

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

(October Term 2018-2019)

**FRANCISCO “FRANK” APODACA,
Petitioner**

v.

**NOEL FRANCISCO, SOLICITOR GENERAL OF THE UNITED STATES
Respondent**

**On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a corporation or other legal entity be associated in fact with a union or one or more individuals under the “enterprise” definition of the RICO statute, when only union members or individuals can be associated-in-fact under the definition of “enterprise” provided in this statute?

2. Is a defendant who files a 28 U.S.C. § 2255 motion to vacate conviction foreclosed from asserting an ineffective assistance ground of complaint relating to an incorrect PSR restitution calculation if the district court determines that the defendant knowingly and voluntarily entered a guilty plea to the criminal charge?

LIST OF PARTIES

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OPINIONS BELOW

1. The Opinion of the United States Court of Appeals (App. A)
2. The District Court Memorandum Opinion (App. B)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its Opinion denying Petitioner Apodaca a certificate of appealability on December 4, 2018. No petition for rehearing was timely filed in this case. Jurisdiction to file this petition for certiorari is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI, which

In all criminal prosecutions, the accused shallhave the assistance of counsel for his defense.

United States Constitution, Amendment 14, which provides, in pertinent part:

No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 1961(3): “person” includes any individual or entity capable of holding a legal or beneficial interest in property;

18 U.S.C. § 1961(4): “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

28 U.S.C. § 2255(a) “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”

STATEMENT OF THE CASE

A. Apodaca's Actual Innocence Claim

On page 26 of its Memorandum Opinion, the district court denied Apodaca relief as to ground of complaint five of his 28 U.S.C. § 2255 motion to vacate sentence wherein he asserted that he was actually innocent of the conspiracy to engage in racketeering activity offense to which he pled guilty in Count One. Apodaca based his actual innocence claim on the flawed "enterprise" definition utilized in the indictment and argued the "enterprise" offense element under which he was indicted not encompassed within the "enterprise" definition of the RICO statute. Count One alleged in relevant part that Frank Apodaca and others, "being persons employed by and associated with an enterprise, namely the ACCESS Enterprise, conspired and agreed with several persons not charged, to conduct and participate, directly and indirectly, in the conduct of the affairs of the ACCESS Enterprise through a pattern of racketeering activity...." Page 6 of the indictment defined "the ACCESS Enterprise" as follows:

At various times relevant to this indictment, the enterprise (hereinafter, the ACCESS Enterprise) consisted of ACCESS, including its three subsidiaries, its successor corporation Precis, Inc., and defendants FRANK APODACA and MARC SCHWARTZ along with others known and unknown, including unindicted conspirators REJ [Robert E. Jones] and DW [David Wysong]. These individuals and entities constituted an enterprise as that term is defined in Title 18 United States Code, Section 1961(4), that is an association-in-fact of individuals and legal entities.

In rejecting ground of complaint five of Apodaca's § 2255 motion, the district court stated in its Memorandum Opinion:

"[A]ctual innocence" meansthe person did not commit the crime. If the movant does not meet this burden of showing cause and prejudice -- or a fundamental miscarriage of justice--he is procedurally barred from attacking his conviction or sentence on the basis of the defaulted claim. ...Apodaca asserts he is legally innocent

of the crime of conviction, but makes only conclusory statements to support this allegation.... Moreover, in this case, Apodaca rebuts his claim of innocence with this own sworn statement, in open court at this Rule 11 hearing that he is committed the acts alleged by the Government.

Apodaca asserts that he raised this “actual innocence” claim in ground of complaint five of his § 2255 motion and as ground of error eight of his application for certificate of appealability and supporting brief which read:

The district court abused its discretion by failing to address Apodaca’s actual innocence claim which he based on an “enterprise” definition in the RICO statute. The RICO “enterprise” under which he was prosecuted was not authorized by the “enterprise” definition in the RICO statute because under that definition corporations and other legal entities cannot be associated-in-fact with individuals. Apodaca thus pled guilty to conduct which was lawful and did not constitute a criminal offense in his appeal to the United States Court of Appeals to the Fifth Circuit and is not required to “show cause and actual prejudice” to raise this claim to the Supreme Court.

