[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11045
Non-Argument Calendar

D.C. Docket Nos. 4:14-cv-00171-WTM-GRS; 4:08-cr-00100-WTM-GRS-1

ALFREDO FELIPE RASCO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(July 17, 2019)

Before NEWSOM, BRANCH and HULL, Circuit Judges.

PER CURIAM:

Alfredo Felipe Rasco, a pro se federal prisoner, appeals the district court's denial of his § 2255 motion to vacate his convictions and sentences. After review, we vacate and remand for further consideration consistent with this opinion.

I. BACKGROUND

In 2010, pursuant to a written plea agreement, Rasco pled guilty to one count of conspiracy to commit health care fraud, in violation of 18 U.S.C. §§ 1349 and 2, and one count of aggravated identity theft, in violation of 18 U.S.C. § 1028A. Rasco was born in Cuba and was brought to the United States by his parents when he was an infant. Rasco's plea agreement did not address his citizenship or the immigration consequences of his guilty plea. In addition, during the change of plea hearing, the district court did not address Rasco's citizenship or the immigration consequences of his guilty plea.

Rasco received a 133-month total sentence. In imposing the sentence, the district court stated that, upon release from prison, Rasco was to be delivered to Immigration and Customs Enforcement ("ICE") for deportation proceedings and, if deported, to remain outside of the United States during his three-year supervised release period and not to reenter the United States without express permission of the United States Attorney General. Rasco appealed, and this Court affirmed his convictions and sentences. See United States v. Rasco, 545 F. App'x 895 (11th Cir. 2013).

In 2014, Rasco filed this pro se § 2255 motion raising twelve claims. Relevant to this appeal, in Claim One Rasco alleged ineffective assistance of counsel regarding his guilty plea. Specifically, Rasco alleged that his attorney was unprepared for trial, coerced him into signing a plea agreement with a collateral appeal waiver and then into pleading guilty, altered the plea agreement after Rasco signed it, and afterward refused to file a motion to withdraw his guilty plea or a motion to withdraw as counsel.

In Claim Four, Rasco alleged that, in violation the Sixth Amendment and Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010), neither his attorney nor the district court had advised him of the immigration consequences of his guilty plea.[1] As to Claim Four, Rasco stated that had he known he would be deported he would not have pled guilty because he has not returned to Cuba since he was a baby and his life could be in danger in Cuba due to his family's ties to the pre-Castro government.

Without requiring a government response, Rasco's § 2255 motion was referred to a magistrate judge for a preliminary review under Rule 4(b) of the Rules Governing § 2255 Proceedings. The magistrate judge's report ("R&R") recommended that Rasco's § 2255 motion be denied. The R&R found that a direct

[1]In Padilla, the Supreme Court held that the Sixth Amendment right to effective assistance of counsel requires counsel to "inform her client whether his plea carries a risk of deportation." Padilla, 559 U.S. at 374, 130 S. Ct. at 1486.

and collateral appeal waiver in Rasco's plea agreement "preclude[d] any ineffective assistance of counsel ('IAC') claims except those that go to the validity of his guilty-plea agreement." As to Rasco's surviving "involuntary-guilty-plea claim," the R&R stated that this claim "[b]oiled down" to a claim that his "counsel 'coerced' him to accept the above-cited plea agreement." In describing the claim, however, the R&R cited solely to portions of Claim One of Rasco's § 2255 motion. The R&R rejected this claim on the merits because Rasco raised no objections about his counsel's performance during the plea colloquy and did not seek to withdraw his plea. The R&R then stated that "[a]ll of Rasco's other claims are barred by his double waiver [in his plea agreement], if not also by procedural default, for which he has pled no cause and prejudice or miscarriage of justice exceptions." The R&R, however, did not discuss Claim Four alleging that Rasco had not been advised of the immigration consequences of pleading guilty.

