

ORIGINAL

Case No. 18-8996

IN THE
SUPREME COURT OF THE UNITED STATES

FILED

JAN 04 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ZACK ZAHER DYAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for *Writ of Certiorari* to Appeals Court Eighth Circuit

PETITION FOR *WRIT OF CERTIORARI*

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QUESTIONS PRESENTED

1 - Does the miscalculation of the amount of loss as applied to the sentencing guidelines represent an illegal sentence, and plain error that the Court should leave uncorrected?

2 - Does the Court of Appeals commit error or abuse of discretion granting a motion it has no jurisdiction to hear when the government's motion has run afoul of the statute of limitation?

LIST OF PARTIES

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

TABLE OF CONTENTS

| | |
|---|----|
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... | 3 |
| STATEMENT OF THE CASE..... | 4 |
| REASONS FOR GRANTING THE WRIT..... | 8 |
| CONCLUSION..... | 16 |

INDEX TO APPENDICES

| |
|---|
| APPENDIX A – Eighth Circuit Judgment |
| APPENDIX B – Eighth Circuit denial of rehearing by the panel |
| APPENDIX C – Eighth Circuit denial of recall the mandate motion |
| APPENDIX D – District Court Order & Opinion |
| APPENDIX E – Government’s Exhibit (Amounts of loss spreadsheet) |

TABLE OF AUTHORITIES CITED

Cases

| | |
|--|--------|
| <i>City of Duluth v. Fond du Lac Band of Lake Superior Chippewa</i> , 702 F. 3d 1147, 1152 (8 th Cir 2013) | 17 |
| <i>Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc.</i> , 952 F. 2d 980 (8 th Cir. 1991).... | 16 |
| <i>First Nat'l Bank of Olathe, Kansas v. Pontow</i> , (in re. pontow), 111 F. 3d 604, 609 (8 th Cir. 1997) | 17 |
| <i>Gardner v. Florida</i> , 430 U.S. at 356 (1976)..... | 12 |
| <i>Great S. Fire Proof Hotel Co. v. Jones</i> , 177 U.S. 449, 453, 44 L. Ed20 S. ct. 690 (1900)..... | 15 |
| <i>Haines v. Kerner</i> , 404 U.S. 519, (1972). | 8 |
| <i>Molina-Martinez v. United States</i> . _U.S._ 136 S. Ct. 1338, 1345, 194 L. Ed 2d 444 (2016)..... | passim |
| <i>Peugh v. United States</i> , 569 U.S. 530, 544, 133 S. Ct. 2072, 186 L. Ed. 2d. 84 (2013) | 14 |
| <i>Rosales-Mireles v. United States</i> , 138 S. Ct. 1897, 1910, 201 L. Ed. 2d0376 (2018)..... | 13 |
| <i>Royal v. Kautzky</i> , 375 F. 3d 720, 724-725 (8 th Cir. 2004). | 17 |
| <i>Steel Co. v. Citizens for a better Env't</i> , 523 U.S. 83, 94-95, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)..... | 15 |
| <i>Townsend v. Burke</i> , 334 U.S. 736, 741 (1948)..... | 12 |

| | |
|--|----|
| <i>United States v. Arthurs</i> , 647 Fed. Appx. 846, 2016 U.S. App. Lexis 9195, 2016 WL 2865756, *4 (10th Cir. May, 2016)..... | 13 |
| <i>United States v. Dominguez Benitez</i> , 542 U.S. 74, 76 82 (2004)..... | 14 |
| <i>U.S. v. Englemann</i> , 720 F. 3d 1005, 1013 (8 th Cir. 2003)..... | 11 |
| <i>U.S. v. Mancini</i> , 624 F. 3d 879, 881-82 (8 th Cir. 2010)..... | 11 |
| <i>U.S. v. McKanry</i> , 628 F. 3d at 1019 (8 th Cir. 2011)..... | 11 |
| <i>U.S. v. Oladimeji</i> , 463 F. 3d 152, 160 (2 nd Cir. 2006)..... | 11 |
| <i>United States v. Olano</i> , 507 U.S. 725 (1993)..... | 14 |
| <i>United States v. Omoware</i> , 731 F. 3d 951, 952 (8 th Cir. 2008) | 14 |
| <i>U.S. v. Parish</i> , 565 F.3d 528, 535 (8 th Cir. 2009)..... | 11 |
| <i>United States v. Sabillon-Umana</i> , 772 F. 3d 1328, 1333 (10 th Cir. 2014)..... | 13 |
| <i>U.S. v. Tucker</i> , 404 U.S. 443, 447 (1972)..... | 12 |
| <i>U.S. v. Mujica-Aranda</i> , 806 F. 3d 999, 1000 (8 th Cir. 2015) | 16 |
| <i>U.S. v. Dura-Lux International Corp.</i> 529 F. 2d 660 (8 th Cir. 1975) | 17 |
| <i>Vafer Inv. Group, LLC. V. Case (in re visionaire carp.)</i> , 299 B.R. 530, 532-33 (B.A.P. 8 th Cir. 2003) | 17 |

