

NO. 25-

24-6683

FILED

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SUPREME COURT, U.S.

IN THE
SUPREME COURT FOR THE UNITED STATES

FERRELL WALKER,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ferrel Walker
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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals in the determination of the Issuance of a Certificate of Appealability follows their own Circuit Precedent under Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992) (en banc), thereby denying Petitioner Effective-Assistance-of-Counsel under the United States Constitutions Sixth Amendment and to be free from unreasonable searches and seizures under the United States Constitutions Fourth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner is Ferrell Walker

Respondent is the United States

RULE 29.6 STATEMENT

Petitioner Ferrell Walker is an individual with no corporation affiliation, no parent corporation, and no publicly held corporation owning 10% or more of its stock.

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ANITA L. COOPER

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit which denied Petitioner's Certificate in Case No. [7:22-cv-108-HL-TQL]. United States Court of Appeals for the Eleventh Circuit Case No. [24-10077].

OPINIONS BELOW

The most decent decision of the United States Court of Appeals for the Eleventh Circuit is not reported. Judgment for Motion for Extension of Time for Motion for Reconsideration En Banc [10349842-2] (December 03, 2024) and is reproduced at Pet. App. 1a. Judgment of Motion for Extension of Time for Motion Rehearing En Banc [10349842-2] (December 03, 2024), and is reproduced at Pet. App. 1a. Judgment for Motion for Extension of Time to File Petition En Banc [10337292-2] (November 14, 2024) is not reported, and is reproduced in Pet. App. 2a. Judgment for Motion for Leave to File Motion for Clarification [10309846-2] (October 30, 2024) is not reported, and is reproduced at Pet. App. 3a. Judgment for Motion for Leave to File an Out of Time Motion for Reconsideration is not reported (September 19, 2024), but is reproduced at Pet. App. 4a. Judgment for Denial of Certificate of Appealability is reported at 2024 U.S. App. Lexis

15183 (11th Cir.), and is reproduced at Pet. App. 6a. United States District Court Adoption of Magistrates Report and Recommendation and Denial of Certificate of Appealability is not report (December 01, 2023), and is reproduced at Pet. App. 11a. The United States Magistrates Report and Recommendation, recommending §2255 be denied and Certificate of Appealability be denied is report report, but is reproduces at Pet. App. 27a.

JURISDICTION

The United States Court of Appeals entered its judgment denying Petitioner's Certificate of Appealability in Appeal No. 24-10077 - Civil Case No. 7:22-cv-108-HL - Criminal Case No. 7:17-cr-34-HL. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides Effective-Assistance-of-Counsel to all criminal defendants. The Fourth Amendment of the United States Constitution provides the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by and oath or affirmation, and

particularly describing the place to be searched and the person or things to be seized.

INTRODUCTION

This case presents the question whether the Eleventh Circuit Court of Appeals in the determination of the Application for a Certificate of Appealability follows their own Circuit Precedent under *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc), thereby denying Petitioner Effective-Assistance-of-Counsel afforded by the Sixth Amendment and the right to be free from unreasonable searches and seizures afforded by the Fourth Amendment.

The Eleventh Circuit Court appeals in *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc) held ("we are disturbed by the growing number of cases we are forced to remand for consideration of issues by the district court chose not to resolve.") Accordingly, we now exercise our supervisory power over district courts, see *United States v. Jones*, 899 F.2d 1097, 1102 (11th Cir. 1990) and instruct the district courts to resolve all claims for relief raised in a petition for writ of habeas corpus, regardless whether relief is granted or not. This is the Eleventh Circuit Court of Appeals own language that is [unambiguously] and [unequivocally] clear.

