
No. _____

SUPREME COURT OF THE UNITED STATES

ZACHARY JOSEPH LOVE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. Question Presented

In a *habeas corpus* proceeding under 28 U.S.C. § 2255 originating from a federal district court, where facts have not been established on the record to show conclusively that the defendant is not entitled to relief, should this Court confirm the application of the factors requiring an evidentiary hearing for 28 U.S.C. § 2254 proceedings originating from a state court as established by Townsend v. Sain to § 2255 proceedings as specified in Kaufman v. United States and enumerate the role of the Townsend factors to cases originating in federal court?

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IV. Petition for Writ of Certiorari

Zachary Love, an inmate currently incarcerated at the Federal Correctional Institute in Phoenix, Arizona, by and through Terrance O. Waite, counsel of record appointed under the Criminal Justice Act, U.S.C. §3006A, respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

V. Opinions Below

The decision by the Eighth Circuit Court of Appeals denying Mr. Love's direct appeal is reported as Love v. United States, 949 F.3d 406 (8th Cir. 2011). The Eighth Circuit denied Mr. Love's petition for rehearing on April 1, 2020. That order and Judge Kelly's dissent is attached at the Appendix ("App.").

VI. Jurisdiction

Mr. Love's petition for rehearing to the Eighth Circuit Court of Appeals was denied on April 1, 2020. Mr. Love invokes this Court's jurisdiction under 28 U.S.C. §1257, having timely filed this petition under the temporarily extended time of one hundred fifty days of the Eighth Circuit's judgment.

VII. Constitutional Provisions Involved

United States Constitution, Amendment VI:

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 the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

VIII. Statement of the Case

In evaluating whether a claim of ineffective assistance of counsel in a *habeas corpus* proceeding under U.S.C. § 2255 may be proven, this Court has held that a petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for that deficient performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

The right to effective assistance of counsel extends to plea negotiations. Allen v. United States, 854 F.3d 428, 432 (8th Cir. 2017). A § 2255 motion can be dismissed without an evidentiary hearing if (1) the petitioner's allegations, if accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." Ford v. United States, 917 F.3d 1015, 1026 (8th Cir. 2019)(quoting United States v. Regenos, 405 F.3d 691, 694 (8th Cir. 2005)).

The Eighth Circuit Court of Appeals has found that an evidentiary hearing in a *habeas* proceeding originating from a federal district court "must be held... unless the motion and the files of the records of the case *conclusively* show that the prisoner is entitled to no relief." Franco v. United States, 762 F.3d 761, 763 (8th Cir. 2014) (cleaned up, emphasis added). This Court has held that in *habeas* proceedings originating from a state court, a six-factor test applies, under which the existence of

any one of the six factors triggers a mandatory evidentiary hearing. Those factors are

“if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.”

Townsend v. Sain, 372 U.S. 293, 313 (1963).

Six years after Townsend, this Court found that all but the third factor shall apply to proceedings originating from federal courts, and that regarding all other factors of the Townsend test, “we perceive no differences between the situations of state and federal prisoners which should make allegations of the other circumstances listed in Townsend v. Sain less subject to scrutiny by a § 2255 court.” Kaufman v. United States, 394 U.S. 217, 227 (1969).

This case presents the question of whether the guidance laid out by this Court in Kaufman is being adhered to by lower courts, specifically the Eighth Circuit Court of Appeals, and whether this Court should affirm the finding of the applicability of five of the six factors of the Townsend test to § 2255 proceedings originating in a federal court in order to ensure that petitioners’ Sixth Amendment rights are upheld in a unified manner whether they are charged in state or federal courts.

1. The expired plea deal

In May 2015, Zachary Love was charged under 21 U.S.C. § 841 and 846 with conspiracy to distribute and possess fifty grams or more of methamphetamine. During the proceedings in the District Court of Nebraska, his trial counsel became aware that Mr. Love suffered from a traumatic brain injury and numerous mental health disorders. Concerned that Mr. Love was not competent to stand trial, Mr. Love's counsel moved for a mental health evaluation.

Mr. Love was transported to the Metropolitan Correctional Center in San Diego (“MCC San Diego”) where he underwent a six-week observation and evaluation. The resulting Forensic Report summarizing Mr. Love's evaluation found that he suffered from post-traumatic stress disorder, attention deficit-hyperactivity disorder, and substance abuse, in addition to possible borderline intellectual functioning, traumatic brain injury, and migraines. The Forensic Report concluded that Mr. Love understood the charges against him, the processes of the court, plea bargaining, punishment, and the meaning of pleas. The Report also found that while Mr. Love's medications were effective, he should be re-evaluated for mental health stability if his medication regimen was changed significantly.

