No. 20-6018

IN THE

SUPREME COURT OF THE UNITED STATES

WIN MIN HTUT — PETITIONER
(Your Name)

vs.

SUPERINTENDENT FAYETTE SCI *et al* — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Win Min Htut
(Your Name)

SCI Fayette. 50 Overlook Drive
(Address)
La Belle, PA 15450
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Can a guilty plea which contains impossible and illegal clauses be entered into intelligently, knowingly, and voluntarily?

2. Is the Due Process Clause to the United States Constitution offended when a defendant signs a guilty plea which forbids him from challenging the stewardship of the counsel who assisted him in signing the plea?

LIST OF PARTIES

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

[X] 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:

1. Superintendent of State Correctional Facility at Fayette.
2. Attorney General of Pennsylvania.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

United States Supreme Court Decisions

Federal Cases

State Cases

Law Reviews and Commentary:

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

- Win Min Htut v. Lane, 2018 U.S. Dist. LEXIS 119988, Magistrate Judge Lynne A. Sitarski (July 17, 2018).
- Win Min Htut v. Lane, 2018 U.S. Dist. LEXIS 231119, District Judge Edward Smith (August 9, 2018).
- Win Min Htut v. Fayette SCI, C.A. No. 18-2950 (Chagares, Restrepo, and Scirica) (November 19, 2019).
- Win Min Htut v. Fayette SCI, 18-2950 Denial of Reconsideration) (July 2, 2020).

JURISDICTION

The date which the United States Court of Appeals denied rehearing in my case was July 2, 2020.

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

Constitutional and Statutory Provisions Involved

STATEMENT OF THE CASE

Petitioner Htut was born in Myanmar. He speaks very little English and understands even less. The instant case revolves around the controversially issue of a defendant's wavier of appellate rights, wavier of a state right to seek a pardon and/or commutation, wavier of the right to present claims of ineffective assistance of plea counsel, wavier of the right to plead any future and present claims of newly discovered evidence, and wavier of the right to grieve any misconduct on the part of the prosecutor and judge who handled his case.

In the case at hand, Petitioner unknowingly, involuntarily, and most importantly, *unintelligently* plead guilty to the charges of second degree murder in exchange for a life sentence without the possibility of parole.[1] The plea contract Petitioner unintelligently, unknowingly, and involuntarily signed mandated him to do the impossible. The Commonwealth included in the plea agreement a series of clauses forcing Petitioner to agree to never appeal his conviction or *even challenge the actual signing of the plea.* Additionally, the Commonwealth added clauses stating that no new evidence existed in Petitioner's case; that counsel had acted effectively during the plea process; and most egregious, that there was no prosecutorial or judicial misconduct.

The United States District Court found Petitioner's claim—that his wavier could not have possibly been intelligent because he did not know (and could not have known) what claims he was giving up in the future—unpersuasive. The District Court's contention hinged on a misinterpretation of the Third Circuit's Court's decision in United States v. Khattak, 273 F.3d 557 (3d. Cir. 2001). That is that, "individuals often gain more favorable sentences in exchange for waving future rights... It is entirely possible that an individual could intelligently relinquish unknown future rights to obtain a better plea bargain."[2]

The District Court's interpretation of Khattak was wrong and in conflict with the concept, and indeed, very definition of what a legal "waiver" implies. Wavier: the voluntary and intentional giving up or renouncing of a known, right, benefit, or privilege."[3] Here, the wavier by definition was uninformed and unintelligent and cannot be considered voluntary and knowing.

In coming to its conclusion, the District Court ignored clearly established federal law as determined by this Court's holding that, "for a wavier to be valid under the Due Process Clause, it must be an intentional relinquishment or an abandonment of a *known* right or privilege." McCarthy v. United States, 394 U.S. 459, 466 (U.S. 1969) (Emphasis added). This High Court added that a guilty plea is only "valid if done voluntarily, knowingly, and intelligently, with

sufficient awareness of the relevant circumstances and likely consequences." Bradshaw v. Stumpf, 545 U.S. 175, 182 (U.S. 2005). Tellingly, the District Court cited no decision from our Supreme Court to support its decision.

A. Procedural History

On September 2, 2014, Petitioner entered into a guilty plea of murder of the Second Degree, and was sentenced to life imprisonment without the possibility of parole.

On August 3, 2015, Petitioner filed a *pro se* PCRA petition raising several claims of ineffective assistance of counsel, claims of newly discovered evidence, and issues surrounding the unlawful taking of his plea.

Counsel was appointed and filed a timely "Amended PCRA Petition." On January 5, 2016, a hearing was held limited to the enforcement of Petitioner's wavier of appeal rights. At the conclusion of hearing, the wavier was upheld and the petition dismissed.

