

DOCKET NUMBER: _____

IN THE SUPREME COURT OF THE UNITED STATES

CHINA HESTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Ms. Hester may have received ineffective assistance of counsel such that *certiorari* should be granted, and this matter reversed and remanded.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings, both in the Federal District Court for the Southern District of Ohio, as well as in the United States Court of Appeals for the Sixth Circuit, included the United States of America, Respondent herein, and China Hester, the Petitioner herein. There are no parties to these present proceedings other than those named in the Petition.

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PETITION FOR A WRIT OF CERTIORARI

Ms. China Hester (hereinafter, Ms. Hester) hereby respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit issued August 19, 2020.

OPINIONS BELOW

The Decision of the Sixth Circuit in this matter was issued on August 19, 2020. It was not selected for full-text publication, and the unpublished decision of the Sixth Circuit is reproduced at Petitioner's Appendix A.

The relevant District Court Judgment underlying Ms. Hester's conviction was not published, but is reproduced at Petitioner's Appendix B.

STATEMENT OF JURISDICTION

Because the underlying cases involved a federal indictment against Ms. Hester for a violation of federal law, the United States District Court for the Southern District of Ohio had jurisdiction pursuant to 18 U.S.C. §3231. Because Petitioner Hester timely filed a notice of appeal from the final judgment of a United States District Court, the United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Because Petitioner Hester is timely filing this Petition for Writ of Certiorari within the time allowed by the Supreme Court Rules, this honorable Court has jurisdiction pursuant to 28 U.S.C. §1254. *See also*, Supreme Court Rule 13.1.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The relevant statutory provision under which Ms. Hester was indicted, namely, 42 U.S.C. §408(a)(7)(B), is set forth in the attached Petitioner's Appendix C.

STATEMENT OF THE CASE

The following Statement of the Case is intended to summarize the “facts material to consideration of the questions presented.” *See generally*, Supreme Court Rule 14.1(g). A comprehensive history of the case is set forth in the Order of the Sixth Circuit below, along with the Plea Agreement of the parties and the Presentence Investigation Report which was prepared in the District Court. *See generally, United States v. Hester*, Docket Number 19-3977 (August 19, 2020); *see also*, Plea Agreement (Dist. Ct. RE 30; Page ID 58-64); *and*, PSIR.

China Hester was the subject of a one-count Indictment which was issued by a federal grand jury in the Southern District of Ohio on or about April 4, 2019. (Indictment) (RE: 15) (Page ID#20). That Indictment charged Ms. Hester with a violation of 42 U.S.C. §408(a)(7)(B) for “False Representation of a Social Security Number,” and gave the District Court jurisdiction pursuant to 18 U.S.C. §3231.

On July 18, 2019, Ms. Hester entered into a plea agreement with the assistance of prior counsel. *See*, Plea Agreement (Dist. Ct. RE 30; Page ID 58-64). That Plea Agreement provided the following factual basis, to which the parties stipulated:

The defendant’s true identity is CHINA HESTER, and her Social Security number (SSN) is xxx-xx-7905. This number was originally assigned by the Social Security Administration to HESTER in 1983, when she was less than a year old. This SSN is also associated with HESTER’S Ohio driver’s license.

On July 22, 2014, HESTER was sentenced to 50 months of imprisonment for conspiracy to possess with intent to distribute 28 grams or more of cocaine base (Southern District of Ohio case no. 2:13-cr-00270). She was released from custody on February 17, 2017 to begin her four-year term of supervised release.

On November 27, 2017, HESTER applied to rent an apartment on Mount Badon Road in Canal Winchester, Ohio. HESTER listed her SSN as xxx-xx-0790, which is not HESTER's true SSN. According to the Social Security Administration, the number xxx-xx-0790 has never been issued. When the landlord screened HESTER using this false SSN, the landlord received a report indicating that HESTER had no prior felony drug convictions. The landlord signed a lease with HESTER on December 13, 2017. HESTER was evicted from the apartment in late 2018 for nonpayment of rent.

A credit report for HESTER's name and the SSN xxx-xx-0790 reflects a collection account payable to LJ Ross (original creditor American Electric Power) for \$1,382.

On January 30, 2019, HESTER applied to rent a home on Trentshire Drive in Canal Winchester, Ohio. HESTER listed her SSN as xxx-xx-0137, which is not HESTER's true SSN. According to the Social Security Administration, the number xxx-xx-0137 has never been issued. In support of her application, HESTER also provided forged pay stubs and a fake Ohio driver license. HESTER stated on her application that she had never been evicted and had not been convicted of a felony. The landlord ultimately declined to offer the apartment to HESTER.

A credit report for HESTER's name and the SSN xxx-xx-0137 reflects an American Express credit card opened in January 2019 with an all-time high balance of \$5,543.00 and a current balance of \$2,928.