STATEMENT OF THE CASE

1. Petitioner Walker is currently incarcerated at the Federal Correctional Institution in Miami, Florida.

2. On August 23, 2007, Petitioner Walker plead guilty to a one-count information charging him with possession of child pornography in violation of 18 U.S.C. §2252(a)(4)(B). Petitioner Walker was sentenced on November 27, 2007, to a term of imprisonment for 87 months to be followed by a term of supervision for 25 years. a fine of \$2,000.00 and a mandatory assessment fee of \$100.00. United States v. Walker, 7:07-cr-30-HL

3. On May 16, 2014, Petitioner Walker began serving his term of supervision in the Middle District of Georgia. On November 17, 2017, Petitioner Walker was arrested on a new indictment charging him with possession of child pornography in violation of 18 U.S.C. §2252(a)(4)(B) United States v. Walker, 7:17-cr-34 and on a warrant for an offender under supervision for violation of his supervision. United States v. Walker, 7:07-cr-30-HL.

4. On May 16, 2018, the district court sitting without a jury, heard evidence relating to the charges that Petitioner violated the conditions of his supervision, including Petitioner Walker had possessed child pornography. Pursuant to the

provision of 18 U.S.C. §3583(k), the district court sentence Walker to the minimum mandatory term of imprisonment of 60 months followed by a term of supervision of 25 years. United States v. Walker, 7:07-cr-30-HL.

5. Counsel for Petitioner Walker timely objected to the district courts sentence as did Petitioner Walker when asked by the Court if he had any objections to the Court's sentence. Petitioner Walker appealed the imposition of the 60 month sentence pursuant to 18 U.S.C. §3583(k), for violation of the conditions of supervision based on judge-found facts, including a finding that Petitioner Walker possessed child pornography, under a preponderance-of-the-evidence standard of proof. United States v. Walker, 849 Fed. App'x. 822 (11th Cir. 2021).

6. Subsequently, in July 2018, Petitioner Walker went to trial on the indictment returned against him in United States v. Walker, 7:17-cr-34-HL. The jury returned a verdict of guilty of violating 18 U.S.C. §2252(a)(4)(B) on July 31, 2018. At sentencing on December 4, 2018, based on the report of the presentence investigation, the district court found Petitioner Walker's advisory sentencing guideline range was between 135 and 168 months, based on an offense level 31, and a criminal history of III. The district court sentence Petitioner Walker to a term of imprisonment of 168 months to be followed by a term of supervision for life, to run consecutive to the sentence

previously imposed for Petitioner Walker's violation of his conditions of supervised release in case no. 7:07-cr-30-HL. Petitioner Walker appealed from the district court's 168 month sentence in United States v. Walker, 7:17-cr-34-HL. See, United States v. Walker, 849 Fed. App'x. 822 (11th Cir. 2021). The court of appeals consolidated the two appeals.

7. The court of appeals found that Petitioner's sentence under 18 U.S.C. §3583(k) violated the Ex Post Facto Clause because the conduct for which Petitioner Walker was originally prosecuted occurred before the effective date of the statute which he was sentenced. United States v. Walker, 849 Fed. App'x 825-26.

6. The court of appeals vacated Petitioner's sentence for violating the conditions of his supervision and remanded the case for further proceedings consistent with its opinion. Petitioner Walker's subsequent for a writ of certiorari was denied by this Court. Walker v. United States, 142 Sup. Ct. 240 (2021).

8. On July 13, 2021, on remand, the district court corrected Petitioner Walker's sentence and resentenced him under 18 U.S.C. §3583(e)(3) - the statute in effect in 2005 when Petitioner Walker's crime was committed - to the statutory maximum sentence of 24 months imprisonment followed by 25 years of supervision.

Petitioner Walker appealed from the district court's imposition on remand of a sentence to a term of imprisonment of twenty four months followed by a term of supervision of twenty five years.

9. On appeal from the district court's revocation sentence, Petitioner Walker argued, as he did at sentencing, that his revocation sentence which was based on the same facts used in his prosecution for possession of child pornography, violated the Double Jeopardy Clause, citing this Court's decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019). Second he argued that the statutory maximum sentence of twenty four month is substantively unreasonable.

10. The court of appeals affirmed, finding no violation of the Double Jeopardy Clause because Walker's revocation sentence was imposed as part of the penalty for the initial offense. Thus, the Court of appeals reasoned, the second prosecution was not a successive prosecution for the same offense. The court found Haymond had no bearing on Petitioner Walker's appeal. *United States v. Walker*, 2023 WL 119422 (11th Cir.).

