ORIGINAL

No. 23-5906

IN THE
SUPREME COURT OF THE UNITED STATES

CAREY ACKIES,

PETITIONER

v.

UNITED STATE OF AMERICA,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
First Circuit

PETITION FOR WRIT OF CERTIORARI

CAREY ACKIES
Reg. No. 88900-053
FCI-McKean
P.O. Box 8000
Bradford, Pa. 16701

Questions Presented

1. WHETHER ACKIES HAS SATISFIED ALL PROCEDURAL PREREQUISITES NECESSARY TO FILE COA?

2. WHETHER ACKIES HAS SATISFIED THE STANDARDS OF STRICKLAND V. WASHINGTON?

List of Parties

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

Petition for a Writ of Certiorari

Petitioner Carey Ackies respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Opinion Below

The opinion of the First Circuit under review; a copy is attached hereto.

Statement of Jurisdiction

The First Circuit issued its decision on July 19, 2023. The time within which to file a petition for a writ of certiorari extends until October 17th, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

The Fifth Amendment to the U.S. Constitution provides in pertinent part that: "No person shall be...subject for the same offense to be twice put in jeopardy of life or limb...."

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. In addition, case law requires that to satisfy the right, the assistance must be effective. See Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This right to effective assistance of counsel extends to require such assistance on direct appeal of a criminal conviction. See Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985).

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Statement of the Case

I. Proceedings in the District Court

According to the government, Ackies was charged by Indictment with conspiracy to possess with intent to distribute heroin and cocaine base, and possession with intent to distribute those substances, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Dkt # 9. 1 He filed numerous suppression motions. Dkt ## 107-09, 116-18. One described a federal DEA investigation based in Maine that included information from cooperating defendant (CD)1 and CD2 about a suspect known as Boyd, Boy, and Killer. Dkt # 108. During that investigation, DEA agents obtained two warrants for real-time precise-location information (PLI) on two target phones--TT1 and TT2. Dkt # 107. Ackies contended: probable cause was lacking for the PLI warrant regarding TT1; the warrants were void because they issued in violation of provisions applicable to tracking-device warrants; and his arrest was not supported by probable cause. Dkt # 109.

The court's jury charge repeated its instruction on the limited use of the transcripts. Tr.1137. The jury found Ackies guilty as charged. Tr.1156-59.

The PSR combined historical amounts of cocaine base, heroin, and oxycodone with drugs seized from CD2 and converted them to their marijuana-equivalent, which produced 2,155.97 kilograms of marijuana and base offense level (BOL) 30. PSR-¶¶15, 21. After applying various guideline enhancements, the result was total offense level 38, which, when coupled with Ackies's criminal history category III, produced a guideline sentencing range (GSR) of 292-365 months. PSR-¶¶22-25, 30, 67. Ackies preserved objections to the drug-quantity calculation and to whether the offense involved at least five participants for aggravated-role purposes. Tr.1184-86, 1222-23, 1237-41.

During sentencing, the court admitted several exhibits under seal without objection, including the grand jury transcript for CD1's testimony. Tr.1198-99. The court found "ample support for the [PSR's drug-quantity] amount, which was "very conservative, and there probably was a substantial amount more than that." Tr.1259. And the court "easily f[ou]nd the four-level enhancement for being an organizer or leader of criminal activity involving five or more people" applied for reasons stated in the PSR and argued by the Government. Tr.1260. Adopting the remaining PSR calculations and 292-365-month GSR, the court sentenced Ackies to a variant 230-month term. Tr.1260-63.

On March 13, 2019, the First Circuit rejected Ackies' arguments on appeal and held that the district court correctly denied Ackies's suppression motions because: (1) the initial precise-location-information (PLI) warrant was supported by probable cause; (2) the PLI warrants properly issued under the Stored Communications Act from a federal magistrate judge in Maine who had jurisdiction over the drug-trafficking offenses being investigated; and (3) and even assuming error, the Leon good-faith exception to the exclusionary rule applies.