A Notice of Appeal was filed on January 22, 2016, and a statement pursuant to Pa.R.A.P 1925(b) was filed on February 10, 2016. Shortly thereafter, the PCRA Court filed an Opinion pursuant to Pa.R.A.P 1925(a).

On March 23, 2016, appointed counsel, Robert Long, filed a "FINELY LETTER BRIEF" in the Pennsylvania Superior Court.

Petitioner shortly thereafter lodged a motion for permission to file a brief on his own behalf in the Superior Court, as well as a motion to compel Counsel Long to relinquish the entire case file over to

Petitioner, both of which were granted. Petitioner then filed an appeal with the Pennsylvania Superior Court – Commonwealth v. Win Min Htut, 326 EDA 2016, who on February 13, 2017 affirmed the PCRA Court's decision and allowed Counsel Long to withdraw. Petitioner then sought relief via Allowance of Appeal in the Pennsylvania Supreme Court, which was denied on August 28, 2017.

On September 1, 2017, Petitioner filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C.S. § 2254. District Judge, Edward Smith, was appointed to adjudicate upon said Petition. Judge Smith referred the matter to Magistrate Judge Lynne Sitarski to issue a Report and Recommendation. On July 16, 2018, Judge Sitarski issued a Report and Recommendations proposing that Petitioner's Writ of Habeas Corpus be denied. Petitioner filed timely objections, which were overruled by Judge Edward Smith on August 9, 2018.

Petitioner filed a timely Notice of Appeal to the Third Circuit Court of Appeals. Certificate of Appealability was denied on May 9, 2019. Petitioner filed for rehearing, which was denied on July 2, 2020.

Issue 1. Can a guilty plea which contains impossible and illegal clauses be entered into intelligently, knowingly, and voluntarily?

This Court has previously held that "[a] guilty plea operates as a wavier of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." Bradshaw v. Stumpf, 545 U.S. 175, 182 (U.S. 2005). This simple, but profound constitutional standard was recently reaffirmed in Class v. United States, 138 S.Ct. 798 (U.S. 2018).

Petitioner entered into a contractual plea agreement with the Commonwealth to plead guilty to Second Degree Murder under the guise that the Commonwealth would not seek the death penalty.

The plea colloquy made sure to protect the trial judge, prosecutor, and defense "advocate," but failed

to provide any safeguards for the *defendant.* Additionally, a rational reading of the plea agreement makes obvious that the agreement is unworkable and could not have been agreed to intelligently.

A fair reading of the "WRITTEN WAIVER OF APPEAL RIGHTS COLLOQUY" shows the impracticality of the *"negotiated"* plea. No advocate with the best interests of his client in mind would advise a defendant under the circumstances of *this case* to sign a plea like the one in question. The plea on its face shows that it was impossible to carry out. See paragraphs 6- 7(k):

(6) I further agree, in consideration of the District Attorney's agreement not to seek the death penalty and to permit a guilty plea to Second Degree Murder, to the following.

(a) I agree never to seek or file or have filed on my behalf, any direct or collateral appeals of my conviction, sentence, **or this agreement to the appellate courts ...** [or any claims of :]

(2) **ineffective assistance of counsel** which, in the circumstances of my case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;

(3) a plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused me to plead guilty and that I am innocent;

(4) the improper obstruction by government officials of my right to appeal where a meritorious appealable issue existed and was properly preserved in the trial court;

(5) **the unavailability at the time of the trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced;**

(6) the imposition of a sentence greater than the lawful maximum;
(7) a proceeding in a court without jurisdiction.
(f) I agree that I am giving up the right to make any of the above allegations or any other allegation. **I agree that none of these claims are present in my case.**

(g) I agree to never seek or file, or have filed on my behalf, **any claims of ineffective assistance of counsel**, including but not limited to: a claim of lack of preparation for trial, lack of defense strategy, failure to file pre-trial motions and/or a claim of any defense attorney errors. I know that I am now giving up these rights forever.
(h) I agree to never seek or file or have filed on my behalf, **any claims of error by the Court regarding *any* ruling**. I know that I am now giving up these rights forever.
(i) I agree to never seek or file, or have filed on my behalf, **any claim of prosecutorial misconduct** on the part of the District Attorney of Lehigh County, I know that I am now giving up this claim forever.
(j) **I agree never to seek or file, or have filed on my behalf, any Petitions for Pardon before the Pennsylvania Board of Pardons on my life sentence.**
(k) **I agree never to seek or file, or have filed on my behalf, any request for commutation of my life sentence to the Governor of the Commonwealth of Pennsylvania.** (Emphasis added).

