No. 23-5818

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

EDUARDO MARTINEZ — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SEVENTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

EDUARDO MARTINEZ (13976-027)
(Your Name)

FCI-2 ,Oakdale, Louisiana,P. O. Box 5010
(Address)

Oakdale, LA 71463
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

(1). Whether a court of appeals can deny a Certificate of appealability because it believes the applicant will not demonstrate an entitlement to relief and the appeal will not succeed.

TABLE OF AUTHORITIES CITED

LIST OF PARTIES

[x] 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

Tharpe v. Eric Seller, 583 U.S_____(2018)
Miller El v. Cockrel, 537 U.S 322 (2003)
Buck v. Davis, 580 U.S_____ (2017)
Welch v. United States, 578 U.S 120 (2016)

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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

[X] For cases from **federal courts:**

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

[ ] reported at _____; or,
[X] 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 March 24, 2023.

[x] 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: _____, 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. § 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

28 U.S.C 2253(c)(2):

"A certificate of appealablity may issue under paragraph 1 only if the the applicant has made a substantial showing of a denial of a constitutional right"

STATEMENT OF THE CASE

The petitioner filed a 28 U.S.C 2255 motion on July 30, 2018 and an amendment thereto on December 10, 2018 respectively to vacate, set aside or correct the sentence imposed by the United States District Court of Northern District of Indiana Forth Wayne Division, pursuant to a 324-months sentence ordered by the court for each of the two violations of 21 U.S.C 841(a)(1) and 120-months for violations of 922(g)(5), all to be served concurrently. The post-conviction 28 U.S.C 2255 motion denied by the district court on July 29. 2022 was predicated on trial counsel's ineffectiveness for failure to file a notice of appeal, and same opinion also denied the certificate of appealabilty.

Therefrom, the 7th circuit court of appeals denied the petitioner's request for certificate of appealablity on March 3, 2023 on account that it believes the petitioner will not demonstrate an entitlement to relief. The gravamen issue for the certiorari consideration in this case is whether a court of appeals can deny a certificate of appealablity without conducting a 28 U.S.C 2253(c)(2) threshold inquiry determination analysis or a narrow and incomplete requisite threshold inquiry, and if not whether the court of appeals erred in failing to make the determination. Accordingly, at the forefront of this petitioner is the thrust of 28 U.S.C 2253(c)(2), the petition for the writ of certiorari is hereby timely filed before this court.

REASONS FOR GRANTING THE PETITION

The law is well-settled that "cases in the court of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree". Hohn v. United States. 524 U.S 236 (1998), Ayetas Aka Zeleya Corea v. Davis Director. Tx. Dept. of Corrections. 584 U.S-- n.3 (2018)[Alito J. delivering unanimous opinion]. Indeed, the denial of certificate of appealability are issues subject to 28 U.S.C 2252(c) scrutiny and "common law certiorari is available to review the denial of certificate of appealability". Hohn (supra). Ayetas. n.1 (supra). Tharpe v. Eric Sellers:Warden. 538 U.S (2018).

Accordingly, "this court has jurisdiction to review denial of application for certificate of appealability by a circuit judge, or by court of appeals panel" and"determine whether the petitioner is entitled to certicate of appealablity". Hohn. (supra), Brown v. Moore. 532 U.S 968 (2001)(Granting a pro se petition for certiorari and vacating the 11th circuit judgment denying a certificate of appealablity), Welch v. United States, 578 U.S (2016)(Granting Welch a pro se certiorari petition that presented two questions).

Having established that this court has the "statutory certiorari jurisdiction to review denial of a certificate of appealbility" in issue, there are compelling reason law apart from the National importance of this case that are grounded in the Supreme Court's rational to grant this certiorari. Slack v. Mcdaniel, 529 U.S 473, 481 (2000).