Although the United States Court of Appeals acknowledges in its three page Opinion that Apodaca’s had asserted “actual innocence” as a ground of error, it failed to specifically address the merits of his “actual innocence” ground of error. Instead, it made the global ruling on page 3 of its Opinion only that Apodaca has failed to make a substantial showing of the denial of a constitutional right as to any grounds of error asserted in connection with his application for a certificate of appealability.

B. Apodaca’s Ineffective Assistance Claim Relating to the Probation Department’s Restitution Calculation

The district court also erred in ruling that Apodaca waived any complaint regarding ineffective assistance ground of complaint seven based on the Supreme Court’s holding in *McMann v. Richardson*, 397 U.S. 759, 774 (1970), a case that holds that ineffective assistance claims that do not relate to the voluntariness of a guilty plea are waived by a voluntary and intelligent guilty plea.

Ground seven of Apodaca's § 2255 motion was a post-guilty plea ineffective assistance claim directed to trial counsel's failure to object to the manner in which the probation department incorrectly calculated in its Presentence Report ("PSR") that Apodaca owed several millions of dollars of restitution. The district court wholly and completely failed to even address the merits of this ground of complaint. It accordingly disregarded the assertions of fact and analysis Apodaca made with regard to this ground of complaint that demonstrated that the restitution calculation made by the probation department was based on speculation, projected rather than actual losses, conduct that transpired before Apodaca was even employed or affiliated with Access Health Source, Inc., and on other identified errors.

The U.S. Court of Appeals for the Fifth Circuit thereafter denied Apodaca's request for a certificate of appealability as to Apodaca's ground of complaint that the erroneous restitution calculation by the probation department. In ground two of his application and supporting brief to the Fifth Circuit for a certificate of appealability, Apodaca specifically asserted that the district court abused its discretion by completely failing to address the merits of his complaint that his trial counsel rendered ineffective assistance by failing to object to the manner in which his probation officer calculated the amount of restitution he owed. Apodaca also provided detailed factual statements and argument why the district court had erred in adopting the probation department's erroneous determination that Apodaca owed restitution of more than four million dollars. The Fifth Circuit did not address the merits of this ineffective assistance claim in its Opinion, however. It merely denied Apodaca's request for a certificate of appealability by making a global ruling that Apodaca had failed to assert any claim that made a substantial showing of the denial of a constitutional right.

REASONS FOR GRANTING THE PETITION

- 1. The Supreme Court should grant review to resolve the unsettled issue of whether a legal entity such as a corporation can be associated in fact with a non-legal entity such as an “individual” based on the RICO “enterprise” definition codified in Title 18 U.S.C. § 1961(4)**

In *United States v. Turkette*, 452 U.S. 576 (1981), the United States Supreme Court held that "In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." *Id.*, at 583. This decision establishes that the Government must prove a defendant's connection to an “enterprise” before that defendant can be found guilty of a RICO offense. The Supreme Court in *Turkette* further held that Title 18 U.S.C. §1961(4)

describes two categories of associations that come within the purview of the "enterprise" definition. The first encompasses organizations such as corporations and partnerships, and other "legal entities." The second covers "any union or group of individuals associated in fact although not a legal entity." *Id.*, at 581-582.

The type of "enterprise" under which the Government prosecuted Apodaca and other named defendants fails to comport with the "enterprise" definition codified in 18 U.S.C. § 1961(4). The indicted definition of “enterprise” relied on in Apodaca’s case does not fit within the RICO statute definition of that term, to wit: “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” See 18 U.S.C. § 1961(4). This interpretation is bolstered by the way in which “person” is defined in 18 U.S.C. § 1961(3): “‘person’ includes an individual or entity capable of holding a legal or beneficial interest in property.” This latter definition reveals that the term “person” has a broader meaning than the term “person” and further indicates that an “individual” is

not a legal entity such a corporation, partnership, or other legal entity under the “enterprise” definition of the RICO statute. This interpretation is suggested by the distinction drawn by the U.S. Supreme Court in *Turkette* between legal entities and non-legal entities:

