

18-8912

No. 18A804

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CIRILO FLORES,
Petitioner

Vs

UNITED STATES OF AMERICA,
Respondent (s)

PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURTS OF APPEALS FOR THE THIRD CIRCUIT

Appeal from judgment in C.A. No. 17-3629

PETITION FOR WRIT OF CERTIORARI

Cirilo Flores, Pro se
S.C.I. Benner Township
301 Institution Drive.
Bellefonte, Pa. 16823

ORIGINAL

QUESTION PRESENTED FOR REVIEW

(1) WHETHER OR NOT THE GUILTY PLEA ENTERED WAS LEGAL
WHEN PETITIONER DID NOT FULLY UNDERSTAND, KNOW OR
INTELLIGENTLY ACCEPT VOLUNTARY THE GUILTY PLEA
AGREEMENT AS PRESENTED BY THE UNITED STATES ?

SUGESTED ANSWER; NO

In Strickland v. Washington, along with applicable case, Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), in Order for a guilty plea to be valid, it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. See, Hill, 474 U.S. 52, 56.

This Court established that a defendant enter a guilty plea upon Counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demand or of attorney in criminal cases, the two- part standard adopted in Strickland v. Washington, 466 U.S. 668, 688, 88 L. Ed. 2d 674 (1984).

On Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), the Supreme Court help that the Strickland test applies to advise given by Counsel in the context of guilty plea discussions. See id, at 58 (stating that "the Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel". The Court determined that the prejudice prong in the context of the plea process "focuses on whether Counsel's constitutionally ineffective performance affected the outcome of the plea process". Id, at 58.

Petitioner, Cirilo Flores, under the improper advice of Counsel entered a guilty plea, despite Petitioner repeated objections to doing so. Petitioner was sentenced to forty-six months imprisonment, twenty (20) years supervision release for the offense of possession of child pornography, for a crime Petitioner did not committed, but pled guilty under Counsel advise.

On February 13, 2017, Petitioner filed a motion pursuant to 28 U.S.C § 2255, which the District Court denied on November 14, 2017, without an evidentiary hearing. Subsequently, Petitioner filed a timely appeal to the Court of Appeals for the Third Circuit, in which the Court affirmed the District Court's denial.

**(2) WHETHER OR NOT COUNSEL WAS INEFFECTIVE FOR NOT
REPRESENTING PETITIONER'S BEST INTEREST IN WANTING TO
GO TO TRIAL, INTER ALIA, AND NOT ENTER INTO A PLEA
AGREEMENT?**

SUGGESTED ANSWER; NO

On May 9, 2012, at an interview with initial Counsel Jeremy H.G. Ibrahim, Esq., Petitioner advise him his goal to stand trial, and any plea agreement offer would be rejected. During Counsels representation, Counsel was trying to coerce Petitioner to enter into a guilty plea. Mr. Ibrahim presented multiples plea agreement offers, which were rejected every time. Petitioner addressed the issue to the District Court, and informed that Counsel

was inducing Petitioner to enter a guilty plea despite Petitioner wishes to stand trial. Counsel was dismissed as Petitioner request.

On April 3, 2013, Mia Roberts Perez, Esquire, was appointed as substituted Counsel. Counsel was advise to prepare for trial and not to engage into plea agreements with the District Attorney for any reason, that any plea agreement offer would be rejected as prior offers. Counsel responded that the judge informed her that this present case was for trial and not for a guilty plea offer.

On June 21, 2013, Ms. Perez, filed two (2) motions on this case, in which confirmed that despite the allegations presented in this case, no evidence has been found on any electronic device belong to Petitioner.

On July 11, 2013, Ms. Perez, presented Petitioner a forty-six (46) months plea agreement offer, which was rejected, and Petitioner advised Counsel once again his wishes to stand trial. Surprisingly, Counsel a change of plea hearing without Petitioner consent, which was held on July 12, 2013. At the aforementioned "change of plea" hearing, Counsel advised Petitioner to waive his speedy trial right, and subsequently requested the Court for additional time to discuss a forty-six (46) months plea agreement offer that was provided on July 11, 2013.

On August 1, 2013, once again Petitioner rejected the forty-six (46) months plea agreement for the record. Counsel addressed the Court that Petitioner has rejected the plea offer, and wanted to continue to trial.

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On October 6, 2013, Ms. Perez, presented a United States Justice Department letter, in which the District Attorney alleged that the case agent, re-examined the micro SD storage card belong to Petitioner cellular phone. Petitioner advised Counsel to investigate the allegation, obtain an expert opinion before advice Petitioner to enter a guilty plea, provide the evidence for inspection and to challenge the prosecution newly discovered evidence. Counsel refused, and advised Petitioner that with Counsel review was enough. Petitioner rejected the plea offer, and ended the meeting.

