

No.

IN THE SUPREME COURT OF THE UNITED STATES

EPATI MALAUULU

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

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QUESTION PRESENTED

**Whether, Despite a Waiver, Malauulu Can
Properly Raise Ineffective Assistance of Counsel
Claims Under 18 U.S.C. § 2255?**

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Epati Malauulu petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Order denying his request for a certificate of appealability. (Appendix A)

OPINION BELOW

On November 17, 2021, the Ninth Circuit Court of Appeals entered a order denying Malauulu's request for a certificate of appealability.

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

18 U.S.C. § 3553(a)

CUSTODY STATUS OF PETITIONER

Malauulu is serving his 240 month sentence in federal prison.

STATEMENT OF THE CASE

On January 18, 2017, Malauulu pled guilty to Count One of an indictment charging him with conspiracy to distribute and possess with intent to distribute methamphetamine. 21 U.S.C. §§ 846, 841(a)(1). (Dkt. 107)

On April 26, 2017, the district court sentenced Malauulu to 240 months of imprisonment and 60 months of supervised release. (Dkt. 136, 137).

The plea agreement required that Malauulu agree to “give up the right to appeal [his] guilty plea, conviction, and the sentence imposed” and the “right to bring a collateral

attack, including a motion under 28 U.S.C. § 2255 . . . challenging any aspect of [his] guilty plea, conviction or sentence, except for non-waivable claims.” (Dkt. 107 at 9)

On July 6, 2020, the district court denied Malauulu’s § 2255 motion. (Dkt. 238; Appendix B) On July 6, 2020, Malauulu filed a Notice of Appeal. (Dkt. 240) On July 7, 2020, the district court declined to issue a Certificate of Appealability (“COA”) (Dkt. 238; Appendix B) On August 6, 2020, Malauulu filed a Request for a Certificate of Appealability and on November 17, 2021, the Ninth Circuit denied Malauulu’s Request for a Certificate of Appealability. (Dkt. 3, 6)

REASON TO GRANT CERTIORARI

I. DESPITE A WAIVER, MALAUULU CAN PROPERLY RAISE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS UNDER 18 U.S.C. § 2255

A. Malauulu Properly Raised the Issues in a § 2255 Petition

The district court held that Malauulu’s waiver of his right to collateral attack in his plea agreement bars him

from challenging his trial counsel's ineffectiveness in his 2255 motion. (Dkt. 238 at 3; Appendix B) The district holds that Malauulu also failed to show ineffective assistance of counsel. (Dkt. 238 at 1; Appendix B)

Malauulu disagrees. Malauulu qualifies for relief under § 2255 because the federal sentencing court may grant relief if it concludes that the prisoner was sentenced in violation of the Constitution or the laws of the United States. *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999) (citing 28 U.S.C. § 2255).

Relief is warranted because Malauulu has shown "a fundamental defect which inherently results in a complete miscarriage of justice. . ." *Davis v. United States*, 417 U.S. 333, 346, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974) (quoting *Hill v. United States*, 368 U.S. 424, 429, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962)).

B. Malauulu Never Waived His Right to Attack Non-Waivable Claims.

The district court finds that Malauulu expressly,

knowingly, and voluntarily waived his right to both an appeal and the right to file a motion to attack his sentence under §2255 waived his claims. (Dkt. 238 at 5; Appendix B) Malauulu disagrees. The plea agreement allowed Malauulu to challenge “non-waivable” claims:

The defendant understands that the law gives the defendant a right to appeal his guilty plea, conviction, and sentence. The defendant agrees as a part of his plea/pleas, however, to give up the right to appeal the guilty plea, conviction, and the sentence imposed in this case as long as the sentence does not exceed 20 years in prison.

In addition, regardless of the sentence the defendant receives, the defendant also gives up any right to bring a collateral attack, including a motion under 28 U.S.C. § 2255 or § 2241, challenging any aspect of the guilty plea, conviction, or sentence, *except for non-waivable claims.* (Dkt. 107 at 9) (Italics added.)

The district court overlooks that appellate waivers cannot bar a defendant from later claiming that this incompetent legal representation infected the negotiation of his plea agreement. *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005). “[A] plea agreement that waives the

right to file a federal habeas petition pursuant to 28 U.S.C. § 2255 is unenforceable with respect to an IAC claim that challenges the voluntariness of the waiver." *Id.* See also *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (An appeal waiver may not "categorically foreclose" defendants from bringing § 2255 proceedings alleging ineffective assistance of counsel "based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain").

