NO. 18-8133

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DARYL MINGO - Petitioner

vs.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR REHEARING (EN BANC) FROM APRIL 1, 2019

PETITION FOR WRIT OF CERTIORARI

Daryl Mingo
Petitioner, pro se
P.O. Box 699
Estill, SC 29918

LIST OF PARTIES

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is subject of the petition for rehearing en banc, is as follows:

Baker, Hon. David A., United States Magistrate Judge;

Bently, A lee, III, former United States Attorney;

Boggs, Emmett Jackson, Jr., Assistant United States Attorney;

Bryon, Hon. Paul G., United States District Judge;

Elm, Donna Lee, Federal Public Defender;

Henderson, Larry G., Federal Public Defender's Office;

Kahn, Conrad B., Federal Public Defender's Office;

Lopez, Maria Chapa, United States Attorney;

Muldrow W. Stephen, former Acting United States Attorney;

Pryor, Jill A., United States Circuit Judge

Ravenel, J. Bishop, Assistant United States Attorney;

GROUND ONE

PETITIONER'S STATEMENTS DURING THE ACCEPTANCE OF HIS RULE 11 PLEA. DOES NOT BAR OR DISMISS HIS QUESTION UNDER SAID WRIT OF CERTIORARI, HIS PLEA WAS INVALID DUE TO A INSUFFICIENT FACTUAL BASIS THAT ESTABLISHED A NONEXISTING OFFENSE UNDER 18. U.S.C. 924(C)(1)(A).

The plea agreement did not track the language in the charging federal information. The Middle District (Florida) and the 11th Circuit Court of Appeal Court (Atlanta) denials were unethically determined.

(1) Petitioner Mingo's prior statement of accepting the plea can be overlooked. A panel of the Eleventh Circuit recently agreed with United States v. Hildenbrand's reasoning, albeit in a unpublished, non-binding opinion. The panel respects the ruling of its colleagues, as well as other Circuit Court opinions addressing similar issues, that a defendant can still challenge the sufficiency of the factual basis on which the district court accepted the guilty plea even in the face of a knowing and voluntary appeal wavier.

The Supreme Court has held that independently of any constitutional requirements as to the validity of a guilty plea, a Federal District Court may not accept such a plea without fully compling with Rule 11 of the Federal Rule of Criminal Procedure, which requires, inter alia, that the court address the defendant personally and determine that

the guilty plea is made voluntarily and with understanding of the nature of the charge and of the consequences of the plea, and that there is factual basis for the plea. However, it has been recognize that "like any procedural mechanism, its [Rule 11's] exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegation." Fontaine v. United States, supra, 411 U.S. at 215.

The Court: In administering the writ of habeas corpus and its 2255 counterpart, the federal court cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment. Id. at 74-75 (citations and footnotes omitted).
See UNITED STATES V. HURTADO, 2015 U.S. app. LEXIS 12647 (11th Cir 07/22/15). The alleged Rule 11(b)(3) violation is a bit more complicated with claims of an insufficient factual basis for a guilty plea are inconsistent.

Our prior panel precedent rule requires that, where there are two or more inconsisent circuit decision, we "follow the earliest one" Hurth v. Mitchem, 400 F.3d 857, 862 (11th Cir. 2005). We therefore follow Vera, Price, Johnson, and Boatright, all of which predated Fairchild, and address Mr. Puentes-Hurtado's claim that there was an insufficient factual basis for his plea to the narcotics conspiracy charge.

See, other circuit opinions also addressing this matter similarly, an appeal waiver does not bar a Rule 11 claim that ther is an insufficient factual basis to support a guilty plea. See United States 794 F.3d 1285 v. Hildenbrand, 527 F.3d 466, 474 (5th Cir. 2008); United States v. Adams, 448 F.3d 492, 497-98 (2d Cir. 2006); United States v. Portillocano, 192 F.3d 1246, 1250 (9th Cir. 1990).

Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich. Stat. Ann. 28.1053 (1954); Mich. Sup. Ct. Rules 35A; In re Valle, 364 Mich. 471, 110 N.W.2d 673 (1961); People v Barrows, 358 Mich. 267, 99 N.W.2d 347 (1959); People v Bumpus, 355 Mich. 374, 94 N.W.2d 854 (1959); People v Coates, 337 Mich. 56, 59 N.W.2d 83 (1953). See also Stinson v Coates, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

When the record reveals the existence beyond the more allegations of the petitioner from which the reasonable inference can be drawn that his guilty plea has been induced by an unkept plea bargain, or that a substantial mistake has been made in the impostion of the sentence, the guilty plea cannot stand. See Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Dugan v. United States, supra. Moreover, the appellant was proceeding pro se and the court should be liberal in its

consideration of the motion presented. Cf. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

Petitioner's case involved a unreliable proven confidential source received a little over a gram of heroin and a after the fact firearm 357 revolver for $600.00 United States currency to which only created Count II, carrying a firearm in the commission of a drug trafficking offense 18 U.S.C. 924 (c)(1)(A) with count 1, possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); and Count III, Possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. 841 (a).

In explaining its holding that "18 U.S.C. 924(c) criminalizes two separate and district offenses," the court of appeals found that "'in furtherance of' differs from 'during and in relation to' and requires the government to prove a defendant used the firearm with greater participation in the commission of that the firearm's presence in the crime was something more than chance or coincidence." Id at 933. The most natural reading of the statute, however, is that "in relation to" modifies only the nearby verbs "uses" and "carries." The next verb--"possesses"--is modified by its own adverbial clause, "in furtherance of."

Petitioner questioned whether Congress allowed there Courts to impose punishment under the acceptance of a plea factual basis, When the elements "carry" with "in furtherance" by law can not punish a crime under 18 U.S.C. 924 (c)(1)(A). Moreover, the language in Mingo's Rule 11 plea Agreement and the statements

made during the plea colluquy is problematic because it does not track the language of count II from the information.

See, Reiter v. Sonotone Corp, 442 U.S. 330, 339, 60 L.Ed.2d. 931, 99 S.Ct. 2326 (1979). Court decisions require the government under 18 U.S.C. section 924(c) to present different proofs to show "using or carring a firearm during and in relation to" a drug trafficking crime from that required to show "possession of a firearm in furtherance of" a drug trafficking crime.

Furthermore, text of 18 U.S.C. Section 924(c) belies the view that the Statute Simply identifies alternative means for committing a simple offense. The two prongs of the statute are seperated by the disjunctive "or" which according to the precepts of statutory construction suggest the seperate prongs must have different meaning.

See, United States v. Martell Deanaz Collins, 2016 U.S. Dist LEXIS 125040, (6th Cir.) What constitutional rights forbid's Mr. Mingo the same justice as Mr. Collins recieved in the Federal Hierarchy System dealing with the same claims.

Why during Mingo's plea agreement was the government allowed to charge Mingo with both 924(c)'s under count II, carrying a firearm in the commission of a drug trafficking offense, using "and" but not "or" ... then the record established the factual basis under "carrying" a firearm "in furtherance" of a drug trafficking offense; to which is not a codified federal crime under 18 U.S.C. 924(c)(1)(A).

Petitioner would gracefully request a rehearing en banc for the reasons set forth.

GROUND TWO

COUNSEL FAIL TO OBJECT THAT ONE FIRE_ARM FROM THE SAME COURSE OF CONDUCT COULD RENDER TWO SENTENCES CONCURRENTLY AND CONSECUTIVE.

Petitioner avers that counsel (Larry Henderson) whom here inafter shall be called 'Counsel' - failed to assist his client because he [xxxx] did not know that both convictions under sections 922(g) and 924(c)(1)(A) were multiplitious and violated the Double Jeopardy Clause of the Fifth Amendment in relation to the way a single firearm concurrently and consecutively sentences petitioner. Counsel's performance may[] be considered deficient because both convictions are based on the same conduct involving a ["sin"]gle firearm.

The question becomes - why did counsel not understand this? This Court has held that when attorneys do not know the law in a relation to know it applied to facts of his/her client's cases are ineffective. See, Caroway v. Beto 421 F.2d 636 (5th Cir. 1970). Prejudice is plain where, again, Petitioner should have never faced such punishment - and court(s) have reversed on such[] issue.

