ORIGINAL

NO. 20-6471

IN THE

SUPREME COURT OF THE UNITED STATES

ISRAEL WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Israel Washington (PRO SE)
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QUESTIONS PRESENTED

[1] WHETHER CERTIORARI SHOULD BE GRANTED CONCERNING THE DISTRICT COURT'S APPLICATION OF THE ABUSE OF DISCRETION STANDARD IN RELATION TO THE DENIAL OF A REQUEST FOR THE READBACK OF TESTIMONY? WHEN THE COURT ADOPTS A POLICY OF DISALLOWING READBACKS, THE COURT HAS ABUSED ITS DISCRETION BY FAILING TO EXERCISE IT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at **UNITED STATES v. ISRAEL WASHINGTON**, No. 17-10141 (9th Cir. Mar. 17, 2020).

JURISDICTION

The court of appeals issued its decision on March 17, 2020. App. 1a. Thereafter, Petitioner filed a Petition for Rehearing and Rehearing **En Banc,** and the same was denied on June 23, 2020. On March 19, 2020 this Honorable Court extended the deadline to file petitions for writs of certiorari in all cases due on or after that date to 150 days from the date of the lower court judgment --in this case, that is November 23, 2020. Hence, this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Israel Washington (hereinafter "Petitioner"), appealed his conviction and sentence for two conspiracies to distribute controlled substance and related crimes. During his Direct Appeal, Petitioner argued:

(1) That the district court had committed plain error by not giving a specific unanimity instruction. Evidence supporting the count one conspiracy tended to show

multiple conspiracies, rather than an overarching conspiracy, requiring the jury to determine which insiders were part of the count one conspiracy. Without a unanimity instruction, different jurors might have reached different conclusions as to which conduct supported count one.

(2) The district court improperly denied the jury's request for readback of Paul Mack's trial testimony as "too cumbersome." There was no risk of undue emphasis on Mr. Mark's testimony. Rather, readback of his testimony would have **CLARIFYING** because he testified at the beginning of a trial spanning two weeks, his testimony provided a poor timeline of events, and the jury may have had difficulty understanding his answers.

(3) The district court erred in its application of the United States Sentencing Guidelines. First, the district court improperly applied a 4-level increase in offense level of Mr. Washington's leadership because Mr. Washington did not direct or control the other participants in the conspiracy. Culpability itself does not warrant the application of the leadership enhancement. The application of both the leadership and witness intimidation enhancements was based on unreliable hearsay of unknown witnesses. Finally, two criminal history points were erroneously imposed for Mr. Washington's 1992 conviction because it is outside of the 15-year window contemplated by the Guidelines.

However, the Honorable Ninth Circuit Court of Appeals affirmed Petitioner's Direct Appeal and Petitioner seeks that his Writ of Certiorari be Granted for the following reasons:

REASONS FOR GRANTING THE WRIT

[1] CERTIORARI SHOULD BE GRANTED CONCERNING THE DISTRICT COURT'S APPLICATION OF THE ABUSE OF DISCRETION STANDARD IN RELATION TO THE DENIAL OF A REQUEST FOR THE READBACK OF TESTIMONY. WHEN THE COURT ADOPTS A POLICY OF DISALLOWING READBACKS, THE COURT HAS ABUSED ITS DISCRETION BY FAILING TO EXERCISE IT.

The decision whether to grant or deny a jury's request

for a readback is a decision of vital importance to the trial process. There is no dispute that in reviewing the district court's decision to deny a readback request, the abuse of discretion standard applies as the district court is best positioned to make the decision based upon its evaluation of the circumstances of the case. but to secure a full and fair review of the district court's action, the abuse of discretion standard must be applied in harmony with applicable precedent addressing what it means for a court to exercise its discretion. The abuse of discretion standard should not be applied in a manner that would insulate from reviewing a district court's pretextual justification for denying a readback. Along those same lines, a district court's decision should not be upheld on review where it fails to actually consider and weigh the various factors for and against the granting of a readback request. Under both circumstances a legal abuse of discretion has occurred. The manner in which the abuse of discretion was applied in the March 17, 2020 memorandum did not consider that the failure to actually exercise discretion, and the failure to consider the factors affecting the courts discretion, is itself an abuse of discretion. Hence, Certiorari should be Granted because the court applied a definition of abuse of discretion applicable when a district court denies a new trial motion.

