IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No: 3:75-CR-26-F
No.: 5:06-CV-24-F

UNITED STATES OF AMERICA,	)
	)
v.	)
	)
JEFFREY R. MacDONALD,	)
	)
Defendant/Movant.	)

MOTION FOR APPOINTMENT OF COUNSEL

Pursuant to Rule 8 of the Rules Governing § 2255 Proceedings and the Court's inherent authority, Defendant/Movant Jeffrey R. MacDonald ("Defendant") hereby moves for the appointment of counsel. In support of this motion, Defendant shows the following:

1. By order of September 21, 2011, the Court set an evidentiary hearing in this matter [DE-180].

2. On October 3, 2011, the Court allowed lead counsel for Defendant, Hart Miles, to withdraw [DE-186].

3. The evidentiary hearing, originally set for October 31, 2011, was continued until November 28, 2011 [DE-187]. The Government has estimated that the hearing will take five (5) court days and has made a preliminary list of about thirty (30) witnesses.

3. Undersigned counsel, F. Hill Allen, is disqualified from representing Defendant at the evidentiary hearing. The Government has represented that Wade M. Smith will "undoubtedly" be a witness at the evidentiary hearing and is likely to be subpoenaed by both sides [DE-185, para. 4]. In addition, as has been publicly chronicled, Wade Smith defended the

lead prosecutor and a central figure in this matter, James Blackburn, on later criminal charges. Hill Allen, in turn, is Wade Smith's law partner and, therefore, is disqualified from representing Defendant at the evidentiary hearing as a result of Wade Smith's own disqualification. Wade Smith and Hill Allen are filing a motion to withdraw contemporaneously with this motion for appointment of counsel.

4. Christine Mumma appeared for Defendant only a month ago on a *pro bono* basis in an effort to obtain additional DNA testing pursuant to the Innocence Protection Act (IPA). She is newly admitted to this District (as of September 21, 2011, the morning of the status conference) and not prepared or able to represent Defendant at the evidentiary hearing. She remains willing, however, to assist Defendant with respect to DNA testing issues under the IPA.

5. The Federal Public Defendant for the Eastern District of North Carolina also has a conflict in this matter. Thomas P. McNamara was involved on behalf of the Government in the prosecution of Jeffrey MacDonald.

6. Undersigned counsel have attempted to identify qualified counsel to replace Hart Miles following his withdrawal as MacDonald's lead counsel. M. Gordon Widenhouse, Jr., of Rudolf Widenhouse & Fialko in Chapel Hill has agreed to accept appointment as Defendant's counsel if that meets with the Court's approval, provided the evidentiary hearing will be continued until February 16, 2012, when the Government has represented it is available [DE-185, pp. 2-3, para. 6]. Mr. Widenhouse is duly admitted to practice in the District and clerked for the Honorable W. Earl Britt, United States District Judge, from 1981-83. Mr. Widenhouse has experience with matters under 28 U.S.C. § 2255. He has also taught a class on Federal Habeas Corpus at the UNC School of Law. He has authorized undersigned counsel to represent his willingness to be appointed as MacDonald's counsel if the evidentiary hearing is continued.

Mr. Widenhouse could not be prepared for a hearing on November 28. He currently has a brief due in the North Carolina Court of Appeals on October 21, an oral argument in the United States Court of Appeals for the Fourth Circuit on October 25, a reply brief due in the Fourth Circuit on November 1, another brief due in the North Carolina Court of Appeals on November 2, another brief due in the Fourth Circuit on November 14, and a third brief that will likely be due in the North Carolina Court of Appeals on November 18, as well as a proposed record on appeal that must be served on November 4. With these existing obligations, Mr. Widenhouse simply could not be prepared for an evidentiary hearing on November 28.

