

NO.

23-6889 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

OCT 20 2023

OFFICE OF THE CLERK

RICHARD WAYNE BARTON

Petitioner/Defendant,

v.

UNITED STATES OF AMERICA

Respondent/Plaintiff.

PETITION FOR CERTIORARI TO THE FIFTH CIRCUIT
COURT OF APPEALS

5TH Circuit Court of Appeals Cause No. 23-40100

On appeal to the Fifth Circuit Court of Appeals from the
United States District Court for the Southern District of Texas
Galveston, Division; Cause No. 3:20-CV-107

District Judge: Honorable Jeffrey V. Brown

Richard Wayne Barton
Reg. # 96257-379
FCI Beaumont Low
P.O. Box 26020
Beaumont, Texas 77720-6020
Pro se'

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

Whether the Bureau of Prisons' failure and refusal to tender to Barton his Record on Appeal, provided by the Fifth Circuit to enable Barton to prepare his motion for certificate of appealability constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment and/or Obstruction of Justice?

LIST OF THE PARTIES

Richard Wayne Barton
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Richard W. Barton is the sole defendant and the only party to this motion.

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CORPORATE DISCLOSURE

The underlying suit is a petition for writ of habeas corpus by an inmate currently confined, seeking relief under 28 U.S.C. §2255. The Original Indictment involved Richard Wayne Barton charged with three separate offenses unrelated to any corporation, on information and belief.

I make this corporate disclosure to the best of my knowledge and belief, under penalties of perjury pursuant to 28 U.S.C. §1746.

10-6-2023
Date


Richard Wayne Barton

OPINIONS BELOW

United States v. Richard Wayne Barton, 879 F.3d 595 (5th Cir. 2018)

Richard Wayne Barton v. United States, Cause No. 23-40100, Before the United States Court of Appeals for the Fifth Circuit (The Court has denied the motions to reinstate the case, file the motion for COA out of time, and an extension to comply with the COA requirements.) (Barton cannot locate the dismissal on the legal service provided by the BOP) (August 18, 2023)

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254:

(1) 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;

The Fifth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291; 18 U.S.C. 3742(a).

"The Courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

The United States District Court for the Southern District of Texas, Galveston Division pursuant to 18 U.S.C. §3231; 28 U.S.C. §2255.

"The district courts of the United States shall have original jurisdiction ... of all offenses against the laws of the United States."

"(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released ... may move the Court which imposed the sentence to vacate, set aside or correct the sentence."

The date of the judgment sought to be reviewed is August 18, 2023. No motion for en banc or for rehearing having been filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V.

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.

U.S. CONST. AMEND. XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under Section 2255 [28 U.S.C. §2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

[]

(c)(1) 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

(B) the final order in a proceeding under Section 2255 [28 U.S.C. §2255]

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of a denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(a) 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.

[]

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

STATEMENT OF THE CASE

On August 3, 2021, the trial court issued an order denying Barton's request for relief under 28 U.S.C. §2255 (Dkt. 75), Barton's motion for an evidentiary hearing (Dkt. 77) and Barton's motion for appointment of counsel (Dkt. 78). Barton filed a request for a ruling determining a certificate of appealability (COA) pursuant to the rules (August 27, 2021) (Dkt. 81). (Barton does not have, the Bureau of Prisons (BOP) having refused to deliver, the Record on Appeal (ROA).)

Barton timely appealed. On or about March 15, 2023, the Fifth Circuit sent its introductory correspondence and briefing schedule (brief due within 40 days).

On March 31, 2023, Barton requested the ROA and an extension in the briefing schedule to allow for the delivery of the ROA.

On April 12, 2023, the Fifth Circuit noted that "a CD of the record of the record on appeal [sic] has already been sent to you. Should you determine at a later date that additional time to file your COA documents is necessary, a motion for an extension of time can be filed."

On April 26, 2023, the Clerk of the Court for the Fifth Circuit noted that a "paper copy of the record" had been sent and for Barton to "[use] this copy of the paginated record" for his appeal. The BOP has continuously refused and failed to deliver any copy of the ROA in any form to Barton.

Barton filed several additional motions for extension of time due to the BOP's failure and refusal to delivery the ROA to Barton. Barton additionally sought assistance from the Fifth

Circuit to induce the BOP to deliver the ROA to Barton to be used to prepare his COA. Extensions were granted into July of 2023 for Barton to receive the ROA (he never did) and to comply with the filing requirements of a COA filing.