(A). THE DECISION OF THE APPELLATE COURT DENYING THE CERTIFICATE OF APPEALABLITY IS ERRONEOUS AND IN CONFLICT WITH THE DECISION OF THE SUPREME COURT

This certiorari petitioner seeks the Supreme Court's review of the diverged and conflicting opinion of the Seventh Circuit Court of Appeals on federal issues of law and procedures when it denied the issuance of the certificate of appealablity contrary to the "controlling precedents" established with clarity and candor by the Supreme Court. See Supreme Court rule 10(c). Indeed,the 7th circuit court of appeal's decision has not only conflicted with the Supreme Court's well-established COA "controlling precedents", but has also departed from the accepted federal practice established by 28 U.S.C 2253(c)(2) rather than promote the uniformity and even-handedness. See Agostini v. Felton. 521 U.S 203, 237-238 (1997)("Lower federal courts are bound not only to the holding of the Supreme Court's decisions but also by their mode of analysis").

The COA improperly denied here by the 7th circuit court of appeals is crucial to the functions of the petitioner's 2255 petition because the dispute here is a

proceeding seeking relief for an important and redressable injury that is the wrongful detention in violation of the constitutional right to effective assistance of counsel. See Hohn (supra). Being so, at the forefront of this certiorari request is the thrust of 28 U.S.C 2253(c)(2) and cascades of Supreme Court's COA "controlling precedents" expounded with clarity and provide no basis for the departure and the conflict created by the appellate court in issue.

It is axiomatic that "the COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal". See Miller El v. Cockrell. 537 U.S 322. 336 (2003). "When a habeas petitioner (or 2255 petitioner) seeks permission to initiate appellate review of the dismissal of his petition the COA should limit its examination to a threshold into the underlying merit of his claim". This threshold question should be decided without full consideration of the factual or legal basis adduced in support of the claim, and " a COA ruling is not the ocassion for ruling on the merit of the petitioner's claim". Miller El. 527 US at 327 and 336.

Infact, obtaining a COA does not require a showing that the appeal will succeed and a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief". Welch. 578 U.S (supra) quoting Miller El. 537 U.S at 337. Rather, the COA establishes a procedural rule and require the appellate court to conduct a limited threshold inquiry analysis and make a determination whether the COA applicant has made a substantial showing of the denial of a constitutional right pursuant to 2253(c)(2). Inother words, "to obtain a COA a petitioner need not prove before the issuance of the COA that some jurist would grant the petition for habeas corpus" or 2255. Miller El. at 338.

A perusal of the 7th circuit court of appeals decision shows that the requisite "substantial showing" analysis relied on by the court and laced upon the court of appeals as an enduring part of the venerable appellate judicial duty by 28 U.S.C 2253(c)(2) at the COA stage, failed this case and sits in conflict with the Supreme Court's "controlling precedents". Notably, in making its "substantial showing" analysis determinations, this opinion failed to decide whether "reasonable jurist could debate whether or for that matter agree that the petition should have been resolved in a different manner", or that the issues presented were inadequate to deserve encouragement to proceed further. See Miller El. 527 U.S at 336.

Simply stated, a mere recital of the "substantial showing" determination and limited scope of the "substantial showing" analysis determination without the additional judicial analysis and findings that "no jurist of reason could disagree with the district court's resolution of the constitutional claim", or that no jurist would conclude the issues presented are adequate to deserve the encouragement

to proceed further, has failed the sufficient indicia of the "substantial showing" analysis determination that the denial of a COA was required to establish to justify the COA denial in this case. See Miller-El. 537 U.S at 327. 335, Barefoot v. Estelle. 463 U.S 880, 893 n.3 (1983).

More to the point, as an additional proof of the error and conflict in claim, same opinion has also first decided the merit of the appeal by noting that "the district court found that counsel was never directed to file a notice of appeal". and then justify its COA denial on the adjudication on the merits, and in essence decided an appeal without jurisdiction. See Miller-El at 336.

However, against this judicial practice, the Supreme Court has warned that "deciding the substance of an appeal in what should only be a threshold inquiry undermines the conscept of the COA. The question is the debatability of the underlying constitutional claim, not the resolution of the debate", and a "COA is not the ocassion for a ruling on the merits of the petitioner's claim". See Miller-El. at 331-342.

To this end, the Seventh Circuit's opinion must yield to the Supreme Court's "controlling precedents", the ususal and accepted course of judicial proceedings and analysis at the COA stage. So far as important here, the need to bring the Seventh Circuit court of appeals opinion to berth with the Supreme Court's "controlling precedents" in conflict with weighs heavily in favor of granting this certiorari.

