No.: 18A676

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IN THE
SUPREME COURT OF THE UNITED STATES

****

Kenton Deon Harrell
petitioner,

versus

United States of America,
respondent.

****

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

PETITION FOR A WRIT OF CERTIORARI

****

Kenton Deon Harrell #39409-179
Federal Correctional Complex
P.O. Box 1031 (Low custody)
Coleman, Florida 33521-1031

QUESTION

This Court's holding and 28 U.S.C. § 2255(b) require a § 2255 court to conduct an evidentiary hearing unless the record and filings conclusively prove that the move is not entitled to relief. Mr. Harrell alleged that his attorney's out-of-control-statements allegations entitle Mr. Harrell to an evidentiary hearing rather than summary disposition?

LIST OF PARTIES INVOLVED

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

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TABLE OF AUTHORITIES

Cases: Pages:

Other authorities:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying the certificate of appealability (COA) appears at Appendix "1";

The opinion of the United States District Court for the Southern District of Texas, Houston Division dismissing the 28 U.S.C. § 2255 motion appears at Appendix "2"; and

the grant by this Court (Justice Alito) up to and including February 25, 2019, appears at Appendix "3".

JURISDICTION

The date on which the Fifth Circuit Court of Appeals decided Mr. Harrell's certificate of appealability was October 2, 2018. (Appendix "1").

The date on which the United States District Court for the Southern District of Texas dismissed Mr. Harrell's 28 U S C § 2255 motion was June 14, 2017. (Appendix "2").

This Court extended the time to file a petition for a writ of certiorari up to and including February 25th, 2019. (Appendix "3").

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE
(Procedural History)

In October 2014, the United States District Court for Southern District of Texas, Houston Division sentenced Kenton Deon Harrell to a term of 135 months of imprisonment for violation of 18 U.S.C. § 1951(a), conspiracy to interfere with commerce by robbery.

In October 2017, the United States Court of Appeals for the Fifth Circuit affirmed the district court's conviction and sentence. A petition for certiorari was denied in March 2016.

Mr. Harrell filed a 28 U.S.C. § 2255 motion in September 2016. Thereafter, the government responded and Mr. Harrell filed a reply brief. In June 2017, the district court dismissed the § 2255 motion stating that; "He fails to show with competent evidence that the Government would have offered him a favorable plea agreement, that he would have accepted the plea agreement, and that he would have received less time in prison as a result of the plea agreement " (Appendix "2" p.4-5).

Thereafter, Mr. Harrell filed an application for a certificate of appealability (COA) and on October 2, 2018, the Fifth Circuit Court of Appeals denied the COA stating: "Harrell has not made the requisite showing ...we will not consider his newly raised claim that, but for counsel's purported ineffectiveness, he would have pleaded guilty without a plea agreement." (Appendix "1", p.2).

And, on December 31st, 2018, Justice Alito granted an extension of time up to and including February 25, 2019 to filed his petition for a writ of certiorari.

This petition ensues:

REASONS FOR GRANTING THE WRIT

This Court and most circuits conclude that an evidentiary hearing must be conducted when a habeas claim results from events outside the courtroom and off the record. The Fifth Circuit implicitly rejects that rule in denying Mr. Harell's § 2255 motion without a certificate of appealability, that is, without argument and briefing.

This Court's decisional authority and Congress's statutory mandate entitles a 28 U.S.C. § 2255 movant to an evidentiary hearing whenever the § 2255 movant's well-pleaded factual allegations would, if proven, warrant habeas relief. **28 U.S.C. § 2255(b); Fontaine v. United States**, 411 U.S. 213, 215 (1973); **Townsend v. Sain**, 372 U.S. 293 (1963).

In the courts below, and in the paragraphs that follow, Mr. Harell alleged his trial attorney's specific misadvice that caused him to reject a favorable plea agreement. This advice occurred outside the courtroom, yet neither the district nor the appeals court conducted an evidentiary hearing.

This Court explicitly identified that when a claim depends on "factual allegations outside the courtroom and upon which the record could, therefore, cast no real light[,]" then, generally, the issues raised by the § 2255 motion cannot be conclusively resolved by the motion and "files and records;" thereby requiring the habeas court to conduct an evidentiary proceeding. **Machibroda v. United States**, 368 U.S. 487, 494-95 (1962).

In the proceedings below, Mr. Harrell alleged that his attorney gave him inaccurate advice that was directly material to his decision to reject a plea bargain and proceed to trial.

