18-7039 ORIGINAL

APPLICATION NO. 17A285
CIRCUIT COURT NO. 15-1972/4 & 15-2029

BEFORE HONORABLE STEPHEN BREYER, JUSTICE OF THE SUPREME COURT

IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDER NDAULA, AKA "MONEY MALS" - PETITIONER

VS.

UNITED STATES – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALEXANDER NDAULA
#100003604
CLINTON COUNTY CORRECTIONAL FACILITY
58 PINE MOUNTAIN ROAD
MCELHATTAN, PA 17748

308.379.0889 (SPOUSE PHONE)

QUESTION(S) PRESENTED:

I. The 5th & 6th amendments to the Constitution guarantee fairness in criminal proceedings to the accused. When the verification of a sentence enhancement factor, here the loss amount, is disputed during sentencing, those fairness procedures entitled the petitioner to an evidentiary hearing where the government would have been required to corroborate, its allegations with actual evidence, as opposed to refuted naked allegations. Moreover, 18 U.S.C. 3553(a) required that the district court adequately explain the reasons for the enhanced sentence.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

OPINIONS BELOW 6

JURISDICTION 6

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 6

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 12

INDEX TO APPENDICES

APPENDIX A - Opinion of the First Circuit Court of Appeals

APPENDIX B - Oral Judgment of the District Court

APPENDIX C - Order Denying Petition for Rehearing by the Court of Appeals

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

United States v. Martí–Lón, 524 F.3d 295, 302 (1st Cir. 2008) 7

United States v. Mustread, 42 F.3d 1097, 1101–02 (7th Cir. 1994) 11

United States v. Isirov, 986 F.2d 183, 186 n.1 (7th Cir. 1993) 11

United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), Cert. Denied, 404 U.S. 1061, 92 S. Ct. 748, 30 L. Ed. 2D 749 (1972) 11

United States v. Bass, 535 F.2d at 120-21, 11

United States v. Needles, 472 F.2d 652, 65 (2nd Cir. 1973) 11

United States v. Curram, 926 F. 2d 59, 61 (1st Cir. 1991) 11

United States v. Kenney, 756 F. 3d 36, 49 (1st Cir. 2014) 11

United States v. Taylor, 487 U.S. 326, 336 (1988) 13

STATUTES AND RULES

Federal Rules of Criminal Procedure 32 (c)(1)(B)

18 U.S.C. 3663 (a)(1)B)(i)

18 U.S.C. §§ 3553(a)

U.S. Sentencing Guidelines 2B1.1(3)(c) and 6A1.3

PETITIONER'S AFFIRMATION & MEMORANDUM IN SUPPORT

Clinton County]

Ss:

Commonwealth of Pennsylvania]

I, Alexander Ndaula, swear and affirm under penalty of perjury 28 U.S.C. 1746, that the statements made in support of this petition are true and correct and personally known to me. As to those facts I am personally familiar with, they are based reviewing court documents and consultations with my attorneys.

INTRODUCTION

Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was April 19, 2017.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 19, 2017, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including November 16, 2017 on September 17, 2017 in Application No. 17A285.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C Section 1651(a) & (b), the *all writs act* as further articulated in the accompanying late notice of petition for writ of certiorari, and the supporting affirmation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th Amendment Due Process Clause to the Constitution provides in pertinent part; "No person shall be deprived of life, liberty, or property, without due process of law;" while the

6th Amendment to the United States Constitution provides; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a) & (c), 3661; 28 U.S.C. §§ 991, 994, U.S. sentencing guidelines, the Mandatory Victim's Restitution Act and of the Speedy Trial Act, 18 U.S.C. § 3162(a)(2), as follows;

Federal Rules of Criminal Procedure 32 (c)(1)(B), states;

"If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution." and *(i) (3)(B)* "must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing;"

U.S.S.G § 6A1.3, the policy statement regarding resolution of sentencing disputes states;

"When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

U.S. Sentencing Guideline 2B1.1 (3)(C) states that

"The court need only make a *reasonable* estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence... The

estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances."

18 U.S.C. 3663 (a)(1)B)(i) states;

"The court, in determining whether to order restitution under this section, shall consider--

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

The constitutional and statutory provisions guarantee fairness in sentencing proceedings by requiring the government to meet a threshold evidentiary standard of proof. (The government carries the burden to show that "conduct ha[s] been proved by a preponderance of the evidence.") United States v. Martí–Lón, 524 F.3d 295, 302 (1st Cir. 2008).