(A). Certiorari should be Granted concerning the Court's Application of the Abuse of Discretion Standard to the Denial of the Readback Request.

The Ninth Circuit Court's Memorandum states that Mr. Washington "makes fair arguments as to why a readback may

have been reasonable had one occurred." **Memorandum, p.2.** The court nonetheless concludes, "we cannot say the district court's decision to deny the readback was "illogical, implausible, or without support in inferences that may be drawn from facts in the record," **UNITED STATES v. HINKSON**, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc)." **Memorandum, pp. 2-3.** Hence, Certiorari should be granted concerning the District Court's application of the abuse of discretion standard, and the reliance upon **HINKSON**.

(i) Failure to Exercise Discretion:

FIRST, the court failed to actually exercise its discretion, instead following a blanket rule in denying the rehearing request. One way a court is deemed to have legally abused its discretion involves error in the procedure and process of making the discretionary decision. In the context of evaluating whether to grant a readbook request, the court must base its decision upon the particular facts and circumstances of the case. **UNITED STATES v. RICHARD**, 504 F.3d 1109, 1113 (9th Cir. 2007).

Trial courts charged with exercising discretion by way of a balancing or weighing of factors must properly exercise discretion in order to be deemed not to have abused it. This form of abuse of discretion is represented in **UNITED STATES v. CURTIN**, 489 F.3d 935, 957 (9th Cir. 2007). In **CURTIN**, the district court was called upon to exercise its Rule 403 discretion concerning inflammatory stories, however, the court did not review and evaluate ALL of the stories. In finding an abuse of discretion, the court writes that "a district court

making a Rule 403 decision must know precisely what is in the stories in order for its weighing discretion to be properly exercised and entitled to deference on appeal." Thus, **CURTIN** stands for the proposition that a legal abuse of discretion can arise if there is an error in the balancing and weighing of factors, such as not reviewing all the evidence sought to be excluded.

A related type of discretionary abuse occurs when the court fails to actually undertake a balancing and weighing, and hence engage in its discretionary process as required by law. This occurs when a district court adopts a blanket outcome determinative policy, in a specific circumstance. An example of this type of abuse of discretion occurred in **MORGAN v. UNITED STATES DISTRICT COURT (In Re MORGAN)**, 506 F.3d 705, 711-712 (9th Cir. 2007), holding that a court abuses its discretion by adopting a blanket policy of rejecting specific sentence agreements under Rule 11; see **PLAINTIFF B.v. FRANCIS**, 631 F.3d 1310, 1314 (11th Cir. 2011) (district court abuses its discretion "if it fails to actually consider the circumstances of the case and to weigh the relevant factors and instead follows a blanket rule in making its final decision"). The Court in **MORGAN** found that the "categorical rejection of a sentence bargain in plea agreements" constituted an abuse of discretion, and it remanded "to the district court to make an individualized assessment of the propriety of [the] stipulated sentence, in light of the factual circumstances specific to this case." Id. at p. 712.

An explanation for why the adoption of a blanket policy results in an abuse of discretion was explained by the court in **UNITED STATES v. MILLER**, 722 F.2d 562 (9th Cir. 1983). The **MILLER** decision involved a district court's "general policy not to accept single count pleas to multiple count indictments." Id. at 565. The court in **MILLER** held that such categorical rules violate the principle that "the existence of discretion requires its exercise." Ibid. The court specified that "[w]hen a court establishes a broad policy based on events unrelated to the individual case before it, no discretion has been exercised." Ibid. An abuse of discretion along these lines occurred, here, **when the district court denied the jury's readback request,** apparently due to its policy of disallowing them.