In the habeas context, a petitioner's allegations are presumed true until an attorney is appointed and an evidentiary hearing conducted. **Id.** The offspring rule is that an evidentiary hearing must be conducted unless the record conclusively refutes the allegations or the allegations are scientifically impossible. **28 U.S.C. §2255(b).**

Mr. Harrell's allegations involved advice provided by counsel outside of the courtroom, thus involving events, which were neither part of the record. And as such the law requires the district court to either conduct an evidentiary hearing or presume the allegations true. The district court did neither, and the appellate court's refusal to issue COA sanctioned the district court's departure from the law. See **Machibroda v. United States**, 368 U.S. at 494.

Allegations

Mr. Harrell alleged:

A. Trial Counsel misadvised him about the elements of the crime the government would need to prove at trial, particularly as to whether he alone could be convicted of a conspiracy. If he had known on person conspiracies were possible he would have pleaded guilty.

B. Relatedly, trial counsel did not tell Mr. Harrell that his admission to law enforcement were effectively a death knell to acquittal. And,

C. that he could have pleaded guilty without a plea agreement and received a 2 or 3 level reduction in punishment that is as low as 97 months.

D. Finally, if Mr. Harrell had been so advised then he would have pleaded guilty.

If these allegations are proven, then Mr. Harrell is entitled to have his conviction and sentence vacated, this fulfills the statutory (and decisional authority) requirements for an evidentiary hearing. By refusing to conduct an evidentiary hearing, the district court denied Mr. Harrell not only on his statutory right to prove his claims, but also his statutory right to be heard.

Virtually, every other circuit would find the district court's resolution of the motion debatable. See, e.g. **Lafuente v. United States**, 617 F.3d 944, 946-47 (7th Cir. 2010)(per curiam)(district court abused discretion by denying §2255 motion "without discovery or a hearing"; "The petitioner's pro se motion, sworn statement, and corroborating evidence show that his allegations are plausible, and are sufficient to warrant further inquiry by the district court."); **United States v. Jackson,** 209 F.3d 1103, 1110 (9th Cir. 2000)(district court abused discretion in denying evidentiary hearing, given that "the motion, files and record in this case could not have shown conclusively that Jackson is not

entitled to relief"); **Arredondo v. United States**, 178 F.3d 778, 788-89 (6th Cir. 1999)(district court abused its discretion in refusing to hold evidentiary hearing on ineffective assistance claim, given that petitioner's allegation were not "contradicted by the record, inherently incredible, or conclusions rather than statements of fact"); **Conaway v. Parks**, 453 F.3d 567, 587 (4th Cir. 2005)(quoting **Walker v. True**, 399 F.3d 315, 319, n.1 (4th Cir. 2005)("[i]n assessing, whether a federal habeas corpus petition was properly dismissed without an evidentiary hearing or discovery we must evaluate the petition under the standard governing motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6)...."we [Court of Appeals] are obligated to accept a petitioner's well-pleaded allegations as true...."); **Aron v. United States**, 291 F.3d 708, 714, n.5 (11th Cir. 2002)("if the petitioner alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits).

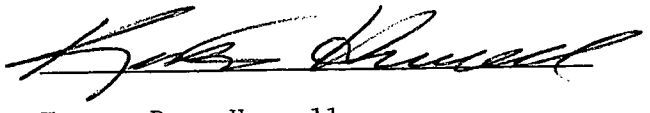
Governing law entitles Mr. Harrell to either § 2255 relief or an evidentiary hearing. In essences the Fifth Circuit creates a sharp circuit split on the appropriate application of 28 U.S.C. § 2255(b). Accordingly, jurists of reason would find the district court's failure to conduct an evidentiary hearing debatable and the Fifth Circuit refusal to issue a COA wrong. Governing law entitles Mr. Harrell to either § 2255 relief or an evidentiary hearing.

The Fifth Circuit should have granted a certificate of appealability on whether the district court should have conducted an evidentiary hearing before adjudicating the § 2255 motion's merits. This Court should either grant certiorari, then vacate, and remand the matter to the Court of Appeals, or grant the certificate of appealability itself.

CONCLUSION

This Court should grant the writ of certiorari, vacate the Fifth Circuit order, and remand with direction to either grant a certificate of appealability or return the cause to the district court with instructions to conduct an evidentiary hearing.

Respectfully submitted on this 22 day of February, 2019, by:



Kenton Deon Harrell