STATEMENT OF THE CASE

On July 10, 2013 the federal district court in Massachusetts indictment petitioner for wire fraud, 18 U.S.C 1343 and conspiracy to commit wire fraud, 18 U.S.C. 1349. On September 30, 2014 he pleaded guilty, provided the base offense level was 7, 2 point reduction for his minor role in the offense, and 3 point reduction for early acceptance of responsibility. The plea also stipulated that the government would argue there was actual loss of $200,000 to $400,000, a 12 point enhancement, but that petitioner would argue that his sentence should be based on intended loss. Similarly, there was no agreement to restitution, which was to be determined at a hearing separate from sentencing. *See, plea agreement, para. , and sentence transcript*, page..

The presentence report calculated actual loss but not intended loss, and noted the actual loss amounts were provided by the government and unsupported by any documentary proof. Prior to sentencing petitioner alerted counsel that the loss agreement and guidelines were in

direct contradiction. On March 25, 2015 a hearing on the issue was held and counsel was granted leave to withdraw, citing the error. On June 28, 2015 new counsel renewed petitioner's objections to loss, among other issues in the presentence report.

On July 28, 2015 the district court sentenced petitioner to 21 months, and adopted the PSR recommendation for restitution of $237,094.30. Petitioner appealed and the first circuit court of appeals, summarily affirmed.

Prior to the court of appeals denial on April 19, 2017, petitioner was the subject of violating federal supervised release before the Eastern District of New York, which has jurisdiction over his residence in New York. In those violation and related state criminal proceedings, he had privately retained counsel. When the court of appeals decision issued, petitioner's retained counsel in New York substituted appointed appellate counsel to petition rehearing at the court of appeals. On September 16, 2017 retained counsel sought extension to file this application which was granted through November 17, 2017.

On October 18, 2017 petitioner was ordered detained at MDC1[1] - Brooklyn, NY, pending trial on the violation proceedings. The trial was held in November and December 2017. In the meantime, counsel reported to the violation court in New York that he had experienced sickness of a child at home and was unable to attend to petitioner's legal needs on November 15, 2017.[2] Exercising caution the petitioner sent an inquiry letter and request for counsel copied to this Court and the Clerk of the court of appeals.

On January 18, 2018 the court found petitioner had violated his release by a preponderance of the evidence and sentenced him 24 months. On March 28, 2018 the BOP[3]

1 Metropolitan Detention Center, Brooklyn, NY

2 Petitioner inquired from counsel about the filing of the application, he was told counsel hadn't filed it, due to sickness of counsel's child, but that a request for additional time had been submitted.

3 Federal Bureau of Prisons

designated that petitioner would serve his sentence in Pennsylvania. On April 4, 2018 all his property was removed from MDC - Brooklyn and transferred by the BOP. On April 13, 2018 his body was transferred to Moshannon Valley Correctional Center, a privately contracted prison by the BOP and ICE[4].

On July 17, 2018 petitioner was again transferred to New York, this time on a state writ for the criminal charges that led to his violation. He pleaded guilty to a misdemeanor and was returned to Pennsylvania on July 19, 2018. While in New York petitioner spoke to counsel inquiring the status of this application and was assured again the application was fine.

On August 21, 2018 petitioner was transferred to Clinton County Correctional Facility, McElhattan, PA by ICE, and housed in a transitional isolated unit to August 24, 2018. When petitioner was transferred from isolation to general population, he contacted the case analyst assigned to this case and the clerk of the court of appeals. Unfortunately, he was informed no action had been taken on this application after the court granted him an extension through November 17, 2017. He requested a copy of the docket and the *pro se* guide pamphlet from this Court and the decisions of the court appeals. The materials from this Court were received on September 20, 2018 and the decisions of the court of appeals on October 2, 2018. The plea agreement, sentencing memoranda, and transcripts were received on October 26th, 2018. In the meantime, on September 27, 2018, ICE removed the law library computer from the jail for apparent routine maintenance, which detainees used to draft and store legal petitions. A new computer was installed on October 18, 2018.

The abandonment, the various transfers, having to scramble efforts to obtain documents all over again, and the conditions of confinement, shouldn't punish petitioner. This Court

4 Immigration and Customs Enforcement

should find these are extra ordinary circumstances and excuse the neglect, thus tolling the filing period, and permit the application to proceed.

REASONS FOR GRANTING THE PETITION

To satisfy its evidentiary burden at sentencing the government is required to produce verifiable evidence, not naked allegations and 18 U.S.C. 3553(a) requires the district court to adequately explain the reasons for the resulting sentence.