Subsequently, Counsel returned for a second time on the same day, and continues to advise Petitioner to enter a guilty plea despite petitioner objection to plea. Without any other avenue to make Counsel to understand his goal to stand trial, Petitioner signed the forty-six (46) months plea agreement offer.

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PETITION FOR WRIT OF CERTIORARI

I, Cirilo Flores, pro se, respectfully petition this Honorable Court, for a writ of certiorari to review the judgment of the United States Court of Appeals of the Third Circuit.

OPINION BELOW

The Order of this instant case is from the United States Court of Appeals of the Third Circuit dated 06/20/2018. Petition for En Banc hearing dated 11/06/2018, is attached in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals of the Third Circuit was entered on June 20, 2018. Subsequently, on November 6, 2018, the Court of Appeals for the Third Circuit, a petition for rehearing by the panel and the Court en banc was denied. On February 5, 2019, Justice Samuel Alito granted Petitioner's request for extension of time in which to file certiorari to April 5, 2019. Jurisdiction is invoked pursuant to 28 U.S.C § ~~2253~~. 1254 (1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution requires effective assistance of Counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "Counsel's absence [in the stages] may derogate from the accused's right to a fair trial". See, *United States v. Wade*, 388 U.S. 218, 226 (1967).

The Constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendant cannot be

presumed to make critical decisions without Counsel advice. This is consistent, too, with the rule that defendant have a right to effective assistance of Counsel on appeal, even though that cannot in anyway be characterized as part of the trial. See, e.g. *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582 (2005)

STATEMENT OF THE CASE

PROCEDURAL HISTORY OF THE JUDGMENT IN ISSUE

On April 19, 2012, Petitioner Flores was charged in a numerous count indictment. The grand jury returned an eight-count indictment charging Petitioner with three count of using or inducing a child to pose for child pornography images, in violation of 18 U.S.C. § 2251 (a) and (e); three counts of distribution of child pornography, in violation of 18 U.S.C. § 2252 (a) (2); and aiding and abetting, in violation of 18 U.S.C. § 2.

As well as being named in these counts, co-defendant Arelys Miranda was also charged with an additional count of using or inducing a child to pose for child pornography, in violation of 18 U.S.C. § 2252 (a) (4) (B0 and (b) (2). On October 16, 2012, co-defendant pled guilty pursuant to cooperation plea agreement.

On May 9, 2012, at Petitioner Initial appearance, Jeremy H.G. Ibrahim, Esquire, was appointed to represent Petitioner, and Petitioner entered into a no guilty plea. On April 3, 2013, at Petitioner request, the District Court appointed Mia Roberts Perez, Esquire, as substitute Counsel.

On July 1, 2013, Appointed Counsel, Ms. Perez, scheduled a change of plea hearing, which was held on July 12, 2013. At the hearing Counsel requested for additional time, which was granted, and re-scheduled to be held on August 1, 2013.

On August 1, 2013, Ms. Perez, addressed the Court and informed that petitioner has rejected a forty-six (46) months plea agreement offer, and requested to continue to trial.

On October 10, 2013, pursuant to a written agreement, Petitioner plead guilty to one-count superseding information charging him with possession of child pornography, in violation of 18 U.S.C. § 2252 (a) (4) (B).

On November 20, 2013, Petitioner on his broken English sent a letter to the District Court, in which was requested withdraw of the guilty plea.

On March 7, 2014, at the scheduled sentencing hearing, Petitioner addressed the Court on the aforementioned letter in which defendant complained that counsel failed to investigate, failed to provide documents, and requested the Court to appoint a new lawyer. The District Court appointed Jose Luis Ongay, Esq., to advice Petitioner and the Court in connection with Petitioner motion to withdraw the guilty plea. On November 13, 2014, the District Court by memorandum of law denied petitioner motion.

On November 17, 2014, the District Court sentenced petitioner to forty-six (46) months imprisonment, 20 years' supervised release, a \$ 500 fine, and a \$ 100 special assessment.

On November 25, 2014, Mr. Ongay filed a notice of appeal. Petitioner avers that Counsel filed to communicate with defendant, and defendant filed a notice of appeal prose. On May 23, 2015, Mr. Ongay filed an Ander's Brief, and a motion to withdraw as counsel.

On November 19, 2015, the United States Court of Appeals for the Third Circuit issue an order & opinion affirming the judgment of the District Court.