Rasco objected to the R&R, arguing that the collateral appeal waiver in his plea agreement should not bar his ineffective assistance of counsel claims or his claim based on Padilla (i.e., Claim Four). The district court overruled Rasco's objections, adopted that R&R, and denied Rasco's § 2255 motion. The district court addressed only one of Rasco's arguments—that he was not advised at his plea hearing that he was giving up his rights to a direct or collateral appeal, as required by Federal Rule of Criminal Procedure 11(b)(1)(N). As to this objection,

the district court found that Rasco was fully advised that he was giving up his rights to a direct or collateral appeal and, because the collateral appeal waiver was enforceable, Rasco was not entitled to relief. The district court did not address Rasco's objection as to Claim Four based on Padilla.

II. DISCUSSION

This Court granted Rasco a certificate of appealability ("COA") on the issue of "[w]hether the district court erred by denying Rasco's 28 U.S.C. § 2255 motion on his claim that his plea was involuntary because his attorney provided ineffective assistance of counsel by failing to advise him that removal was a potential consequence of pleading guilty," in other words, on Rasco's Claim Four. Ordinarily, our review is limited to the issue specified in the COA. Dell v. United States, 710 F.3d 1267, 1272 (11th Cir. 2013). Here, however, there is a procedural issue that must be resolved before we can address the underlying claim specified in the COA. See McCoy v. United States, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001) (explaining that threshold procedural issues are presumed to be encompassed in the COA).

In Clisby v. Jones, this Court instructed district courts to resolve all claims for relief raised in a habeas petition prior to granting or denying relief. Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992) (en banc); see also Long v. United States, 626 F.3d 1167, 1169 (11th Cir. 2010) (explaining that under Clisby, "any

and all cognizable claims" should be included when conducting a merits review). If the district court does not address all claims prior to issuing judgment, we "will vacate the district court's judgment without prejudice and remand for consideration of all remaining claims." Clisby, 960 F.2d at 938.[2] "[T]he district court must develop a record sufficient to facilitate our review of all issues pertinent to the application for a COA and, by extension, the ultimate merit of any issues for which a COA is granted." Long, 626 F.3d at 1170.

Here, the magistrate judge's R&R, adopted in full by the district court, did not include Claim Four in its review of Rasco's claims affecting the validity of his plea agreement, or in any other part of its discussion of Rasco's § 2255 motion, in violation of Clisby.[3] Furthermore, the district court's order adopting the R&R also failed to address the substance of Claim Four. Thus, the district court failed to develop a sufficient record to facilitate our review of whether Rasco's counsel

[2]In reviewing the denial of a § 2255 motion, we review the district court's legal conclusions de novo and its factual findings for clear error. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004).

[3]We decline to read the R&R implicitly to include Claim Four with "[a]ll of Rasco's other claims" that were dismissed sua sponte based on the collateral appeal waiver or, alternatively, as procedurally defaulted, as neither of those grounds will suffice with respect to Claim Four. First, where a defendant's plea agreement included a collateral appeal waiver, the district court may not dismiss the § 2255 motion on its own initiative on that basis, but instead must give the parties notice and an opportunity to present their positions on the waiver issue. See Burgess v. United States, 874 F.3d 1292, 1297-98 (11th Cir. 2017). Second, a claim of ineffective assistance of counsel "may be brought in a collateral proceeding under § 2255, whether or not the [movant] could have raised the claim on direct appeal." Massaro v. United States, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694 (2003).

provided constitutionally ineffective assistance by failing to inform him of the immigration consequences of his guilty plea.

Given that the district court did not address Claim Four, we decline the government's invitation to do so on the merits based on the certified public records the government submitted for the first time on appeal. Under Clisby, our role is to vacate the judgment and remand to the district court for consideration of the unaddressed claim and any response from the government in the first instance. Clisby, 960 F.3d at 938. Accordingly, we vacate the district court's judgment without prejudice and remand this action to the district court to consider Rasco's Claim Four.

VACATED AND REMANDED.