The Court of Appeals assumed that the second category was merely a more general description of the first. Having made that assumption, the court concluded that the more generalized description in the second category should be limited by the specific examples enumerated in the first. But that assumption is untenable. Each category describes a separate type of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not. The latter is not a more general description of the former. The second category itself not containing any specific enumeration that is followed by a general description, ejusdem generis has no bearing on the meaning to be attributed to that part of § 1961 (4). *Id.*, at 582.

The federal district court decision in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146, 1151 (D.C.N.J. 1983), rev’d on other grounds, 742 F.2d 786 (3d Cir. 1984) is instructive on this point. In that case, the federal district judge hearing the case held that an alleged “enterprise” consisting of two corporations and two individuals could not constitute a RICO “enterprise” within the meaning of the RICO statute “[s]ince the combined entity is not a union and is not ‘associated individuals’” The district court further reasoned that to hold otherwise, would effect eliminate the enterprise element of the statute. *Id.*¹

Thus, the “enterprise” definition provided in Apodaca’s indictment failed to allege a RICO “enterprise” within the meaning of 18 U.S.C. § 1961(4) because it listed several individuals as associated-in-fact with several legal entities and subsidiaries. Substantively, the offense conduct to which Apodaca pled guilty therefore did not constitute a criminal offense because it failed to connect

¹Apodaca believes that several justices of the United States Supreme Court previously acknowledged the importance of correctly understanding the RICO definition of “enterprise” during the oral argument held in *Mohawk Industries, Inc. v. Williams*, 547 U.S. 516 (2006), a petition that was later dismissed as improvidently granted.

Apodaca to participation in an “enterprise” under the RICO statutory definition of an “enterprise.” The district court instead adopted the broad-sweeping and illogical proposition that a defendant who pleads guilty to an offense is still guilty of that offense, even if the factual conduct he admits to having engaged in fails to prove that the defendant committed all of the required elements of the indicted criminal offense.

The district court thus so far departed from the accepted and usual course of judicial proceedings by failing to acknowledge that where there is constitutional error in a plea colloquy that "has probably resulted in the conviction of one who is actually innocent," the guilty plea can be vacated in a collateral proceeding. *Bousley v. United States*, 523 U.S. at 623. By failing to address Apodaca’s actual innocence claim, the United States Court of Appeals for the Fifth Circuit also sanctioned such a departure by the district court by failing to address the merits of Apodca’s actual innocence claim. That is, it failed to address Apodaca’s complaint that even if his guilty plea was voluntary and not coerced, the offense conduct he had pled guilty to did not constitute a RICO offense because an unauthorized and overly-broad definition of “enterprise” was utilized in the indictment that exceeded the breadth of the RICO “enterprise” definition set forth in 18 U.S.C. § 1961(4). This is because under the RICO statute, only union or other individuals could be associated in fact to be considered under the “enterprise” definition; legal entities and non-legal entities could not be associated in fact with each other.

The U.S. Supreme Court in *Bousley v. United States*, 523 U.S. 614 (1998) granted relief for the petitioner after explaining that “cause and prejudice” showing is excused in the “actual innocence” context since “the distinction between substance and procedure is an important one in

the habeas context” and because “The *Teague* doctrine is founded on the notion that one of the "principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" *Teague v. Lane*, 489 U. S., 288, 312 (1989). It thus recognized that a substantive federal criminal statute that does not reach certain conduct, like decisions placing conduct "'beyond the power of the criminal law-making authority to proscribe," "...., necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal." (*Davis v. United States*, 417 U. S. 333, 346 (1974)) and that only Congress, and not the courts, can make conduct criminal. *United States v. Lanier*, 520 U. S. 259, 267-268, n. 6 (1997).

The “actual innocence” analysis that should be applied in Apodaca’s case is no different from that of the *Bousley* case. Apodaca was illegally prosecuted for a RICO offense that did not exist because the RICO “enterprise” offense element under which he prosecuted is not recognized or encompassed within the “enterprise” definition provided in the RICO statute. Apodaca, in short, was convicted based on offense conduct that was not authorized by a Congressional statute or enactment. The indictment in Apodaca’s case defined “enterprise” as an association-in-facts of several individuals and legal entities. This “enterprise” definition was overly broad and failed to comport with the limitations of the “enterprise” definition under the RICO statute because it alleged that Apodaca and several other individuals were associated-in-fact with several corporate entities, when an association in fact cannot exist between these legal entities and non-legal entities under the RICO statute’s definition of “enterprise.” Under the RICO definition of “enterprise” only “any union or group of individuals associated in fact although not a legal entity.” *Turkette*. at 581-582.

The Supreme Court has ruled that claims that could have been raised on direct appeal, but were not, will not be entertained via a motion under § 2255 unless the petitioner shows: (1) cause and actual prejudice to excuse his failure to raise the claims previously; or (2) that he is "actually innocent" of the crime. *Bousley v. United States*, 523 U.S. 614, 622 (1998); *Ray v. United States*, 721 F.3d 758, 761(6th Cir. 2013). Because Apodaca pled guilty to offense conduct that was not a RICO offense, Apodaca can raise this "actual innocence" claim on collateral review for the first time and so does. The Supreme Court should therefore reject the district court's determination that Apodaca is guilty because he pled guilty to the indictment, even though Apodaca demonstrated to the district court below that he was actually innocent because he was convicted based on an unauthorized offense element of the charged RICO offense, i.e. a RICO "enterprise" definition that did not comport with the definition of "enterprise" under the applicable RICO statute. The Supreme Court should settle the issue of what the term "enterprise" as used in the RICO statute means, as this is an important question of federal law that has not been, but should be, settled by this Court.

2. **The Supreme Court should grant review because the U.S. Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, by adopting the district court's determination that an ineffective assistance claim that relates to a sentencing error arising in connection with a PSR restitution calculation is waived so long as the defendant's guilty plea was voluntarily and intelligently made**

The U.S. Supreme Court has stated: "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus...." *Harris v. Nelson*, 394 U.S. 286, 292 (1968). The district court in this case has failed to comply with this obligation. By disregarding Apodaca's ineffective assistance complaint that his

trial counsel's failure to object to the probation department's restitution calculation in the pre-sentence report because this error did not affect or relate to the voluntariness of Apodoca's guilty plea, the district court prejudiced Apodoca's right to a fair sentencing process in at least two ways: First, this restitution calculation obligated Apodoca to pay a millions of dollars in restitution he does not owe. Second, the error greatly increased the length of Apodoca's sentence under the applicable federal sentencing guidelines because the millions of dollars of loss calculated by the probation department resulted in a much higher guideline sentencing range than would have otherwise been assessed.

By approving of the district court's decision to disregard ground of complaint seven of Apodoca's 2255 motion without addressing the merits of this ineffective assistance ground of complaint, the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The express holding of the Supreme Court's decision in *McMann v. Richardson*, 397 U.S. 759, 774 (1970), upon which the district court based its analysis, relates to ineffective assistance claims based on conduct of the defendant's trial counsel before the defendant's guilty plea is entered. This decision does not insulate a defendant's trial counsel from an ineffective assistance claim that relates to a sentencing error that arises after the defendant's guilty plea is entered, even if the defendant's guilty plea is knowingly and voluntarily made. The *McMann v. Richardson* decision of the United States Supreme Court is limited to ineffective assistance claims that exist prior to the date the defendant enters a guilty plea to the charged offense.

The Fifth Circuit has thus so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, by adopting the district court's determination that an ineffective assistance claim that relates to sentencing errors arising in connection with a presentence report ("PSR") restitution calculation is waived so long as the defendant's guilty plea was knowingly and voluntarily made..

CONCLUSION

For all of the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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