While Mr. Love was at MCC San Diego, a plea offer from the government was allowed to expire, the reason for and the facts surrounding the expiration have not been established on the record. Mr. Love alleged that “counsel never advised him that the government had issued a[n expiration] warning or had set a time limit for him to accept that the plea offer.” In fact, he alleged that his counsel had led him to

believe “the offer was still on the table” while he was undergoing his competency evaluation.

After reviewing the Forensic Report, the magistrate judge found Mr. Love competent to stand trial. Mr. Love subsequently pled guilty and received a sentence of 144 months’ imprisonment. Mr. Love filed a pro se motion to vacate his sentence under 28 U.S.C. § 2255 arguing counsel was ineffective by (1) failing to secure a plea agreement, and (2) failing to request a second competency evaluation due to a medication change. Mr. Love requested an evidentiary hearing to develop a record to show why counsel failed to “secure the plea offer” or “maintain plea negotiations” with the government. The district court found that Mr. Love failed to allege facts showing his attorney’s performance was objectively unreasonable and denied the motion without granting Mr. Love an evidentiary hearing to develop the record.

2. Direct appeal

On direct appeal, Mr. Love renewed his argument that his Sixth Amendment rights had been violated due to ineffective assistance of his Criminal Justice Act-appointed trial counsel. He argued that this ineffectiveness was demonstrated in part by counsel allowing the government’s offer for a plea deal to expire while Mr. Love was undergoing his competency evaluation at MCC San Diego, although no record was ever developed with the facts surrounding the expiration or withdrawal, and neither the district court nor the Eighth Circuit required the government to respond regarding the expiration. In a published opinion, the Eighth Circuit Court of Appeals reasoned that, even assuming that all the facts alleged by Mr. Love to be

true, he could not demonstrate that his attorney acted unreasonably by “advising [Mr.] Love to focus on the evaluation instead of a potential plea offer.” The Court found that because Mr. Love’s counsel had legitimate concerns about his ability to make a knowing and voluntary decision to plead guilty, coupled with the strong presumption of reasonableness and the wide range of reasonable behavior of attorneys, the Court could not find that counsel acted unreasonably.

The Court further affirmed that the district court did not abuse its discretion in declining to grant Mr. Love an evidentiary hearing because Mr. Love’s allegations surrounding the expired plea offer, even if taken as true, would not entitle him to relief.

Judge Kelly concurred in part and dissented in part. In her dissent, Judge Kelly stated that “without an evidentiary hearing, we cannot know why the plea offer [Mr.] Love wanted to sign had expired by the time he returned from MCC San Diego. Nor can we can know whether counsel could have done anything to keep the plea offer open, or whether counsel’s actions may have caused the offer to expire.” She went on to state that “it is not appropriate for this [C]ourt to assume facts not in the record,” and that “accepting [Mr.] Love’s allegations as true, it is possible he is entitled to relief.”

IX. Reasons for Granting the Writ

- A. To avoid uneven treatment of the constitutional rights of criminal defendants charged in federal courts compared to those charged in state courts, this Court should confirm and enumerate the application of the factors requiring an evidentiary hearing in *habeas corpus* proceedings as established by Townsend as applying also to § 2255 proceedings originating in federal courts

In Townsend v. Sain, this Court adopted a set of factors to ensure that *habeas corpus* petitions arising from proceedings originating in state courts were granted evidentiary hearings in a fair and uniform manner, allowing for a federal district court to seek to fill out the record when it was necessary. Townsend established six factors for district courts to review, with any one factor triggering a required evidentiary hearing. The six factors enumerated were:

“if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.”

Townsend at 313.

Six years later, in Kaufman v. United States, this Court examined the potential application of the six Townsend factors to *habeas* petitions arising from federal criminal charges, with cases starting in federal district courts instead of state courts. This Court found that indeed the factors were equally applicable to federal *habeas* cases, with the exception of the third factor (finding there that the fact-finding procedure of federal courts was well enough equipped not to require such a safeguard). Besides the third factor, this Court stated that “we perceive no differences between the situations of state and federal prisoners which should make allegations of the other circumstances listed in Townsend v. Sain less subject to scrutiny by a § 2255 court.” Kaufman at 227.

With such a clarification from this Court, there is an expectation that petitioners in federal *habeas* proceedings will see a level of uniformity in the responses to their cases throughout the circuits, and a near-automatic holding of an evidentiary hearing if one of the Townsend factors applies to their case. However, that is not the current situation, and there remains an uneven application of the use of evidentiary hearings even within the same circuit, and virtually no use of the Townsend factors in federal *habeas* proceedings.