Statutes and Rules

| | |
|--|--------|
| 28 U.S.C. Sec. 1651 | 5 |
| 28 U.S.C. Sec. 2255 | 4,5 |
| U.S.S.G. Sec. 2B1.1..... | passim |
| U.S.S.G. Sec. 2B1.1(a)(2) | 10 |
| U.S.S.G. Sec. 2B1.1(b)(1)(J) | 10 |
| U.S.S.G. Sec. 2B1.1(b)(2)(a)(I) | 12 |
| U.S.S.G. Sec. 2B1.1(b)(9)(c) | 10, 12 |
| U.S.S.G. Sec. 2B1.1Comment (n.3)(E)(ii)..... | passim |
| U.S.S.G. Sec. 3B1.1(a) | 10, 12 |
| U.S.S.G. Sec. 3B1.3..... | 10, 12 |
| U.S.S.G. Sec. 3E1.1(a)-(b) | 11, 12 |

Eighth Circuit Local Rules

| | |
|---------------------------------|-------|
| Fed. R. App. P. 27(a)(1)..... | 16 |
| Fed. R. App. P. 47A..... | 9 |
| Fed. R. App. P. 47A(a)..... | 7, 16 |
| Fed. R. App. P. 47A(b)..... | 16 |
| Fed. R. App. P. 27A(a),(b)..... | 18 |

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR *WRIT OF CERTIORARI*

Petitioner respectfully prays that the *writ of certiorari* issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The denial of the United States Court of Appeals Eighth Circuit appears at Appendix A to the petition and the opinion is unpublished.

The opinion of the United States District Court appears at Appendix D to the petition and is reported at 2018 U.S. Dist. Lexis 102251, *United States v. Dyab*,

June 19, 2018

JURISDICTION

For cases from **federal courts**:

A timely petition for rehearing was denied by the United States Court of Appeals on October 23, 2018, and a copy of order denying the rehearing appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when actual service in time of war or public danger, nor shall any person be subject for the same offense to twice put on jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken from public use, without just compensation.

STATEMENT OF THE CASE

Petitioner pled guilty to conspiracy count, and money laundering count related to a mortgage loan fraud, and was sentenced to a cumulative ten year term of imprisonment as well as \$6,374,950 restitution. The District Court entered judgment on September 15, 2011. Petitioner did not appeal this judgment. On September 13, 2012, Petitioner filed a motion pursuant to 28 U.S.C. Sec. 2255 in which Petitioner claimed his attorney failed to file a timely notice of appeal. The District Court held a hearing, and on February 20, 2013, denied the motion.

Petitioner filed a number of sequential *Pro Se* motions and appeals thereafter.

On October 31, 2014, the government filed a motion to amend the petitioner's judgment. The motion requested to update addresses of payees listed in the government's motion (Exhibit 1) as well as recognize that three of the properties are joint and several with defendant Barbara Puro (from U.S. District Court Case # 11-288 (JNK/JJK), see Docket # 222.

On November 4, 2014, the District Court granted the government's motion *ex parte*, adopted the proposed amendment, and entered an amended judgment. There is no record that the Petitioner received notice of the government's motion or the amended judgment.

In fact, the amendment thought to change the identity of the restitution payees rather than update to the addresses of the same payees, and the amended

judgment listed Barbara Puro jointly liable for restitution with Petitioner, but for a totally different dollar amounts than the Petitioner on the same properties.

On October 8, 2015, Petitioner received a copy of his updated criminal docket, at that time the Petitioner noticed the entry of the amended judgment.

On November 4, 2015, Petitioner filed a *Pro Se* motion pursuant to 28 U.S.C. Sec. 2255, attacking the amended judgment on two grounds:

- 1) Petitioner was denied his Fifth Amendment right to notice and opportunity to be heard before the Court entered an order amending judgment, and
- 2) Amended sentencing judgment was invalid, because it was predicated upon money laundering conviction which Petitioner is actually innocent of committing.