7. Rule 8(c) of the Rules Governing § 2255 Proceedings provides: "If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A." Defendant is financially eligible and qualifies to have counsel appointed under 18 U.S.C. § 3006A. "All of the circuits that have discussed the issue agree that the rule makes appointment of counsel mandatory when evidentiary hearings are required." *United States v. Duarte-Hegareda*, 68 F.3d 369 (9th Cir. 1995); *accord United States v. McClaren*, 112 F.3d 511 (4th Cir., decided May 1, 1997) (unpublished decision attached as Exhibit 1); *United States v. Lewis*, 21 Fed. Appx. 843 (10th Cir., decided Oct. 24, 2001) (unpublished decision attached as Exhibit 2). Furthermore, appointment of Mr. Widenhouse as Defendant's counsel is well within the Court's authority and would be in the best interests of justice.

8. Accordingly, Defendant respectfully requests that the Court appoint M. Gordon Widenhouse, Jr. as counsel in this action and continue the evidentiary hearing until February 16, 2012, when the Government has said it is available, or shortly thereafter.

This the 18th day of October, 2011.

/s/ F. Hill Allen
F. Hill Allen
N.C. State Bar No. 18884
THARRINGTON SMITH, L.L.P
209 Fayetteville Street
Post Office Box 1151
Raleigh, North Carolina 27602-1151
Telephone: (919) 821-4711
Facsimile: (919) 829-1583
Email: hallen@tharringtonsmith.com

/s/ Christine Mumma
Christine Mumma
Executive Director of the North Carolina
Center on Actual Innocence
Attorney for Defendant Jeffrey R. MacDonald
N.C. State Bar No.: 26103
P.O. Box 52446, Shannon Plaza Station
Durham, NC 27717-2446
admin@nccai.org
Telephone: 919-489-3268
Fax: 919-489-3285

CERTIFICATE OF SERVICE

The undersigned certifies that on October 18, 2011, the foregoing **MOTION FOR APPOINTMENT OF COUNSEL** was electronically filed with the Clerk of Court, United States District Court for the Eastern District of North Carolina, using the CM/ECF system. The CM/ECF system will send electronic notification of such filing to all parties.

/s/ F. Hill Allen
F. Hill Allen
N.C. State Bar No. 18884
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209 Fayetteville Street
Post Office Box 1151
Raleigh, North Carolina 27602-1151
Telephone: (919) 821-4711
Facsimile: (919) 829-1583
Email: hallen@tharringtonsmith.com

EXHIBIT 1

Unpublished Disposition
112 F.3d 511
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Wenley MCCLAREN, Defendant-Appellant.

No. 95-8591. Submitted: July 16, 1996. Decided: May 1, 1997.

On Petition for Rehearing and Suggestion for Rehearing in Banc.

Attorneys and Law Firms

Wenley McClaren, Appellant Pro Se. Thomas Oliver Mucklow, Assistant United States Attorney, Wheeling, West Virginia, for Appellee.

Before RUSSELL, LUTTIG, and WILLIAMS, Circuit Judges.

Opinion

OPINION

PER CURIAM:

*1 Appellant Wenley McClaren appealed from a district court order that, after a hearing, denied his 28 U.S.C. § 2255 (1988), *amended by* Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, motion in which he alleged that he received ineffective assistance of counsel in various ways during his criminal trial. This Court previously dismissed the appeal on the reasoning of the district court. After obtaining a response from the Government, we now grant McClaren's timely petition for rehearing and deny his request for rehearing en banc. Because the district court did not appoint counsel to represent McClaren at the evidentiary hearing on his habeas motion, we vacate the district court's order, and remand the case for the court to conduct another evidentiary hearing in which Appellant is represented by appointed counsel.

Though there is no constitutional right to counsel in § 2255 proceedings, "there is a statutory right to appointed counsel in a section 2255 proceeding under Rule 8, 28 U.S.C. § 2255, if an evidentiary hearing is required." *United States v. Vasquez,* 7 F.3d 81, 83 (5th Cir.1993). Other circuits that have addressed the issue have also so held. *See United States v. Duarte-Higareda,* 68 F.3d 369, 370 (9th Cir.1995); *Rauter v. United States,* 871 F.2d 693, 697 (7th Cir.1989).

