No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

MALVIN NATER-AYALA, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, MALVIN NATER-AYALA, who states that he has previously been granted leave to proceed in forma pauperis in the United States Court of Appeals for the First Circuit, and further that the United States Court of Appeals for the First Circuit appointed the undersigned attorney to represent him under the Criminal Justice Act of 1964, U.S.C. § 3006A.

THE PETITIONER
BY HIS ATTORNEY

/s/ John T. Ouderkirk, Jr.
_____
John T. Ouderkirk, Jr.
P. O. Box 2448
Westerly, RI 02891-0924
401.932.4800
jouderkirk@att.net

Dated: March 21, 2019

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

MALVIN NATER-AYALE, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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Counsel of Record

October Term, 2018

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Nicolas Warren Cannon, Esq., AUSA

Mariana E. Bauza Almonte, Esq., AUSA

Malvin Nater-Ayala, Defendant

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WHETHER THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO ADDRESS THE CRITERIA UNDER WHICH SUMMARY JUDGMENT IS WARRANTED?

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U.S. Supreme Court Cases

Other Cases

FEDERAL STATUTES

FEDERAL RULES

IN THE SUPREME COURT OF THE UNITED STATES

_____

MALVIN NATER-AYALA, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

_____

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

PETITION FOR A WRIT OF CERTIORARI

Malvin Nater-Ayala, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed his conviction and sentence as reported in U.S. v. Nater-Ayala, 15-1758, (1st Cir., 12-21-2018) decided on December 21, 2018.

OPINIONS BELOW

The December 21, 2018 decision of the United States Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed was not reported but decided on summary judgment, as United States v. Angel Melendez-Orsini, 15-1758 (1st Cir., 12-21-2018), and the final order is reprinted in the Appendix to the Petition at p..

JURISDICTION

This case arises from a plea agreement in the United States

District Court for the District of Puerto Rico.[1] The District Court judge imposed a sentence that focused only on punishment and not the totality of the § 3553 sentencing goals. The First Circuit Court of Appeals affirmed the sentence on summary disposition. The defendant moved for rehearing. That motion was denied.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

18 U.S.C. § 3553

1st Cir. R. 27.0(c)

STATEMENT OF THE CASE

The defendant did not challenge the following facts as part of his change of plea. The defendant acknowledged that, in or about March 2007, and continuing up to in or about October, 2011, he did knowingly and intentionally combine, conspire, and confederate and agree together, and with others, to commit an offense against the United States. Apx.61. That is to possess, with intent to distribute and distribute, controlled substances, namely five 'kilos' or more of cocaine, two hundred and eighty grams or more of cocaine-base crack, a mixture or substance containing a detectable amount of marijuana, and a detectable amount of Oxycodone, at the Llorens Torres Public Housing Project, and within one thousand feet of two elementary public

[1] References to the Addendum are denoted "A." followed by the page number in the Addendum. References to the brief are denoted "P." followed by the page number. References to the Appendix are denoted "Apx." followed by the page number.

schools, the Luis Llorens Torres Elementary School and the Maria Martinez de Perez Almiroty Elementary Public School. Apx.62.

For purposes of this agreement, the parties stipulated that this defendant was accountable for the possession, with intent to distribute and the distribution, of at least one hundred and ninety-six grams, but less than two hundred and eighty grams of cocaine-base crack, at a drug point located in the area under the control of the Calle 4 Gang, within the Luis Llorens Torres Housing Project, and within one thousand feet of two elementary schools. Apx.62.

The defendant, as a member of the drug trafficking organization, received large quantities of cocaine, and was a cocaine-base crack drug point owner. He was in charge of cooking, preparing, and packing these controlled substances for the distribution at the drug point for financial gain and profit. Apx. 62-63.

The defendant admitted that he possessed firearms and supplied firearms to others as part of the conspiracy. He also incurred in violent acts, made credible threats to use violence or directed the use of violence, in furtherance of the drug conspiracy. Apx.63.

REASON FOR GRANTING THE WRIT

I. THE DISTRICT COURT ERRED WHEN IT IMPOSED A SENTENCE THAT WAS GREATER THAN NECESSARY TO ACCOMPLISH THE GOALS OF SENTENCING.