Subsequently, the motion was denied on December 23, 2015. Petitioner filed a timely Notice of Appeal, which the Eighth Circuit affirmed the denial of the Petitioner, but on ground different than the District Court.

On May 4, 2017, the Eighth Circuit Court of Appeals indicated that relief may be available to remedy a violation of due process in the amendment of a restitution order under the All Units Act, 28 U.S.C. Sec. 1651, but refrained from remanding to the District Court to construe the prior *Pro Se* pleading as requesting relief under that statute. (see Appeal # 16-1296, opinion at 4,5).

Petitioner filed a petition for a Writ of Certiorari to the U.S. Supreme Court, and was denied on October 3, 2017.

On January 22, 2018, Petitioner filed a *Pro Se* motion to reopen restitution order and amend judgment, pursuant to All Writs Act, 28 U.S.C. Sec. 1651,

challenging the violation of his Fifth Amendment right to notice of the 2014 government's motion to amend judgment, and to the Court's order amending the Petitioner's judgment. In the motion, the Petitioner brought to the attention of the Court that:

1) The amendment judgment changed the identity of loss payees with identities whom are not victims, and did not update the addresses as the government's 2014 motion requested.

2) The amendment judgment listed the restitution amounts on Barbara Puro were different loss amounts than the Petitioner on the same properties.

See docket #274. Neither the government, nor the Court offered any explanation for that discrepancy in the amounts of loss.

The Petitioner looked in the matter further and was able to obtain records from the Sherriff's offices regarding the foreclosure sales and discovered that the discrepancy found it genesis in the errors originally made by the government when they applied wrong figures to the formula set to calculate the loss amounts.

On June 19, 2018, the District Court denied the Petitioner's motion to reopen the restitution order and amend judgment (see Appendix D). In the District Court's order denying the Petitioner's motion states in a relevant part:

" in 2014, the government requested two changes to the restitution portion of the criminal judgment see ECF No. 222. First, the government asked that certain of the payees be changed to reflect sales on the secondary market of the mortgage at issue."¹

Please see Docket # 285 at 1 Appx D.

¹ The 2014 government's motion requested an update to the payees' addresses not to substitute entities. Please see Docket #222.

Also, the Court in its order/opinion stated in relevant part:

“Dyab contends in his reply brief that his motion ‘is based, at least in part on the incorrect [SIC] formula that was used to determine actual loss.’”²

Please see order Docket # 285 at 3 Appx D.

On June 9, 2018, the Eighth Circuit Court of Appeals ordered a briefing schedule. The Petitioner filed his brief on August 6, 2018 (see Appeal # 18-2456).

On August 22, 2018, the government filed an Untimely motion for Summary Disposition, pursuant to the Eighth Circuit local Rule 47A.

On August 29, 2018, the Petitioner filed his response in opposition to the government’s motion being untimely pursuant to the local rule 47A(b), also the Petitioner stated in his response motion that the Eighth Circuit Court of Appeals lacked jurisdiction to entertain the government’s untimely motion pursuant to 47A(a).

On September 12, 2018, the Eighth Circuit Court ordered that the judgment of the District Court is summonly affirmed citing Eighth Circuit Rule 47A(a) . See Appx A.

On September 26, 2018, the Petitioner filed a Petition for Rehearing by a panel which was denied on October 23, 2018. See Appx B.

On November 7, 2018, the Eighth Circuit Court of Appeals issued the mandate in the above matter.

² The Petitioner in his reply brief did not contest the formula used to calculate loss was incorrect. The Petitioner contested the error made by the government when they applied wrong figures to the formula. See Reply brief Docket 284 at 2.

On November 19, 2018, the Petitioner filed a motion to recall the mandate pursuant to Fed.R.App. P. 41. Subsequently the motion was denied on November 21, 2018. See Appx C.

The petition seeks review in this honorable Court from the decision of the Eighth Circuit.

Further, the Petitioner asks this honorable Court for a liberal construction of his *Pro Se* pleading in accordance with Haines v. Kerner, 404 U.S. 519, (1972).

REASONS FOR GRANTING THE PETITION

1 – The U.S. Supreme Court has not decided if the Court errs when it misapplies the figures to the formula for purposes in determining loss calculations, under U.S.S.G. Sec. 2B1.1; and the miscalculated United States Sentencing Guidelines range error was not intentionally relinquished or abandoned, the error was plain, affected substantial Petitioner rights and the error seriously affects the fairness, integrity or public reputation of Judicial proceedings.

2 - The U.S. Supreme Court has not decided whether it is an abuse of discretion or if the Eighth Circuit Court of Appeals has jurisdiction to untimely motion, and deny an appeal under Eighth Circuit Fed. R. App. p. 47A.