Such error is not susceptible to harmless error review. *Vasquez,* 7 F.3d at 85. Neither has McClaren waived consideration of the issue on appeal. He twice requested counsel at the evidentiary hearing, and his requests were denied. He also noted the issue in his docketing statement and informal brief in this court.

For these reasons, we vacate the district court's order and remand the case with instructions that the court hold another evidentiary hearing on McClaren's § 2255 motion at which he is represented by appointed counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED.

Parallel Citations

1997 WL 215527 (C.A.4)

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EXHIBIT 2

*** Start Section

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21 Fed.Appx. 843
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Eric L. LEWIS, Defendant-Appellant.

No. 00-3347. Oct. 24, 2001.

Before EBEL, KELLY, and LUCERO, Circuit Judges.

Opinion

ORDER AND JUDGMENT*

This case raises a single issue: whether a district court's failure at a section 2255 evidentiary hearing to provide counsel to a defendant entitled to have counsel under Rule 8(c) requires reversal. We conclude that it does.

I. *Background*

A federal grand jury indicted Eric L. Lewis, the defendant-appellant, on October 27, 1998, for conspiracy to possess with intent to distribute approximately one pound of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 841, and for conspiracy to possess with intent to distribute one-half gallon of a mixture or substance containing phencyclidine ("PCP"), in violation of 21 U.S.C. § 846. In addition to Mr. Lewis, the grand jury indicted several other individuals, including Antonette A. Huckaby.

After the district court denied his motion to suppress the evidence against him, Lewis pled guilty on February 6, 1999, to being an accessory after the fact. On May 5, 1999, the district court sentenced Mr. Lewis to 87 months in prison. On May 5, 2000, exactly one year after being sentenced, Mr. Lewis filed a motion with the district court seeking to have his sentence set aside, vacated, or corrected. The district court granted Mr. Lewis's motion to proceed *in forma pauperis* in that proceeding.

Mr. Lewis's motion advanced several grounds for setting aside his sentence, including that he received ineffective assistance of counsel during his trial because his attorney, Mr. Carl Cornwell, failed to inform him that he was professionally associated with Ms. Huckaby's attorney, Mr. Brian Johnson. The only evidence Mr. Lewis presented in support of this claim was a March 9, 2000, docket sheet that listed the same address for Mr. Cornwell and Mr. Johnson.

**844* On August 28, 2000, the district court held an evidentiary hearing and concluded that all of Mr. Lewis's claims were without merit. (Doc. 214; August 28, 2000 Tr. at 23-25.) At the onset of the hearing, Mr. Lewis requested that the district court appoint counsel to represent him, which the court denied. (August 28, 2000 Tr. at 4.) The district court then explained to Mr. Lewis that, in light of the docket sheet, he had presented a prima facie case of ineffective assistance of counsel and that the government would bear the burden of rebutting this presumption.

The government then called Mr. Cornwell to the stand, and he testified that between June 1999 and May 2000 he and Mr. Johnson were, in fact, members of the same firm. (*Id.* at 7-8.) Mr. Cornwell testified, however, that he did not become professionally associated with Mr. Johnson until after Mr. Lewis was sentenced in May 1999. (*Id.* at 8-9.) Following direct examination, the district court clarified that although Mr. Johnson and Mr. Cornwell represented co-defendants in the same case, they were not co-counsel; the court then offered Mr. Lewis the opportunity to cross-exam his former attorney. (*Id.* at 9-11.) Mr. Lewis declined the invitation. (*Id.* at 11.)

Following Mr. Cornwell's testimony, the district court gave Mr. Lewis the opportunity to present his other arguments to the court, complimented Mr. Lewis on his well-written brief, and encouraged Mr. Lewis to relax when he expressed nervousness about presenting his arguments before the district court. The district court then denied Mr. Lewis's 2255 motion. As to Mr. Lewis's ineffective assistance claim, the court explained that Mr. Cornwell's testimony demonstrated that he and Mr. Johnson were not professionally associated while Mr. Cornwell represented Mr. Lewis. Consequently, it concluded that Mr. Cornwell did not have conflict of interest while representing Mr. Lewis. (*Id.* at 23.)

