APPEAL NO 18-6927

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

IN RE: JERRY URBINA
AKA "JERRY BOY"
Petitioner

-VS-

UNITED STATES OF AMERICA
Respondent

ON WRIT OF PROHIBITION UNDER 28 U.S.C. SECTION 1651(A) TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF(S) SUBMITTED TO ASSOCIATE JUSTICE WITH SUPERVISORY CONTROL OVER THE FIFTH CIRCUIT PURSUANT TO RULE 22-1 OF THE SUPREME COURT RULES

JERRY URBINA
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QUESTION PRESENTED FOR REVIEW

WHETHER IN LIGHT OF THE SUPREME COURT HOLDING IN HUGHES V. UNITED STATES (CITATIONS OMITTED), THE LOWER COURTS ABUSED THEIR DISCRETION BY DENYING PETITIONER URBINA RELIEF, UNDER THE 782 AMENDMENT, BY REASON OF HIS BEING THE BENEFICIARY OF A RULE 11 C PLEA AGREEMENT.

LIST OF PARTIES

IN RE: JERRY URBINA

-VS-

UNITED STATES OF AMERICA

THE NAMES OF ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE. THERE ARE NO ADDITIONAL PARTIES.

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STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." See, Maryland v. Louisiana, 451 U.S. 725, 737 (1981). Second, the Supreme Court also possesses original jurisdiction for "(all)n controversies between the United States and a State." 28 U.S.C. Section 1251 (b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court, for "all) actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970), United States v. Louisiana, 339 U.S. 699 (1951), United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeal" and "certiorari" as vehicles for appellate r review of the decisions of state and lower federal courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari," the Court has complete discretion to hear the matter.

The Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review was virtually entirely eliminated. Now almost all cases come to the Supreme Court by writ of certiorari. Pub. L. No. 100-352, 102 Stat. 662 (1988). The date on which the United States Court of Appeals decided my case July 2018.

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651(a) IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court and all courts established in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule may be issued by a justice (Chief Justice Roberts) to whom an application to a writ of Prohibition is submitted may refer it to the Court for determination.

The date on which the United States court of Appeals decided my case was July 20, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS

LAW RELATED TO STRUCTURAL ERRORS

In conducting harmless error analysis of constitutional violations, including direct appeals and especially habeas generally, The Supreme Court repeatedly has reaffirmed that "(s)ome constitutional violations ...by their very nature cast so m much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999)("W)e have recognized a limited class of fundamental constitutional errors that ';defy analysis by "harmless error:" standards.'...Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. 'affect substantial rights') without regard to their effect on the outcome.").

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)("Although most constitutional errors have been held to harmless-error analysis, some will always invalidate the conviction "(citations omitted); id at 283 (Rehnquist, C.J., concurring); United states v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 570. 577-78 (1986)("some constitutional errors require reversal without regard to the evidence in the particular case ...(because they) render a trial fundamentally unfair"), Vasquez v. Hillary, 474 U.S. 254, 283-264 (1986); Chapman v. California, 386 U.S. 18, 23 (1967)("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error").

A JUDICIAL NOTICE/STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 OF THE FEDERAL RULES OF EVIDENCE ON PLEA AGREEMENT.

The Right to Effective Assistance of Counsel. See, Kyles v.. Whitley, 514 U.S. at 435-436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 F.2d 832, 839 (8th Cir. 1994)("It is unnecessary to add a separate layer of harmless-error analysis to bar evaluation of whether a petitioner has presented a constitutionally significant claim for ineffective assistance of counsel").

LAW RELATED TO STRUCTURAL ERROR OR CONCEALMENT AND MANIPULATION OF EVIDENCE ON PLEA AGREEMENT.

Included in t he rights granted by the U.S. Constitution, is the protection against prosecutorial suppression or manipulation of exculpatory evidence and other prosecutorial and judicial failures that amount to fraud upon the court. Failure to make available to defendant's consul, information that could well lead to the assertion of an affirmative defense is material, when 'materiality' is defined as at least a "reasonable probability that had the evidence been disclosed tot he defense, the result of the judicial proceedings would have been different. Kyles v. Whitley, 514 U.S. at 435 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)(plurality opinion); id at 685 (White, J,. concurring in judgment)).

In addition to Bagley, which addresses claims of prosecutorial suppression of evidence, the decisions listed below-all arising in "what might be loosely be called the area of constitutionally guaranteed access to evidence," Arizona v. Youngblood, 488 U.S. 51, 55 (1988)(quoting United states v. Valenzuela-Bernal, 458 U.S. 856, 867 (1982) or require proof of "materiality" or prejudice.

The standard of materiality adopted in each case is not always clear, but if that standard requires at least a "reasonable probability" of a different outcome, its satisfaction also automatically satisfies the Brecht harmless error rule. See, e.g. Arizona v. Youngblood, supra at 55 (recognizing the due process violation based on state's loss ort destruction before trial go material evidence); Pennsylvania v. Richie, 480 U.S. 39, 57-58 (1987)(recognizing due process violation based on state agency's refusal to turn over material social services records; "information is Material" if it "probably would have changed the outcome of his trial "citing United States v. Bagley, supra at 685 (White, J,. concurring in judgment)).

Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (denial of access by indigent defendant to expert psychiatrist violates Due Process Clause when defendant's mental condition is "significant factor" at guilt-innocence or capital sentencing phase of trial); California v. Trombetta, 467 U.S. 479, 489-90 (1984)(destruction of blood samples might violate Due Process Clause, if there were more than slim chance that evidence would affect outcome of trail and if there were no alternative means of demonstrating innocence).

United States v. Valenzuela-Bernal, supra at 873-874 ("As in other cases concerning the loss (by state or government of material evidence, sanctions will be warranted for deportation of alien witness only if there is a reasonable likelihood that the testimony could have affected the judgment of the Trier of fact." Chambers v. Mississippi, 40 U.S. 284, 302 (1973)(evidentiary rulings depriving defendant of access to evidence "critical to (his) defense 'violates traditional and fundamental standards of due process."); Washington v. Texas, 388 U.S. 14, 16 (1967)(violation of Compulsory process Clause when could arbitrarily deprived defendant of "testimony (that) would have been relevant and material, and ...vital to his defense.").

A LAW RELATED TO STRUCTURAL ERROR FOR JUDICIAL BIAS

Included in the definition of structural errors, is the right to an impartial judge, i.e. the right to a judge who follows the constitution and Supreme Court precedent and upholds the oath of office. See, e.g. Neder v. United States, supra., 527 U.S. at 8 ("biased trial judge" is "structural error" and thus is subject to automatic reversal"); Edwards v. Balisok, 520 U.S. 461, 469 (1997); Sullivan v. Louisiana, 508 U.S. at 279; Rose v. Clark, 478 U.S. 570, 577-78 (1986); Tunney v. Ohio, 273 U.S. 510, 523 (1927).

STATEMENT OF CASE AND PROCEDURAL POSTURE

Pursuant to a plea agreement in the Western District of Texas, El Paso division, Jerry Urbina agreed to plead guilty to Count One of an indictment, which charged him with Conspiracy to Possess a controlled Substance, with Intent to Distribute (ROA. 179). On December 13, 2013, Urbina was sentenced to 180 months imprisonment followed by a five-year term of supervised release (ROA. 103-05).

On December 12, 2016, Urbina filed a pro se Motion for Reduction of Sentence, pursuant to 18 U.S.C. Section 3582(c)(2), based on Amendment 782 (ROA. 127-34). The district court denied Urbina's motion on June 23, 2017, without ordering the Government to respond (ROA. 135). Urbina filed a pro se notice of appeal (ROA.139).

On July 27, 2017, the Federal Public Defender moved for leave to withdraw as Urbina's appointed counsel on appeal, stating that the probation Office had determined Urbina was ineligible for a sentence reduction under Section 34582(c)92), because he plead pursuant to a Rule 11(c)(1)(C) plea agreement wherein the parties agreed to a sentence of 180 months imprisonment (ROA. 141-43).

Citing to Freeman v. United States, 141 S.Ct. 2685 (2011), the district court agreed that Urbina was ineligible for a reduction of sentence under Section 3582(c_)(2) based on the details of his plea agreement, and granted the FPD's motion to withdraw (ROA. 144-45).

REASONS FOR GRANTING

As a threshold matter, Urbina avers that regardless of a defendant's eligibility or resentencing, a district court's decision to modify a sentence under 18 U.S.C. 3582(c)(2) is discretionary and, as such such, is reviewed by the Court of Appeals for abuse of discretion. This is the case here. Urbina contends that the district court abused its discretion when it relied on clearly erroneous findings of fact, and improperly used an erroneous legal standard. In essence, the district court declined to use the authority under section 3582(c)(2), but instead, concluded that it lacks the authority to reduce Urbina's sentence under the statute. Instead of applying a de novo review on the district court's determination that Urbina was ineligible, the panel of the fifth circuit rubberstamped and adopted the district court's clearly erroneous findings.

The 782 Amendment revises the guidelines to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in Section 2B1.1 (unlawful manufacturing, Importing or trafficking, including possession with intent to commit these offenses); Attempt or conspiracy incorporate the statutory minimum penalties for such offenses. The panel's analysis and determination is narrow and compartmentalized, because it does not take into consideration the points just elucidated.

When Congress passed the Anti-Drug Act of 1986, PUB l. 99-570, the commission responded and extrapolating upward ad downward top set guidelines sentencing ranges for all g=drug quantities. The quantity thresholds in the drug quantity table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory= minimum penalties. Accordingly, offenses involving drug quantities that trigger a five year statutory minimum were assigned a base level (level 26) corresponding to a sentence of 63-78 months for a defendant with a Criminal history Category 1 (a guideline range that exceeds the five year statutory minimum for such offenses by at least three months).

Similarly, offenses that trigger a ten year minimum were assigned a base offense level (level 32) corresponding to sentencing guideline range that exceeds ten year statutory minimum for such offenses by at lest one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities. see 2B1.1 comment (backg'd) with a minimum base offense level of 6 and a maximum base offense level of 38 for drug offenses.

This analysis is very critical in assessing the degree of departure for the goals of the Amendment, not only by the district court, but the wholesale adoption of it, by the panel of the fifth circuit. Critically absent from the panels' evaluation and analysis is the fact that the amendment stresses how the applicable statutory mandatory minimum penalties are incorporated in the Drug quantity table while maintaining consistency with such penalties. See 28 U.S.C. Section 994(b)(1)(providing that each sentencing range must be "consistent with all the pertinent provisions of Title 18, United States code").; see, also 28 U.S.C. Section 994(a)(providing the the Commission shall promulgate guidelines ad policy statements "consistent with all pertinent provisions of any federal statute").

The Amendment also reflect the fact that the guidelines now more adequately now adequately differentiate among t=drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times in response to conf=congressional directives __to provide greater emphasis pm the defendant's conduct and role in the offense, rather than the drug quantity. The version of Section 2D1.1 in effect at the time of this amendment contains for=fourteen enhancements and three downward adjustments.(including the "mitigating role cap" provided in sub-section (a)(5).

These numerous adjustments, both increasing and decreasing offense levels, based on specific conduct, reduce the need to rely on drug trafficking offenders like Urbina, as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

CONCLUSION

Finally, the Commission relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received several testimony from stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

Despite the confusion surrounding U.S. Sentencing Guidelines Manual Section 1B1.10(b)(2)(B), two things appear to be clear: (1) courts are only authorized to reduce sentences that are "based on" a sentencing range subsequently lowered by an amendment to the Guidelines that has been made retroactive; and (2) the language of the second sentence of Section 1B1.10 (b)(2)(B) does nit serve to remove the sentencing court's discretion to reduce a sentence where the original sentence was , in fact, "based on" a subsequent lowered guideline . range, whether pursuant to a departure or a variance.

The distinction between between a sentence in which a district court applied a variance from the recommended Guidelines range bases upon Booker and the !8 U.S.C.S. Section 3553(a) factors but the sentence was nonetheless 'based on" the guidelines, and one where the resentence was not "based on" the Guidelines at all may indeed he subtle. The district courts, however, are fully capable of making that distinction and determining whether a further reduction is appropriate, regardless of whether the original sentence incorporated a variance or a departure from the Guidelines.

Date: October 24, 2018

Respectfully Submitted

Jerry Urbina

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