After the July 2023 extension, on the BOP's continued refusal and failure to produce the ROA to Barton, Barton, a few days (3 days on information and belief) out of time filed for a motion for leave to file his COA out of time and a motion for extension to comply with the COA filing requirements (all for the reason that the BOP was continuing to deny and refuse to deliver the ROA to Barton). While Barton's motions were in the mail (BOP mail box rule) the Fifth Circuit dismissed for want of prosecution (DWOP) Barton's case.

Barton, timely and expeditiously filed his motion to reinstate.

On August 18, 2023 the Fifth Circuit denied both the motion to reinstate the case, and motion to file out of time, and for an extension to comply with the COA requirements.

This timely petition for certiorari follows, seeking a "GVR", to allow Barton to file his appeal (Motion for COA based on the ROA) of the trial court's denial (presumed denial) of COA with the Fifth Circuit Court of Appeals, using the paginated ROA.

SUMMARY OF THE ARGUMENT

Since Griffin v. Illinois, 351 U.S. 12, 16, 100 L.Ed 891, 76 S.Ct. 585 (1956) this Court has instructed that treating indigent defendants differently regarding the procurement of the ROA violates the Equal Protection Clause of the United

States Constitution. Here, the BOP has not merely not provided the ROA, which was tendered to FCI Beaumont Low by the Fifth Circuit, on information and belief, but gone a step further and obstructed justice by blocking Barton's access thereto.

ARGUMENT

Whether the Bureau of Prisons' failure and refusal to tender to Barton his Record on Appeal, provided by the Fifth Circuit to enable Barton to prepare his motion for certificate of appealability constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment and/or Obstruction of justice?

In Griffin v. Illinois, 351 U.S. 12, 16, 100 L. Ed 891, 76 S.Ct. 585 (1956) the Court has instructed that "[p]roviding equal justice for poor and rich, weak and powerful alike" requires equality in the defendant's procurement of the trial record. A plurality in Griffin acknowledged "the importance of appellate review to correct adjudication of guilt or innocence." Id. at 18, 100 L. Ed 891, 76 S.Ct. 585. "[T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." Id. at 19, 100 L. Ed. 891, 76 S.Ct. 585.

When a right of appeal is created it must be available to poor and rich alike.^{EN1}

Here, Barton, seeking to challenge the denial of a COA filed an appeal. The Fifth Circuit provided the ROA to the BOP (FCI Beaumont Low). The prison failed and refused, over a period of months, to provide the ROA to Barton to be used to prepare his COA.

The Fifth Circuit, due to Barton's failure to timely prepare and file his brief on the COA issue dismissed the case for Barton's failure to prosecute the case (as noted supra Barton does not have the ROA).

Barton filed, one motion to reinstate, and one motion for leave out of time, to obtain another extension to file for his COA. Barton had, heretofore, filed multiple motion for extension all due to the BOP's failure and refusal to provide the ROA to Barton. This type of obstruction of justice has long been prohibited by this Court. This prohibition has long been expanded beyond direct appeals of criminal cases (prohibition against refusing to provide indigent defendants their ROA).^{EN2}

This Court has previously noted the Equal Protection implications involved in denying indigents access to the ROA. "When an appeal is afforded, ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Lindsey v. Normet, 405 U.S. 56, 77, 31 L. Ed 2d 36, 92 S.Ct. 862 (1972).

Barton, an indigent federal inmate, whose ROA was provided to the prison by the Fifth Circuit, had his Equal Protection right expressly denied by the prison's (FCI Beaumont Low) failure and refusal to tender to him his ROA and allow him to prepare his brief using it.

Had Barton been on the street he could have obtained the ROA from the Fifth Circuit for a nominal fee, if any, and prepared his COA. The prison's obstruction of justice (open courts), barring Barton from the ROA violates the equal protection clause and his equal protection rights.