(B). THE SEVENTH CIRCUIT APPELLATE DECISION DENYING THE COA SITS IN CONFLICT WITH SIMILARLY SITUATED OPINION OF ANOTHER COURT ON 2253 (C)(2) ISSUES

Apart from conflict with the Supreme Court's COA precedents and departure from the "usual and accepted course of judicial proceeding" at the COA stage. The opinion has also triggered a conflict for a more fundamental reasons by conflicting with similarly-situated opinions of another appellate court and has evolved divergence, conflict and split of authority among other appellate courts that have adopted the Supreme Court's well-established "substantial showing" analysis-determination standard of review that the 7th circiuit hae rejected. To this end, this case is ideal for settling intercircuit conflict on 2253(c)(2) prerequisite threshold "substantial showing" standard inquiry analysis and determination rules.

Particularly, the position taken by the 7th circuit appellate court is diametrically different from the Fifth, Sixth, Nineth, Eleventh and District of Columbia circuits on similarly-situated issue in claim. The crux of the claim here is that those appellate courts have uniformly adpted the Supreme Court's Slack, Miller-El, and Buck COA progeny analysis and have held in affirmative support of the petitioner's undrelying claim that a COA "substantial showing" analysis requires more than a

mere recital or invocation of "substantial showing" on the paper. Rather, in addition to its "substantial showing" analysis determination, the court must determine whether a reasonable jurist could debate whether or not for that matter agree that the petition should have been resolved in a different manner, or that the issue presented were inadequate not deserving the encouragement to proceed further, and in determing whether the substantial showing requirement is satisfied the court of appeals must not perform a full consideration of the merit. See Boyer v. Chappell, No. 13-32097 (9th cir. July 16 2005), Penny v. Sec. Dept. of Corrections, No. 10-14628 (11th cir. Feb. 5. 2013), Ibrahim v. United States. 09-5052 (DC. cir. Nov. 29, 2011), Shoemaker v. Taylor. 730 F.3d 778, 790 (9th cir. 2013), Duffresne v. Denise Palmer. No. 171340 (6th cir.), Paul Devoe III v. Lorie Davis Dir.Tx.Dept. of Criminal Justice. No. 16-70026 (5th cir. Jan. 9th cir. 2018), United States v. Arrington. No. 12-3037 (DC. cir. August 22. 2014), Blount v. United States, No. 15-5056 (DC.cir. Nov. 29th 2011)("When a court of appeals properly applies the COA standard and determination that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious").

Arguably, the manifest scope of 28 U.S.C 2253(c)(2) and Supreme Court's "controlling precedents" adopted by these appellate courts in denying the COAs presented before them, established that the 7th circuit appellate court should have conducted an indepth and broader analysis of the "substantial showing" analysis instead of a narrowed-scope determination adopted to erroneously deny the petitioner's request for the COA. The concensus among these appellate courts on the question of law and federal procedure presented, also established the distinction and differences on 28 U.S.C 2253(c)(2) as a matter that is analytically dispositive as a conflict under Rule 10 as to weigh in favor of granting this certiorari. Thus, this case presents an opportunity for this court to resolve the judicial conflict created by the 7th circuit.

In sofar asthis court has judicially-noted that "many court of appelas decisions have denied applications for COA only after concluding that the appellants were not entitled to habeas or 2255 relief, without even analyzing whether the applicant has made a substantial showing of a denial of a denial of constitutional right. The requisite threshold inquiry requirement engulfed in the substantial showing analysis standared of review ignored and conflicted with by the 7th circuit court of appelas, would be uterly frustrated and transformed into little more than verbiage if 7th circuit was allowed to deny the COA application in question on a merit review, and without making the reasonable jurist debatablity inquiry and determination. This case is ideal for the Supreme Court to settle the COA issuance determination quagmire vreated by the 7th circuit.

Infact, granting this certiorari is necessarily connected to bringing the 7th

circuit 's opinion to berth with the accepted and usual course of judicial proceeding at the COA stage and with the Supreme Court's "controlling precedents". Most tellingly, this certiorari if granted will secure and maintain uniformity among the court of appeals on COA issuance law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eduardo Martinez

Date: June 19, 2023