Issue One:

A - Actual Loss Calculation

Pursuant to U.S.S.G. Sec 2B1.1 comment. (n.3)(E)(ii). The difference between the unpaid loan balance and the prices obtained for the properties at Sherriff's sale or short sales, is the method the guidelines recommend.

In determining the actual loss calculation in the instant case, the government agreed to the above method:

“The face of the mortgage that went onto default less what the bank actually got at the foreclosure sale.”

See the Petitioner evidentiary hearing transcript (Doc. #161, Pg. 13, line 23-25; and Pg. 14, line 1-2, September 14, 2011.)

However, the government misapplied the monetary figures into the loss calculation formula under U.S.S.G. Sec 2B1.1 comment. (n.3)(E)(ii). The government used the original purchase price figures, minus the sale price of the property a year or more after the Sheriff's sale. This is not the method the guideline recommended, nor did the government present such a method to calculate the loss amount. By doing this, the government created an inflated monetary loss calculation that increased the Petitioner exposure to more prison time.

The government's misapplication of the total amount of loss to be \$6,374,950.00. Please see the government's Exhibit 1, Docket # 150-1 at Appx. E.

For sentencing, purposes the starting point was base offense level of 6, U.S.S.G. Sec. 2B1.1(a)(2), by adding an enhancement for the loss amount of more than \$2,500,000, but less than \$7,000,000, warranting an 18 point enhancement pursuant to U.S.S.G. 2B1.1(b)(1)(J), 2-Points are added pursuant to U.S.S.G. Sec. 2B1.1 (b)(d)(a)(I), 2-Points are added pursuant to U.S.S.G. Sec. 2B1.1 (b)(9)(c), 4-Points are added pursuant to U.S.S.G. Sec. 3B1.1 (a), and 2-Points are added pursuant to U.S.S.G. Sec. 3B1.3, 3-Level are reduced for acceptance of

by adding an enhancement for the loss amount of more than \$400,000 but less than \$1,000,000, warranting a 14-point enhancement pursuant to U.S.S.G. Sec. 2B1.1(b)(1)(4), adding 2-point, pursuant to U.S.S.G. Sec. 2B1.1(b)(2)(a)(I), adding 2-point, pursuant to U.S.S.G. 2B1.1(b)(9)(c), adding 4-point pursuant to U.S.S.G. Sec. 3B1.1(a), and adding 2-point pursuant to 3B1.3, reducing 3-level for acceptance of responsibility, pursuant to U.S.S.G. Sec. 3E1.1(a)-(b). This would result in a total base level of 27, Criminal History Category I, has an advisory guidelines range of 70-87 months.

B – Prejudice / Due Process:

In this case, the Petitioner was prejudiced by the government's error in calculation the correct amount of loss which affected his sentence range.

The use of improper figures to the formula set to calculate loss resulted in the Petitioner receiving 33 months more on the high end of the guidelines and 50 months more on the low end of the guidelines.

U.S. v. Tucker, 450 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948)(Defendants have due process right to be sentenced on the basis of accurate information) *Gardner v. Florida*, 430 U.S. at 356 (1976)

see Rosales-Mireles v. United States, 138 S. Ct. 1897, 1910, 201 L. Ed. 2d.376 (2018) (concluding that a court abused its discretion in determining that a miscalculated guidelines range did not affect the fairness of judicial proceedings); also see United States v. Omoware, 731 F. 3d 951, 952 (8th Cir. 2008)

The District Court has the ultimate responsibility to ensure that the guidelines range it considers is correct and the “[F]ailure to calculate the correct guidelines range constitutes prejudicial error.” Paugh, 569 U.S., at 537.

In United States v. Olano, 507 U.S. 725 (1993), the Court established three conditions that must be met before a Court may consider exercising its discretion to correct the error. “First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain that is to say, clear or obvious. Third, the error must have affected the defendant’s substantial rights.” Molina-Martinez, 578 U.S. at _ (slip Op., at 4) (citations omitted). To satisfy this third question, the defendant ordinarily must “show a reasonable probability that, but for the error, the outcome of the proceedings would have been different.” Id. (quoting United States v. Dominguez Benitez, 542 U.S. 74, 76, 82 (2004)). Once these three conditions have been met, “the Court of Appeals should exercise its discretion to correct the forfeited error of the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” Molina-Martinez, 578 U.S. at ____ (slip Op., at 4,5) (internal quotation marks omitted).

In this instant case, the Petitioner meets all of the Olano’s three conditions, which would demand an exercise of discretion to correct the error.