GROUND THREE

PETITIONER WOULD ASK WHAT JUSTIFICATION NEGATES COUNSEL NOT BEING PRESUMED INEFFECTIVE ASSISTANCE OF COUNSEL. WHEN COMPARABLE LITIGANTS WERE PROVIDED THE 6TH AMENDMENT RIGHT UNDER THE UNITED STATES CONSTITUTION WITH THERE 18 U.S.C. 924(c)(1)(A) BEING VACATED.

Federal Constitution's Sixth Amendment requires effective assistance of counsel at critical stages of criminal proceeding, including plea bargaining. Lafler v Copper (2012, Us) 182 L.Ed 2d 398, 132 S.Ct. 1376.

This Court has held that the right to effective counsel applies to all "critical stages of the criminal proceeding". Montejo v. Louisiana, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (internal quotation marks omitted). Those stages included not only "the entry of a guilty plea," but also arraignment, postindictment interrogation, 137 S.Ct. 1972 [and] postindictment linups." Frye, supra, at 140, 132 S.Ct. 1399, 182 L.Ed.2d 379 (citing cases). In those circumstances, the Court has not held that the prejudice inquiry focuses on whether that stage of the proceeding would have ended differently, it instead has made clear that the prejudice inquiry is the same as in Strickland, which 2017 U.S. LEXIS 29 requires a defendant to establish that he would have been better off in the end had his counsel not erred. See 466 U.S., at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.B

Under its rule, so long as a defendant alleges that his counsel omitted or (misadvised him) on a (piece of information)

during the plea process 2017 U.S. LEXIS 37 that he considered of "paramount importance," ante, at 10, he could allege a plausible claim of ineffective assistance of counsel.

Person complaining of deprivation of his constitutional rights that allegedly occured prior to entry of his guilty plea is limited in federal habeas corpus proceeding to attacks on voluntary and intelligent nature of guilty plea, through proof that advice received from counsel was not within range of competence of demanded of attorneys in criminal cases. Blackledge v Perry, 417 US 21, 40 L Ed 2d 628, 94 S Ct 2098.

Counsel, Larry Henderson's advice was not under professional norms, as his advice that the crimes were not in question. But, due to the fact petitioner was facing life does not constitute that what transpired throughout the preliminary proceedings until petitioner pled. That he was in fact ineffective for allowing petitioner to plead to a non-codified federal offense as carrying a firearm in furtherance of a drug trafficking offense can not establish a factual basis under Rule 11, plea colluquy.

See, United States v. MARTELL DEANAZ COLLINS, 2016 U.S. Dist. LEXIS 125040 (6th Cir. 2016). Collins' indictment was flawed. Count III of the indictment charged: "MARTELL DEANAZ COLLINS... did knowingly use carry firearms...in furtherance of drug trafficking crime." See indictment, Docket Entry 11, at 4. Collins was therefore indicted on the conduct (use and carry) from the 924(c) "use" offense in conjuction with the standard of participation (in

furtherance of) from the other "possession" offense, resulting in the indictment failing to charge Collins with any codified federal crime. Combs dictates that the Court must vacate Collins' conviction as to Count III because this count of the indictment fails to charge defendant with a codified federal crime.

Collins' case concerns the sufficiency of the indictment, not whether, as the government suggests, Collins' plea colloquy provides sufficient evidence to "support the judgment entered against him." Gov't's Additional Briefing Re. Applicability of U.S. v. Combs at 3. Collins' guilty plea does not change the fact that the indictment as to Count III was invalid to begin with. Moreover, the language in Collins' Rule 11 Plea Agreement and the statements made during the plea colloquy provide additional reasons why Collins' 924(c) conviction must be vacated.

The rule 11 Plea Agreement is problematic because it does not track the language of Count III of the indictment. The indictment charged defendant with the nonexistent offense of using and carrying a firearm in furtherance of a drug trafficking crime. However, the plea agreement charged Collins with "possession of a firearm during and in relation to a drug trafficking crime." Furtherance, the offense to which defendant pled guilty not only fails to track the offense in the indictment, it also impermissibly combines the conduct elements (possession) from the 924(c) "possession" offense with the standard of participation (during and in relation to) from the other "use" offense, resulting in Collins pleading guilty to a nonexistent crime. See Combs, supra;

see also Williams v. United States, 475 F. App'x 36, 40-41 (6th Cir. 2012).

