U.S. Department of Justice

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February 10, 2021

VIA CM/ECF
Patricia S. Connor
Clerk of the Court
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

Re: *Patrick Marlowe* v. *Warden, FCI Hazelton*, No. 20-6719 (4th Cir.)

Dear Ms. Connor:

Pursuant to Federal Rule of Appellate Procedure 28(j), attached please find a copy of *Martinez* v. *United States*, No. 19-3497, 2019 WL 11706037 (6th Cir. Sept. 27, 2019), a Sixth Circuit order denying a certificate of appealability that is pertinent for this Court's resolution of this appeal.

In his opening brief, petitioner Marlowe argues that the jury instructions used at his trial did not require the jury to find but-for causation and thus were deficient under *Burrage* v. *United States*, 571 U.S. 204 (2014). Br. 22. In our response, we noted that Sixth Circuit substantive law governs Marlowe's petition and explained that the instructions sufficed because they "simply explain[ed] the proximate cause standard" and "[did] not lower the burden of proof." U.S. Br. 15, 20.

The attached order in *Martinez* confirms that, because Marlowe's jury instructions required the jury to find that his actions were the proximate cause of his victim's death, the instructions satisfied *Burrage*'s requirement of but-for causation. In *Martinez*, the district court rejected the petitioner's argument that he was actually innocent of his convictions under 18 U.S.C. 1347 because the convictions had been "upheld under the 'proximate cause' standard of 18 U.S.C. § 242 * * * and the proximate causation standard under § 242 is stricter than the but-for causation standard set forth in *Burrage*." 2019 WL 11706037 at *3. The Sixth Circuit concluded that "[r]easonable jurists could not disagree" with the district court's conclusion. *Ibid*.

Accordingly, as the United States will explain at oral argument, the district court lacked jurisdiction over Marlowe's petition under *In re Jones*, 226 F.3d 328 (4th Cir. 2000), because no Sixth Circuit or Supreme Court case law conclusively established the legality of Marlowe's conviction, and thus *Burrage* effected no change in the applicable substantive law. U.S. Br. 13-14, 16-17. Even if the court had jurisdiction, Marlowe's claim fails on its merits because the jury instructions sufficed under *Burrage*, as *Martinez* shows, and any defect was harmless given the uncontested evidence at trial that Marlowe's failure to provide medical care resulted in his victim's death. U.S. Br. 17-20.

Sincerely,

Erin H. Flynn
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s/ Jason Lee
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Enclosure

cc: Counsel of Record (via CM/ECF)

2019 WL 11706037
Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

JORGE A. MARTINEZ, Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 19-3497
|
September 27, 2019

ORDER

***1** Jorge A. Martinez, a pro se federal prisoner, moves this court for a certificate of appealability ("COA") to pursue his appeal of (1) the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255 and (2) the district court's order denying his post-judgment motion for leave to file a supplement to his motion to vacate. Martinez also moves for leave to proceed in forma pauperis on appeal.

In 2006, a jury convicted Martinez of eight counts of distribution of controlled substances, 21 U.S.C. § 841(a)(1), (b)(1)(C); fifteen counts of mail fraud, 18 U.S.C. § 1341; ten counts of wire fraud, 18 U.S.C. § 1343; twenty-one counts of health care fraud, 18 U.S.C. § 1347; and two counts of health care fraud resulting in death, 18 U.S.C. § 1347. He was sentenced to an effective term of life in prison. While his case was on direct appeal, Martinez filed a motion for a new trial, which the district court denied. This court then affirmed Martinez's convictions and sentence. *United States v. Martinez*, 588 F.3d 301 (6th Cir. 2009). Martinez did not challenge the denial of his motion for a new trial on direct appeal.

In 2011, Martinez filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 that was over 600 pages long. The district court dismissed the motion on the ground that it exceeded the page limit set forth in its local rules. This court, however, vacated the district court's order and remanded the case so that Martinez could be afforded an opportunity to refile a compliant motion. *Martinez v. United States*, No. 11-4418 (6th Cir. June 9, 2014) (order).

