and Mischaracterization by the District Court.

Tinnen's primary contention, as presented in his § 2255 motion, was the alleged ineffective assistance of counsel on two fronts: 1. The failure

of his counsel to challenge the sentencing enhancement related to firearm possession in the context of drug trafficking, as per U.S.S.G. § 2D1.l(b)(l). 2. The counsel's failure to object to an alleged "breach of the plea agreement" when the government did not oppose the § 2D1.l(b)(l) enhancement. [Doc. 80 at 4-5]. However, the District instead of addressing the ineffective assistance of counsel claim head-on, the court reframed Tinnen's argument, suggesting that he was retroactively challenging his advisory guideline range, a move that's generally impermissible as per *United States v. Foote*, 784 F.3d 931, 935-36 (4th Cir. 2015); *United States v. Pregent*, 190 F.3d 279, 283-84 (4th Cir. 1999) ('Barring extraordinary circumstances ... an error in the application of the Sentencing Guidelines cannot be raised in a [section] 2255 proceeding.')" Yet, Tinnen's core argument was not a direct challenge to the guideline range but rather a critique of his counsel's performance. Specifically, Tinnen argued that his counsel should have objected to the firearm enhancement during sentencing, especially given the circumstances surrounding the firearm's location and its connection to the offense. The U.S.S.G. § 2D1.1 cmt. n.11(A) itself states that an

enhancement should not be applied "unless it is clearly improbable that the weapon was connected with the offense."

The facts, as presented, seem to support Tinnen's position. The firearm was found not at the scene of the arrest but at a residence belonging to Tinnen's estranged wife, located approximately 45 miles away. At the time of the arrest, Tinnen was not residing there, and Mrs. Tinnen's affidavit further strengthens this claim. She confirmed their separation, the firearm's location in her locked bedroom, and Tinnen's lack of access to both the residence and her room. She also claimed to have informed Tinnen's counsel about these facts, which could have been used to counter the firearm enhancement. [Doc. 80 at 13].

In light of these details, Tinnen's argument were not a mere challenge to the advisory guideline range but a genuine claim of ineffective assistance of counsel. Counsel's failure to object to the firearm enhancement, given the evidence at hand, could be seen as a significant oversight, potentially impacting the fairness and justness of Tinnen's sentencing.

In his § 2255 motion, Tinnen centered his argument on the ineffective assistance of counsel, specifically highlighting the highly improbable

connection of the firearm to the offense. This stance is supported by the precedent set in *United States v. Bolton*, 858 F.3d 905, 912 (4th Cir. 2017), which posits that the enhancement should only be applied if the weapon was present, barring situations where it's improbable that the weapon was associated with the crime.

The District Court's failure to address Tinnen's claim of ineffectiveness is a glaring oversight. The affidavit provided by Tinnen's wife, which remains uncontested in the records, lends significant credence to his claim. She confirmed their separation and detailed the firearm's location in her locked bedroom, emphasizing that Tinnen had no access. Furthermore, she relayed that she had informed Tinnen's counsel of these facts, which could have been instrumental in contesting the firearm enhancement. Given the substantial nature of this evidence and the uncontested status of the affidavit, it's evident that an evidentiary hearing is warranted. Such a hearing would facilitate a comprehensive evaluation of the counsel's actions (or inactions) and ascertain whether Tinnen's constitutional right to effective legal representation was infringed upon.

Considering the District Court's omission in addressing the ineffective assistance of counsel claim under the appropriate standard, there's a compelling case for the issuance of a certificate of appealability. The court's decision, in light of the evidence and circumstances presented, is undeniably "debatable" as delineated in *Buck v. Davis*, 137 S.Ct. 759, 773-75 (2017). Consequently, Tinnen's appeal for a certificate of appealability merited serious consideration.

B. "Substantial Showing of Denial of a Constitutional Right" – Counsel was ineffective when he failed to object to the government's breach of the plea agreement when they did not object to the firearm enhancement as applied by the Probation Officer.

