

JAN 19 2023

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22-7032
CASE NO. 22A518

IN THE
SUPREME COURT OF THE UNITED STATES

THE UNITED STATES OF AMERICA,
RESPONDENT,

VS

SCOTT L. FISHBEIN,
PETITIONER.

REQUEST FOR A
CERTIFICATE OF APPEALABILITY
FROM THE FIFTH CIRCUIT JUSTICE

PETITIONER:

SCOTT L. FISHBEIN, pro se

REGISTER NO. 60244-177

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ORIGINAL

Question Presented for Review

Should a certificate of appealability have been issued by the court of appeals for review of an appeal of the denial of a 28 U.S.C. §2255 which presented facts proving that an innocent man was compelled by false information from his defense counsel, and his defense counsel, to falsely plead guilty when there was no evidence to prove the alleged offense?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution applies in the following:

Fifth Amendment Due Process and Self-Incrimination Clauses: "No person shall... be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law."

Sixth Amendment to the United States Constitution applies in the following:

Sixth Amendment Counsel Clause. "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence.

IN THE
SUPREME COURT OF THE UNITED STATES
REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM
THE FIFTH CIRCUIT JUSTICE

OPINIONS BELOW

The opinion of the 2255 paperwork to the United States Court of Appeals appears at Appendix A. The opinion of the United States Court of Appeals appears at Appendix B. to this petition, and is currently unpublished,

The opinion of the 2255 paperwork to the United States District Court appears at Appendix C. The opinion, order, and judgement of the United States District Court appears at Appendix D. to this petition, and are reported at 2022 U.S. Dist. Lexis 21118 No. 4:21-CV-1005-P, (No. 4:20-CR-084-P) February 7, 2022.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit denied my request for a Certificate of Appealability was August 25, 2022. No petition for rehearing was filed in my case.

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

STATEMENT OF THE CASE

Here I will, to show the substantial denial of constitution trial rights, to show the errors and misconduct of my Court Appointed Lawyer George Lancaster.

Between the time I was arrested by the Federal Government on March 20, 2020 and my sentencing trial on September 2, 2020. I had made court appearances, at which time Mr. Lancaster worked to compel me into pleading guilty of the charge of Enticement of a Child, 18 U.S.C. 2422 (b). At which time he compelled me to sign a Waiver of Indictment. When doing so it violated my Fifth Amendment Self-Incrimination and Due Process rights. Without it being a truly knowing and intelligent act with sufficient awareness of the relevant circumstances and likely consequences.

I believe Mr. Lancaster compelled me into signing a "waiver of indictment" because due to a lack of evidence to establish that I committed the alleged offense, a Grand Jury would not indict me. I believe this because Mr. Lancaster's explanations, reviewed by myself after conviction suggested that was the case. If the Grand Jury had been able to Indict me, no waiver of indictment would have been needed. My review of Mr. Lancaster's explanations were prompted by my discovery post-conviction that there were no printing or pictures of any text messages, which the police and prosecutor claimed were between myself and the undercover officer showing my intent to meet the undercover false identity as a minor for sexual activity. Yet, there are copies of other content retrieved from my cell phone.

When Mr. Lancaster compelled me into pleading guilty he violated my Sixth Amendment rights. To the effective assistance of counsel for my defense to be able to confront my accuser or witnesses to my alledged crime. The only accuser or witness that could have been produced was Arlington Police Detective Bishop.

Which he would have had to admit that he was portraying a fictitious 13 year old female on at least two (2) different chat sites. That we did text about sexual contact. But towards the end we decided and agreed to not to have any sexual contact. Following that Bishop as the fictitious female stated that she wanted to meet that weekend. I explained that that weekend would prove difficult for me to meet. But we could meet another time. The fictitious female became presistant on wanting to meet that weekend. Which I was hassitant on wanting to meet. But ended up agreeing to.

After my sentencing, I spoke with Mr. Lancaster about proceeding with my appeal. He refused to proceed with it stating "The Judge could add more time to my sentence." Which could not be done, unless the judge went above the offense level without just cause or him resentencing me. After we finished talking Mr. Lancaster spoke with my mother Lynda Shaver and sister Mindy Fishbein. They asked him if he is going to do the appeal within the fourteen (14) days and his response was "I can't do the appeal!" After speaking with them they parted ways.

In August of 2021, I started my 2255 paperwork for ineffective council and for the errors and misconduct in my case. When Judge Pittman reviewed my 2255 paperwork. He should have seen all the errors and misconduct made by Mr. Lancaster. That I was compelled to plead guilty and sign a waiver of indictment. At which time Judge Pittman should have granted the 2255.

On May 3, 2022, I requested a certificate of appealability from the Fifth Circuit Court of Appeals. On August 25, 2022, my request for a COA was denied.