In 2014, Martinez filed a new § 2255 motion, again containing over 600 pages. The district court granted the government's motion to strike Martinez's § 2255 motion on the ground that the motion again exceeded the district court's page limit, but it gave him another opportunity to refile a compliant motion. *United States v. Martinez*, Nos. 4:11 CV 2348, 4:04 CR 430, 2014 WL 5162641, at *4-5 (N.D. Ohio Oct. 14, 2014). Martinez failed to do so, and the district court therefore dismissed Martinez's § 2255 motion with prejudice on the ground that he had not timely refiled a compliant § 2255 motion. In the same order, the district court advised that "[n]o further filings under 28 U.S.C. § 2255 will be accepted from [Martinez]." This court affirmed, holding that the district court had properly dismissed Martinez's § 2255 motion for failure to comply with the page limitations set forth in its local rules. *Martinez v. United States*, 865 F.3d 842 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1036 (2018). The district court thereafter denied Martinez's motion to reopen his § 2255 proceedings. The district court and this court each denied Martinez a COA. *Martinez v. United States*, No. 17-3989 (6th Cir. Feb. 26, 2018) (order).

Martinez then filed a motion for relief under Rule 60(d)(1) and (3) of the Federal Rules of Civil Procedure. The district court denied the motion, reasoning that, because it sought to vacate Martinez's sentence, Martinez had to follow the requirements of § 2255 and could not circumvent those requirements by filing under Rule 60(d). Thereafter, the district court denied Martinez's motion for reconsideration and declined to issue a COA. This court also denied Martinez a COA. *Martinez v. United States*, No. 18-3572 (6th Cir. Nov. 30, 2018) (order).

***2** Martinez also filed two motions for authorization to file a second or successive § 2255 motion to vacate. This court denied each motion as unnecessary, reasoning that his prior § 2255 motions were never adjudicated on the merits. *In re Martinez*, No. 18-3843 (6th Cir. Jan. 7, 2019) (order); *In re Martinez*, No. 18-3389 (6th Cir. Aug. 23, 2018) (order).

Martinez then filed the present motion to vacate. He claims that: (1) he is actually innocent of his two convictions for health care fraud resulting in death in view of *Burrage v. United States*, 571 U.S. 204 (2014); (2) his due process rights were violated when the district court admitted the testimony of Dr. Lowell Douglas Kennedy, an "unqualified" expert; (3) pursuant to *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), his due process rights were violated when the sentencing court found that he caused $60 million in losses because

the indictment charged him with causing only $46,000 in losses; and (4) there was a "retroactive misjoinder" with a "prejudicial spillover effect due to unreliable evidence."

The district court denied the motion and declined to issue a COA, reasoning that Martinez's claims were untimely, were procedurally defaulted, lacked merit, or were already adjudicated on direct appeal.

Martinez then filed a motion to supplement his § 2255 motion, seeking to support his claims based on allegedly newly discovered evidence—namely, a newspaper article dated May 29, 2018. The district court denied the motion as moot and as not presenting any new evidence that is relevant to Martinez's case.

In his motion for a COA, Martinez reiterates the four claims raised in his motion to vacate. Because Martinez does not challenge the district court's denial of his motion to supplement, any argument that the denial was in error has been forfeited on appeal. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a habeas corpus petition is denied on procedural grounds, the petitioner must show "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court's procedural ruling that Martinez's § 2255 motion is untimely. Federal prisoners have a one-year limitations period in which to file a § 2255 motion. The limitations period generally begins to run when a prisoner's conviction becomes final. 28 U.S.C. § 2255(f)(1); *Johnson v. United States*, 246 F.3d 655, 657 (6th Cir. 2001). Here, Martinez's conviction became final on November 3, 2010, when the Supreme Court denied his petition for writ of certiorari that he filed after this court affirmed his conviction on direct appeal. *Clay v. United States*, 537 U.S. 522, 527 (2003). Martinez, however, argues that his § 2255 motion should be deemed timely because he preserved his claims within one year of when this court made *Burrage* retroactively applicable to cases on collateral review and within one year of the Supreme Court's decision in *Nelson*. Under § 2255(f)(3), the one-year statute of limitations runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f). The Supreme Court has clarified that the limitations period starts from the date on which a right is initially recognized, not the date on which a right is made retroactive. *See Dodd v. United States*, 545 U.S. 353, 357 (2005).

***3** The district court rejected Martinez's argument that his motion is timely in view of *Burrage* and *Nelson*. No reasonable jurist could disagree: *Burrage* was decided in 2014, *see Burrage*, 571 U.S. at 204, and *Nelson* was decided on April 19, 2017, *see Nelson*, 137 S. Ct. at 1249; Martinez, however, did not file the present § 2255 motion until March 2019—more than one year after *Burrage* and *Nelson* were decided. Reasonable jurists therefore would agree that Martinez's motion to vacate is time-barred.

