Case Number: 18-9043

In The

SUPREME COURT OF THE UNITED STATES

BRYAN BINKHOLDER,

Petitioner, Pro Se

V.

United States of America

Respondant

On Petition For A Writ of Certiorari

To The United States Court of Appeals

For The Eighth Circuit

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Petitioner's Reply to Brief in Opposition

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Petitioner's Reply Brief to Brief in Opposition

Petitioner's writ of Certiorari was filed on April 25,, 2019 and after three (3) extensions, the Government filed its response on September 27, 2019. Petitioner is an inmate incarcerated at Sheridan FCI, Satellite Camp and is operating Pro Se. Sheridan's mailroom has been closed since approximately September 18, 2019 due to a hazardous material spill. Petitioner has yet to receive the Government's response as of 1pm on October 3, 2019. In an effort to comply with Supreme Court rules, Petitioner has attempted through the Bureau of Prison's Corrlinks system to have the Governments petition retyped and sent to the Petitioner via his spouse.

Petitioner requests that due to the issues involved with delivery of the Government's response that consideration is given to including this Reply even if it fails to meet the 14 day period expressed in the Supreme Court rules.

Petitioners Reply Brief

I. Government's Contention Plea Agreement Contemplated CVRA Determination

1. The Government argues that the CVRA was contemplated in the plea agreement stating in their brief that "MU's motion and mandamus petition thus addressed an issue explicitily left open in the plea agreement, namely, whether MU qualified as a victim under the CVRA." (Gov. Brief #14). The fact is, nowhere in the plea agreement, plea colloquy, nor the MU evidentiary hearing is the term CVRA invoked. The first use of the term and statute CVRA wasn't until February 27, 2015 when MU filed his initial "Motion to Reconsider". (Doc106)

2. Petitioner's counsel at the plea hearing noted "[t]he Government and the defendant have agreed that this is an individual that we don't agree is a victim" and that at some point a hearing would be held "which would permit us the opportunity to each examine [MU] for the pleasure of the court [district] so that the court [district] may ultimately make a decision as to whether [MU] is a designated victim whose losses are to be included in the loss calculationprocess." (Plea Transcript Pg 17: Ln 6-13).

3. Defense counsel later again recited the plea with the government. "And so I'm not going to re-recite that which we understand about [MU] and the hearing for that, but it is for the purpose of determining whether he is a victim for inclusion and consideration by the court [District] of the ultimate range of sentencing." (Plea Transcript Pg 21: Ln 20-25). Again, there is absolutely no discussion or understanding by any party to the agreement that the CVRA was to be invoked for consideration. The entire recital by both parties was for the disputed item of the plea--the victim status determination of MU for the purposes of calculating the Sentencing Guidelines Loss Calculation.

4. The plea is obviously ambigious as the Petitioner has previously claimed and defense counsel noted in the 2015 sentencing hearing. "The writ of mandamus issue gives rise to a tremendous problem that we have and that's one of an illusory contract. Mr. Binkholder entered into a plea bargain agreement that said if [MU] was determined by the court to be a victim then one thing happened but if he wasn't, then another thing happened, and the decision was to be made by the court [district]. The government entered into this agreement. The defendant entered into this agreement. The court [district] accepted the plea." (Doc 156, Page 34, Lines 13-25).

5. Due process not only "requires that the government adhere to the terms of any plea bargain or immunity agreement it makes" United States v Pelletier 898 F. 2d 302 (2nd Cir. 1990) but also requires courts to construe agreements

strictly against the government in recognition of its superior bargaining power. United States x Ready 82 F.3d 551, 559 (2nd Cir. 1996).

II. Section 3771 (d)(5) Procedural & Jurisdictional Violations

6. The government in its brief describes how the Federal Case shows a legal basis for why the 14 day requirement per 3771(d)(5) should not apply. Ironically, it was the government who argued against the Writ of Mandamus Petition by Federal Insurance citing their violation of the 14 day requirement of 3771(d)(5). and the jurisdictional force of the statute. Federal Insurance 882 F.3d(2nd Cir. 2018)at 360.

7. The government cites the 2nd Circuit's finding that "considerable reason to doubt that Congress intended the CVRA's 14 day time limit...to be jurisdictional." (Gov. Brief #12). What they fail to include is the court went on in that same section of their opinion to say "Nevertheless, because that time limit was set by Congress there remains a substantial argument that in cases where that deadline applies, it has jurisdictional force." (Ibid). The "when that deadline applies" is in reference to 3771(d)(5) and the reopening of a plea.

