

No. 19-8325

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

DEC 05 2019

OFFICE OF THE CLERK

QAIS HUSSEIN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Qais Hussein
Petitioner Pro Se
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SUPREME COURT, U.S.

Question Presented

Is it reasonably debatable that Qais Hussein was deprived the effective assistance of counsel where his defense attorney failed to object to any insinuation that the plea agreement stipulated to a loss amount and failed to object to the government's failure to recommend a reduction of three levels for acceptance of responsibility?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Appellant seeking the Certificate of Appealability in order to appeal the denial of a § 2255 motion, is Qais Hussein.

Respondent, who was the Appellee in the proceedings below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Seventh Circuit decided this case by summary order issued on September 27, 2019, in which it denied a Certificate of Appealability and dismissed the appeal, thus affirming the judgment of the habeas court in the Southern District of Illinois. A copy of the Seventh Circuit's summary order is included in the appendix attached to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of a court of appeals' denial of a certificate of appealability which followed the denial of a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 where Hussein attacked the validity of his conviction because his attorney, inter alia, failed to enforce the terms of the written plea agreement by failing to hold the government to its unequivocal and unqualified promise to recommend a three level reduction from the relevant Guidelines calculation and further failed to point out that the contract did not, contrary to the government and district court's claim otherwise, set forth any stipulated loss amounts for the application of enhancements. This petition is being filed within the time permitted by the Rules of this Court. See S. Ct. R. 13. This Court has jurisdiction to review the Seventh Circuit's denial pursuant to 28 U.S.C. § 1254(1). This Court further has jurisdiction over this habeas case pursuant to 28 U.S.C. §§ 2241, 2253, and 2255 in that all United States Courts have the power to grant writs of habeas corpus when justice so requires.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED BELOW

The question presented in the instant petition was argued and reviewed below as Hussein timely moved to Vacate, Set Aside, or Correct his sentence pursuant to § 28 U.S.C. § 2255(a), (f)(1) and the district court denied that motion following an evidentiary hearing. Hussein renewed this Petition's primary argument on appeal to the Seventh Circuit wherein he submitted a formal brief/application for the issuance of a certificate of appealability. Hussein specifically argued that his attorney failed to hold the government to the bargain entered into by both Hussein and the government. The Seventh Circuit dismissed the appeal and declined to issue a Certificate of Appealability by summary order. Accordingly, the issues presented herein have been properly preserved for review by this Court.

CONSTITUTIONAL PROVISION INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy 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 defence.

United States Constitution, Amendment VI

STATEMENT OF THE CASE

On October 22, 2014 a grand jury indicted Hussein and Odeh with a four-count indictment. Count 1 of the indictment charged Hussein and Odeh with conspiracy to unlawfully acquire Supplemental Nutrition Assistance Program ("SNAP") benefits, in violation of 18 U.S.C. § 371. Id. Count 2 and 3 charged aiding and assisting in the preparation and presentation of a false tax return, in violation of 26 U.S.C. § 7206(2). Id. Count 4 charged trafficking in counterfeit goods, in violation of 18 U.S.C. §§ 2320(a) and 2. Id.

On May 11, 2015, Hussein pleaded guilty to all four counts, stipulating to losses to the Government of \$1.6 million. The Court sentenced Hussein to 85 months while denying him a three-level reduction credit for acceptance of responsibility because he frivolously challenged the loss amount at issue. Hussein's direct appeal was dismissed because his Plea Agreement contained appellate waivers. United States v. Odeh, 832 F.3d 764, 765-68(7th Cir. 2016), cert. denied, 137 S. Ct. 1106 (2/21/17).

After the dismissal of his appeal, Hussein filed his petition seeking relief under 2255 (Doc. 1). In his 2255 petition, Hussein raised six grounds as the basis for his relief: (1) voluntariness of plea; (2) failure to investigate and conduct discovery; (3) loss of acceptance of responsibility; (4) obstruction of justice enhancement; (5) speedy trial; and, (6) immigration consequences. Id.

On December 19, 2018, the Court conducted a joint evidentiary hearing regarding both Hussein's and Odeh's 2255 petition. During

the hearing, Hussein, through counsel, waived five grounds (1,2,4,5,6) as the basis of his 2255 relief and proceeded on ground three which relates to Hussein's loss of acceptance of responsibility.

The District Court entered a final, appealable, judgment, by Memorandum & Order, in the § 2255 matter on December 21, 2018 which denied Petitioner-Appellant's Motion to Vacate. [Exhibit A].

Petitioner-Appellant desired to appeal this judgment, as is authorized by 28 U.S.C. § 2253(a). However, 28 U.S.C. § 2253(c)(1) and Fed. R. App. Proc. 22(b)(1) require a Certificate of Appealability as a prerequisite to proceeding with this appeal.

The Government responded in opposition, [Exhibit B], to which Petitioner traversed. [Exhibit C]. Further, the District Court ordered and held an evidentiary hearing on the matter. [Exhibit D].

The District Court sua sponte, and without explanation, declined to issue a Certificate of Appealability. [Exhibit F at 7].