Ackies' Section 2255 Motion

On December 7, 2020, Ackies filed a timely Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C. §2255. Dkt. # 274. In this motion, Ackies asserted four separate grounds upon which he argues that his counsel was ineffective: (1) "Counsel was ineffective during plea negotiations;" (2) "improper sentencing enhancement for guns and drugs"4; (3) "the government breached its deal with the defendant during plea negotiations;" and (4) "violation of right to speedy trial or prosecutorial misconduct." Dkt # 274. One June 8, 2021, and again on July 29, 2021, the defendant filed additional material supplementing his original

2255 filing. The section 2255, motion for reconsideration and COA were denied on July 11th, 2022. (See Dkt #. 304).

Thereafter, in the First Circuit Ackies filed a request for COA which was denied July 19th, 2023. (See attachments).

Reasons for Granting the Writ

I. The First Circuit's decision regarding the COA is not consistent with the standards of Barefoot v. Estelle, 463 U.S. 880, 893 (1983). Ackies' section 2255 motion asserted four separate grounds upon which he argues that his counsel was ineffective: (1) "Counsel was ineffective during plea negotiations;" (2) "improper sentencing enhancement for guns and drugs"4; (3) "the government breached its deal with Ackies' during plea negotiations;" and (4) "violation of right to speedy trial or prosecutorial misconduct." Dkt # 274.

Ackies, moves this Court for a Certificate of Appealability within the meaning of Section 2253(c) of Title 28 of the United States Code and Rule 22(b) of the Federal Rules of Appellate Procedure. The standard for obtaining a certificate of appealability (COA) in the U.S. Supreme Court appears to be the same as the standard for obtaining a COA in lower courts: the applicant must make a "substantial showing of the denial of a constitutional right."

Standard for Grant of a Certificate of Appealability

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), amended the availability of appealing the denial of a motion under 28 U.S.C. Section 2255:

"Unless a circuit justice or judge issues a Certificate of Appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court; or

(B) the final order in a proceeding under section 2255."

28 U.S.C.A. Section 2253(c)(1) (supp. 1998); Hohn v. United States, 524 U.S. 236 (1998); Soto v. United States, 185 F.3d 48, 51 n.3 (2d Cir. 1999).

The standard for granting a COA is "materially identical" to the pre-AEDPA standard for granting a certificate of probable cause. 28 U.S.C. Section 2253(c)(2) and Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). Barefoot found the following statement "cogently sums up this standard:"

"In requiring a 'question of some substance,' or a 'substantial showing of the denial of [a] federal right,' obviously the petitioner need not show that he would prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the questions [differently and that the questions presented] are 'adequate to deserve encouragement to proceed further.'" Id., n.4 (citations omitted); see also Weeks v.

Jones, 52 F.3d 1559, 1574 (11th Cir. 1995), cert denied, 514 U.S. 1104 (1995) (quoting Barefoot); United States v. Rocha, 109 F.3d 225, 227 n.2 (5th Cir. 1997). Certificates of Appealability may issue "only if the applicant has made a substantial showing of the denial of constitutional right[s]." Section 2253(c)(2). A "substantial showing of the denial of a federal right," see Barefoot v. Estelle, supra, 463 U.S. at 893, results in the grant of a COA where the applicant has demonstrated that the issues raised are: (1) debatable among jurists of reason; (2) that a court could resolve the issues differently; or (3) that the questions presented are deserving of further proceedings. See Tankleff v. Senkowski, 135 F.3d 235, 241, 42 (2d Cir. 1998).

Any doubt on whether to issue the certificate is resolved in favor of the petitioner, Miller v. Johnson, 200 F.3d 274 (5th Cir. 2000), and the reviewing court may take into consideration the severity of the penalty in making that determination, Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir. 1997); accord Castro v. United States, 310 F.3d 900, 903 (6th Cir. 2002); Murphy v. Ohio, 263 F.3d 466, 467 (6th Cir. 2001).