Clearly, the clauses contained in this plea could not be intelligently agreed to. "Plea agreements, although arising in the criminal context, are analyzed under contract law standards." United States v. Castro

, 704 F.3d 125, 135 (3d. Cir. 2013); also see Puckett v. United States, 556 U.S. 129, 137 (U.S. 2009). The principle that no one is bound to that which is impossible is embodied in the common-law contractual doctrine of impossibility, which excuses a party's contractual performance "[w]here the means of performance have been nullified, making performance objectively impossible."[4] This contractual conceptualization of impossibility applies to a variety of the clauses contained within Petitioner's plea colloquy.

For example, the plea holds that Petitioner agrees "[t]hat the unavailability at the time of the trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced" *does not exist.* It was not possible for Petitioner to have knowingly and intelligently made that assurance at that juncture.

Any averment at a pre-trial or pre-plea stage of the proceedings that a newly discovered evidence claim *does not exist* cuts against the very nature of a newly discovered evidence claim. The characteristic that makes newly discovered evidence *newly* discovered is that it could not have been discovered until *after* the proceeding despite reasonable diligence. Commonwealth v. Smith, 741 A.2d 666, 673 (Pa. 1999); Also See Commonwealth v. Johnson, 179 A.3d 1105 (Pa. Super. 2018). To met the jurisdictional threshold of the PCRA (Post-Conviction-Relief-Act) a Petitioner must explain why he *could not have learned* the new facts earlier with the exercise of due diligence.

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[4] 30 Williston on Contracts § 77:25 (4th ed. 2013); see also e.g. Taylor v. Caldwell, 122 E.R. 309, 314 (K.B. 1863); The Tornado, 108 U.S. 342, 351 (U.S. 1883).

Commonwealth v. Breakiron, 781 A.2d 94, 98 (Pa. 2010). Here, the agreement required Petitioner to acquire some sort of oracle ability–and foresee the future. Moreover, one cannot agree to waive something *unknown.* Clearly established federal law defines "wavier" as the intentional relinquishment or abandonment of a *known* right. United States v. Olano, 507 U.S. 725, 733 (U.S. 1993); also see United States v. Erwin, 765 F.3d 219, fn. 5. (3d. Cir. 2014).

Furthermore, the plea also asserts that Petitioner would agree "that ineffective assistance of counsel which, in the circumstances of [his] case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place" *does not exist.* Not only does this defy commonsense, but it simply cannot be done during a pre-plea stage.

What the plea asks Petitioner to agree to is impossible, and therefore, **the plea itself is unintelligible.**[5] Petitioner could not have possibly made an *intelligent* wavier of his constitutional rights where the language contained in the plea is incomprehensible. Again under contract law this is unacceptable, "[i]f the court as a matter of law finds the contract of any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable

[5] Although the clauses contained in the plea are a far cry from mere ambiguities - the law is clear: "Any ambiguities in the terms of the plea agreement will be construed against the government." See Commonwealth v. Farabraugh, 2016 PA Super 63 (2016).

clause, or it may limit the application of any unconscionable clause as to avoid any unconscionable result. Alexander v. Anthony Unt'l, L.P., 342 F.3d 256, 264-265 (3d. Cir. 2003). This language mirrors Title 13 of Pennsylvania's Consolidated Statutes § 2302 concerning Unconscionable contact or clause.

Lastly, the plea forbids Petitioner from applying for clemency. However, controlling case law from the Pennsylvania Supreme Court holds that: "A court cannot impinge upon the exclusive jurisdiction of the executive branch of the government in showing clemency. Action by the Broad of Pardons of Pennsylvania is in accordance with constitutional provisions and in no way comes under the aegis of the courts." Commonwealth v. Michael, 57 A.3d 899, 903 (Pa. 2012).

The instant case presents a quintessential example of the concerns of the National Association for Criminal Defense Lawyers, who has urged the United States Judiciary to, as a matter of law, find that a wavier of appellate rights entered into *prior* to sentencing, be considered unknowing and involuntary on its face: "The NACDL asserts that in such cases a defendant can never knowingly and voluntarily waive his Petitioner rights because he cannot *possibly know in advance* what errors a district court might make in the process of arriving at an appropriate sentence." United States v. Hahn, 359 F.3d 1315, 1326 (10th Cir. 2004).

Justice Parker of the Fifth Circuit Court of Appeals has echoed those very sentiments:
"I do not think that a defendant can ever knowingly and intelligently waive, aspects of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea

agreement; such a waiver is inherently uninformed and unintelligent." United States v. Melancon, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., Concurring)

Outrageously, the colloquy, along with having Petitioner waive every conceivable right the prosecutor could conjure up, also had Petitioner waive his right to challenge even the *entering of the plea.* See 6(a): "I agree never to seek or file or have filed on my behalf, any direct or collateral appeals of my conviction, sentence, **or this agreement to the appellate courts**...."

The plea agreement has obviously pushed beyond the ambit of what is acceptable, and thus, the waiver has resulted in miscarriage of justice.

