

No.: 17A734

IN THE
SUPREME COURT OF THE UNITED STATES

Charlie Vernon, Jr.,
petitioner,

versus

United States of America,
respondent.

On Appeal From The United States Court of Appeals
For The Eleventh Circuit

Related Appeal No.: 17-10126-D

PETITION FOR WRIT OF CERTIORARI

Charles Vernon, Jr. #58250-018
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QUESTIONS PRESENTED

1. Charlie Vernon's trial counsel did not object to the district court's supplemental jury instruction. Twenty minutes after the supplemental instruction the jury reached a verdict. Because trial counsel did not object to the supplemental instruction, the appeals attorney did not raise it on appeal. And, the collateral review courts elected only to review it for plain error. Trial counsel's failure to preserve a claim for direct appeal or collateral review constitute's deficient performance. See **Edwards v. Carpenter**, 529 U.S. 446 (2000). Should the Section 2255 court have determined prejudice by using the harmless error test rather than the actual prejudice test?

2. Any fact that changes the permissible range or type of punishment necessarily is an element of the crime. With a single exception, the existence of prior conviction, every punishment-altering fact (i.e., element) must be decided by a jury or admitted by the accused. The Armed Career Criminal Act requires three elements (§ 922(g)(1) conviction, three qualifying prior convictions, all offenses to have occurred on separate occasions . Mr. Vernon alleged the government never properly proved that the convictions occurred on separate occasions. The Eleventh Circuit acknowledged the debatable procedural ruling, but skipped the certificate of appealability process, and decided the merits.

Did the Eleventh Circuit exceed its subject-matter jurisdiction by deciding the appeal without granting a certificate of appealability?

3. The district court found the government's questionable search practices excused by the "good faith exception." On direct appeal, the Eleventh Circuit directed appeals counsel to address the "good faith exception" ruling. Appeals counsel failed to answer the Court of Appeals question. Then the appeals court summarily affirmed the district court.

In the section 2255, the appeals attorney claimed it was a strategic decision. That claim of strategy prevailed both in the section 2255 and with the application for COA. But in reaching those decisions the district and appellate courts applied an incorrect (too broad) good-faith exception test.

Jurists of reason find it debatable for the district court to use the wrong legal rule in determining defense counsel's effectiveness?

LIST OF PARTIES

Petitioner Charlie Vernon, was movant in the district court and the appellant in the court of appeals. The United States was the respondent in the district court and the appellee in the court of appeals. The parties that have an interest are listed in the case caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charlie Vernon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

On June 1, 2017, the Eleventh Circuit Court of Appeals denied Mr. Vernon's application for a certificate of appealability. (Appendix "A").

On November 18, 2016, the United States District Court for the Middle District of Florida, Tampa Division denied Mr. Vernon's 28 U.S.C. § 2255 motion. (Appendix "B").

On January 12, 2018, this Court granted Mr. Vernon an extension of time to include April 15, 2018 to file his petition for certiorari. (Appendix "C"). Therefore this petition is timely filed on this 15th day of April, 2018.

STATEMENT OF JURISDICTION

The Eleventh Circuit's decision was issued on June 1, 2017. (Appendix "A"). This petition is timely filed under the Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) provides in pertinent part:

- (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such persons shall be....imprisoned not less than fifteen years and notwithstanding any other provision of law....

(2)(B) As used in this subsection...the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year....involving the use or carrying of a firearm, knife, or destructive device....

(i) has an element the use, attempted use, or threatened use of physical force against the person of another[.]

STATEMENT OF THE CASE
(course of proceedings)

In October 2013, Charlie Vernon, Jr. was found guilty by a jury of his peers for violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 18 U.S.C. §§ 2 and 922(g).

In January 2014, during the sentencing hearing the district court determined that Mr. Vernon qualified under the ACCA provision and sentenced him to 280 months.

In March 2015, the United States Court of Appeals affirmed his conviction and sentence. (Appeal No.: 14-10260).