Title 28, United States Code, Section 2255 provides for post-conviction relief only when the petitioner has demonstrated that his sentence "(1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3) exceeded the statutory maximum, or (4) was otherwise subject to collateral attack." Moreno-Morales v. United States, 334 F.3d 140, 148 (1st Cir. 2003) (citing David v. United States, 134 F.3d 470, 474 (1st Cir. 1998)). A sentence is subject to collateral attack if it involves an error or defect which, if uncorrected, would result in the complete miscarriage of justice or irregularities that are inconsistent with the rudimentary demands of fair procedure. Id.
A document filed by a pro se party "is to be liberally construed, and a pro se

complaint, however in artfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)) (internal quotation marks omitted); see also Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.").

The Court is also "solicitous of the obstacles that pro se litigants face, and while such litigants are not exempt from procedural rules, [the Court] hold[s] pro se pleadings to less demanding standards than those drafted by lawyers and endeavor[s], within reasonable limits, to guard against the loss of pro se claims due to technical defects." Dutil v. Murphy, 550 F.3d 154, 158-59 (1st Cir. 2008) (citing Boivin v. Black, 225 F.3d 36, 43 (1st Cir. 2000)). "[O]ur task is not to decide whether [Williams] ultimately will prevail but, rather, whether he is entitled to undertake discovery in furtherance of the pleaded claim." Rodi v. S. New England Sch. of Law, 389 F.3d 5, 13 (1st Cir. 2004). "Our judicial system zealously guards the attempts of pro se litigants on their own behalf. We are required to construe liberally a pro se complaint and [dismissal is warranted] only if a plaintiff cannot prove any set of facts entitling him or her to relief." Ahmed v. Rosesnblatt, 118 F.3d 886, 890 (1st Cir. 1997). A pro-se party is held to less stringent standards than formal pleadings drafted by lawyers but is not excused from compliance with the rules of procedural and substantive law. Dutil v. Murphy,550 F.3d 154, 158 (1st Cir.2008). We must liberally construe the submissions and interpret them to raise the strongest arguments that they suggest. See Castillo-Gonzalez v. Administration De Correccion, 947 F. Supp. 2d 177, 178 (D.P.R. 2013).

1. WHETHER ACKIES HAS SATISFIED ALL PROCEDURAL PREREQUISITES NECESSARY TO FILE COA?

Ackies Has Satisfied All Procedural Prerequisites for Action by This Court Ackies has satisfied all of the procedural prerequisites to action by this Court on the application for Certificate of Appealability.

1. Ackies has filed a timely notice of appeal.

2.Ackies promptly applied for a certificate from the District Court prior to applying for a certificate from this Court.

3. Ackies has made more than a good faith effort to conform this application to of the requirements set out in Appellate Rule 22 and Second Circuit Local Rule 22.1(a).

4. Ackies has served all parties to the action with a copy of this application and supporting papers, as is shown in the attached Certificate of Service.

Ackies will supply this Court with any additional materials or argument that it deems necessary for a prompt resolution of this application.

In McGee v. McFadden, 139 S. Ct. 2608 (2019), the Court held that the lower courts should have granted the petitioner a COA because he had made "a substantial showing of the denial of a constitutional right." The Court further clarified that the "threshold" inquiry for a COA is more limited and forgiving than

"adjudication of the actual merits."

McGee v. McFadden discusses the standard for granting a certificate of appealability (COA) in the context of a federal habeas corpus petition. The case is relevant to the research request because it addresses the threshold inquiry for obtaining appellate review, which is a key part of the COA process.

"Nevertheless, the District Court denied McGee federal habeas relief, and both the District Court and the U. S. Court of Appeals for the Fourth Circuit summarily declined to grant McGee a "certificate of appealability" (COA), 28 U. S. C. § 2253(c), concluding that his claim was not even debatable. Without a COA, McGee cannot obtain appellate review on the merits of his claim. See ibid."