See, Statement of Facts attached to Plea Agreement; RE: 30; Page ID 63.

Ms. Hester then appeared before the District Court on August 13, 2019, and entered her plea of guilty before a Magistrate Judge. On that same date, the Magistrate Judge recommended that the plea be accepted, and that the acceptance Plea Agreement be deferred until after the preparation of a presentence investigation report. *See generally, Report and Recommendation (RE: 35)(Page ID 71-73).*

That presentence investigation report (hereinafter, "PSIR") was initially prepared and submitted on September 11, 2019. *See, PSIR at 2.* It does not appear

that Ms. Hester's trial counsel ever submitted any objections to that initial PSIR, and a final PSIR appears to have been transmitted to the parties on October 3, 2019. *Id.* at 2 (stating "date report revised: October 3, 2019") and at 32 (stating "the parties have no objections to the presentence report," that the report had been disclosed "to the defendant, the defendant's attorney and counsel for the government," and dated October 3, 2019). The record also does not demonstrate that trial counsel for Ms. Hester ever prepared a Sentencing Memorandum for the Court below on Ms. Hester's behalf.

Nevertheless, the PSIR, at least, provided additional background information about Ms. Hester, as well as the difficulties that she had encountered through the years. *Id.* at pgs 22-24. And, like the Plea Agreement that preceded it, the PSIR included a calculation of loss which included an American Express card, and additionally included a recommendation that restitution be made to American Express. *Id.* at ¶¶5, 6, 19, 21, 28-29, 128. That PSIR also utilized that American Express balance when it calculated the total loss amount which, in turn, increased Ms. Hester's base offense level by 2 points. *Id.* at ¶¶19, 28-29

On October 9, 2019, the District Court convened for sentencing.¹ At that time, the Plea Agreement was accepted. *See, (Order)(RE: 43)(Page ID 91).* After confirming that neither party had any objections to the Presentence Report, the Court

¹ That sentencing hearing also concerned sentencing for a then-concurrently-pending "supervised release violation" under case number 2:13-CR-00270-10. That matter was not before the Sixth Circuit in the proceedings below, and is the subject of its own appellate proceedings under Sixth Circuit docket number 20-3683.

turned to the sentencing issues then at bar. *See*, Transcript of Sentencing Proceedings (hereinafter, “Sentencing T.P.”) at 3-4 (RE: 48)(Page ID 123-124).

Ms. Hester, through counsel, requested a sentence of “time served.” *Id.* at 8; Page ID 128. The United States made a similar recommendation of “time served concurrent for both” sentences. *Id.* at 8-9; Page ID 128-129.

The District Court was not fully persuaded. The Court instead sentenced Ms. Hester to “time served” on her substantive offense, but imposed a sentence of 18 months of imprisonment for her supervised release violation, to be served consecutively to the sentence in the substantive offense. *Id.* at 13-14; Page ID 133-134. Along with standard and special conditions of supervised release, and the mandatory \$100.00 special assessment, the District Court also ordered a restitution obligation of \$4,310.00. *Id.* Once again, counsel for Ms. Hester failed to raise any objection to the sentence. *Id.* at 15; Page ID 135.

Ms. Hester was less demure. In contrast to her counsel, she engaged in the following exchange with the District Court:

THE DEFENDANT: It’s still too many months. It should have been four to ten months. The dollar amount is still wrong. I’m still not going to get credit for the months I spent in jail according to the last case. He said consecutive.

THE COURT: Is she objecting to the restitution obligation?

THE DEFENDANT: It’s wrong. Yes, it is, Your Honor.

MR. EDWARDS [Defendant’s trial court counsel]: Judge, the amount of restitution was, I believe agreed upon in the plea agreement.

THE COURT: Did I misstate it?

THE DEFENDANT: The American Express card that's in the case, that was not mine. That was an authorized user card. I don't know how that even got that I used it. I've never used the American Express card. The one for the electric bill is mine.

Id. at 15-16; Page ID 135-136.

Then, upon review of the Plea Agreement, the District Court stated:

THE COURT: It says here that the defendant agrees to pay restitution in the amount of \$1,382 to LJ Ross, collection account for American Electric Power, and \$2,928 to American Express.

THE DEFENDANT: That's not right. That card was the authorized user card.

Id. at 16-17; Page ID 136-137.

The District Court then confirmed the restitution amount from the PSIR as \$4,310.00, an amount with which Ms. Hester's counsel agreed. *Id.* at 17; Page ID 137.