A. The sentence suggested by the defendant fully addressed all the goals of sentencing.

The trial court was required to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing. 18 U.S.C. § 3553. Some of those purposes were to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. Another goal is to afford adequate deterrence. The sentence must also consider the goals of rehabilitation and the preparation of the defendant to return as a productive, law-abiding member of society.

The District Court Judge agreed that the defendant's offense level was 35, and that he was a category one offender. The guideline range for the defendant was between 168 and 210 months. Apx.74, 104.

The defendant proposed a sentence of incarceration for 168 months. Given the defendant's offender status, and all of the maximum upward adjustments used to calculate his offense level, his change in personal attitude, and his successful efforts to rehabilitate himself while in prison, this sentence met the goals of sentencing. It was a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing.

The government agreed that the defendant was not the only leader of the conspiracy. There were actually three leaders, and the only reason the government designated this defendant as number one was that he had been in a leadership role for the longest period of time compared to the other two. Apx.76.

At the time of sentencing, the defendant had made significant strides toward turning his life around. He had been

incarcerated for four years, and had taken advantage of that time to improving himself. He had selflessly helped a cell-mate in need, and kept that fact to himself. Apx.84. He had no disciplinary actions, even for minor infractions. Apx.84-85. He worked in the prison. He had worked as an orderly; providing cleaning services. He was currently dealing with meals for the other prisoners. He took every course that he was eligible for. He showed behaviors, attitudes and efforts to improve himself, and focus on the right values. Apx.85.

He suffered great losses in his life, but was trying and succeeding in overcoming his prior world of constant tension, pressure and violence. Apx.86. He left school because he lived in a very dangerous neighborhood, and his mother felt it was too dangerous for him to walk through that neighborhood to get to the High School. Apx.86-87. He was an avid athlete. Apx.86. He continued to learn and understand English, and his mastery of the language was improving. Apx.86.

He had a very real social structure to return to when he was finally released from prison. He had strong support from his family members, a great number of which attended his sentencing. Apx.87-88. During his own address to the District Court judge, he first apologized to the family that were present. He told them that he would leave prison as “an honest man, a man with a clear mind, an objective mind and [that he] will recognize the offenses [he] has committed.” He promised them that he would go “on the straight path.” Apx.89-90.

When he addressed the Court, he said that during the four

years he had already been in prison, he had learned how to help others, from the heart, asking for nothing in return, without having to intimidate or use violence; only with affection and humility. He learned to earn his money “with the sweat of his brow.” Although he did not earn much, he felt proud that he was making honest money. He said that he knew he had to pay for the offense he committed. Apx.90-91.

The government agreed to a specific quantity of drugs which were possessed by this defendant. Nevertheless, the District Court judge determined the defendant’s sentence not on that quantity, but on what she knew “well exceeded the amounts that have been stipulated for bargaining purposes by this defendant.” Apx.108. She also had a table that was prepared throughout the case, listing not only the defendant’s involvement, but actually the co-defendant’s participation as well. Apx.109. That table was not before the court as evidence in this case although the District Court judge relied on the table in determining the defendant’s sentence.

The government stressed that fact that the defendant possessed and gave firearms to others. Apx.95. This was improper because the defendant had filed a motion prior to his change of plea contesting the improprieties in both the number of firearms and the allegations concerning the firearms. The Magistrate Judge stated that, “[a]nd I understand as well that, because Mr. Nater is only pleading guilty to count one, those issues are really not...they’re really not issues anymore.” Later the Magistrate judge again told the defendant, [a]s to the firearms count, it’s

really a non-issue. Because if you decide to plea, count two, the firearms, that count will be dismissed. Ese cargose la archiva." Apx.24, 33. Once the case finally went to sentencing, the firearms count did, in fact, matter a lot. The issues about the number of firearms and allegations about the types of firearms were very big issues. This raised a serious question about whether the defendant understood the significance that the types and number of firearms would play in his sentencing after the plea.

The government recited a litany of violent acts that the government wanted to attribute to this defendant. Apx.96-99. The evidence they had, however, was less than resounding. All of it was based on only eye-witness testimony, Apx.100-01, which has recently been shown to be less than reliable in all cases. The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures. Perry v. New Hampshire, No. 10-8974, January 11, 2012, pp.40-41

(U.S., 2012)(Sotomayor, dissenting).