Collin's plea colloquy did not constitute an implied waiver of his Fifth Amendment right reindictment by a grand jury because such a waiver occurs only "where a valid indictment has been obtained." Gaudet, 81 F.3d at 590 (emphasis added). Thus, Collins could not have waived his Fifth Amendment right to indictment by grand jury at the plea colloquy because his indictment, as discussed above, was not valid to begin with. Further, given the litany of errors that occured in this case, the following cursory exchange between the government and Collins cannot be deemed curative:

When the record reveals the existence of evidence beyond the mere allegations of the petitioner from which the reasonable inference can be drawn that his guilty plea been induced by an unkept plea bargain, or that a substantial mistake has been made in the imposition of the sentence, the guilty plea cannot stand. See Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Dugan v. United States, supra. Moreover, the appellant was proceeding pro se and the court should be liberal in its consideration of the motion presented. Cf. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

GROUND FOUR

PETITIONER WOULD ASK WHAT AUTHORITY GIVES THE FEDERAL DISTRICT AND APPEAL COURTS JURISDICTION TO WITH HOLD THAT STATE STATUTE

NEED NOT "EXACTLY MATCH" THE SPECIFIC ACTS LISTED IN THE ACCA DEFINITION. PETITIONER'S PRIOR CONVICTIONS FOR SALES OF COCAINE AND SALES AND DELIVERY OF COCAINE UNDER FLORIDA STATE LAW ARE OVERBOARD IN REGARD TO COMPARABLE FEDERAL STATUTES. FURTHERANCE, PETITIONER'S BURGLARY CHARGE UNDER THE STATUTE COVERS MORE THAN GENERIC BURGLARY.

See, DARYL MINGO v. UNITED STATES, 2018 U.S. App. LEXIS 32920 (11th Cir. 2018).

Mr. Mingo would state for the record that under Florida drug statutes the element mens rea, illicit nature can not be construed to disregard an enhancement under the federal sentencing guidelines. Furthermore, Georgia nor Alabama high courts have authoritive jurisdiction to case law opinionate Florida high court interpretation. On, whether Florida state laws for sale of cocaine and sales and delivery of cocaine are overboard in regard to comparable federal statutes. However, where does the fact that Florida state statute need not "exactly match" the specific acts listed in the ACCA definition overrule procedural language in Mathis Court.

Under this Court's prior precedent rule, "a prior panel's holding binding on all subsquent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or this court sitting en banc." United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008). To conclude that we are not bound by a prior holding in light of a Supreme Court case we must find that the case is "clearly on point" and that it

"actually abrogat[s] or directly conflict[s] with, as opposed to merely weaken[s], the holding of the prior panel." United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009)

See, John v. Fankell, 520 U.S. 911, 916, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997) ('Neither this Court nor any other federal tribunal has any authority to place a construction on state statute different from the one rendered by the highest court of the State."). See, DARYL MINGO v. UNITED STATES, 2018 U.S. App. LEXIS 32920 (11th Cir. 2018).

These measures in the above waarants the 11th Circuit Court of Appeals in conflict regarding petitioner's ground four, (4); Mathis Court. Note, the 11th Circuit sister court is in conflict (5th Circuit), to which has ruled in favor of petitioner had he commited his crimes in Texas.

Petitioner would ask that a rehearing en banc be granted as Mathis Court needs to be applied to all circuits Constitutionally. En Banc is warranted as the 11th Circuit has intertwined Florida, Georgia, and Alabama drug statutory laws to address said Mathis Court unconstitutionally as each requires different interpretations under there state statutes and ruling from their highest state courts.

CONCLUSION

Petitioner has set forth new language that demonstrates within all four, (4) grounds that he entitled to a rehearing en banc as his Writ of Certiorari questions validated questionable facts

to which constituted this Court elaboration due to petitioner's Constitutional rights being denied.

D J Mingo 06/28/2019

SIGNATURE / DATE

[SECTION 1746]

UNSWORN DECLARATIONS UNDER PENALTY OF PERJURY.

I, DARYL MINGO, declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on (date) D J Mingo 06/28/2019

SIGNATURE