No. 19-8698

IN THE

SUPREME COURT OF THE UNITED STATES

Neal Scott Stone
(Your Name)

PETITIONER

ORIGINAL

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Neal Scott Stone
(Your Name)

FCI Big Spring, 1900 Simler Avenue
(Address)

Big Spring, Texas 79720
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Does the Sixth Circuit's Amended Order, in which it denied Stone's COA Motion, conflict with Lozada v.Deeds, 498 U.S. 430 (1991)(per curiam) and progeny, when case laws establish that Stone's ineffective assistance of counsel claim is debatable among jurists of reason?

2. Is an entrapment defense viable as the Seventh and D.C. Circuits held, when a police informant persistently induces a defendant with a drug trafficking record to engage in a fake cocaine transaction after the defendant expressed his reluctance to do so; or does a drug trafficking record along with some unrelated drug trafficking charges outweigh an informant's improper inducements and a defendant's reluctance as the Sixth Circuit held?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

There are no related cases.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 16, 2019.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 1, 2019, and a copy of the order denying rehearing appears at Appendix C.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

"Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Title 28 U.S.C. § 2255(b) (2019).

"A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Title 28 U.S.C. § 2253(c)(2) (2019).

STATEMENT OF THE CASE

In May of 2014, Stone was arrested, along with codefendant Catherine Leake, for distributing heroin. Stone bonded out and advised Leake he would find someone to post her $30,000 bond. (Trial Doc. # 125)(Page ID # 758). Thereafter, Stone contacted Christopher Jordan, a Lexington Police confidential informant that was trying to convince Stone to accept a kilogram of cocaine on consignment. During their discussion, Stone expressed his desire to get Leake out of jail; and Jordan, in turn, notified the Lexington Police of Stone's desire. In an attempt to build trust with Stone, the Lexington Police directed Jordan to offer his assistance. (Government's Discovery, Detective Zachary King's Incident Report # 2014112652). Thus, on May 24, 2014, Jordan drove Stone to the Madison County Detention Center so Stone could post Leake's bond. However, the Police thwarted Stone's efforts by seizing the bond money. (Trial Doc. # 127)(Page ID # 982). Notably, Jordan knew the Police were going to seize the bond money before he and Stone arrived. (Id.)(Page ID ## 976, 979).

After these sequence of events, Stone called Jordan on numerous occasions and asked him to hire an attorney that could get the bond money back. (Id.)(Page ID # 982-83). Because of Stone's persistent efforts to persuade Jordan to do this, Jordan contacted attorney Matthew Malone and told him about this dilemma. During one of their conversations, Jordan and Malone concocted a plan that would lull Stone; Malone would create a fictitious demand letter addressed to the Madison County Police, in which

he would request the location and return of the bond money. At the same time, Jordan would tell Stone he hired Malone; Malone would get the money back; it would take Malone a while to get the money back; and he would front Stone a kilogram of cocaine in the meantime, so Stone could recoup the bond money a lot sooner. (Id.)(Page ID ## 872-73, 985). Malone mailed the fictitious demand letter to the Madison County Police; and Jordan electronically mailed a copy of the demand letter to Stone. (Id.). Because Jordan's U.S. Probation Officer had previously told the Madison County Police that Malone was going to mail its Office a copy of this demand letter, the letter came as no surprise to the Police. (Id.)(Page ID # 872-73)

Additionally, Jordan, at the behest of Detective Zachary King, contacted Stone on a regular basis to persuade Stone "to do a drug deal." (Id.)(Page ID # 930-31). According to King, however, Stone told Jordan that he was not "ready" to do such a thing, and that he (Stone) had "stopped' selling drugs after he had "caught the charges in Madison County." (Id.); (See Appendix E, Detective Zachary King's Incident Report # 2014112652). Nonetheless, King "continued to have and advise" Jordan to persuade Stone "to do a drug deal," after Stone had expressed his reluctance to do so. (Trial, Doc. # 126) (Page ID # 930-31).

As a result of this persuasion, Stone met Jordan in a Lexington, Kentucky Waffle House parking lot on July 7, 2014,

"to do a drug deal.[1]" During this meeting Stone handed Jordan over $6,000 in exchange for a bag that contained a piece of wood. (Id.)(Page ID # 912). Immediately after this exchange, the Police moved in and placed Stone under arrest. (Id.)(Page ID # 911). After he was Mirandized, Stone voluntarily told King the bag contained "weed." (Government's Discovery, Audio Recording). Yet, Stone was charged with attempting to possess five hundred grams or more of cocaine with the intent to distribute. (Indictment, Doc. # 1)(Page ID # 1).