The court explanation for denying the readback shows it was applying a **BLANKET POLICY.** The court stated that when it served in the state court, readbacks were "done... almost automatically... a court reporter would actually go into the jury deliberation room and read to the jury whatever was requested." ER 145-146. The court noted that "we did [readbacks] here for a short time when I came to this court. **BUT MY PRACTICE HAS BEEN THAT I FOLLOW THE INSTRUCTION THAT WAS GIVEN.**" Ibid. The court's reference to the previous instruction was to 9th Circuit Model Instruction 1.9, which the court pre-instructed on, informing the jury that "at the end of the trial, you will have to make your decision **based on what you recall of the evidence. You will NOT have a verbatim, written transcript as it is given.**"

The court's response to the jury concerning the readback request shows it was following a **BLANKET POLICY.** Referring the jurors back to its pre-instruction (Module Instruction 1.9), the court explained to the jurors, "[in my pre-instruction] I urged you to pay close attention to the testimony as you will not have a trial transcript for read back at the end of the trial. So with respect to the request to have Mr. Mack's testimony read back to you, **that request is denied.**" ER 148-149. Here, however, the court's explanation to the jury as to why it would not get a readback misstated **Model Instruction 1.9.** Instruction 1.9 states merely that "you will not have a **WRITTEN TRANSCRIPT** of the trial" --it does not state **"you will not have a trial transcripts for READBACK at the end of the trial."** So not only did the court state that it would follow **Instruction 1.9,** which it viewed as not providing for readbacks, the court informed the jury that its decision to deny the readback was in accordance with its pre-instruction, stating that the jury **"will NOT have a trial transcript for read back at the end of the trial."**

The court's response to the jury's read back request was illogical and implausible, supporting that it was applying a **BLANKET POLICY.** The request was neither broad nor vague. ER 143. **The jury REQUESTED the testimony of a single, clearly identified, witness.** The comment that such readback, "would mean the court reporter would have to delete all the objections, rulings, and start reading from the beginning of that testimony until the very end, without allowing anyone to stop or say we've heard enough...," is merely a statement of the readback

process, and does not show that the court was basing its decision on the particular facts and circumstances of the case before it. As discussed above, the court cannot exercise actual discretion, deciding whether or not to grant a readback, when it would never under any circumstances grant one, instead, adopting a blanket policy that the procedure is **"CUMBERSOME."** ER 145-146.

(ii) The Court's Reasoning on the Unanimity Issue Heightens the Importance of Paul Mack's Testimony, and hence the need for a Readback.

The first issue decided in the Memorandum addresses the failure to give a unanimity instruction. On this issue, the Court found that "the evidence at trial showed that only one of the multiple conspiracies --between Washington, Paul Mack, Gerard "Nunu" Nelson, and Nunu's girlfriend-- involved crack cocaine." **Memorandum, p.2.** The court reasoned that the district court did not plainly err because the evidence did not tent to show multiple conspiracies **involving crack cocaine**, and hence there was no genuine possibility of jury confusion or the risk of a nonuanimous verdict. Ibid. The court found that the special verdict form properly guided the jury to unanimously find a conspiracy involving crack cocaine. Ibid.

The Court's reasoning on the unanimity issue means that Mr. Mack's testimony was extremely important to the case in that it supported the count one crack cocaine conspiracy. The problem with the readback request arises because Mr. Mack's testimony, and hence count one, was the subject of the readback, making the request an important one. This problem was recognized

by Judge Collins who, during oral argument, noted that "Mack is quite central [to Count 1]. So the notion that you can sustain [Count 1] without regard to him and that [Mack] is unimportant doesn't seem to fly." Oral Argument at 18:42 - 19:18. Therefore, the district court's denial of the readback request was highly prejudicial as it involved a crucial witness to the count one crack cocaine conspiracy.

CONCLUSION

WHEREFORE, based on the aforementioned, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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