8. The government then attempts to shift in its brief to say that the the writ of mandamus by MU was a 'presentencing motion.' Later they offer the same rationale of why the Petitioner's 6th Amendment Rights of Confrontation were not violated because the writ, in their view, was part of the sentencing process and not subject to confrontation.(Gov Brief #16). In fact, MU's writ of mandamus mentions nothing concerning sentencing and instead focuses solelyon the Memorandum and Order of February 9, 2015 declaring MU to "not be a victim for the purposes of sentencing". The writ asks the court to vacate the district court's erronous order consistent with the CVRA & MVRA (Doc 128). Clearly the Mandamus Petition was not a presentencing motion.

9. In regards to re-opening the Petitioner's plea, the government argues that the writ did not re-open the plea and that the change in the defendant's sentencing guideline range was contemplated in the plea. Petitioner points to the PSR that was created prior to the writ being issued and the district court's order on February 9, 2015 that finalized the one disputed item of the plea. (Doc.118 & 102). As the government notes in their brief, both parties left MU's status "to be resolved by the district court about whether MU qualified as a victim whose lost funds shall be included in the guideline

calculations." (Gov brief #5, citing Binkholder 832 F.3d at 926. By allowing the Court of Appeals to alter the determination of MU and change the Federal Sentencing Guideline ranges of the Petitioner after this sole issue was resolved by the district court, it obviously re-opened the plea and the agreement entered into by the Petitioner. This was in direct violation of 3771(d)(5)(B) and the decision should be vacated.

10. Finally the government agrees with the Petitioner that the Mandamus Petition sought restitution for MU and their brief cites dissenting Judge Gruender's view that the "Question" whether the Mandamus Panel should ordered the district court to "recognize MU as a victim only for the purpose of awarding restitution "as difficult." The government suggests that the Petitioner has received Due Process rights in subsequent hearings. This is contradicted by the record. Petitioner has never been allowed to challenge the CVRA designation itself which clearly became the focal point of all decisions and the only item the government can point to is that the Petitioner failed to procedurally Recall the Mandate. Even if one were to attempt such a manuver, the opinion offered clearly shows the high hurdle of such an attempt. "Although some justices have expressed doubt on the point [ability to recall a mandate], see e.g. United States v Ohio Power Co, 353 US 98, 102-103, 1L.Ed 2d 683, 775 S. Ct 652 (1957)(Harlan J, dissenting), The court of appeals are recognized to have an inherent power to recall the mandates, subject to review for an abuse of discretion." Attempts to attack judgements after the fact are extremely difficult as can be seen in Petitioner's second appeal when the district court clearly errored by saying the "CVRA's narrower definition of a victim" led him to his definition that MU "Must be a victim under the broader definition of a victim in the sentencing guidelines." (Doc. 237). The Appeals court noted the error in the district court's view writing they didn't find the CVRA's definition was narrower but nevertheless, they could not find the district court's ruling as erronous.

III. Fraud on The Court--False Allegations in Mandamus Petition

11. Once again, the government avoids addressing the false statement clearly found in MU's writ. Petitioner also finds it shocking that the [redacted]

government never once admitted or addressed the fraud perpetrated on the court (both district and Appeals). The governmnet argues that the Petitioner had ample opportunity to point out material mistatements or fabrication or events in his sentencing or resentencing (Gov. Brief #21). The government thus concedes that his Due Process rights and 6th Amendment Rights were violated because as the Petitioner pointed out in the Writ of Certiorari (page 21), every step of the legal process the Petitioner has pointed out MU's fraudulent accusations--proved by the record-- yet the Appeals Court and the District Court has never addressed the issue. (Appellent Brief 15-2125 pg. 33; Apellent Brief 17-2688 pg. 18; Post remand MU Determination submission; Resentencing Sentencing Memorandum 240-2).

12. Post remand submission by the Petitioner included the fact that MU had lied in his writ of mandamus. "MU's writ of mandamus included a deliberate mistatement of fact. MU alleged that the defendant Binhkholder had "taken additional steps to victimize [MU] by attempting to sell properties in which [MU] had a financial interest without informing MU."Doc 128. To the contrary, Defendant binkholder presented evidence to the court [district] that demonstrated that MU had specifically been informed of the potential sale of the property. Doc 115." .

13. In the Post Remand Resentencing on May 8 2017, Petitioner again submitted as part of the sentencing memorandum (Doc 240-2) the email which showed MU to have known of the actions he claimed he was not told of, yet the district court again remained silent on the issue just as the Appeals Courts had done In Binkholder 1 and Binkholder 2.