One of the violent incidents that the government recited involved an offense where this defendant was monitored by an electronic bracelet on home confinement. When the video surveillance of that incident was reviewed, this defendant was not there. Apx.101-03. The District Court judge interjected personal past knowledge to support the government's claim by relying on a memory of a prior plea agreement proffer which was not part of this agreement. Apx.103.

The District Court judge made an upward variance because she felt the guidelines did not reflect the seriousness of the defendant's participation in the conspiracy. The fact was, however, that every single adjustment in reaching the base offense level, whether it be for violence, for firearms, or for leadership was made to the maximum level. Apx.116.

The government also referred to the defendant being in possession of stolen property, which even they conceded was not part of this case, but which they wanted the District Court judge to be aware of. Apx.99. The government went on to list another arrest, for which no probable cause was found. Apx.99. The District Court judge conceded that she took into consideration activities that occurred before the beginning of the conspiracy, when sentencing the defendant for this conspiracy alone. Apx.94, 96, 106.

The government stated that they wanted the high end of the guidelines to be imposed. Apx.100. The high end of the guidelines was 210 months, but they wanted 262, which was far beyond the

high end of the guidelines. That was due to the fact that between the time of the change of plea and the time of sentencing, Congress had determined that the penalties for cocaine-base crack, had been too severe. The Fair Sentencing Act of 2010 as implemented by new sentencing guidelines, substantially reduced crack cocaine sentences, including the mandatory minimum sentences. 21 U.S.C. § 841(b). The government did not believe that they should have to suggest a sentence that was consistent with the Fair Sentencing Act, nor did the District Court judge feel constrained to abide by the Act either.

The District Court judge relied on evidence that was not before the court. She considered the fact that [the drug trafficking organization] was widely known in Puerto Rico as one of the most violent ones, with violent acts not only against rival gangs, but as disciplinary measures against gang members that were suspected of violating the gang's own rules. The source of this information was an admission by a co-defendant in a separate proceeding. Apx.107. The District Court judge also stated, "[w]hen I mentioned the organization is known as one of perhaps the most violent ones in the District, it is clear and I think it is commonly known and there would be no need for additional evidence as to that, that Llorens Torres is and has been and known to be in a state of seizure by all of the violence that happens there." Apx.119. There can be no question that the sentence was driven by extrajudicial evidence, and personal bias on the part of the judge. Any reference to extrajudicial evidence by the trial judge destroys the fundamental premise of any trial

that the ultimate decision rests solely upon evidence presented by the parties within the confines of the rules of evidence. Scott v. Ohio, 480 U.S. 923, 925 (1987)

The trial court judge stated that the reason the sentence was imposed was the need to punish. The District Court judge was focused on only the punishment aspect of § 3553.

This Honorable Court stated that the trial court judge "should be guided by the broadly worded goals of sentencing spelled out in section 3553(2), to which Kimbrough pays homage." U.S. v. Rodriguez, 527 F.3d 221, 228 (1st Cir., 2008). A District Court should not evaluate a request for a sentence piecemeal, examining each section 3553(a) factor in isolation, but should instead consider all the relevant factors as a group and strive to construct a sentence that is minimally sufficient to achieve the broad goals of sentencing. Id. (emphasis added). See 18 U.S.C. § 3553(a) (requiring judicial temperance such that the sentence imposed must be "sufficient, but not greater than necessary, to comply with" the purposes of sentencing); see also United States v. Rodriguez, 527 F.3d 221, 228-29 (1st Cir. 2008)(discussing Supreme Court's decision in Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), as reflective of the parsimony principle). U.S. v. Gallardo-Ortiz, 666 F.3d 808, 817 (1st Cir., 2012). Here, the trial court judge specifically singled out one factor in isolation; that being punishment.

The defendant put objections on the record for any variance or upward departure based on violence, firearms, and his

leadership role. Those arguments were therefore preserved for review by this Court. Apx.110.