Issue Two:

Jurisdiction / Abuse of Discretion:

The government filed its untimely motion in response to the Petitioner's Appeal Brief. The Eighth Circuit Court of Appeals has no jurisdiction and abused its discretion to grant the government's untimely motion.

A. Jurisdiction

A court is required to ascertain the existence of jurisdiction whether subject matter or appellate, at the offset of an appeal. The Court must resolve outstanding questions of jurisdiction before proceeding to analyze the merits. Steel Co. v. Citizens for a better Env't, 523 U.S. 83, 94-95, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) ("it is our obligation to notice jurisdictional infirmities, whether the parties notice them or not.") See Id. At 94 ("on every writ of error or appeal, the First and Fundamental question is that of jurisdiction, ... this question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. ") (quoting Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453, 44 L. Ed. 20 S. Ct. 690 (1900)).

(1) Eighth Circuit Fed. R. App. P. 47 A(a) Summary Disposition States in relevant part:

“On motion of Court. The Court on its own motion may summarily dispose of any appeal without notice. However, in an *In Forma Pauperis* appeal in which a Certificate of appeal ability has been issued, the Court will afford 14 days’ notice before entering summary disposition if the briefs have not been filed. The Court will dismiss the appeal if it is not within the Court’s jurisdiction or it frivolous and entirely without merit. The Court affirm or reverse when the questions presented do not require further consideration.”

See *Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc.*, 952 F. 2d 980 (8th Cir. 1991).

Although Rule 47A(a) is limited to the Court’s own motion, the Eighth Circuit Court has recognized “The Federal Rules of Appellate Procedure Planning Permit” the government to pursue a motion for summary disposition as well. *U.S. v. Mujica-Aranda*, 806 F. 3d 999, 1000 (8th Cir. 2015) (citing Fed. R. App. p. 27(a) (1).

Nevertheless, the Court failed to ascertain that it had jurisdiction to entertain the government’s untimely motion for summary disposition.

(2) – Eighth Circuit Fed. R. App. p. 47A(b), states in relevant part:

“On motion of parties, except for good cause or on the motion of the Court, a motion to dismiss based on jurisdiction must be filed within 14 days after the Court has docketed the Appeal. Except as the Court orders, the filing if a motion to dismiss does not toll the time limitations set forth in the Federal Rules of Appellant procedure or these rules.”

In this instant case at bar the Eighth Circuit Court of Appeals not only failed to ascertain jurisdiction of the government's motion, the Court failed to have good cause for untimely filing its motion for summary disposition within the time allotted in Fed. R. App. p. 47A(a),(b). U.S. v. Dura-Lux International Corp. 529 F. 2d 660 (8th Cir. 1975) ("this matter comes before a screening panel of this Court pursuant to a motion by appellee U.S. for summary disposition of the appeal. The motion is untimely and is denied.")

B. Abuse of Discretion

The abuse of discretion standard is "highly deferential". Royal v. Kautzky, 375 F. 3d 720, 724-725 (8th Cir. 2004). A court abuses its discretion "when its ruling is founded on an error of law or a misapplication of law to the facts". Vafer Inv. Group, LLC. v. Case (in re visionaire corp.), 299 B.R. 530, 532-33 (B.A.P. 8th Cir. 2003) (quoting First Nat'l Bank of Olathe, Kansas v. Pontow, (in re. pontow), 111 F. 3d 604, 609 (8th Cir. 1997)

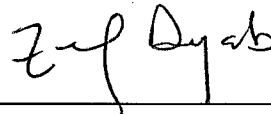
A court abuses its discretion when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight, or when all proper factors and no improper ones are considered, but the Court commits a clear error of judgment in weighting those factors. City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 702 F. 3d 1147, 1152 (8th Cir 2013).

The Court of Appeals for the Eighth Circuit abuses its discretion on ordering that the judgment of the District Court is summary affirmed and that the Eighth Circuit Court of Appeal had no jurisdiction to entertain this government's untimely motion for summary disposition, which violate Eighth Circuit Fed. R. App. p. 47A(a),(b).

CONCLUSION

WHEREFORE, for the reasons discussed above, the Petitioner respectfully requests that the above judgment of the Eighth Circuit Court of Appeals to be reversed and the case remanded with instructions to calculate the amount of loss, and resentence the Petitioner to the correct guidelines under U.S.S.G. Sec. 2B1.1 Comment (n.3)(E)(ii).

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Zack Dyab", is written above a horizontal line.

Zack Zafer Dyab

January 2, 2019