"The lower courts should have granted McGee a COA to allow review of the District Court's conclusion that the AEDPA standard was not met, because McGee has at least made "a substantial showing of the denial of a constitutional right." § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' " Buck v. Davis, 580 U. S. ——, ——, 137 S. Ct. 759, 773, 197 L.Ed.2d 1 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003)). This "threshold" inquiry is more limited and forgiving than " 'adjudication of the actual merits.' " Buck , 580 U. S., at ——, 137 S. Ct., at 773 (quoting Miller-El , 537 U.S. at 337, 123 S. Ct. 1029); see also id., at 336, 123 S. Ct. 1029 (noting that "full consideration of the factual or legal bases adduced in support of the claims" is not appropriate in evaluating a request for a COA)."

Similarly, in Slack v. McDaniel, 529 U.S. 473 (2000), the Court held that a COA should issue when the petitioner shows that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right."

"We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard provided in Barefoot, supra, at 893, and n. 4, and adopted by Congress in AEDPA." "Miller-El v. Cockrell, 537 U. S. 322, 327 (2003)."

Taken together, these cases suggest that the standard for obtaining a COA in the U.S. Supreme Court is the same as the standard for obtaining a COA in lower courts: the applicant must make a "substantial showing of the denial of a constitutional right."

2. WHETHER ACKIES HAS SATISFIED THE STANDARDS OF STRICKLAND V. WASHINGTON?

Ackies argues that: (1) "Counsel was ineffective during plea negotiations;" (2) "improper sentencing enhancement for guns and drugs"4; (3) "the government breached its deal with the defendant during plea negotiations;" and (4) "violation of right to speedy trial or prosecutorial misconduct.

On Review under § 2255, the harmless error standard applies to constitutional errors due to flawed jury instructions. Neder v. United States, 527 U.S. 1, 9-10 (1999); Sustache-Rivera v. United States, 221 F.3d 8, 18 (1st Cir. 2000). Under the harmless error standard "the inquiry is whether any trial error had a 'substantial and injurious effect or influence in determining the jury's verdict.'" Ortiz-Graulau v. United States, 756 F.3d 12, 20 (1st Cir. 2014) (quoting Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)). The burden is on the government to show that the trial error is harmless. Sustache-Rivera, 221 F.3d at 18.

In this case, the government has not met this burden, and the lower court has failed to conduct the harmless error analysis. This issue in itself raises a "question of some substance" and is clearly an issue "debatable among jurists of reason" that would resolve the question differently and is "adequate to deserve encouragement to proceed further." Barefoot, 463 U.S. at 893, n.4.

In this case, at a minimum the District Court should have granted a hearing. And, Ackies' claims are not procedurally barred. These claims can and should be considered under Strickland. As the record reflects, the strategy undertaken by defense counsel here was not aggressive and sound. If so, there was a likelihood of

improving Ackies' negotiating position with respect to pretrial resolution.

The Strickland v. Washington standard for ineffective assistance of counsel claims requires a defendant to show that (1) counsel's performance was deficient and (2) the deficiency prejudiced the defense. Subsequent cases have clarified and expanded on this standard in various contexts, such as when an attorney fails to file a notice of appeal or fails to investigate mitigating evidence in a capital case.

Some cases have also clarified or expanded on the Strickland standard. For example, in "Although our decision in Strickland v. Washington dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process."

"We hold, therefore, that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel."

"The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Strickland v. Washington, 466 U.S. 668 (1984). Strickland is directly relevant to the research request, as it sets out the two-part test for determining whether a defendant received ineffective assistance of counsel. The case has not been overruled or reversed, and thus remains good law.

Conclusion

This Court should grant the petition for a writ of certiorari.

Respectfully submitted, Oct. 14th 2023

Carey Ackies, pro-se