Even if this court were to accept Martinez's argument that his *Nelson* claim raised in his motion to vacate was timely filed on April 16, 2018—the date on which he filed his first motion for authorization to file a second or successive § 2255 motion, in which Martinez raised his *Nelson* claim—*Nelson* does not entitle Martinez to relief because it is wholly irrelevant to Martinez's case. In *Nelson*, the Supreme Court held that Colorado's Compensation for Certain Exonerated Persons statute violated the due process rights of two individuals who sought refunds of court costs, fees, and restitution paid before their convictions were reversed and vacated because it required them to prove their innocence in order to obtain a refund. *Id.* at 1254-55. But none of Martinez's convictions have been reversed or vacated. Therefore, Martinez's *Nelson* claim does not deserve encouragement to proceed further.

Absent equitable tolling—which Martinez does not argue applies here—the only gateway for review of an otherwise time-barred claim is a showing of actual innocence. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). A credible claim of actual innocence "requires [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence

—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Here, Martinez maintains that, pursuant to *Burrage*, he is actually innocent of his two convictions under § 1347 for health care fraud resulting in death because the evidence did not show that he actually caused the death of the two decedents. In *Burrage*, the Supreme Court held that, where use of a drug distributed by the defendant is not an independently sufficient cause of the victim's death, the defendant is not subject to the penalty enhancement provision of § 841(b)(1)(C) unless such use is a "but-for" cause of the death. 571 U.S. at 218-19.

The district court reasoned that Martinez is not actually innocent in view of *Burrage* because his § 1347 convictions were upheld under the "proximate cause" standard of 18 U.S.C. § 242—not the "but-for" standard of § 841(b)(1)(C), as in *Burrage*—and the proximate causation standard under § 242 is stricter than the but-for causation standard set forth in *Burrage*. *See Martinez*, 588 F.3d at 317-23. Reasonable jurists could not disagree. *See Burrage*, 571 U.S. at 211 (characterizing the "but-for" causation standard as "*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result," as is the case here (quoting ALI, Model Penal Code § 2.03, Explanatory Note (1985))).

Moreover, although not addressed by the district court, Martinez's jury instructions comported with *Burrage*. The jury instructions provided that, to convict Martinez under § 1347, the jury was required to find that his health care fraud was the "proximate or direct cause" of the decedents' deaths, and according to the jury instructions, "proximate or direct cause exists where the acts of the Defendant in committing health care fraud in a natural and continuous sequence directly produces the deaths *and without which they would have not occurred*." *Martinez*, 588 F.3d at 318 n.5 (emphasis added). In other words, notwithstanding that the instructions used the term "proximate," the jury could convict Martinez only if it found that "without" his fraud—i.e., "but-for" his fraud—the decedents' deaths "would not have occurred." Because "[j]urors are presumed to follow instructions," *United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011), the jury here necessarily found that the decedents would not have died absent—"but-for"—Martinez's health care fraud. This accords with *Burrage*. *See United States v. Volkman*, 797 F.3d 377, 392-93 (6th Cir. 2015) (holding that a jury instruction comported with *Burrage* when it provided that, to show that a death resulted from the defendant's conduct, "the government must prove beyond a reasonable doubt that the death would not have occurred had the mixture and substance containing a detectable amount of oxycodone, a Schedule II controlled substance dispensed by defendant, not been ingested by the individual"). Martinez therefore cannot show that the untimeliness of his motion to vacate is excused by his actual innocence in view of *Burrage*.

***4** Reasonable jurists also could not debate the district court's rulings that Martinez's untimely claims were procedurally defaulted, cannot be relitigated, or lack merit. First, Martinez failed to raise on direct appeal his claim that Dr. Kennedy's psychiatric illnesses rendered him unfit to testify as an expert at trial. Because Martinez offers no argument that cause and prejudice excuse his default for failing to raise this claim on direct appeal, and because he has not demonstrated that he is actually innocent, no reasonable jurist could debate the district court's rejection of Martinez's expert-testimony claim. *See Bousley v. United States*, 523 U.S. 614, 622-23 (1998). Second, no jurist of reason could debate the district court's rejection of Martinez's amount-of-losses claim because it has already been considered and rejected by this court on direct appeal, *see Martinez*, 588 F.3d at 326-27, and Martinez has not shown any "highly exceptional circumstances" that would permit him to relitigate this claim. *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999). Finally, reasonable jurists would agree with the district court's rejection of Martinez's misjoinder-and-spillover claim as meritless in view of Martinez's failure to show the requisite compelling prejudice or bad faith. *See United States v. Daniels*, 653 F.3d 399, 414 (6th Cir. 2011).

Accordingly, the court **DENIES** the motion for a COA and **DENIES** as moot the motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

All Citations

Not Reported in Fed. Rptr., 2019 WL 11706037