This Court has never directly addressed whether ineffective assistance of counsel in the negotiation of an appellate wavier would render that wavier invalid.

During Petitioner's PCRA proceedings he challenged the stewardship of his plea counsel's effectiveness during the plea process, but the PCRA Court refused to even hear his claims, and instead chose to enforce the waiver.

The State Court in denying Petitioner's claims, indeed denying even to rule upon his claims, found that Petitioner had waived his right to appeal his conviction. This ruling resulted in a fundamental miscarriage of justice and was contrary to clearly established federal law as determined by the Supreme Court of the United States in Glasser v. United States, 315 U.S. 60, 70 (U.S. 1942) that "[t]o preserve the protection of the Bill of Rights for hard-pressed defendants a court must indulge every reasonable presumption against the wavier of the unimpaired assistance counsel."

Issue 2. Is the Due Process Clause to the United States Constitution offended when a defendant signs a guilty plea which does not allow him to challenge the stewardship of the counsel who assisted him in signing said plea?

The jurisprudence surrounding ineffective assistance in conjunction with an appellant waiver is a virtual legal kaleidoscope, with no court directly assessing the issue in a head-on manner. However, theoretically, commonsense would dictate that when counsel provides ineffective assistance in connection with an appellate waiver, that wavier should therefore be rendered invalid.

The Third Circuit Court of Appeals, while never directly addressing whether ineffective assistance of counsel in connection with the negotiation of an appellate wavier would render that waiver invalid, has hinted that it could. United States v. Marbry, 536 F.3d 231, 243 (3d Cir. 2008). Additionally, the Court of Appeals for the District of Colombia has also suggested that claims of ineffective assistance of counsel surrounding counsel's advice to enter into the wavier can not be waived. United States v. Powers, 885 F.3d 728 (D.C. Cir. 2018). Also see United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993) (Expressing doubt that a plea agreement could waive a claim of ineffective assistance of counsel.) Also see United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994) (Same). See United Stated v. Taylor, 139 F.3d 924, 931 (D.C. Cir. 1998) ("Taylor could not have foreseen trial counsel's conduct in plea negotiations with the Government and was unaware of trial counsel's alleged conflicts when he affirmed the adequacy of his representation.")

Various District courts have also echoed this logic:

- ✓ United States v. Raynor, 989 F. Supp. 43 (D.C.C. 1997) (A defendant can never knowingly and intelligently waive the right to appeal or collaterally attack a sentence that has not yet been imposed. Such a wavier is by definition uninformed and unintelligent and cannot be voluntary and knowing.)
- ✓ United States v. Johnson, 992 F. Supp. 437 (D.D.C. 1997) (Wavier of the right to appeal an unconstitutional or otherwise illegal is sentence is inherently uninformed and unintelligent.)
- ✓ Pratt v. United States, 22 F. Supp. 2d 968, 870 (L.D. Ill. 1998) (upholding a § 2255 waiver against a challenge based on ineffective assistance of counsel but noting that "had his counsel's ineffective assistance caused [the defendant] to waive his right to appeal, today's decision might be different.")
- ✓ United States v. Perez, 46 F.Supp.2d 59, 67 (D.C. Mass. 1999) ("A criminal defendant's ability to appeal to may not be unduly burdened. Any under burden would be a violation of due process.")

Moreover, several legal scholars have sung from same hymns:

- ✓ **Robert K. Calhoun**, *Waiver of the Right to Appeal*, 23 Hasting Const. LQ. 127 (1995).
- ✓ **Alexander W. Reimelt,** *An Unjust Bargains: Plea Bargains and Wavier of the Right to Appeal*; SLB.CL.Rev. 87 (2010).
- ✓ **Nancy J. King**, *Plea Bargains that Waive Claims of Ineffective: Waiving Padilla and Frye*, 51 Duq. L. Rev. 647 (2013).
- ✓ **Andrew Dean**, Note *Challenging Appeal Waivers*, 61 Buff. L. Rev 1191 (2013).
- ✓ **Kevin Bennardo**, *Post-Sentencing Appellate Waivers*, 48 U. Mich. J. L. Reform. 347 (2015)

REASONS FOR GRANTING THE PETITION

Petitioner is requesting this court to accept his case for certiorari in order to determine whether a criminal defendant can ever waive a claim regarding his right to challenge the stewardship of the counsel who advised him to sign the wavier.

Petitioner additionally avers that his case should be accepted in order to determine whether the due process claim is violated when a criminal defendant signs a guilty plea which contains clause that are legally and logical impossible to carry out.

Petitioner suggests that given the fact that the overwhelming majority of criminal cases in our system are resolved via plea bargains.[6] It is of crucial importance for this Court to answer these questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Win Min Htut

Date: September 14 2020