IV. CVRA Designation Led to Decision by The District Court

14. The government's brief claims the Petitioner has suffered no prejudice because of subsequent proceedings, however, the government never challenges the Petitioner's claims that the CVRA determination had become the "focal point" of all proceedings. (Gov. Brief at 16). One cannot dispute that the district court's change of opinion concerning the victim status of MU (compare February 9 2015 ruling to the May 3, 2017 ruling) was clouded by the CVRA Determination. This is especially true given the district court cited the CVRA's narrower definition of a victim thus leading him to his decision and change of heart in 2017. (Doc. 102, Doc 237).

V. Due Process and Initial Filing of Writ of Mandamus

15. The government's brief reasons Petitioner could have taken procedural steps to address teh writ of mandamus even in light of the 72 hour review requirement of 18 USC 3771. (Gov. Brief at 17). In their reasoning, the Federal Insurance case shows intervention was possible. Once again, it was the Government in the Federal case who 'opposed the writ of mandamus 'when Federal sought relief via the writ of mandamus. The Monzel case the government cites again confuses the issue because it revolved around the courts not deciding on the writ of mandamus within the 72 hour timeframe. This was not a case of a party objecting to the mandamus petition.

16. In response to the Government's questioning why the Petitioner didn't attempt to intervene in the writ of mandamus, Petitioner had attached in the addendum copies of attorney billing statements for that time period. The counsel of record, Albert Watkins had informed the Petitioner that since we were not a party to the petition we could not respond unless required by the court. This was memorialized in a letter to the Petitioner. The billing statement shows that the attorney also spoke with AUSA Casey concerning the matter and one would suppose professional guidance would have been exchanged between parties. This court can also see that the attorney then researched appellate procedures on the day the Mandate and decision was reached.

VI. Immunity of MU & Restitution

17. The government argues in its brief that MU wasn't a target of the investigation and did not knowingly participate so he is entitled to restitution. The facts gathered during a full day evidentiary hearing produced the exact opposite information. The District Court later ruled in it's February 9, 2015 order that MU was "a sophisticated businessperson who was complicit in Binkholder's Scheme." (Doc 102). Petitioner has included Doc 101 filed immediately after the hearing detailing the information gathered from the hearing concerning MU's role. (Addendum Item #2).

18. The government asserts that the investigators never found evidence of MU being involved, however, their own testimony revealed the obvious fact that they never looked at MU. Given Immunity to assist the government, the full target of the investigation was the Petitioner.

MU testified during the full day hearing that he alone controlled escrow accounts that were to be disbursed only after the rehabbing of homes was completed by contractors. The Petitioner had no access to these accounts or funds yet they mysteriously were depleted without the work having been completed. The FBI agent claimed that nothing in their investigation pointed to MU's using investor funds for himself, however, the FBI testified that they were totally unaware of the missing money from escrow accounts that only MU had access to. (Doc 115, Pg. 64 Ln 11-24, Pg. 81 Ln 4-20, Pg. 98). Can the government really claim MU wasn't complicit when his testimony and the obvious fact the FBI never looked into a simple situation like 'escrow accounts' which where the backbone of the Petitioner's and MU's business? Included in the appendix is the Petitioner's brief following the MU hearing. (Doc 101, Appendix Item 2).

19. MU's subordination of his restitution claim at Post Remand Resentencing obviously indicated MU knew in a civil setting he would be found guilty and subject to ramifications by the true victims who were mounting a legal challenge. To avoid this, when challenged he subordinated his claim after the true victims. (Doc 222 & 227).

VII. The Writ of Certiorari Should Be Granted

20. The uncertainty of 3771(d)(5) time requirements expressed by the various circuits, due process concerns over the 72 hour review requirement of 18 USC 3771 and how Immunity agreements should be viewed in light of the CVRA demand that this Court address and clarify the disjointed views of the Circuits and the questions that are posed by the Petitioner. As the court in United states v. McNulty 587 f.3d 344 (6th Cir. 2010) wrote in Footnote 4 of their decision, "We would like to express our frustration that Congress has permitted the courts only 72 hours in which to read, research, write, circulate, and file an order or opinion on these petitions for a writ of mandamus. Especially in cases such as this, where t he law is **relatively new and untested**, both litigants and future courts would benefit from additional time to prepare a clear and well reasoned decision." (emphasis added by Petitioner)

21. Finally, the government never addressed the issue that a writ of mandamus is a drastic remedy not to be issued absent a compelling justification or in extraordinary situations. See Kerr v. U.S. Dist. Court, 426 U.S. 394, 402, 96 S. Ct 2119, 48 L. Ed. 2d 725 (1976).