REASONS FOR GRANTING A CERTIFICATE OF APPEALABILITY

This is a request to the U.S. Supreme Court's Justice for the Fifth Circuit for a certificate of appealability for appeal to the United States Court of Appeals for the Fifth Circuit concerning the denial of a motion under 28 U.S.C. §2255 to the United States District Court for the Northern District of Texas in Fort Worth, Texas.

Legal Standard

The legal standard for a certificate of appealability (COA) for appeal of the denial of a motion under 28 U.S.C. 2255 is derived from 28 U.S.C. 2253 (c), and Slack v. McDaniel, 529 US 473 (2000), see Slack, *id.*, 482 ("The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal."); and 483-484 ("To obtain a COA under §2253 (c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that includes showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed farther." Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy §2253 (c) is straightforward: The petitioner must demonstrate the reasonable jurists would find the district court's assessment of the constitutional claims desatatable or wrong.")

The Legal Issues

This is a case in which a miscarriage of justice occurred when I, Scott Fishbein, a person who has intellectual and psychological disabilities which are obvious, was compelled by my court appointed counsel, in violation of the

U.S. Constitution's Self-Incrimination and Due Process Clauses of the Fifth Amendment, and the Counsel Clause of the Sixth Amendment, to plead guilty to an offense under 18 U.S.C. §2422 (b) that [1] I did not actually commit; and [2] there was no actual evidence to support. see The Black's Law Dictionary, Ninth Ed. (2009) ("Miscarriage of justice: A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.").

The Lack of Evidence

Mine is a case in which there was no actual evidence to support a charge under 18 U.S.C. §2422 (b) that I used, or attempted to use any facility or means of interstates commerce to knowingly persuade, induce, entice, or coerce any individual who had not attained the age of 18 years to engage in any sexual activity for which any person can be charge with a criminal offense. And because of that lack of evidence, my court appointed attorney, George Lancaster, who would have noticed quickly that I had intellectually and psychological disabilities, and was naive, worked to compell me to plead guilty, rather than challenge the case against me, which would have resulted in a different outcome: I would not have been convicted.

I discovered that there was no evidence to support the accusation, that there was only the verbal claims of an Arlington, Texas police officer named Bishop, when I finally got to review my case file when I received a copy of it on a CD-ROM from the Federal Public Defenders office which Lancaster worked for (he is now retired), and learned that there were **NO** copies of any of the cellular phone text communications (texts) officer Bishop claimed he had with me, while he portrayed a 13-year-old girl, in which I allegedly tried to entice his 13-year-old girl identity into engaging in sexual activity with me.

And while there are no such communication copies provided, my case file contains copies of texts between me and others, proven obtaining such was possible.

Incidentally, had copies of the texts between Bishop's 13-year-old girl identity and myself been provided, they would have revealed that I and the 13-year-old female agreed not to engage in any sexual activity if we were to meet.

Consequently, because there was no "evidence," other than the lack of the evidence against me (which can be proved by review of my file retained by the Federal Public Defenders office, and the prosecutor's case file for my case),² for me to use to prove that lack of evidence, and Lancaster's compelling me in violation of the Constitution's Self-Incrimination, Due Process, and Counsel Clauses, that district court denied my constitutional claims that I was wrongly convicted when Lancaster (1) denied me effective assistance of counsel and (2) compelled me to plead guilty to an offense I did not commit and which there was no evidence to prove beyond a reasonable doubt, on the grounds that I failed to provide any evidence to prove those claims.

Being convicted, that is, being compelled by my court appointed attorney to plead guilty, when there is no evidence to actually prove the alleged offense, is the denial of due process rights. see, c.g. Jackson v. Virginia, 443 US 307, 309 (1979) (The Due Process Clause of the Constitution "prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt."); and id., at 314 ("a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.").

²While the prison I am in, FCI Seagoville, Texas, provides a computer for inmate use to view CD-ROM copies of their client/case files, the prison does not and will not provide a means for printing the contents, or individual documents of such CD-ROMs. However if this Court were to appoint me counsel, the counselor could copy the CD-Rom, or get a copy of my client/case file from the Public Defenders office.

The ONLY thing that resulted in the accusation in my case is an unproven, unprovable claim by Arlington Police officer Bishop that I, in some unpreserved cellular phone texts, attempted to entice Bishop's 13-year-old girl undercover identity to meet me for sexual activity, which I never actually tried to do; I expressly said that I wasn't interested in any sexual activity, but was only willing to talk if I were to meet with the girl, which I really did not want to do despite the persistent requests by Bishop's undercover texts for me to meet with his undercover identity.