Thereafter, counsel for Ms. Hester indicated to the Court that Ms. Hester wished to appeal the sentence in the 2019 case, to which Ms. Hester added "It's the restitution. That's it." *Id.* Counsel then confirmed that Ms. Hester wished to only appeal her 2019 matter, not the supervised release violation, to which Ms. Hester stated "Yeah, that's it. Not for the supervised release." and to which the District Court responded:

THE COURT: And I take it that's because she disagrees with the Court's finding on the restitution obligation?

THE DEFENDANT: Yes. It's wrong.

MR. EDWARDS: That's my understanding.

THE COURT: She can appeal on anything she wants to, but I think that's what she's concerned about here this afternoon.

MR. EDWARDS: Correct.

THE COURT: So am I correct, then, Ms. Hester, that you do not wish to appeal the court's sentence in your original case in which Judge Frost sentenced you?

THE DEFENDANT: No. I don't want to appeal, no. You already sentenced me on that. I was just appealing the dollar amount on the first case.

Id. at 18-19; PAGE ID 138-139.

Despite this chaotic ending to the sentencing proceeding, it does not appear that counsel for Ms. Hester ever attempted to further resolve the substance of this disagreement during the sentencing hearing below. In addition, the available record discloses no post-sentencing attempt to rectify the substance this issue before the District Court.

Instead, Ms. Hester timely filed a notice of appeal on October 9, 2019. (Notice of Appeal)(RE: 44)(Page ID 92). New counsel was appointed shortly thereafter. (Ruling Letter)(6th Cir. RE: 8).

On appeal, Ms. Hester contended that she had received ineffective assistance of counsel² when her trial court attorney failed to resolve, at the sentencing hearing, these issues about the loss amount.³ Specifically, Ms. Hester argued that, because

² Although Ms. Hester's Plea Agreement contained an "appellate waiver," the Agreement itself carved out an exception for appeals raising claims of ineffective assistance of counsel. *See generally*, Plea Agreement at 3; RE: 30; Page ID: 60; and, Order below at 3.

³ Ms. Hester's Sixth Circuit proceedings also raised an issue related to the timeliness of the PSIR. That issue has not been raised in the instant Petition for Certiorari. *See generally*, Brief at 23-26; 6th Cir. RE: 26; CM/ECF Page 26-30.

calculation of the loss amount was crucial to the determination of the base offense level, her counsel was ineffective for having failed to resolve these issues when they arose at sentencing. *See generally*, Appellant's Brief; 6th Cir. RE 26 at 14-15, 18-22 ; Page ID: 18-19, 22-26.

The Sixth Circuit did not agree. Instead, after briefing was concluded, the Sixth Circuit issued an Order denying Ms. Hester's appeal on August 19, 2020.⁴ First, the Court found that Ms. Hester's admissions during the District Court proceedings defeated her claim of ineffectiveness, stating:

In her plea agreement, Hester agreed to the two-level increase to her base offense level pursuant to USSG § 2B1.1(b)(1)(B), which corresponded to a loss more than \$6,500 but less than \$15,000. Hester also agreed to pay restitution in the amount of \$2,928 to American Express. In the statement of facts attached to the plea agreement, Hester stipulated that a credit report for her name and a false social security number "reflects an American Express credit card opened in January 2019 with an all-time high balance of \$5,543 and a current balance of \$2,928." During the plea hearing, Hester affirmed under oath that she had read the plea agreement and the statement of facts, that she had discussed them with her attorney, and that she understood and agreed with them.

See, Opinion below at 3-4. Thus, the Court found that "[i]n light of her admissions, Hester cannot demonstrate that counsel's failure to pursue her belated objection to the loss amount fell below an objective standard of reasonableness." *Id.* at 4 *citing*, *United States v. Laskowski*, 1 F. App'x 363, 367 (6th Cir. 2001); *and, United States v. Williams*, 176 F.3d 301, 312 (6th Cir. 1999).

⁴ Oral argument was waived by both parties, and was not otherwise ordered by the Court below.

Second, the Court below also found that Ms. Hester could not demonstrate “prejudice,” reasoning that:

When Hester objected to the “dollar amount,” particularly the inclusion of the loss from the American Express credit card, the district court reviewed the plea agreement and the presentence report and confirmed the restitution obligation of \$4,310. Given that the district court considered and rejected her argument regarding the American Express credit card, Hester cannot show that there is a reasonable probability that her sentencing would have been different if counsel had pursued her challenge to the loss amount.

Id. Thereafter, and after disposing of a procedural issue raised by Ms. Hester below, but not herein, regarding the timeliness of the PSIR, the Court of Appeals affirmed the judgment of the District Court.

This Petition timely follows.

REASONS FOR GRANTING THE WRIT

Certiorari is requested to determine whether Ms. Hester may have received ineffective assistance of counsel at the District Court such that it would be appropriate to reverse and remand these proceedings.