In March 2016, Mr. Vernon filed a 28 U.S.C. § 2255 motion with various claims of ineffectiveness. The government responded and Mr. Vernon filed a reply.

In November 2016, by order the United States District Court for the Middle District of Florida, Tampa Division (Appendix "B") denied Mr. Vernon's § 2255 motion.

Thereafter, Mr. Vernon filed for a certificate of appealability application raising several procedural claims both during sentencing and in the appellate level. On June 1, 2017, the United States Court of Appeals for the Eleventh Circuit denied the application for the COA. (Appendix "A").

On January 12, 2018, this Court granted Mr. Vernon an extension of time up to and including April 15, 2018. (Appendix "C").

Statement of Facts

The jury informed the district court that it could not reach a decision on a particular count in the indictment. The district court then gave not only a modified **Allen** charge, but actually threatened the jury "if we do not reach a verdict by 5:00 this evening -- a unanimous verdict by 5:00 this evening, we will be obliged to continue the matter until Tuesday or Wednesday of next week." (Doc. 137, page ID 1284). Significantly, once the court gave its next week push, the jury decided the verdict within minutes.

Counsel should have objected to the supplemental **Allen** instructions, even without the district court committed plain error of constitutional magnitude.

The district court determined that Mr. **Vernon** had four prior convictions that qualified as predicates for the ACCA enhancement. Its reasoning that: "courts are permitted to rely on the undisputed facts in a PSR where, as here, the facts in the PSR are undisputed." *Id.* at Page ID 1291. However, the government never proved the convictions qualified as separate convictions.

Mr. **Vernon's** attorney when asked by the court of appeals to expand on the good-faith exception test. Counsel was aware that he needed to respond to the government's motion for summary affirmance in order to prevent the court of appeals from affirming the denial of the motion to suppress, but counsel determined that he had no basis on which to contest the court's good-faith ruling, and therefore, decided not to pursue the issue. Counsel stated that he performed Westlaw searches and consulted other authorities and colleagues, but could not find any case with similar facts on which he could rely to make a non-frivolous argument that any of the exceptions to the good-faith rule existed.

REASONS FOR GRANTING THE WRIT

1. **The Eleventh Circuit acted without jurisdiction by deciding the merits of the supplemental instruction claim without granting a certificate of appealability.**

This Court pronounced that an federal appeals court lacks jurisdiction to decide a substantive habeas claim without first granting a certificate of appealability. **Buck v. Davis**, 137 S. Ct. 759, 773 (2017)("[W]hen a Court of Appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction"); see, **Miller-El v. Cockrell**, 537 U.S. 322, 326 (2003).

Here the Eleventh Circuit did just that. The appeals court found the district court's supplemental-instruction process debatable. The appeals court found counsel's failure to object deficient, but then decided that the supplemental instruction was not **actually** coercive.

Put differently, the appeals court decided the merits without the benefit of briefing; and without the jurisdiction of a certificate of appealability. The Eleventh Circuit acted beyond its subject-matter jurisdiction.

This Court should grant the writ, vacate the unlawful order, and remand to the Court of Appeals with direction to grant a certificate of appealability.

2. **The Eleventh Circuit's interpretation of the Armed Career Criminal Act criteria as sentencing factors conflicts with this Court's decision that any fact that increases the penalty range must be an element of the offense.**

In 1990, the Eleventh Circuit concluded that 18 U.S.C. § 924(e) was a sentencing statute and did not identify separate crimes but mere separate punishments. See **McGatha v. United States**, 891 F.2d 1520 (11th Cir. 1990); but see **United States v. Gundy**, 842 F.3d 1156, 1162-64 (11th Cir. 2016).

