
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019

FRANK MARTINEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITION
FRANK MARTINEZ

QUESTION PRESENTED

The sentencing court failed to disclose the “Confidential Recommendation” of the Probation Officer in regards to the sentencing of the Petitioner. The failure to disclose is a violation of the Petitioner’s Due Process rights under the Fifth Amendment to the United States Constitution and contra to this court decision in *Gardner v. Florida* 430 U.S. 341, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

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The petitioner, Frank Martinez, respectfully requests this United States Supreme Court to grant his petition for *Writ of Certiorari* that seeks the review of the sentencing procedure used by the United States District Court for the Central District of California in not disclosing to the Petitioner, the confidential recommendation of the Probation officer. The Memorandum of Decision from the Ninth Circuit Court of Appeals is attached as **Appendix A**. The Order from the Ninth Circuit Court of Appeals denying a motion for reconsideration and *En Banc* is attached as **Appendix B**. The Mandate from the Ninth Circuit Court of Appeals is attached as **Appendix C**.

I.

JURISDICTION

The District Court had jurisdiction to entertain Mr. Martinez Writ of Habeas Corpus under 28 U.S.C. sec. 2255. This court has jurisdiction from the denial of his Appeal to the Ninth Circuit of States, 28 U.S.C. sec. 2253.

II.

STATEMENT OF THE CASE

On December 4, 2017, Frank Martinez entered a plea of guilty to various counts of the indictment pursuant to a plea agreement. The Presentence Investigative

Report (P.S.R.) was filed on January 29, 2018 (Doc. # 1601.)¹. The Addendum was filed on March 2, 2018 (Doc. # 1641). That Addendum, for the first time, disclosed that a “Confidential Recommendation letter (CL) was filed with the court. (**Exhibit D**) On March 7, 2018, the Petitioner was sentenced. (Doc. # 1659)

Although counsel became aware of the CL, the contents of the recommendation letter were not. At sentencing, the court failed to indicate to counsel the contents of the recommendation or a summary of the contents to permit counsel to adopt or object to the confidential recommendation. (**Exhibit E**) As it turns out, the confidential recommendation was confirmed in an email from the probation officer on April 11, 2019, that she had recommended a “variance” below the Guidelines. (**Exhibit F**) The court did not sentence on a “variance” but rather on a sentencing guideline “departure.” The contents of the confidential recommendation remain unknown to the Petitioner.

III.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution mandates that “No person ... be deprived of life, liberty, or property without due process of law...”

The fact that the sentencing court failed to disclosed orally or in summary form the

¹ Docket Numbers are reference only to the Docket of the Central District of California.

confidential recommendation of the probation officer as to a variance deprived the Petitioner of his due process right to a fair and just sentence.

IV.

ISSUES PRESENTED

1. The Sentencing Court violated Rule 32(1), and Rule 32(2) and that Rule 32 (e)(3) is a violation of Petitioners Due Process Right to be informed of all recommendations by the Probation Department in respect to the individual sentence recommended. In this matter the Confidential Recommendation was not disclosed to the Petitioner, there was “No Court Order” issued and the Central District of California has not “Local Rule” in respect to Confidential Reports.

V.

ARGUMENT

As Justice Ginsburg stated in her dissenting opinion in *Gray v. Netherland*, 518 U.S. 152, 182 116 S.Ct. 2074, (1996), that “Due process demands an opportunity to be heard ‘at a meaningful time in a meaningful manner.’ [cases cited]. Justice Ginsburg went on to state that “absent a full, fair, potentially effective opportunity to defend against state’s charges, the right to a hearing would be ‘but a barren one.’”(*Gray at p. 182*)

Before sentencing, the court received a confidential recommendation from the probation officer that was not disclosed to the Petitioner before or at sentencing by the district court. The failure to disclose this recommendation violated Petitioner's right to Due Process. It is unknown what facts were presented to the court that the court considered or not. A Fifth Amendment violation occurred. All confidential recommendations by a probation officer restricted only to the court should be struck as a violation of Due Process in all federal sentencing cases.

The Supreme Court has long held that the district court must give the parties reasonable notice of what it intends to rely on at sentencing and that Rule 32 “provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence.” *Burns v. United States*, 501 U.S. 129, 134, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991). The concept of disclosure was further affirmed in the decision of *Irizarry v. United States*, 553 U.S. 708, 715, 128 S.Ct. 2198, 171 L.Ed.2d 28 (2008).