In the District Court, Ms. Hester’s sentencing proceedings were governed by U.S. Sentencing Guidelines §2B1.1. *See generally*, PSIR at ¶27. Her base offense level was “six,” with potential enhancements based on the amount of loss. *See*, U.S.S.G. §2B1.1(a)(2); *and*, U.S.S.G. §2B1.1(b)(1). *Id*; *see also*, PSIR at ¶28. Pertinent to Ms. Hester’s proceedings, if the loss was less than \$6,500 then no increase would be added to her base offense level, but if the loss was more than \$6,500 but less than \$15,000, then 2 points would be added. *See*, U.S.S.G. §2B1.1(b)(1). At a total offense level of “4” (resulting from a base offense level of 6 minus the 2 points which Ms. Hester was credited for acceptance of responsibility), her sentencing range is 2 to 8 months at her criminal history category of IV. *See*, U.S.S.G. §5A (sentencing table); *see also*, PSIR at ¶74 (calculating criminal history score and category). In contrast, at a total offense level of “6”, as was ultimately used below (and resulting from a base offense of 6, plus 2 points for loss amount between \$6,500 and \$15,000, minus 2 points for acceptance of responsibility) results in a sentencing range of between 6 and 12 months. *Id*. Given that the “American Express” balance is the factor which puts the loss amount above or below the \$6,500 threshold for an additional two points, the American Express balance was, basically, determinative of the initial, potential sentencing range.

Granted, the reality is that Ms. Hester was ultimately sentenced to “time served.” However, despite the “time served” sentence, resolution of this issue still had the potential to impact her overall / ultimate sentence. Specifically, if the American Express loss had not been included, then Ms. Hester’s sentencing range would have been 2 to 8 months, rather than 6 to 12. Given that the Plea Agreement recommended a sentence at the low end of the Guidelines range, the low end of an unincreased sentence would have been two months, thus meaning that her 18 months of consecutive time on her supervised release violation would have begun several months earlier than the date of sentencing, thereby potentially reducing Ms. Hester’s overall duration of imprisonment and/or supervised release.

On this item, it is noted and disclosed that Ms. Hester was released from custody by Order of the District Court on or about July 15, 2020, under the provisions of 18 U.S.C. §3582(c)(1)(A), and that her sentence of incarceration in the supervised release violation was reduced to “time served,” followed by a period of supervised release which appears to terminate on or about her originally-projected release date.

See generally, Opinion, Order, and Amended Judgment; Dist. Ct. RE 57; Page ID 222-228. It is not clear what effect, if any, Ms. Hester’s release has on her pending claims, but it would seem that her case still presents a live controversy, given that if her eighteen-month consecutive sentence had begun earlier, her supervised release sentence would, overall, similarly terminate earlier. However, and because of the potential for mootness, Ms. Hester’s release from incarceration is herein noted, in an abundance of caution, and in candor to the tribunal.

Despite the potential importance of the “loss amount” to Ms. Hester’s sentencing proceedings, counsel for Ms. Hester never resolved this issue during the sentencing. The transcript of proceedings reveals that Ms. Hester was clearly distraught, and was clearly attempting to challenge the loss amounts in her case (even if she frequently referred to the challenges as ones sounding in restitution). Nevertheless, it does not appear that her counsel took any steps, either during or after the sentencing, to resolve the substance of this issue before the Court. Ms. Hester submits that her counsel’s failure to resolve these issues during or after the sentencing proceedings rose to the level of ineffective assistance of counsel.

Given the state of the record prior to the sentencing hearing, including the plea agreement, statement of facts, plea colloquy, and PSIR, as well as the content of the sentencing hearing itself, Ms. Hester is constrained to recognize the contrary *Strickland* analysis of the Court below. *See generally, Strickland v. Washington*, 466 U.S. 668, 686-687 (1984). This is especially so, given that her arguments run headlong into the contrary, and likely controlling, authority cited by the panel below, *United States v. Laskowski*, 1 F. App’x 363, 367 (6th Cir. 2001); *United States v. Williams*, 176 F.3d 301, 312 (6th Cir. 1999).

However, it is submitted that Ms. Hester’s counsel still should have done more to resolve this at the sentencing hearing itself. As this honorable Court has noted, the “reality” is “that criminal justice today is for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). If this is true (and the statistics in *Lafler* would indicate it is), then the criminal justice system today is,

necessarily, a system of sentencing, in which the sentencing hearing itself may be the only inflection point. As such, it is submitted that this important matter deserved additional resolution in the District Court proceedings.

For these reasons, certiorari is requested to determine whether Ms. Hester may have received ineffective assistance of counsel at the District Court such that it would be appropriate to reverse and remand these proceedings.

CONCLUSION

Wherefore, and for all of the foregoing reasons, Petitioner Hester respectfully requests that this honorable Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



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