The parties had no agreement regarding loss, the government contended actual loss was $237,094.30, and petitioner contended his sentence should be based on intended loss. In the first instance, "loss is the greater of actual loss or intended loss," U.S.S.G. 2B1.1(3)(A), rendering the plea agreement erroneous. Next, petitioner objected to the amounts proffered by the government, and the presentence report noted the government provided no proof of the alleged loss numbers. The plea agreement also provided that restitution would be determined at a hearing.

There was no proof of the actual loss nor the identity of the victims in this case. The only documents concerning the transactions were in the defendant's sentencing memorandum, showing only that lenders on the Massachusetts properties obtained title at auction. The was no proof of the original purchase price, balance on the loans at the time of the post-foreclosure sale, or the price of the post-foreclosure sale for the Tampa property. The government provided no support for the allegations it made. On the sentencing date, there was no hearing held, the actual loss amounts were unverified, but petitioner was nonetheless found liable for restitution. "Generally, where a court relies on a PSR in sentencing, it is the defendant's task to show the trial judge that the facts contained in the PSR are inaccurate." *United States v. Mustread*, 42 F.3d 1097, 1101–02 (7th Cir. 1994). At least where there is an apparently reliable basis for information in a presentence report, "'bare denial' " is not enough. The defendant must produce "some evidence" calling the presentence report into question, unless the report contains only a "

'naked or unsupported charge.' " Id. at 1102, quoting *United States v. Isirov*, 986 F.2d 183, 186 n.1 (7th Cir. 1993).

Neither the 6th Amendment right of confrontation nor the Federal Rules of Evidence apply during the sentencing phase of a criminal proceeding. *United States v. Rodriguez,* 336 F.3d 67, 71 (1st Cir. 2003) Thus, the district courts enjoy wide discretion in determining what information to consider at sentencing. Though wide, the discretion is bounded by the Federal Rules of Criminal Procedure and the 5th Amendment Due Process Clause to the U.S. Constitution. These strictures require, at a minimum, that "a defendant ... be sentenced upon information which is not false or materially incorrect." *United States v. Curram,* 926 F. 2d 59, 61 (1st Cir. 1991); also, *United States v. Kenney,* 756 F. 3d 36, 49 (1st Cir. 2014). Since petitioner did not concede the loss amount proffered, the court should have held an evidentiary hearing to determine the actual loss amount. See, e.g. *United States v. Fatico*, 579 F. 2d 707 (2nd Cir. 1978)

When a defendant disputes information sought to be introduced, *United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), Cert. Denied, 404 U.S. 1061, 92 S. Ct. 748, 30 L. Ed. 2D 749 (1972) United States v. Bass, 535 F.2d at 120-21, United States v. Needles, supra, 472 F.2d at 658,* as sentencing information there must be sufficient corroboration by other evidence introduced, *United States v. Bass, supra, 535 F.2d at 120-21*, the sentence is the product of reliable information. *See United States v. Needles, supra, 472 F.2d at 659.* The core of this argument is that the reliability of evidence that is difficult to challenge must be ensured through cross-examination. Consequently, sentences based on disputed facts shouldn't be deemed presumptively reasonable even when they fall within guidelines. A district court should adequately explain its reasons and considerations of factors under 18 U.S.C. 3553(a), including the impact of disputed facts on the sentence.

While district courts have greater discretion in sentencing post-*Booker* it does not negate their statutory duty to articulate their reasoning on record. Contrarily, this increased discretion heightens both the need for and value of a reasoned explanation for the sentence imposed, based in evidence on the record, whether it falls within or outside the Guidelines range. This Court made clear that when reviewing language involving sentencing factors in Section 3553(a), district courts must articulate their consideration of all factors relevant to judgment. See *United States v. Taylor,* 487 U.S. 326, 336 (1988). A sentence imposed without adequate explanation, whether within the range recommended by the Guidelines and or accorded a presumption of reasonableness, should not evade meaningful appellate review. Instead any such presumption should be linked to the adequacy of the explanation.

CONCLUSION

WHEREFORE, the Court should reverse the decision of the First Circuit, vacate the sentence, and remand to the district court for re-sentencing. The petition for a writ of certiorari should be granted.

Dated: November 6th, 2018

Respectfully submitted,

Alexander Ndaula (Petitioner Pro Se)

Sworn to and subscribed to this 9th day of November 2018

Sheila K. Peter

NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Sheila K. Peter, Notary Public
Wayne Twp., Clinton County
My Commission Expires July 29, 2021
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES