

No.

IN THE SUPREME COURT OF THE UNITED STATES

MAQSOOD HAROON,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Should this Court issue a GVR (grant, vacate, and remand) order directing the court of appeals to determine whether Petitioner is entitled to a new trial on the charge of procuring naturalization contrary to law [18 U.S.C. §1425(a)] in order for a properly-instructed jury to consider, pursuant to the intervening decision in *Maslenjak v. United States*, 137 S.Ct. 1918, 1931 (2017), the newly-recognized “complete defense” that he “was in fact qualified to become a U.S. citizen”?

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Petitioner Maqsood Haroon (“Petitioner”) respectfully prays that a writ of certiorari will issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 16-3440 on October 26, 2017.

OPINION AND ORDERS BELOW

On October 26, 2017, the United States Court of Appeals for the Sixth Circuit filed an opinion (App. 1a) and judgment (App. 10a) affirming Petitioner’s conviction for procuring his naturalization contrary to law, and the district court’s order revoking his citizenship.. The opinion is officially reported at *United States v. Haroon*, 874 F.3d 479 (6th Cir. 2017).

By order filed December 28, 2017, the court of appeals denied Petitioner's petition for rehearing en banc. (App. 17a) The order is not published.

The United States District Court entered its criminal judgment (App. 10a) and the order revoking citizenship (App. 16a) on April 22, 2016.

JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on October 26, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §1425:

(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person . . . ;

. . . .

[s]hall be fined under this title or imprisoned not more than 25 years
. . .

8 U.S.C §1451:

. . . .

(e) When a person shall be convicted under section 1425 of title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

STATEMENT OF THE CASE

A federal grand jury in the Southern District of Ohio indicted Petitioner, formerly a native of Pakistan, for violating 18 U.S.C. §1425(a) (procuring naturalization contrary to law). The indictment alleged he falsely represented on his naturalization application “that he had only been married once, that he has no children and that he has never given false or misleading information to a U.S. Governmental official while applying [for] an immigration benefit or to prevent removal[.]”

The matter proceeded to trial before a jury in 2016. At the time of trial, this Court had not yet issued an authoritative decision interpreting §1425(a).

The government called one witness in its case-in-chief, a special agent of Homeland Security Investigations (“HSI”). The HSI agent conceded that a prior divorce and biological children in a foreign country do not disqualify an applicant from naturalization.

However, over defense objection, he testified that providing false written responses to questions on a naturalization application or any earlier application for immigration benefits regarding marital history and children demonstrates a lack of good moral character, and *automatically* disqualifies the applicant from obtaining citizenship. His testimony on this point was a blatant misstatement of the law. See *Kungys v. United States*, 485 U.S. 759, 780 (1988) (Scalia, J.) (the “false testimony” disqualifier under 8 U. S. C. §1101(f)(6) “is limited to oral statements made under oath” [and] “does not include ‘other types of

misrepresentations or concealments, such as falsified documents or statements not made under oath.”)

The jury found Petitioner guilty. The district court placed him on probation and revoked his United States citizenship pursuant to 8 U.S.C. §1451(e). Petitioner appealed his conviction and the revocation order to the Sixth Circuit Court of Appeals.

In the direct appeal, Petitioner challenged the adequacy of the jury instructions, the sufficiency of the evidence, and the case agent’s legal opinion regarding the effect of a false answer on an application for naturalization or immigration benefits. Following full merit briefing by the parties, this Court released its decision in *Maslenjak v. United States*, 137 S.Ct. 1918 (2017).

Maslenjak took a holistic approach to instructing a jury in a prosecution for violating §1425(a). In a nutshell, this Court stated that the instructions must address three key points: 1) materiality (a truthful disclosure “would have led a reasonable official to make some further investigation,”) 2) causation (the investigation “would predictably have yielded a legal basis for rejecting [his] citizenship application,”) and 3) a “complete defense” based on being qualified, in fact, for citizenship. *Id.* 137 S.Ct. at 1931.

The three-judge panel of the Sixth Circuit purported to review the adequacy of the jury instructions in Petitioner’s trial under the criteria announced in *Maslenjak*. The hearing panel concluded that the instructions sufficiently addressed the elements of materiality and causation. (App. 3a) The panel remarked, “[t]hese instructions required what *Maslenjak* demanded.” (*Id.*)

But *Maslenjak* also demands an instruction on the “complete defense” of actual qualification for citizenship. The panel opinion failed to consider and discuss the omission of any language in the jury instructions regarding this defense. Petitioner pointed out this defect in a petition for rehearing.

Petitioner argued that under *Griffith v. Kentucky*, 479 U.S. 314 (1987), he is entitled to the benefit of the “complete defense” announced in *Maslenjak* because his direct appeal was still pending when *Maslenjak* was decided. The court of appeals filed a boilerplate order denying the petition without explanation or comment. (App. 17a)

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

THIS COURT SHOULD ISSUE A GVR (GRANT, VACATE, AND REMAND) ORDER DIRECTING THE COURT OF APPEALS TO DETERMINE WHETHER PETITIONER IS ENTITLED TO A NEW TRIAL ON THE CHARGE OF PROCURING NATURALIZATION CONTRARY TO LAW [18 U.S.C. §1425(a)] IN ORDER FOR A PROPERLY-INSTRUCTED JURY TO CONSIDER, PURSUANT TO THE INTERVENING DECISION IN *MASLENJAK V. UNITED STATES*, 137 S. CT. 1918, 1931 (2017), THE NEWLY-RECOGNIZED “COMPLETE DEFENSE” THAT HE “WAS IN FACT QUALIFIED TO BECOME A U.S. CITIZEN.”

This Court has recognized its authority to summarily grant a petition for certiorari, vacate an appellate court judgment, and remand the case for further consideration (a “GVR” disposition) when it is evident that the appellate court failed to properly apply a recent intervening decision of this Court. *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996). In *Lawrence*, the Court explained that a GVR disposition “conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a

particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues[.]” *Id.* at 167 (internal citation, quotation marks, and brackets omitted).

In *Griffith*, this Court stated that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]” *Id.* 479 U.S. at 328. This Court announced a “new rule” for the conduct of prosecutions under 18 U.S.C. §1425(a) in *Maslenjak*.

After discussing the government's two-pronged burden of proving materiality and causation, the *Maslenjak* opinion recognized, for the first time, the right of a defendant in a §1425(a) prosecution to avoid conviction based on his being actually qualified for citizenship. The Court explained:

Section 1425(a) is not a tool for denaturalizing people who, the available evidence indicates, were actually qualified for the citizenship they obtained. . . . We have never read a statute to strip citizenship from someone who met the legal criteria for acquiring it. We will not start now. Whatever the Government shows with respect to a thwarted investigation, qualification for citizenship is a complete defense to a prosecution brought under § 1425(a).

Id. 137 S.Ct. at 1930.

The trial record contains ample evidence that Petitioner is qualified for citizenship despite his false written responses regarding his marital history and children. The case agent admitted that a prior divorce and offspring from the marriage do not disqualify an applicant from naturalization. He also admitted the

absence of any proof that Petitioner gave false oral testimony regarding his first marriage and children.¹

A cynical Sixth Circuit panel nevertheless speculated that Petitioner “may have practiced polygamy” or may not have married his second wife, a United States citizen, in “good faith.” (App. 6a) But the author of the panel opinion neglects to mention that the HSI agent testified that an earlier administrative investigation and his own criminal investigation failed to uncover any evidence of a sham divorce and/or remarriage.² In opening statement, counsel for the

¹The prosecution did not call, as a witness, the CIS officer who conducted the naturalization interview, or any officer who interviewed Petitioner in connection with a prior application for immigration benefits. The HSI agent conceded that a verbatim record or recording of the naturalization interview does not exist. He also admitted he lacked personal knowledge of the particular questions asked during the naturalization interview:

Q. So we do not know whether the adjudicator asked Mr. Haroon any questions regarding prior marriages and children, correct?

A. I believe that’s correct, if there was any.

²The government’s exhibits included a certified copy of Petitioner’s divorce decree terminating his first marriage in Pakistan.

The case agent testified the CIS officer who had processed Petitioner’s permanent residence application utilized the standard interview protocol for determining the legitimacy of a marriage between an applicant and his American spouse. This protocol entails separating the individuals, asking each of them the same questions about their daily routine, and ascertaining whether “they give the same responses.” Petitioner successfully passed the interview.

The case agent identified an affidavit executed by Petitioner’s second wife, attesting to the legitimacy of the marriage. On cross-examination, he made the following concession:

Q. And you investigated this case, right?

government even conceded this point, rhetorically asking the jury: “Was his marriage to [the second spouse] bona fide? I suppose.”

The Sixth Circuit panel also theorized that Petitioner was “automatically disqualified” for citizenship because he stated on his naturalization application that he had not lied or given false or misleading information regarding his marital history and children on prior applications for an immigration benefit. (App. 4a-5a) But this Court rejected a similar exercise in circular reasoning in *Kungys*:

[W]hat is relevant is what would have ensued from official knowledge of the misrepresented fact (in this case, Kungys’ true date and place of birth), not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood. On the basis of the Third Circuit’s reasoning, a misrepresentation that, in and of itself, is utterly immaterial both in the visa proceeding and in the naturalization proceeding, becomes material simply because it is repeated in both. **That is not what the statute intends.**

Id. 485 U.S. at 775-76 (Scalia, J.)(emphasis supplied).

In *Maslenjak*, this Court emphasized that unless the jury was asked to make all three required determinations (materiality, causation, and qualification for citizenship), a court of appeals must conclude the defendant “was not convicted by a properly instructed jury of ‘procur[ing], contrary to law, [his] naturalization.’” *Id.* 137 S.Ct. at 1931. The instructions in Petitioner’s trial did

A. That’s correct.

Q. And you did not uncover any evidence to dispute [the second wife’s] statements in this affidavit, correct?

A. I did not.

not require the jury to make the third determination -- his qualification for citizenship.

Based on the HSI agent's testimony and the government's concession, a properly-instructed jury could have found that Petitioner was actually qualified to be a U.S. citizen, even though he gave false written responses on his application regarding his marital history and children. The omission of a jury instruction explaining the "complete defense" and providing an avenue for acquittal was therefore prejudicial error.

The Sixth Circuit panel opinion does not mention, not even in passing, the "complete defense" recognized in *Maslenjak*. Worse yet, certain language in the opinion, insinuating the possibility of polygamy or a sham marriage, suggests that the panel was predisposed to avoid any argument or issue that might justify relief. Under the circumstances, Petitioner was deprived of his right to a fair and meaningful appellate review.

CONCLUSION

This Court has described the value of American citizenship as "a most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963), a "priceless treasure," *Fedorenko v. United States*, 449 U.S. 90, 507 (1981), and "the highest hope of civilized men," *Schneiderman v. United States*, 320 U.S. 119, 122 (1943). Thus, "[t]o take away a man's citizenship deprives him of a right no less precious than life or liberty," *Klapprott v. United States*, 335 U.S. 601, 616 (1949)

(Rutledge, J., concurring in judgment); and may “result in the loss of all that makes life worth living.” *Knauer v. United States*, 328 U.S. 654, 659 (1946).

Because the draconian penalty of denaturalization is a mandatory consequence of a conviction under Section 1425(a), *see* 8 U.S.C. § 1451(e), Petitioner should have the benefit of having his day in court to defend himself before a properly instructed jury. Accordingly, Petitioner’s case presents an appropriate occasion for the exercise of this Court’s authority to summarily grant the petition for certiorari, vacate the judgment of the court of appeals, and remand his case for a ruling on whether he should be given a new trial for the purpose of having a properly-instructed jury determine, in the first instance, whether he is not guilty because he is, in fact, qualified for citizenship.

Respectfully submitted,

Dated: March 6, 2018

s/Dennis C. Belli

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