This Court stated that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. United States v. Zavala-Martf, 715 F.3d 44, 54 (1st Cir., 2013); quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

That was not the case where the District Court judge relied on facts not in evidence, including facts drawn from personal recollection of prior proceedings, and the arena of public media and opinion. It was not the case with this trial judge's opinion about the defendant's need for punishment.

B. The Court of Appeals Court could hear the present appeal.

Although there was a waiver of appeal clause in the plea agreement, this Court can set aside the waiver. Pre-sentence waivers are enforceable if they meet certain criteria. The defendant must enter the waiver knowingly and voluntarily. "In examining whether the defendant knowingly and voluntarily waived his appellate rights, the text of the written plea agreement and the change of plea colloquy are of critical importance." Sotirion v. United States, 617 F.3d 27, 33 (1st Cir., 2010). Here, serious questions are raised as to how knowingly the change of plea was entered. The defendant had been assured by the Magistrate Judge that the number of firearms and firearms allegations would not be

an issue. Instead, it was a major issue at sentencing. Had the defendant known how much his sentence would be increased because of his reliance on that assurance, he may very well not have changed his plea. The plea was not made knowingly.

"Second, even if the waiver is knowing and voluntary, [this court retains] discretion not to enforce the waiver if it would result in a 'miscarriage of justice'." Sotirion v. United States, 617 F.3d 27, 33 (1st Cir., 2010). In the present case, the District Court judge relied on extrajudicial and anecdotal evidence. The District Court judge relied on evidence that was outside the terms of the plea agreement. The defendant had been told earlier that one of the major grounds for his increased sentence would not be an issue if he changed his plea. That resulted in a sentence that was 52 months greater that the maximum guideline calculation.

As mentioned above, the defendant did object on the record to the increases to his sentence bases on violence, firearms and his leadership role.

By affirming the sentence on summary disposition, the defendant was deprived of any guidance regarding the Court of Appeals underlying rationale for their decision.

CONCLUSION

For all the reasons stated above, this Honorable Court should review the decision of the United States Court of Appeals for the First Circuit and grant the writ of certiorari.

THE DEFENDANT
BY HIS ATTORNEY

/s/ John T. Ouderkirk, Jr.
_____
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CERTIFICATE OF SERVICE

I, John T. Ouderkirk, Jr., do hereby certify that I have caused the foregoing to be served by mailing a complete copy to the Clerk of the United States Court of Appeal for the First Circuit, 1 Courthouse Way, Suite 2500, Boston, MA 02210-3004, one copy each to Nicolas Warren Cannon, Esq. and Mariana E. Bauza Almonte, Esq., both of the U.S. Attorney's Office, 350 Carlos Chardon Ave., Torre Chardon Ste. 1201, San Juan, PR 00918-0000, and the Solicitor General of the United States, Room 5614, DOJ, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001, on this 25th day of March, 2019.

/s/ John T. Ouderkirk, Jr
_____
John T. Ouderkirk, Jr.

AFFIDAVIT OF TIMELY FILING (SUP. CT. R. 29.2)

Under oath I depose and say that my name is John T. Ouderkirk, Jr., and that I am the attorney for the petitioner. On January 21, 2019, I submitted a copy of the Petition to the Clerk of the United States Supreme Court at 1st Street, N.E., Washington, DC 20543-0001 via the Court's electronic filing system. The final judgement was entered on December 21, 2018 and the last day for filing is March 21, 2019.

/s/ John T. Ouderkirk, Jr.
_____
John T. Ouderkirk, Jr.

APPENDIX

United States Court of Appeals
For the First Circuit

No. 15-1758

UNITED STATES,

Appellee,

v.

MALVIN NATER-AYALA, a/k/a Malvin,

Defendant, Appellant.

Before

Howard, Chief Judge,
Lynch and Thompson, Circuit Judges.

JUDGMENT

Entered: November 8, 2018

Appellant Malvin Nater-Ayala pleaded guilty, pursuant to a plea agreement, to conspiring to possess with intent to distribute controlled substances. On appeal, he argues that the district court erred in imposing an upward-variant 262-month sentence. The government moves for dismissal or for summary disposition.

We have carefully reviewed the parties' submissions and relevant portions of the record. Even assuming, without deciding, that the appeal is not barred by the appeal waiver in the plea agreement, we conclude that the appeal does not present a "substantial question" and that affirmance is in order. 1st Cir. R. 27.0(c). Accordingly, we grant the government's motion for summary disposition. See United States v. Santiago-Rivera, 744 F.3d 229 (1st Cir. 2014) (reasonableness principles).

Affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 15-1758

UNITED STATES
Appellee,

V.

MALVIN NATER-AYALA, a/k/a Malvin
Appellant.

Motion to Reconsider and Vacate the Judgment issued on November 8, 2018

Now comes the defendant, pursuant to F.R.A.P. 25 and 27, who moves this Honorable Court to reconsider and vacate the November 8, 2018 judgment. In making that judgment, the Court relied on United States v. Santiago-Rivera, 744 F.3d 229 (1st Cir., 2014). The present appeal is distinguishable from that matter. In the Santiago-Rivera matter, the record made manifest that the defendant's action during the incident was part and parcel of a persistent pattern of serious crimes. Santiago-Rivera, 744 F.3d at 234. In the present case, the District Court judge relied on extrajudicial, anecdotal information that was not in evidence. The District Court's reliance on information that was not in the record presents a different issue.

The District Court judge stated that the drug trafficking organization at hand had been described in Puerto Rico as one of the most violent ones and incidents to which others have even admitted responsibility. Apx.107. She reported that another co-

defendant in a different prosecution admitted shootouts with Puerto Rico police officers. Apx.107. The record in this co-defendant's case was not manifest with that evidence. The District Court judge stated that the defendant was suspected to be responsible, not that there was evidence in the record that this defendant was, in fact, responsible. The record in this case did not include this defendant admitting to those actions.

The District Court judge cited two prior arrests in which no probable cause was determined, one of which was outside the time-frame of the conspiracy. Apx.110-11. She acknowledged that this defendant had no criminal history. Apx.111. She stated that she relied on notes she had taken during other defendant's guilty pleas. Apx.111. That information was not manifest in the record of this case.

The District Court judge opined that it was clear and, in her opinion, commonly known that the area of the organization's activities were in a state of seizure. In light of that commonly known anecdotal "knowledge," there would be no need for additional evidence on the record in this defendant's case. Apx.119. She was confident that this extrajudicial knowledge was sufficient to increase the defendant's sentence, even though it was not in the record of this case. The District Court judge admitted that she relied on her memory of a prior plea agreement which was not part of this case. Apx.103. The District Court

judge utilized information which even the government conceded was not part of this case. Apx.99. As stated in the defendant's brief, the fundamental premise of any trial is that decisions rest solely upon evidence presented by the parties within the confines of the rules of evidence. Scott v. Ohio, 480 U.S. 923, 925 (1987).

In the case cited by the panel, the issue was the amount of significance that the District Court attached to mitigating factors. In the present case, the issue was whether the factors that the judge considered were in the record before the Court at all. Due to the different nature of the questions in the panel's cited case and the present case, the Court should reconsider the judgment, vacate the judgment and consider the appeal on its merits.

WHEREFORE, the defendant prays that the Court reconsider and vacate the November 8, 2018 judgment.

THE DEFENDANT
BY HIS ATTORNEY

DATED: November 16, 2018 /s/ John T. Ouderkirk, Jr.

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United States Court of Appeals
For the First Circuit

No. 15-1758

UNITED STATES,

Appellee,

v.

MALVIN NATER-AYALA, a/k/a Malvin,

Defendant, Appellant.

Before

Howard, Chief Judge,
Lynch and Thompson, Circuit Judges.

ORDER OF COURT

Entered: December 21, 2018

Malvin Nater-Ayala's "Motion to Reconsider and Vacate the Judgment issued on November 8, 2018" is construed as a petition for panel rehearing, and **denied**.

By the Court:

Maria R. Hamilton, Clerk

cc: John T. Ouderkirk Jr.
Malvin Nater-Ayala
Julia Meconiates
Myriam Yvette Fernandez-Gonzalez
Mariana E. Bauza Almonte
Teresa S. Zapata-Valladares
Jose A. Contreras
Juan Carlos Reyes-Ramos
Edward Gantar Veronda
Nicholas Warren Cannon