On October 2, 2001, Mr. Lewis filed a Notice of Appeal with this Court. On appeal, Mr. Lewis argued that the

district court violated his statutory rights under Rule 8(c) of the Rules governing section 2255 proceedings. Rule 8(c) unequivocally states, "If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g)." Because prior decisions by this Court had held that 2254's Rule 8(c), which is identical to section 2255's Rule 8(c), *requires* appointment of counsel when an evidentiary hearing is held for a defendant who qualifies for counsel under section 3006A(g), *see Swazo v. Wyoming Dept. of Corrections State Penitentiary Warden*, 23 F.3d 332 (10th Cir.1994), we concluded that "it appears Lewis qualified for mandatory appointment under Rule 8(c)."[1] We further concluded that the failure to appoint counsel "hindered ... [Mr. Lewis's] attempt to make" his Sixth Amendment ineffective assistance of counsel claim. (*Id., citing* 28 U.S.C. § 2253(c)(2).) Consequently, while we found Mr. Lewis had not made a "substantial showing of a denial of a constitutional right" on the other grounds asserted before the district court, we granted a Certificate of Appealability on Mr. Lewis's ineffective assistance of counsel claim. (*Id.* at 4.) In addition, we ordered the United States Attorney for the District of Kansas to submit a brief within thirty days addressing one question:

> **845* What is the appropriate remedy for the district court's apparent violation of Rule 8(c) in this case?

(*Id.* at 4.) We now address that issue.

II. *Analysis*

As the government forthrightly concedes in its brief, every circuit to date that has addressed the issue raised in our August 10, 2001 order has held that a Rule 8(c) violation requires automatic reversal and is not eligible for harmless error review. *See Green v. United States*, 262 F.3d 715, 718 (8th Cir.2001); *Shepherd v. United States*, 253 F.3d 585, 588 (11th Cir.2001); *United States v. Iasiello*, 166 F.3d 212, 213 (1999); *United States v. Vasquez*, 7 F.3d 81, 85 (5th Cir.1993); *Rauter v. United States*, 871 F.2d 693, 697 & n. 7 (7th Cir.1989) (all holding harmless error analysis inapplicable to the Rule 8(c) violations). *See also United States v. Duarte-Higareda*, 68 F.3d 369 (9th Cir.1995) (noting that all circuits hold that Rule 8(c) mandates the appointment of counsel and summarily reversing a district court that did not appoint counsel).

Notwithstanding the weight of authority against it, the government urges this Court to "pause before joining the stampede rejecting harmless error analysis and momentarily consider the wisdom of such an approach." (Aplc. Br. at 10.) The government advances several arguments in support of its position. First, it points out that "there is no constitutional right to appointment of counsel at an evidentiary hearing on a 2255 petition; instead it is mandated by statute." (*Id.* at 12.) Second, it notes that many constitutional errors are evaluated under the harmless error standard and do not result in automatic reversal. Finally, it contends that "structural" errors, which warrant automatic reversal, "emanate from the [C]onstitution," not statutes. (*Id.* at 13.) In essence, the government asserts that our sister circuits erred by "rais[ing] a statutory right to the appointment of counsel at a post-conviction evidentiary hearing above many constitutional rights which when violated do not require automatic reversal." (*Id.*)

Although we appreciate the government's argument, we reject it and hold that a violation of Rule 8(c) requires automatic reversal. We reach this conclusion for several reasons. First, precedent from this Circuit has already suggested that a Rule 8(c) violation under section 2255 requires automatic reversal. As touched on above, this Court held in *Swazo* that the failure to provide an attorney at an evidentiary hearing held under section 2254 requires reversal. 23 F.3d at 334 ("Because the district court did not appoint counsel when it required a hearing, we *must* remand the case for further proceedings.") (emphasis added). In reaching this conclusion, this Court expressly noted that the "rules governing § 2255 cases contain a similar [right to counsel] requirement" and invoked precedent from other circuits which hold that a Rule 8(c) violation under section 2255 is not subject to harmless error analysis and requires automatic reversal.[2] *Id.* at 334, *citing Vasquez*, 7 F.3d at 84 and *Rauter*, 871 F.2d at 695. Although we never expressly stated that a harmless error analysis was inapplicable, our summary reversal and holding that the appointment of counsel was required, as well as the precedent we relied upon, suggested such a result. 23 F.3d at 334.