11. Petitioner Walker filed a timely 28 U.S.C. §2255 accompanied by a Memorandum of law on October 1, 2022 in case number 7:17-cr-34-HL. Petitioner Walker was assigned civil case number 7:22-cv-108-HL-TQL. Walker alleged four ground of Ineffective Assistance of trial counsel. Ground 1: Trial Counsel

failed to file a timely suppression motion concerning: (1) Sentence Modification Waiver; (2) Evidence seized from Petitioner's residence as the result of two warrantless searches. (3) Statement obtained from the Petitioner during the execution of the search. Ground 2: Trial Counsel was Ineffective for failing to object and not properly giving instructions to the trial court and to the prosecution that resulted in Conflating of Lay and Expert testimony. Ground 3: Trial Counsel was ineffective for allowing prosecutors to submit testimony that trial counsel and prosecution knew were not true and intentionally misleading the jury and inflaming their passions. Ground 4: Trial counsel was ineffective by allowing prosecutorial vindictiveness during the sentence phase of the proceedings. Petitioner Walker's Memorandum of Law outlined the allegations in detail with cited authority.

12. The United States Magistrate Judge on October 11, 2023 issued a unpublished opinion Report and Recommendation denying Petitioner Walker's claims and denying Walker a Certificate of Appealability. *Walker v. United States, 7:22-cv-108-TQL / 7:17-cr-34-TQL*

13. The United States District Court on December 01, 2023 in an unpublished opinion adopted the Magistrate's Report and Recommendation denying Petitioner Walker's 28 U.S.C. §2255 and denying Petitioner Walker a Certificate of Appealability. Walker

14. Petitioner Walker filed a timely Notice of Appeal denying the issuance of a Certificate of Appealability on December 29, 2023.

15. The Eleventh Circuit Court of Appeals on June 21, 2024 in an unpublished opinion denied Walker's Certificate of Appealability. *Walker v. United States*, Appeal No. 24-10077.

16. The Eleventh Circuit Court of Appeals on September 19, 2024 in an unpublished opinion denied Petitioner Walker's Motion for Reconsideration. *Walker v. United States*, Appeal No. 24-10077.

17. The Eleventh Circuit Court of Appeals on October 30, 2024 in a unpublished opinion denied Petitioner Walker' Motion for Clarification as a successive Motion for Reconsideration. *Walker v. United States*, Appeal No. 10077.

18. The Eleventh Circuit Court of Appeals on November 14, 2024 in an unpublished opinion denied Petitioner Walker's Motion for Extension of Time to File for En Banc as a successive Motion for Reconsideration. *Walker v. United States*, Appeal No. 24-10077.

19. The Eleventh Circuit Court of Appeals on December 03, 2024 in an unpublished opinion denied Petitioner Walker's Motion for Extension of Time for Motion for Reconsideration En Banc as a successive Motion for Reconsideration. *Walker v. United States*, Appeal No. 24-10077.

REASON FOR GRANTING THE PETITION

This Court should grant certiorari, review the proceedings below, reverse the judgment of the Eleventh Circuit Court of Appeals No. 10077, and remand back to the Court of Appeals to Issue Petitioner Walker a Certificate of Appealability under *Clisby v. Jones*, 960 F.2d 925, 935-36 (11th Cir. 1992)(en banc), where the district court failed to address Petitioner Walker's claim of ineffective assistance of counsel for failing to file a motion to suppress, where the FBI did not obtain a search warrant prior not after searching Petitioner's Walker's cell phone. *Illinois v. McArthur*, 531 U.S. 326, 334, 121 S. Ct. 946, 148 L. Ed. 2d. 838 (2001). Nor did Petitioner Walker consent to the search. There are several reasons for the outcome:

1. The Eleventh Circuit's Court of Appeals Clisby Rule

The Clisby rule in the Eleventh Circuit requires district courts to resolve all claims of relief raised in a habeas proceedings, regardless of whether that relief is granted or

denied. *Clisby v. Jones*, 960 F.2d 935-36 (11th Cir. 1992)(en banc) (involving a 28 U.S.C. §2241 petition by a state prisoner); see *Rhode v. United States*, 583 F.3d 1289, 1291 (11th Cir. 2009) (holding that *Clisby* applies to §2255 proceedings). When a district court does not address all of the claims presented in a motion to vacate, we "will vacate the district court's judgment and remand the case for consideration of all remaining claims. *Clisby*, 960 F.2d at 938.

