ORIGINAL

19-7325
No.

Supreme Court of the United States

HOPE KANTETE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Hope Kantete
Petitioner
64511-050
P.O. Box 27137
Fort Worth, TX 76127

QUESTION PRESENTED

Petitioner Hope Kantete proceeded to a jury trial in the face of overwhelming evidence. She was convicted and sentenced, *inter alia*, to 262 months incarceration. The conviction and sentence were affirmed on direct appeal. New counsel subsequently filed a motion pursuant to 28 U.S.C. § 2255 challenging her plea of not guilty and her sentence due to ineffective assistance of counsel in the plea process by demonstrating a reasonable probability that, due to counsel's failure to fully and competently advise her of her "risk factors" in proceeding to trial, she would have pleaded guilty instead of going to trial. The District Court denied the petition by holding that, since she was aware of the potential "sentence" for going to trial and aware of the "sentence" offered in a plea agreement, she was sufficiently advised in the plea process. The District Court's findings specifically did NOT include whether she was advised in any way, shape or form as to the likelihood of conviction if she proceeded to trial and lost. On appeal, the Court of Appeals for the Third Circuit affirmed.

1.) Whether the lower courts erred by failing to rule or even consider on the record whether Ms Kantete was advised of her "risk factors" in proceeding to trial; a material and critical allegation of her Section 2255 motion?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit.

More specifically, the Petitioner Hope Kantete and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Hope Kantete, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on 10-25-19.

OPINIONS BELOW

The 10-25-19 opinion of the Court of Appeals for the Third Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision, and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the District of New Jersey, was entered on 3-18-14, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Third Circuit in the direct appeal in this case, was entered on 5-7-15, is an unpublished decision reported at 610 Fed. Appx. 173 *; 2015 U.S. App. LEXIS 7570 ** and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment of the United States District Court for the District of New Jersey, denying Ms Kantete's motion pursuant to 28 U.S.C. § 2255, was entered on 4-5-19, is an unpublished decision reported at 2019 U.S. Dist. LEXIS 59011 and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the District of New Jersey, denying Ms Kantete's Request for Certificate of Appealability, was entered on 4-5-19, is and unpublished decision reported at 2019 U.S. Dist. LEXIS 59011 and is reprinted in the separate Appendix D to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 10-25-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

STATEMENT OF THE CASE

Petitioner Hope Kantete was initially charged in federal court on 6-1-12 with violation of 18 U.S.C. § 371 (Conspiracy to Transport Stolen Motor Vehicles) (Count 1); 18 U.S.C. § 2312 (Transportation of Stolen Motor Vehicles) (Counts 2-3); 18 U.S.C. § 511(a)(2) and 18 U.S.C. § 2 (Furthering the Theft of a Motor Vehicle) (Count 4).

On or about 4-3-13, Hope Kantete was charged in a Third Superseding Indictment with violation of 18 U.S.C. § 371 (Conspiracy to Transport Stolen Motor Vehicles) (Count 1); 18 U.S.C. § 2312 (Transportation of Stolen Motor Vehicles) (Counts 2-11).

On 6-28-13, she was found guilty after a plea of not guilty.

On 3-14-14, she was sentenced to 262 months incarceration plus 3 years supervised release, $346,936.91 restitution, and $1,100.00 special assessment.

On 5-7-15, the Court of Appeals for the Third Circuit affirmed her conviction and sentence. *United States v. Kantete*, 610 Fed. Appx. 173 *; 2015 U.S. App. LEXIS 7570 ** (3rd Cir. 5-7-15).

On 8-4-16, Petitioner filed a motion pursuant to 28 U.S.C. § 2255. In this motion, she pleaded, *inter alia*:

On 8-4-16, Ms Kantete filed a motion pursuant to 28 U.S.C. § 2255 with the District Court for the District of New Jersey. In this motion, Ms Kantete pleaded, inter alia:

> "GROUND TWO: Kantete's Counsel Provided Ineffective Assistance By Advising Kantete to Proceed to Trial Rather Than Seek a Plea Deal or, At Minimum Plea Guilty open.
>
> * * * * * * * * * *
>
> Hope K. Kantete received constitutionally ineffective assistance of counsel. ... with virtually insurmountable forces arrayed against her, counsel erroneously advised Kantete to proceed to trial rather than plead guilty with a certainly more favorable result. For these reasons, Kantete is entitled to § 2255 relief.
>
> * * * * * * * * * *

> ...counsel failed to provide Kantete with a realistic assessment of the Government's forces arrayed against her."