Tinnen entered into a plea agreement with the government, which included the following pertinent terms:

> 5 The ***parties agree***, pursuant to Fed. R. Crim. P. 11(c)(1)(B), ***to the following positions as to the below-listed sentencing factors only***, which are not binding on the court in its application of the advisory Guideline range; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the United States in no longer bound to its positions as to those factors:
>
> a. The relevant and readily provable quantity of cocaine to be used in determination of the base offense level pursuant to U.S.S.G. § 2D1.1 is at least 5 kilograms but less than 15 kilograms, which results in a base offense level of 30.

> b. A downward adjustment of 2 levels for acceptance of responsibility is warranted under U.S.S.G. § 3E1.1, unless the offense level determined prior to the operation of U.S.S.G. 3E1.1(a) is level 16 or greater, in which event a down adjustment of 3 levels is warranted.

(Doc. 23, at p. 8).

The district court took a different position on the reading of the plea agreement:

> "Tinnen misreads the plea agreement. The plea agreement states that the "The parties agree, pursuant to Fed. R. Crim. P. 11(c)(1)(B), to the following positions as to the below-listed sentencing factors only, which are not binding on the Court in its application of the advisory Guideline range." [D.E. 23] 8. The agreement then lists the agreed-upon drug weight for the base offense level and credit for acceptance of responsibility. Id. This provision does not mean the government and Tinnen agreed that only those sentencing factors applied. Rather, this provision means only that the parties agreed as to those two sentencing factors. Tinnen and the government were both free to object or not object to other sentencing factors. Indeed, at sentencing, Tinnen's counsel objected to the section 3A1.2(c)(1) enhancement. See Sent. Tr. at 5-53. Moreover, even if Tinnen's interpretation were correct, he still does not plausibly allege prejudice from his counsel's failure to object to the government's failure to object to the section 2D1.1(b)(1) enhancement at sentencing. Notably, during Tinnen's Rule 11 colloquy, the court informed Tinnen that it was not a party to the plea agreement and the sentencing recommendations in the plea agreement were not binding on the court. See Rule 11 Tr. at 4-5, 17-22. The government did not breach the plea agreement."

Id. Tinnen v. United States, No. 5:18-CR-290-D-1, 2022 U.S. Dist. LEXIS 57759, at *8 n.3 (E.D.N.C. Mar. 29, 2022).

While the district court retained ultimate discretion in sentencing Tinnen, it doesn't grant carte blanche authority to apply the firearm sentencing enhancement. A clear connection or "nexus" between the firearm and the offense is a prerequisite for such an enhancement. As established in *United States v. Manigan, 592 F.3d 621, 626, 629 (4th Cir. 2010)*, the government bears the burden to demonstrate, by a preponderance of the evidence, that the firearm was possessed in relation to drug activity that aligns with the offense of conviction's course of conduct or common scheme. This critical determination was not conclusively made. Instead, Tinnen contested it, but his counsel failed to address it. Given the potential ambiguity in the plea agreement's interpretation by the parties involved, an evidentiary hearing becomes essential. The court's decision to forgo such a hearing strengthens the case for granting a COA as an initial step in examining the matter.

The Supreme Court's ruling in *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003) underscores that the decision to issue a COA is meant to be a preliminary examination, conducted prior to a comprehensive review of the petitioner's claims. The Court emphasized that the COA determination is a distinct process, separate from evaluating the

underlying merits of the case. In fact, a full exploration of the claims' factual or legal bases during the COA inquiry is not only unnecessary but also prohibited by § 2253(c). As the Court noted, bypassing the COA process and directly deciding on the merits of an appeal is akin to adjudicating an appeal without proper jurisdiction. This perspective is further supported by *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003).

In light of these considerations, there was a compelling argument for the issuance of a COA, given the preliminary nature of the inquiry and the unresolved issues surrounding Tinnen's sentencing enhancement.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Fourth Circuit.

Done this 20 day of August 2023.

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