Even if we are not bound by our decision in *Swazo*, the government has not convinced us that we should break from the position taken by *all* the circuits that have considered this issue. Although the **846* government is correct in noting that cases where automatic reversal is required (i.e., cases involving "structural error") usually involve a constitutional violation, *see Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *United States v. Stevens*, 223 F.3d 239, 244 (3d Cir.2000) (noting that "generally" structural errors are constitutional in nature), it is incorrect in suggesting that only constitutional errors warrant automatic reversal. *United States v. Annigoni*, 96 F.3d 1132, 1144 (9th Cir.1996) (en banc) (noting that "numerous errors are

subject to automatic reversal even though they do not violate constitutional rights"). As the Supreme Court explained in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), a structural error is an error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310, 111 S.Ct. 1246. Among the rights deemed "structural" by the Supreme Court is the complete denial of counsel during a criminal trial, *see Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which so affects "[t]he entire conduct of the trial from beginning to end." *Fulminante*, 499 U.S. at 309. Structural errors exist "where there are ... 'defects in the constitution of the trial mechanism, *which defy analysis by "harmless error" standards.*' " *United States v. Noushfar*, 78 F.3d 1442, 1445, *quoting Fulminante*, 499 U.S. at 309 (emphasis added).

As our sister circuits have explained, evaluating a Rule 8(c) violation defies traditional harmless-error review. The Supreme Court explained in *Fulminante*, for example, that the "common thread connecting" harmless-error cases was that the error "could be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. at 307-08. Yet where a defendant is denied his statutory right to counsel during a hearing, it is nearly impossible for an appellate court to determine whether this error was harmless. As the Fifth Circuit explained, "[I]t is difficult to accurately assess whether it was harmless error to deny counsel on the basis of a record developed at an evidentiary hearing conducted in the absence of that counsel. One can only speculate on what the record might have been had counsel been provided." *Vasquez*, 7 F.3d at 85; *see also Green*, 262 F.3d at 718 (invoking *Vasquez* and rejecting the idea that the government can show the lack of counsel was "harmless by relying upon testimony from the very hearing at which [the defendant] was unrepresented"); *Iasiello*, 166 F.3d at 214 n. 4 (same). [3]

III. *Conclusion*

In light of precedent from this Court and other circuits, the district court's denial of counsel to Mr. Lewis is REVERSED and this case is REMANDED to the district **847* court for a proper evidentiary hearing.

Parallel Citations

2001 WL 1335132 (C.A.10 (Kan.))

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f) and 10th Cir. R. 34.1(G).

1 In our August 10 order, we noted that a defendant who satisfies *in forma pauperis* requirements, as the district court held Mr. Lewis did, necessarily meets 3006A's requirements. (August 10 order at 3.)

2 Section 2254's Rule 8(c) is identical to section 2255's.

3 The facts in this case demonstrate the point articulated by our sister circuits. On appeal, the government contends that the "absence of counsel had absolutely no impact on the district court's decision denying the motion to vacate, set aside, or correct sentence." (Aple. Br. at 13.) Essentially, the government asks this Court to assume that no new information would have been revealed at the hearing had appointed counsel, as opposed to Mr. Lewis, been given the opportunity to cross-examine Mr. Lewis's former attorney. The government's argument, however, completely ignores the fact that Mr. Lewis, who described himself as nervous during the proceeding, expressly declined his right to cross-examine Mr. Cornwell. (August 28, 2000 Tr. at 10-11.) Perhaps as a result of this, we know very little about the relationship between Mr. Cornwell and Mr. Johnson prior to June 1999.

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