The Denial of the Effective Assistance of Counsel

Strickland v. Washington, 466 US 668, 684-686 (1984), and United States v. Cronic, 466 US 648, 652-655 (1984), both hold that the Sixth Amendment "right to counsel is the right to the effective assistance of counsel." Strickland, *id.* at 686 (quotation marks and citation omitted).

In Cronic, *id.*, at 657, the Supreme Court said that the right to the effective assistance of counsel includes "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted---even if defense counsel may have made demonstrable errors---the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."

The record of my case shows that my court appointed attorney, George Lancaster did nothing to test the accusations against me, and that was no actual evidence against me, just the accusation and claims of officer Bishop. Therefore, the record of my case shows that Lancaster denied me my right to have the prosecution's case survive the crucible of adversarial testing, which a reasonable jurist would conclude, contrary to the district court's evaluation of the my claim, warrants further proceedings because, if true, I was

denied Due Process and Counsel Clause rights.

I was Compelled to Falsely Plead Guilty

I was compelled by my court appointed attorney, George Lancaster, to falsely plead guilty to an offense I did not commit, and which there was no actual evidence to prove.

In Boykin v. Alabama, 395 US 238 (1969), at 242-243, the Supreme Court held, in short, that if a defendant's guilty plea is not voluntary and knowing it has been obtained in violation of due process and is therefore void.

In Brady v. United States, 397 US 742, 749 (1970), the Supreme Court held that "the voluntariness of [a guilty] plea can be determined only by considering all of the relevant circumstances surrounding it," citing Haynes v. Washington, 373 US 503, 513 (1963); and Leyra v. Denno, 347 US 556, 558 (1954), where each describes what has become known as the "totality of the circumstances analysis" for compelled self-incrimination claims.

The relevant circumstances for my being compelled, in violation of the Due Process, Self-Incrimination, and Counsel Clauses³ include, but are not limited to:

- 1.) Lancaster misleading me with false information into signing a "waiver of indictment"; compelling me with false information, specifically that since, according to Lancaster, I was guilty, I had no actual right to my Fifth Amendment right stating "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," to unintelligently waive that right;

³Fifth Amendment Due Process and Self-Incrimination Clauses: "No person shall... be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law." Sixth Amendment Counsel Clause. "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence."

- 2.) The fact that I have intellectual and psychological disabilities which cause me to be very naive, and unable to truly understand my constitutional and legal rights---because of that, I had to have help drafting this filing; help provided by another inmate. My prior filings done solely by myself, do reflect my intellectual disabilities.
- 3.) Lancaster (who, like any intelligent person who talks to me, would have quickly noticed I had intellectual and psychological disabilities, had no understanding of my rights, and was naive) repeatedly used false claims that the evidence against me was very overwhelming, and, therefore, I should plead guilty. He told me that there was no possible defense, and that copies of the texts between Arlington Police officer Bishop and me clearly showed I was trying to entice Bishop's undercover 13-year-old girl identity into meeting me for sexual activity, which, as it turns out, was a false claim since no copies of any texts between Bishop and me ever existed.

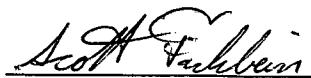
In Bousley v. United States, 523 US 614 (1998); and Padilla v. Kentucky, 176 L. Ed. 2d 284 (2010), the Supreme Court held that affirmative misrepresentations by defendant's attorney regarding things relevant to the defendant's decision to plead guilty will invalidate a guilty plea. Cf., Boykin v. Alabama, 395 US 238, 242-243 ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect coverup of unconstitutionality."). Bousley involved the defendant's attorney, the prosecutor, and trial judge misinforming the defendant "that mere possession of a Firearm would support a conviction under [18 U.S.C] §924 (c)." Id., at 626 (Justice Stevens concurring in part and dissenting in part). Padilla involved the defendant's attorney affirmatively misinforming the defendant that he would not be subject to deportation if he helped guilty to a deportable offense.

The reality of my situation is, as is supported by the record, including the Presentence Investigation Report containing things which help establish that I have intellectual and psychological disabilities, that my guilty plea conviction is a sham conviction of an innocent man, and a reasonable jurist would conclude, based on the record of the case and on what I provide here, that further proceedings are warranted because if that is true, then I am entitled to, and deserve relief.

Conclusion

For the forgoing reasons, a certificate of appealability should be issued so that I may appeal to the Fifth Circuit Court of Appeals concerning the wrongful denial of my motion under 28 U.S.C. §2255 filed in the U.S. District Court for the Northern District of Texas.

Signed, and submitted on January 19, 2023 via deposit, postage prepaid, per Supreme Court Rule 29.2, in the inmate mail deposit box in my housing unit in FCI Seagoville, and certified, under penalty of perjury under 28 U.S.C. §1746 that such was done on that date.


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