Here, the Court of Appeals seems itself confused with and conflicted by the facts surrounding Mr. Love's expired plea deal, with the acknowledgement by Judge Kelly in the dissent that the record surrounding the facts of the plea deal were never developed enough to "know whether counsel could have done anything to keep the plea offer open, or whether counsel's actions may have caused the offer to expire." In Bender v. United States, the First Circuit Court of Appeals found that if a factual dispute exists, a hearing must be held. Bender v. United States, 387 F.2d 628, 630 (1st Cir. 1967). In Mr. Love's case a factual dispute clearly centered the discussion around the expiration of the plea deal, and the government was never required by either the district court nor the Eighth Circuit to respond or flesh out any unknown facts surrounding the offer.

As stated in Judge Kelly's dissent, with almost no facts known about the expiration of the plea deal whatsoever, beyond its initial existence and eventual expiration or withdrawal, it is impossible to say whether Mr. Love would not be entitled to relief based upon his attorney's potentially unreasonable behavior:

because his attorney's behavior is simply completely unknown. The current guidance from the Eighth Circuit is that "a § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of facts." Ford at 1026. The Third Circuit has held that allegations not conclusively refuted by the record warrant the granting of an evidentiary hearing. Government of Virgin Islands v. Weatherwax, 20 F.3d 572, 573 (3rd Cir. 1994). The Eighth Circuit has also stated that an evidentiary hearing "must be held... unless the motion and the files and the records of the case *conclusively* show that the prisoner is entitled to no relief." Franco at 763 (emphasis added).

Here the record could not show conclusively that Mr. Love was entitled to no relief, because no record surrounding the expiration of the plea deal existed. In both Missouri v. Frye, 566 U.S. 134, 145 (2012) and in United States v. Bonnister, 467 Fed.Appx. 175, 176 (4th Cir. 2012), evidentiary hearings were granted in cases where plea deals were not communicated to petitioners. While the Eighth Circuit majority is correct in stating that counsel did communicate the initial plea offer to Mr. Love, Mr. Love alleges that counsel did not advise him that the government had issued a warning or had set a deadline for accepting the plea offer. It is possible that the government unilaterally withdrew their offer without warning, or that counsel was never informed of a deadline, but without an evidentiary hearing to establish a record

on those questions, it is impossible to know for certain whether this happened or whether counsel's behavior affected the option of a plea.

The guidance currently followed by the Eighth Circuit would seem to find that an evidentiary hearing is warranted in Mr. Love's case in order to conduct enough fact-finding to establish a record of events surrounding the plea deal. But because the guidance remains overbroad, nearly the entire process of decision is left to the discretion of the presiding judges. This results in an uneven application of the guidance, in which cases where it is not clear whether petitioner is entitled to relief are still not receiving evidentiary hearings despite clear directions to do so, solely because the instant Court is entitled to determine whether it feels relief would be warranted from a minuscule amount of information, with no required uniformity between the courts.

Petitioners who are able to apply the Townsend factors when appealing upwards from state trial courts do not share this level of risk. The factors can be applied methodically and without passion. Was the Court required to apply the Townsend factors to Mr. Love's case as a federal prisoner in the way they would have were he in the custody of the state of Nebraska, his situation would trigger three of the factors: (1) the merits of the factual dispute were not resolved in the state [here, the district court] hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the material facts were not adequately developed at the state-court [again, district court] hearing. Townsend at 313. This would entitle him to a

mandatory evidentiary hearing to find the facts, develop the record, and resolve the factual dispute.

That *habeas* petitioners entering into the criminal justice system after being charged under federal law should be denied the same uniformity of the protection of their Sixth Amendment rights as petitioners entering after being charged under state law is concerning. This case presents this Court with an opportunity to affirm that the Townsend factors apply to § 2255 proceedings for federal prisoners as stated in Kaufman and to finally clarify a uniform and equal standard for granting evidentiary hearings in *habeas* cases across federal circuits and federal district courts. Absent this Court's intervention, petitioners charged with federal crimes continue to risk violation of their constitutional rights due to the differing values and opinions of the judges seated across the federal court system, while state-charged defendants remain secure in the uniformity of the application of their rights. This disparity works to undermine the very equality of treatment between all criminal defendants that the Sixth Amendment seeks to ensure.

X. Conclusion

For the foregoing reasons, Mr. Love respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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