(Section 2255 motion, Case #1:16-cv-4801-RBK, CR Entry #1, PDF pages 5, 13, 21)

Based on the foregoing allegations, Ms Kantete asked the District Court for an evidentiary hearing where she could prove her case. *Id.*

While the district court found that plea offers were made and also found that Ms Kantete was made aware of her potential sentence if convicted at trial, the district court did NOT rule or even consider on the record whether Ms Kantete was advised of her "risk factors" in proceeding to trial; i.e. the weight of the evidence against her and likelihood of conviction at a trial. (1:16-cv-4801-RBK, CR Entry #6-7) *Kantete v. United States*, 2019 U.S. Dist. LEXIS 59011 * (D NJ 4-5-19) (Appendix D). On 4-5-19, said District Court denied the Section 2255 motion without an evidentiary hearing and without allowing discovery. *Id.*

On 4-5-19, the District Court also denied a Certificate of Appealability. (Appendix D)

On appeal from the denial of the motion pursuant to 28 U.S.C. § 2255, Ms Kantete argued that the the lower courts erred by failing to rule or even consider on the record whether Ms Kantete was advised of her "risk factors" in proceeding to trial; a material and critical allegation of her Section 2255 motion.

On 10-25-19, the Court of Appeals denied Ms Kantete's appeal of the denial of her motion pursuant to 28 U.S.C. § 2255.

In denying the appeal and Certificate of Appealability, the Court of Appeals held:

> Appellant's application for a certificate of appealability is denied. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Appellant's application challenges the District Court's denial of her claim that trial counsel was ineffective for advising her to go to trial. Reasonable jurists would not debate the conclusion that this claim was properly denied because Appellant failed to allege facts or present evidence indicating that there is a reasonable probability that, but for trial counsel's allegedly erroneous advice, Appellant would have opted to

> plead guilty instead of going to trial. See *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 857 (3d Cir. 2017). Appellant's motion for appointment of counsel is denied. See 18 U.S.C. § 3006A(a)(2); *Reese v. Fulcomer*, 946 F.2d 247, 263-64 (3d Cir. 1991), superseded on other grounds by statute, 28 U.S.C. § 2254(d).

(Appendix A)

Ms Kantete demonstrates within that this Court should grant her Petition For Writ Of Certiorari because the court of appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MS KANTETE'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

1A.) The Lower Courts Erred By Failing To Rule Or Even Consider On The Record Whether Ms Kantete Was Advised Of Her "Risk Factors" In Proceeding To Trial; A Material And Critical Allegation Of Her Section 2255 Motion

Ms Kantete made specific, sworn, factual allegations, in the Statement of Claim of her Section 2255 motion, that she was denied her Sixth Amendment constitutional right to effective assistance of counsel during the plea process, when counsel unprofessionally failed to advise Ms Kantete as to her "risk factors" in proceeding to trial. These allegations include the following:

> "GROUND TWO: Kantete's Counsel Provided Ineffective Assistance By Advising Kantete to Proceed to Trial Rather Than Seek a Plea Deal or, At Minimum Plea Guilty open.
>
> * * * * * * * * * *
>
> Hope K. Kantete received constitutionally ineffective assistance of counsel. ... with virtually insurmountable forces arrayed against her, counsel erroneously advised Kantete to proceed to trial rather than plead guilty with a certainly more favorable result. For these reasons, Kantete is entitled to § 2255 relief.
>
> * * * * * * * * * *
>
> ...counsel failed to provide Kantete with a realistic assessment of the Government's forces arrayed against her."