Substantively, the crux of this case centers on the interpretation of the plea agreement that Hussein entered into in the collateral case under attack herein. That agreement is included in the appendix to this petition. Notably, the plea agreement obliged the government to make an affirmative recommendation to the sentencing court to award full credit for acceptance of responsibility. At sentencing, the government failed to make that recommendation arguing that Hussein's presentencing motion to challenge the loss calculation was proof that Hussein had not accepted responsibility. Counsel never pointed out that

the agreement itself required the government to make the recommendation without any qualifications:

The Defendant and the United States agree that the Defendant has voluntarily demonstrated a recognition and affirmative acceptance of personal responsibility for this criminal conduct, and the United States will recommend a reduction of three (3) levels, reducing the offense level of 27 to Offense Level of 24. See U.S.S.G. § 3E1.1. A reduction for acceptance of responsibility is dependent on the Defendant not committing any acts or taking any position prior to sentencing inconsistent with acceptance of responsibility, including falsely denying relevant conduct or committing any acts constituting obstruction of justice.

Plea Agreement at 9-10 (emphasis supplied).

This provision absolutely required the United States to recommend the reduction. Whether or not an award would have been made by the sentencing court was another issue entirely. However, the government was affirmatively required, without qualification, to "recommend a reduction of three (3) levels" to the final guideline calculation. That was a material breach of the agreement.

Further, the government and the sentencing/habeas court continually misconstrue the contract and keep asserting that the contract stipulated to a guidelines "loss-amount." The agreement did no such thing. In reality, the agreement only stipulated to a restitution amount. Accordingly, and as highly relevant to the review requested here, the government breached the agreement and counsel stood idly by while that happened.

REASONS FOR GRANTING THE WRIT

A. Introduction

This Court has long held that plea agreements are, in essence, contracts that must be read utilizing the law of the jurisdiction wherein the contract was entered into. As a Constitutional matter, however, the defendant that entered into the agreement with the agreement is entitled to a substantial amount of weight in construing the agreement in his favor. Where ambiguities exist, for instance, the ambiguities are read against the government as drafter. [United States v. Woods, 081 F.3d 531, 534 (7th Cir. 2008); United States v. Stearns, 479 F.3d 175, 178 (2d Cir. 2008)]. Here, the government was expressly obligated to make a recommendation as to acceptance of responsibility. Plea Agreement at 9-10. Important to the legal analysis is the fact that Hussein's objection to the "loss amount" calculation was not something that was "inconsistent with" accepting responsibility for the criminal act(s) in the plea agreement. In Santobello v. New York, [404 U.S. 257, 262 (1971)], this Court expressly held that where a promise is made by a prosecutor that was material to the decision to plead guilty, the prosecutor must honor that promise. Because the whole idea of the assistance of counsel at sentencing is to ensure that the Court is presented with factually and legally correct analyses, it is reasonably debatable that Hussein was deprived the effective assistance of counsel when his attorney failed to hold the government to its bargain.

B. Hussein has shown it reasonably debatable that the district court erred in denying his Motion to Vacate because it is reasonably debatable that he would have received an award for acceptance of responsibility which would have likely resulted

in a lower sentence.

In Molina-Martinez v. United States, [136 S. Ct. 1338, 1340 (2016)], this Court - evaluating sentencing under the demanding and similar plain error standard - held that a single offense level difference in calculation of the offense level is generally sufficient to show prejudice affecting the Appellant's substantial rights. Further, in Missouri v. Frye, [132 S. Ct. 1399, 1408 (2012)], the Court reasoned that counsel has specific duties in presenting plea agreements for approval or rejection by the defendant himself. Because the Guidelines are a substantial part of the calculation of a defendant's sentence, it is vital that counsel explain agreements to their clients. *Id.* Likewise, under the standard set forth by this Court in Santobello v. New York, 404 U.S. 257 (1971), it is constitutionally mandated that counsel explain and actually understand what that agreement actually confers and requires. In Hussein's case, counsel was lost about what the agreement actually said.

Here, Hussein entered an agreement that made several stipulations. But no stipulation about "loss amount" was made. Counsel relied on Odeh's assertion that an agreement was needed to protect the acceptance of responsibility award. That reliance was fatal to Hussein's case because he was absolutely permitted to challenge the loss-amount. What's more is that the government obligated itself to move for the acceptance of responsibility award - something they clearly failed to do.

In the day and age of stipulated pleas being the norm, it is vital that the government be held to its bargain. Santobello, 404 U.S. at 262. The Seventh Circuit's failure to find it debateable

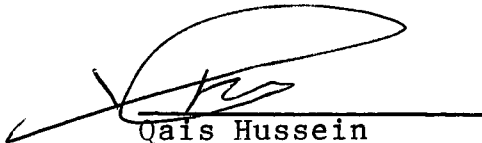
that counsel's failure to enforce the agreement erodes this Court's test under Strickland v. Washington, 466 U.S. 668, 688 (1984), because there is nothing left for counsel to do in plea bargain cases.

This Court's decision in Frye, 132 S.Ct. at 1399, compels a finding of ineffective assistance since it is clear that when counsel himself doesn't know the terms of the agreement there is no possible way he could have explained the agreement to the client. See id. discussing the recommendation that counsel has a duty to "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney."). Thus, this case poses a question of national importance as counsel must be accountable to his client's understanding and pursuing a reasonably sound strategic position.

C. Conclusion

WHEREFORE, Qais Hussein, Petitioner Pro Se, respectfully requests this Court grant a Writ of Certiorari to the Seventh Circuit Court of Appeals and consider this question of national importance.

Dated: November 20, 2019
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