Prior to trial, Stone told one of his attorney's, Scott C. Cox, he voluntarily told King that the bag contained "weed," after he was placed under arrest. Additionally, Stone told Cox that King had testified to such during a state court preliminary hearing. Several months before trial, Stone asked Cox as well as his other attorney, Michael R. Mazzoli, if they could effectively defend him from the attempt to possess cocaine count by arguing that he intended to possess marijuana not cocaine. According to Mazzoli, this theory would not provide an **effective** defense to the attempt to possess cocaine charge, because drug type was not a formal offense element. (Appendix F, Letter from Cox and Mazzoli). In other words, Mazzoli correctly proclaimed, "a person

1. The drug deal required Stone to sell the cocaine for $45,000, and to retain $30,000 of the $45,000 so he could attempt to bond Leake out of jail. However, Jordan directed Stone to give him the remaining $15,000 profit. (Trial, Doc. #127)(Page ID # 988).

can be convicted of attempting to possess cocaine without proof that he knew the substance being purchased was in fact cocaine, even if it's indisputable that the person wanted and intended to buy marijuana or some other drug." (Id.). Nevertheless, Mazzoli explained, this theory "could eventually yield a benefit by mitigating" punishment if, and only if, the Sixth Circuit or the Supreme Court "revers[ed]" this clearly established principle. (Id.)(brackets added).

Although Stone had mentioned Jordan's influential requests and his (Stone's) lack of predisposition Cox, nonetheless, declined to pursue an entrapment defense. Rather, Cox chose to to assert that Stone intended to purchase marijuana, not cocaine. Even though, as the appended letter demonstrates, Cox knew that such a claim lacked merit. (Id.).

During trial Jordan testified that Stone knew he was purchasing cocaine. In fact, during trial, Jordan even went so far as saying that Stone said, "Well there is 7,500 basically on the coke," even though the audio recording of this transaction established that no such statement was made. (Trial, Doc. # 127)(Page ID # 997); (Government's Trial Exhibit # 31, Audio Recording).

During its deliberations, the jury submitted a written question to the trial judge. The jury wanted to know if "what Stone thought he was going to get" mattered, or did "what he believed he had when he took possession" matter. (Trial, Doc. # 128)(Page ID # 1145). In response, the trial judge directed the jury to rely on the instructions pertaining to the attempt to possess cocaine count. (Id.)(Page ID # 1146). The jury subsequently found Stone guilty of

attempting to possess the fake cocaine. Consequently, Stone was ordered to serve a ten-year federal term of imprisonment. (Judgment, Doc. # 99).

On April 24, 2015, Stone filed a timely Notice of Appeal in the U.S. District Court. On January 19, 2017, the Sixth Circuit affirmed Stone's conviction. Stone subsequently petitioned this Court for a Writ of Certiorari on May 12, 2017. This Petition was denied on June 19, 2017. On June 18, 2018, Stone submitted a timely Motion to Vacate his conviction and sentence under 28 U.S.C. § 2255. (Motion, Doc. # 142). The District Court denied this Motion without an evidentiary hearing on September 17, 2018. On December 5, 2018, Stone filed a timely Notice of Appeal in the District Court, and a Motion for a Certificate of Appealability in the Sixth Circuit. On March 21, 2019, the Sixth Circuit denied this Motion; after which, Stone Petitioned the Sixth Circuit for a Rehearing and a Rehearing En Banc. As a result of this, the Sixth Circuit issued an Amended Order denying Stone's COA Motion on August 16, 2019. Moreover, the Sixth Circuit gave Stone an opportunity to withdraw or supplement his previously filed Petition for Rehearing with a Suggestion for Rehearing En Banc. Stone did neither. Thus, the Sixth Circuit issued an Order rendering Stone's Petition moot. (See Appendix C).

REASONS FOR GRANTING THE PETITION

To qualify for an appealability certificate, Stone had to show that his claim was debatable among jurists of reason. Miller-El v. Cockrell, 537 U.S. 322 (2003). The factors justifying the issuance of such a certificate are too numerous to catalogue comprehensively. Nonetheless, the fact that another federal court, addressing a similar issue, has reached a contrary view justifies the issuance of an appealability certificate. Lozada v. Deeds, 498 U.S. 430, 431-32 (1991)(per curiam).