The district court found that Malauulu's waiver bars him from challenging anything other than the voluntariness of his plea agreement. (Dkt. 238 at 5; Appendix B) Malauulu agrees but, "a plea agreement that waives the right to file a federal habeas petition . . . is unenforceable with respect to an [ineffective assistance of counsel] claim that challenges the voluntariness of the waiver" itself. *Washington*, 422 F.3d at 871.

In *Washington*, the petitioner waived his right to post conviction relief in return for a sentencing stipulation. *Id.* at

866. The Ninth Circuit held that the petitioner's ineffective assistance of counsel claim based upon his trial attorney's alleged undue pressure to enter this sentencing stipulation was not barred by the stipulation's waiver clause. *Id.* at 868-69.

The court reasoned that an ineffective assistance of counsel claim cannot be barred by an agreement that, "itself," was "the very product of the alleged ineffectiveness," because "[t]o hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation." *Id.* quoting *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999).

The district court finds that Malauulu's claims do not involve the voluntariness of his plea. (Dkt. 238 at 5; Appendix B) The district court finds that Malauulu properly waived his claims invoking trial counsel's failure to provide discovery, trial counsel's inadequate investigation, and trial counsel's failure to negotiate a more favorable sentence.

(Dkt. 238 at 5; Appendix B)

Malauulu disagrees because, but for trial counsel's ineffective assistance, Malauulu would never have entered his plea and waived his right to appeal or to collateral relief.

C. Trial Counsel Rendered Ineffective Assistance

The district court finds that Malauulu's claims of ineffective assistance of counsel fail to meet *Strickland's* standard. (Dkt. 238 at 6; Appendix B) The district court finds that Malauulu merely attacks his trial counsel's strategy, not the voluntariness of his plea and that, regardless, Malauulu cannot show prejudice. (Dkt. 238 at 6; Appendix B)

Malauulu disagrees. Unless trial counsel (1) provided discovery so that Malauulu could make an informed decision about whether to plead (Docket No. 215-1 at 14); (2) conducted an adequate pretrial investigation (Dkt. 215-1 at 15-16); and (3) negotiated a favorable plea agreement (Dkt. 215-1 at 17), Malauulu could not have made a knowing and

voluntary plea.

Trial counsel's failure to effectively communicate with Malauulu led to Malauulu's involuntary plea. Trial counsel pushed Malauulu to plead guilty. In October 2016, trial counsel presented Malauulu with three plea offers from the government: 15-18, 14-19, and 13-20 years. Trial counsel promised Malauulu that he would not receive 20 years and the judge would be lenient. (Dkt. 215-1 at 13)

Trial counsel never discussed any defenses with Malauulu. Trial counsel never discussed taking the case to trial because trial counsel did not believe Malauulu had an affirmative defense. Trial counsel also wanted Malauulu to plead guilty and receive a reduced sentence by cooperating with the government. (Dkt. 215-1 at 14)

If trial counsel had properly investigated the case, communicated with Malauulu, and researched the law, Malauulu would have accepted the 15-18 years' sentence. Because trial counsel assured Malauulu that the district court judge would not sentence him to 20 years, Malauulu

pled guilty to the shorted imprisonment range of 13-20 years. If trial counsel had properly counseled Malauulu, Malauulu would have accepted the 15-18 years deal. (Dkt. 215-1 at 5)

Trial counsel also failed to adequately object to Malauulu's 4 level leadership role and Malauulu's criminal history points. (Dkt. 215-1 at 23-24) Malauulu believes that, if trial counsel had argued that Malauulu's two 2006 convictions counted as two, not six points, and if trial counsel objected to the three extra points, Malauulu's criminal history would have totaled five and placed Malauulu in Criminal History Category III. Malauulu's Total Offense Level would have been 35, Malauulu's Criminal History would have been Category III and his imprisonment range would have been 210 to 262 months. (Dkt. 215-1 at 5)

CONCLUSION

Malauulu respectfully requests that this Court grant
Certiorari.

DATED: February 1, 2022

Respectfully submitted,
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/s Fay Arfa
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