GRANT, VACATE, REMAND (GVR)

This Court should, and is respectfully requested to grant Barton's petition, vacate only the order dismissing the case for want of prosecution, and remand with instructions. Justice Scalia, famously said "that the question is who decides." (paraphrasing Justice Scalia). This Court has couched the analysis in various cases. For example, recently, in National Federation of Independent Businesses, et al., v. Dept. of Labor, Occupational Safety and Health Administration, et al., 595 U.S. ___, 142 S.Ct. ___, 211 L. Ed 2d 448 (2022) discussed the scope of delegation by acts of Congress. The Court, writing, "[t]he major question doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of legislative power." Id. 211 L.Ed 2d at 458. "Whichever the doctrine, the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people.'" Id. (citing A. Scalia, A Note on the Benzene Case, American Enterprise Institute, J. on Govt. & Soc., July-Aug. 1980, p. 27). Significant for our purposes, no legislation has ever existed that allowed the executive branch (here, the BOP) to determine whether inmates shall have access to the courts or whether the BOP, may, unilaterally, simply determine to deliver a ROA to an inmate.

Barton raises the scope of authority of the executive branch in the context of GVR. Many of the cases, and dissents filed from the denial of GVR, have suggested that the Court's jurisprudence, as to GVR, is narrowing. See Myers v. United

States, 587 U.S. __, __, 139 S.Ct. 1540, 1541, 204 L.Ed. 2d 211 (2019)(Roberts, C.J., dissenting)(GVR unwarranted "[u]nless there is some new development to consider"); Hicks v. United States, 582 U.S. __, __, 137 S.Ct. 2000, 2000, 198 L.Ed. 2d 718 (2017)(Gorsuch, J., concurring)(in cases involving unpreserved but plain errors, GVR appropriate "where we think there's a reasonable probability" that "curing the error will yield a different outcome"); Stutson v. United States, 516 U.S. 193, 198, 116 S.Ct. 600, 133 L.Ed. 2d 571 (1996) (Scalia, J., dissenting with Lawrence v. Chater, 516 U.S. 163, 178, 191-192, 116 S.Ct. 604, 133 L.Ed. 2d 545 (1996) (GVR warranted "where an intervening factor has arisen that has a legal bearing upon the decision").

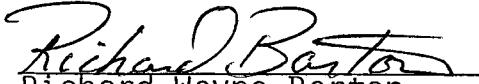
It would be particularly grievous to allow the executive branch to determine whether indigent inmates actually receive their ROA (whether by negligence or intent) and thus have unfettered discretion to deny inmates access to the courts. GVR would be the appropriate remedy in this case, as to the dismissal of the case, prior to Barton being tendered the ROA and having an opportunity to present his motion to the Fifth Circuit for consideration.

PRAYER

FOR THESE REASONS, Richard Wayne Barton, prays that the Court GVR the case to the Fifth Circuit, with instructions that the ROA be tendered by Barton by the BOP to allow Barton to prepare his motion for COA to be considered by the Fifth Circuit. Barton prays for such other and additional relief to

which he may be entitled whether in equity or in law.

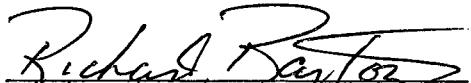
Respectfully submitted,


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Pro se'

VERIFICATION

I hereby verify that all the material factual allegations contained herein are true and correct to the best of my knowledge and belief. I make this verification under penalties of perjury and pursuant to 28 U.S.C. §1746.

10-6-2023
Dated


Richard Wayne Barton

END NOTES

EN1) "[W]hen a state deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review..." Griffin, at 19, 100 L.Ed. 891, 76 S.Ct. 585; See also Ross v. Moffitt, 417 U.S. 600, 607, 41 L.Ed. 2d 341, 94 S.Ct. 2437 (1974) (Griffin and succeeding decisions "stand for the proposition that a state cannot arbitrarily cut off appeal rights for indigents while leaving avenues of appeal for more affluent persons."); Rinaldi v. Yeager, 384 U.S. 305, 310, 16 L.Ed. 2d 577, 86 S.Ct. 1497 (1966) ("This Court has never held that the states are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.")

EN2) This Court declined to limit Griffin to cases in which the defendant faced incarceration. "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." Mayer v. Chicago, 404 U.S. 189, 30 L.Ed. 2d 372, 92 S.Ct. 410 (1971). "Petty offenses could entail serious collateral consequences," the Mayer Court noted. The Griffin principle, Mayer underscored, "is a flat prohibition" against "making access to appellate processes from even [the state's] most inferior courts depend

upon the [convicted] defendant's ability to pay," 404 U.S., at 197, 30 L.Ed.2d 372, 92 S.Ct. 410" (citing M.L.B. v. S.L.J., 519 U.S. 102, 136 L.Ed. 2d 473, 484-485, 117 S.Ct. 555 (1996)).