In the quarter-of-century since then this court made clear that the Constitution considers any fact, which alters a court's penalty jurisdiction, that is an element of a crime rather than a sentencing factor, regardless of what the legislature calls it. See, e.g., **Burrage v. United States**, 134 S. Ct. 881 (2014); **Alleyne v. United States**, 133 S. Ct. 2151 (2013); **O'Brien v. United States**, 139 S. Ct. 2149 (2010); **Nijhawan v. Holder**, 557 U.S. 29, 41 (2009); **Blakley v. Washington**, 542 U.S. 296 (2004); **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

An ACCA conviction requires three distinct elemental facts: (1) a violation of 18 U.S.C. § 922(g); (2) the existence of three prior qualifying convictions; and (3) that all the offenses occurred on separate occasions. If any of the three are absent, then the statute violated has no minimum punishment and a maximum punishment of ten years. On the other hand if all three are present then the mandatory minimum sentence is fifteen years and the maximum is life. In sum, the ACCA criteria are elements of a crime.

This is significant for this petition because the Constitution requires every fact other than the existence of a prior conviction to be found by the trier of fact beyond a reasonable doubt. See **Gaudin v. United States**, 515 U.S. 522-26 (1995). The Eleventh Circuit, however, permitted Mr. Vernon to be convicted of violating the ACCA without any factfinder let alone a jury—having found the "separate occasions" element under the beyond the reasonable doubt standard.

This Court should grant the writ to ensure the Eleventh Circuit's definition of an element of the crime comports with the Constitution.

3. The Eleventh Circuit departed from the regular and ordinary judicial definition of the "good faith" exception to the exclusionary rule and to the meaning of prejudice in the context of an ineffective assistance of counsel claim. The writ should be issued to realign the Eleventh Circuit with the governing rules in other circuits.

The good faith exception to the exclusionary rule applies in cases where the judge makes a technical error in issuing a search warrant and law enforcement relies on the warrant. See, e.g., **Massachusetts v. Sheppard**, 468 U.S. 981 (1984); **United States v. Leon**, 468 U.S. 897 (1984).

The district court applied the wrong test in determining good faith. It overlooked that the agents knew of the facts, which rendered the search improper, but conducted the search anyway, that is, the magistrate's warrant was not in "good faith" but rather "plausible denial ability." The district court accepted the facially valid warrant as evidence of good faith.

On appeal, the appellate court noticed that appeals counsel had not addressed the alternative (good faith) basis for denying the suppression of the evidence at trial. The appeals court requested appeals counsel supplement the brief and address the "good faith" exception; appeals counsel failed to answer. An omission that lead to summary affirmance.

In the 28 U.S.C. § 2255 proceedings (motion and COA) the courts concluded that counsel's error was not prejudicial since no defense existed to the good faith of the officers. The habeas court, however, overlooked that the underlying error was not merely a technical deficiency by the magistrate, but a substantive deception or short cut by the agents.

The agents knew the residence in question was not Mr. Vernon's, the agents knew the utilities were in his father's name (same name different person), and the agents knew the "trash" was not Mr. Vernon's. Yet, the agents presented it to the magistrate as bona fide proof of probable cause.

If Mr. Vernon's attorney had answered the Eleventh Circuit's supplemental question, then it would have been apparent the suppression claim did not involve a technical mistake by the magistrate but rather a bad faith action by the agents to create a plausible "good faith" defense to illegal search.

For our purposes, the point is that defense counsel particularly on appeal performed deficiently and the deficiency was prejudicial (as opposed to the Eleventh Circuit's conclusion) because it allowed the court below to apply too broadly an exception to the exclusionary rule of the Fourth Amendment.

This Court should grant the writ to make the Eleventh Circuit requirements for the "good faith exception" and the test for ineffective assistance prejudice consistent with that of other circuits and consistent with this Court's holdings.

CONCLUSION

This Court should grant a writ of certiorari to the Eleventh Circuit Court of Appeals, vacate the appeals court's opinion, and remand the case within instructions to grant a certificate of appealability.

Prepared with the assistance of Frank L. Amodio and respectfully submitted on this 15th day of April, 2018.

Charlie Vernon Jr. 58250-018
Charlie Vernon Jr.