A "claim for relief" is defined as "any allegation of a constitutional violation." *Id.* at 936. Ineffective assistance of counsel constitutes a violation of a defendant's Sixth Amendment rights, and is thus a claim of constitutional violation. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 2063-64, 80 L. Ed. 2d. 674 (1984).

An unresolved claim constitutes a *Clisby* error regardless of the reason the claim was not resolved. *Puiatti v. McNeil*, 626 F.3d 1283, 1307 (11th Cir. 2010). But a claim must be raised in a way that the district court cannot misunderstand it in order for the district court to resolve it. *Smith v. Sec'y Dep't of Corr.*, 572 F.3d 1327, 1352 (11th Cir. 2009). In *Smith*, the Eleventh Circuit held that a petitioner failed to fairly present a legal argument to the district court when the argument was mentioned in the 123-page supporting memorandum of law. *Id.* In *Dupree v. Warden*, 715 F.3d 1295, 1299 (11th Cir. 2013), however, the Eleventh

Circuit held that "two sentences found in the middle of a fifteen-page memorandum attach to [a §2241] petition' sufficiently raised an ineffective-assistance-of-counsel claim. Because the district court did not resolve the claim, the Eleventh Circuit vacated and remanded as a violation under the Clisby rule. *Id.* Two claims may be distinct even if both allegations arise from the same set of operative facts. *Clisby*, 960 F.2d at 936.

Under *Clisby*, the Eleventh Circuit's only role is to determine whether the district court failed to address a claim, not whether the underlying claim has merit. *Dupree*, 715 F.3d at 1299. A district court facilitates meaningful appellate review by developing adequate factual records and making sufficiently clear findings as to the key issues. *Long v. United States*, 626 F.3d 1167, 1170 (11th Cir. 2010). Indeed, even "reforming or reframing a movant's claim is permissible, so long as the district court "gets to the root of the problem. *Senter v. United State*, 983 F.3d 1289, 1294 (11th Cir. 2020).

The Eleventh Circuit Court of Appeals have significant authority to fashion rules and govern their own procedures. *Cardinal Chem Co. v. Morton, Int'l*, 508 U.S. 83, 99, 113 S. Ct. 1967, 124 L. Ed. 2d. 1 (1983). Under Federal Rules of Appellate Procedure 47(b), moreover the Court of Appeals may adopt local rules and internal operating procedures consistent with

federal law and may regulate practice in a particular case in a manner consistent with federal law, the FRAP, and local rule of the Circuit.

However, the Question before this Supreme Court of the United State today is a clear example of the Eleventh Circuit's of noncompliance of it's own Circuit Precedent.

**2. THE ELEVENTH CIRCUIT'S COURT OF APPEALS FAILURE TO ISSUE A
CERTIFICATE OF APPEALABILITY FOR A CLISBY VIOLATION**

Petitioner Walker's Ground One Section 28 U.S.C. §2255 and Memorandum of law Ground One: Sixth Amendment Ineffective-Assistance-of-Trial-Counsel: (a) Trail counsel failed to file a timely suppression hearing / motion to suppress: (1) Sentence Modification Waiver; (2) Evidence seized from Petitioner's residence as the result of two warrantless searches; (3) Statements obtained from the Petitioner during the execution of the search. Petitioner made multiple pleas to trial counsel to file a suppression hearing. Petitioners' Constitutional rights were violated as a result of trial counsel's Constitutional deficiency, Petitioner suffered clear and obvious prejudice. (See APPENDIX I: 49a).

This Clisby violation in (2) Evidence seized from Petitioner's residence as the result of [two] warrantless

searches. This claim amounts to [two] separate claims for relief because an allegation of one constitutional and a allegation of another constitutional violation constitutes two distinct claims for relief.