Stone's trial attorney abandoned a meritorious entrapment defense and chose to raise a meritless mens rea claim instead. In his 2255 Memorandum, as well as his COA Motion, Stone pointed to a police report and the trial testimony of Detective King that proved: (1) The Police directed the informant to contact Stone on a regular basis in an attempt to persuade Stone "to do a drug deal"; (2) That Stone expressed his reluctance "to do a drug deal," by telling the informant that he had "stopped" selling drugs after he was arrested for selling drugs in Madison County, Kentucky; (3) The informant helped the Police seize the bond money that Stone needed; (4) The informant knew the bond money seizure put Stone in a financial strait; (5) The informant exploited Stone's financial plight by constantly offering Stone a kilogram of cocaine on consignment, so Stone could recoup the money he had lost; and (6) After Stone had expressed his

reluctance "to do a drug deal," the Police "continued to have and advise" Jordan to persuade Stone "to do a drug deal." (COA Motion, pp. 2-3. This evidence, at the very least, justified an entrapment instruction. See e.g., United States v. Mayfield, 771 F.3d 417, 441 (7th Cir. 2014)(en banc)(Entrapment instruction warranted when defendant alleged that informant placed him in debt, then exploited the debt, and that the defendant no longer sold drugs at that time).

According to the Sixth Circuit, however, Stone was predisposed to purchase the fake cocaine and, therefore, he failed to show prejudice under Strickland v. Washington, 466 U.S. 668 (1984). This was so, according to the Sixth Circuit, because Stone was on supervised release for cocaine offenses that occurred eleven-and-a-half years before he attempted to possess the fake cocaine; and because Stone had sold heroin two months before he attempted to do so. However, Stone's record does not establish predisposition[2], and Stone's predisposition to sell heroin does not establish that he was "predisposed to sell" cocaine. See e.g., United States v. Dottery, 353 F. Supp. 2d 894, 898 (E.D. Mich. 2005) (Entrapment instruction warranted when defendant, whom was charged with distributing crack cocaine, alleged that he was predisposed to sell powder cocaine, not crack cocaine. A predisposition to sell one drug does not establish a predisposition to sell different drug). And although the other activity occurred

2. In Mayfield, the Seventh Circuit held that "[a] prior conviction for a similar offense is relevant but not conclusive evidence of predisposition; a defendant with a criminal record can be entrapped." 771 F.3d at 438 (brackets added).

a mere two months before Stone attempted to possess the fake cocaine, this does not establish predisposition. Especially when the record demonstrates that he "stopped" selling drugs after he was arrested for selling heroin. See United States v. Vaughn, 80 F.3d 549, 552 (D.C. Cir. 1996)("Jaccobson[3] allows a jury to consider the possibility that a defendant's disposition to commit a crime changed over time. Sinners may become saints and saints may become sinners. Nothing is necessarily permanent about either state. A person might be disposed to commit a crime one day and not disposed to do so some time later.").

In United States v. Brisbane, 729 F. Supp. 2d 99, 114-17 (D.D.C. 2010), the Court scheduled a 2255 evidentiary hearing in a case similar to Stone's. In Brisbane, the defendant claimed: (1) The informant repeatedly attempted to persuade him to sell drugs during a period in which the defendant was experiencing financial difficulties; (2) He rebuffed the informant's multiple requests to engage in illegal drug activity; and (3) He was no longer in the drug trade when the informant propositioned him. Id. The Brisbane Court granted an evidentiary hearing, even though the countervailing evidence demonstrated that an entrapment defense may have failed. Id. Stone cited this case, as well as the other cases mentioned above, in his COA Motion. (COA Motion, pp. 10-14). The Sixth Circuit's decision, however, illustrates that it completely failed to consider these cases--cases which proved that other courts would have resolved Stone's Strickland claim differently. Consequently, the Sixth Circuit's decisison

3. In Vaughn the D.C. Cir. was referring to Jacobson v. United States, 503 U.S. 540 (1992).

contravenes Lozada and progeny. See Lozada v. Deeds, 498 U.S. at 432 ("Court of Appeals erred in denying" certificate "because, under the standards set forth in Barefoot," the petitioner "made a substantial showing that he was denied the right to effective assistance of counsel." Although the district court concluded that petitioner had not shown prejudice under Strickland, we believe the issue could be resolved differently because "at least two Courts of Appeals" have decided the issue differently).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Noel Scott Stone

Date: December 27, 2019