The United States Supreme Court in *Gardner v. Florida*, 430 U.S. 341, 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Held:

...[T]he trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material. There was, accordingly, no similar

opportunity for petitioner's counsel to challenge the accuracy or materiality of any such information. (p.356)

Complementing its concerns about the accuracy of confidential information, the Supreme Court noted “the importance of giving counsel an opportunity to comment on facts which may influence sentencing decisions.” (id at 360) Thus, although the State argued that trial judges could be trusted to exercise their sentencing discretion in a responsible manner, even if they are basing their decisions on secret information, the Supreme Court responded that the argument “rest[ed] on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts.” Id 2.

The ultimate finding of the United States Supreme Court is “that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.” (p. 358)

There can be no distinction between a capital case and a none capital case in regards to the application of Due Process as it pertains to secret recommendations by the Probation Department to the court under the guise of Rule 32.

The Ninth Circuit failed to discuss their published opinion which runs counter to the Memorandum issued in Petitioner's case. *United States vs. Gray* (905 F.3d

2 Excerpts taken from the memorandum of Amy Baron-Evans, Sentencing Resource Counsel, Boston, FPD.

1145, 9th Cir. 2018). That case reversed the sentencing of Mr. Gray stating in its opinion:

Rule 32 “require(s) the disclosure of all relevant factual information to the defendant,” including “factual information underlying a probation officer’s confidential sentencing recommendation.” (P.6 of the opinion)

The *Gray* decision went on to state:

In the order sentencing Gray, the district court relied on the probation’s officer confidential sentencing recommendation, which included factual information that had not been disclosed to Gray and to which she had no opportunity to respond before sentence was imposed.

Accordingly, we must vacate and remand for resentencing.

(p.6, of the opinion)

The *Gray* case clarifies that the confidential report was not provided to Gray’s attorney at sentencing. It is that fact, and that fact alone requires that Mr. Martinez, the petitioner, to be re-sentenced knowing all the reports that the sentencing judge may have read and may have considered.³

The fact that the court did not recite or that the court considered the

³ See Attached letter from the Federal Public Defender, A.J. Kramer, to the Chief Judge of the D.C. Circuit as **Exhibit G**.

confidential recommendation of the probation officer is not relevant. The point as discussed in *Gray* was that the confidential recommendation violates a defendant's Due Process right to address the facts – of which were unknown to the defendant – regarding sentencing. The failure to disclose the confidential recommendation of the probation officer given to the court is a procedural due process violation of the Fifth Amendment to the United States Constitution:

“... nor be deprived of life, liberty, or property, without due process of law.”

The failure to disclose all facts presented to the sentencing court that affect the liberty of a defendant is a violation of the Fifth Amendment to the United States Constitution. This violation of non-disclosure is such a violation.

CONCLUSION

The Petitioner, Frank Martinez, respectfully requests this United Supreme Court to set aside the sentencing. It is further requested that the Supreme Court find that all confidential recommendations made by a Probation Officer to a sentencing court are disclosed to a defendant before his/her sentencing hearing and if not it is a violation of Due Process.

Dated: March 25, 2019

Respectfully submitted,

S/ Errol H. Stambler

Errol H. Stambler
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I, Errol H. Stambler, hereby certify that on this 25th day of March, 2019, a copy of Petitioner's Brief for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed first class postage prepaid, to Noel Francisco, Solicitor General, Office of the Solicitor General, 950 Pennsylvania Ave. NW Washington, D.C., 20530-0001

S/ Errol H. Stambler

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**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

The petitioner, Frank Martinez, by his undersigned court-appointed attorney, Errol H. Stambler, under the Criminal Justice Act, ask leave to file the attached Petitioner's Brief for a Writ of Certiorari in the United States Court of Appeals for

the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis.

The attorney, Errol H. Stambler, was appointed as counsel for the defendant, Frank Martinez, in the United States District Court and the United States Court of Appeals for the Ninth Circuit under the Criminal Justice Act, 18 U.S.C. Section 3006A(b).

This motion is brought under Rule 39.1 of the Rules of the Supreme Court of the United States.

Dated: March 25, 2019

Respectfully submitted,

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AFFIDAVIT OF MAILING

I, Errol H. Stambler, member of the Bar of this Court, certify that to the best of my knowledge, the attached Petitioner's Brief for a Writ of Certiorari was deposited in a United States Post Office mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Court on March 25, 2019, within the permitted time for filing this petition.

Dated: March 25, 2019

Respectfully submitted,

S/ Errol H. Stambler

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