The supporting memorandum of law presented the two Constitutional claims separately categorizing as [Violation of Petitioner's Fourth Amendment Right's Number One (1)] and [Violation of Petitioner's Fourth Amendment Rights Number Two (2)]. The latter adequately in "plain and simple" language that "Petitioner's Fourth Amendment Rights were violated when Special Agent Matthew Wagner of the Federal Bureau of Investigations failed to procure a 'Search Warrant' to obtain lawful authorization to search the Samsung Galaxy cellular phone confiscated from Petitioner's residence". (See APPENDIX I: 68a-69a).

Walker reiterated this argument in his Objection to the Magistrates Report and Recommendation after the Magistrate failed to address this claim in "Violation of Petitioner's Fourth Amendment Rights Number (2) stating in part: ("Special Agent Matthew Wagner of the Federal Bureau of Investigations did not procure a search warrant before nor after the search of the Samsung cellular phone found at Walker's residence. Walker did not consent nor give authorization to Special Agent Wagner to perform a warrantless search of the cellular telephone. As a

matter of fact, Special Agent Wagner never submitted a probable cause affidavit to the Court to obtain a search warrant for the cellular phone.") (See APPENDIX G: 21a-23a)

The district court and the court of appeals both failed to address Walker's alleged ineffective assistance claim. Instead both court's focused on the validity and the justification of the search of Petitioner Walker's [residence] and [cell phone] by [U.S. Probation] and Walker's Fourth Amendment Waiver that stated: ("You shall submit your person, property, house, residence, vehicle, papers, computers (as defined by 18 U.S.C. §1030(e)(1), other electronic communication or data storage devices or media, or office, to a search conducted by a [United States Probation Officer]. Failure to submit to a search may be grounds for revocation of release. Defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. (See APPENDIX H: 32a-35a) (See also APPENDIX E: 8a-9a)

Neither the district court or the court of appeals addressed Walker's alleged ineffective assistance for failing to file a motion to suppress the [warrantless] search of Walker's cellular phone by the FBI. See Dupree, 715 F.3d at 1279

To obtain a Certificate of Appealability, if the district court denied a constitutional claim on its merits, a movant must

demonstrate that a "reasonable jurist would find the district court's assessment of the Constitutional claim debatable or wrong," or that the issue "deserves encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d. 542 (2000).

Here, as the record has demonstrated, the "clear and simple language" used in Walker's section 2255 and supporting memorandum of law was enough to alert the District Court and the Court of Appeal's that Petitioner Walker's Ground One: ¶2 (Evidence seized from Petitioner's residence as the result of [two] warrantless searches, consisted of two [distinct] ineffective-assistance-of-counsel claims to include Petitioner Walker's trial counsel's failure to file a motion to suppress relating to the [warrantless] search of the cellular telephone by the Federal Bureau of Investigations. See *Dupree*, 579 U.S. at 1299.

The Court of Appeals, the District Court, and the Magistrates Report and Recommendation specifically characterized this ineffective-assistance-of-counsel Ground, as to the validity and justification of the search by [United States Probation] of Petitioner Walker's residence and cellular telephone. With no acknowledgement concerning Petitioner Walker's claim regarding the [warrantless] search of Petitioner Walker's cell phone by Special Agent Matthew Wagner of the FBI.

The Eleventh Circuit Court of Appeal's denial order of Walker's Certificate of Appealability does not comply with the Eleventh Circuit's [Clisby] rule.

Walker has made a substantial showing of the denial of a Constitutional right. 28 U.S.C. §2253(c)(2). Moreover, Walker has unequivocally shown that a "reasonable jurist would find the district court and the court of appeal's assessment of the denial of the Constitutional claim debatable or wrong" or that the issue "deserves encouragement to proceed further." Slack v. McDanial, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d. 542 (2000). Petitioner Walker has presented clear and convincing facts, and as the record has established that the district court and the court of appeals violated the Clisby rule and erred in not granting Petitioner Walker a Certificate of Appealability.

CONCLUSION

Based on the foregoing argument and authorities, this Court should grant Petition for Writ of Certiorari.

Respectfully Submitted,

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