(Section 2255 motion, Case #1:16-cv-4801-RBK, CR Entry #1, PDF pages 5, 13, 21)

This 'advice' was below the standard and Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) and rendered Ms Kantete's rejection of the plea unconstitutional. *Pitcher v. United States*, 371 F. Supp. 2d 246; 2005 U.S. Dist. LEXIS 10314 (SD NY 2005) (attorney's comment that defendant had "winnable case" prevented plea of *not* guilty from being a knowing and voluntary act within the meaning of the Sixth Amendment); *Boria v. Keane,* 99 F.3d 492 (2nd Cir. 1996) (counsel was ineffective in failing to advise and his family that "it was almost impossible for a 'buy and bust' defendant to obtain an acquittal"); *United States v. Grammas,* 376 F.3d 433; 2004 U.S. App. LEXIS 13686 **6, 13 (5th Cir. 2004) ("When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court"); *United*

States v. Holguin-Herrera, 412 F.3d 577; 2005 U.S. App. LEXIS 11061 (5th Cir. 2005) ("A defendant cannot make an intelligent choice about whether to accept a plea offer unless he fully understands the risks of proceeding to trial."); *United States v. Ramsey*, 323 F. Supp. 2d 27; 2004 U.S. Dist. LEXIS 12462 **43-44 (D DC 2004) (plea of not guilty involuntary where attorney failed to fully inform defendant of risk factors in proceeding to trial instead of pleading guilty) (collecting cases). *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

While the district court found that plea offers were made and also found that Ms Kantete was made aware of her potential sentence if convicted at trial, the district court did NOT rule or even consider on the record whether Ms Kantete was advised of her "risk factors" in proceeding to trial; i.e. the weight of the evidence against her and likelihood of conviction at a trial. (1:16-cv-4801-RBK, CR Entry #6-7) The district court erred and the Court of Appeals affirmed that error. (Appendix A) (Appendix D)

As this Court observed in *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

> A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. See Hill, 474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.

Id. citing *Hill v. Lockhart*, 474 U.S. 52, 59; 106 S. Ct. 366; 88 L. Ed. 2d 203 (1985)

What good is it for a defendant to know that a plea agreement was offered and the potential maximum sentence if the defendant has no idea, or a distorted idea, of the likelihood of conviction after going to trial? This omission rendered counsel's performance below the objective standard of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052

(1984) and rendered Ms Kantete's rejection of the plea unconstitutional. *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

Based on the foregoing, this Court should VACATE the denial of Ms Kantete's Request for Certificate of Appealability and ORDER a REMAND to the district court for reconsideration. *United States v. Manos*, 848 F.2d 1427, 1988 U.S. App. LEXIS 8017 (7th Cir. 1988) (We view the "claim not in isolation, but against the entire record."); *Barger v. United States*, 1994 U.S. App. LEXIS 30134, *4-5 (7th Cir. 1994) ("It is simply impossible to conclude from isolated portions of the record whether [attorney] correctly instructed defendant); *Robinson v. Parke-Davis & Co.*, 685 F.2d 912, 913 (4th Cir. 1982) (An order is not final if it disposes of "fewer than all the claims or the rights and liabilities of fewer than all the parties.") (quoting Fed. R. Civ. P. 54(b)); *United States v. Espinoza-Aguilar*, 469 Fed. Appx. 663, 670, 20 a § 2254 (4th Cir. 2009) ("petitioner is entitled to have a *Schlup* actual innocence issue addressed and disposed of in the district court.") (citing *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (remanding Schlup issue when district court failed to address it)); *Wolfe v. Johnson*, 565 F.3d 140, 164, 2009 U.S. App. LEXIS 10042, *6112 U.S. App. LEXIS 6440, *16-17 (10th Cir. 2012) ("The district court must consider the issues presented in a § 2255 motion and our review of the record confirms Espinoza-Aguilar's claim - he raised this issue and the district court did not discuss it"); *Clisby v. Jones*, 960 F.2d 925, 935-38 (11th Cir. 1992) (adopting a categorical rule that district courts must either decide all asserted claims or certify partial dispositions of claims as final judgments under Fed. R. Civ. P. 54(b)).

Based on the foregoing, the decision by the Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id.*

McNabb v. United States, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Third Circuit in Ms Kantete's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Hope Kantete respectfully prays that her Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the denial of her Request for Certificate of Appealability and **REMAND**[1] to the court of appeals for reconsideration in light of *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

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Date: Dec-23-2019

[1] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).