On February 13, 2017, Petitioner timely filed a pro se Motion to Vacate, Set Aside, or Correct Sentence by a person in federal custody pursuant to 28 U.S.C. § 2255, in which claimed numerous Ineffective Assistance of Counsel. In addition, Petitioner filed a Motion in which requested the release of transcripts, discovery experts reports, memorandum of law, and the chain of documents. Nor Counsel was not appointed to amend and supplemental the petition.

On November 14, 2017, the District Court dismissed the motion without an evidentiary hearing. Petitioner timely filed an appeal to the United States Court of Appeals for the Third Circuit on November 26, 2017.

Subsequently, on June 20, 2018, the request for a Certificate of Appealability is denied. Petitioner filed a motion for rehearing En Banc on October 25, 2018, which was denied on November 6, 2018.

REASON FOR GRANTING THE WRIT

In the instant case, Petitioner Flores, avers that he pled guilty on the advice of counsel, which Petitioner relied on his counsel's erroneous advice when pleaded guilty. Counsel advice fell below an objective standard of reasonableness. *McMann v. Richardson*, 397 U.S. 759,771 (1970)

This Court held on *McMann*, that before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." See, *McMann*, *supra*, at 771.

Petitioner avers that during Counsel's representation on the critical stages of this criminal proceedings on this case, Petitioner has objected/ refused numerous plea agreement offers. Petitioner complained to the Court that counsels has failed to provide discovery, prolonged the proceeding with the objective to coerce petitioner to enter a guilty plea, despite Petitioner objection to do so. (Doc. No.68, 72, 75) *McMann*, *supra*, at 769, 770.

Petitioner avers that has requested counsels for documents relevant to this present case, which was requested to help petitioner to make a knowing, voluntary, and intelligent decision in the criminal proceedings. Also requested records of an online conversation, in which co-defendant made exculpatory statements relevant to this case. Petitioner avers that counsels did not provided the records requested, nor even interview the party involved on the aforementioned conversation, in violation of Pa. R. Prof. Conduct 1.4. (a) (4).

See, Cuyler v. Sullivan, 446 U.S. 335, at 344 (1980) (holding that Counsel however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance."); Hill v. Lockhart, 474 U.S. 52, at 59 (1985)

Furthermore, Petitioner avers that Counsel was advised to investigate, and provide records of the aforementioned conversation online, prepare for trial, and not to engage in plea offers. All Attorney involved in Petitioner's representation acknowledged that the Delaware County District Attorney's Office, submitted a computer forensic summary report, in which a FBI computer expert clearly established that no evidence of child pornography was ever found on any item seized from Petitioner.

This Court has explained that "a guilty plea cannot be attacked as based on inadequate legal advice unless Counsel was not a reasonably competent attorney demanded of attorney in criminal cases". See, Strickland, *supra*, at 687 (quoting McMan v. Richardson, 397 U.S. 759, 770, 771 (1970): emphasis added.

In this case, Petitioner avers that Counsel filed two (2) motions, in which confirmed and relied that the report established that no evidence has been found on any electronic devise belonging to defendant, despite the allegations. (Doc. No. 83-84)

Suddenly, Counsel scheduled a change of plea hearing without Petitioner consent (Doc. No. 85), in violation of Pa. R. Prof. Conduct 1.4 (a) (1) and (a) (5), which states: (a) (5) requires that the lawyer promptly consult with and

secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client want the lawyer to take. and (a) (5); the client should have sufficient information to participate intelligently in decision concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Petitioner avers that Counsel did not secure defendant's consent prior to schedule "change of plea" hearing. Counsel scheduled the aforesaid hearing without obtaining the plea agreement document herself. Counsel informed Petitioner about the hearing a day before the hearing would be held. Petitioner rejected the plea agreement.

Furthermore, Counsel withdraw the Motion to Suppress Any & All Physical evidence without Petitioner consent. The Motion was filed by initial Counsel, in which stated specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and even in support thereof, as requires by Rule 581, Suppression of evidence.

Petitioner avers that Counsel was not authorized to withdraw the aforesaid motion. Counsel's improper and unreasonable action is a direct violation of Pa. R. Prof. Conduct 1.3 (1) and 1.4 (a) (1)

Subsequently, Counsel met with Petitioner and Counsel presented a U.S. Department of Justice letter, in which the district attorney alleged that case agent re-examined the items seized from defendant, and alleged that discovered evidence relevant to this case. Counsel was requested to inquire into the

allegation, obtain an expert advice or opinion, and challenge the alleged discovered evidence, provide the alleged discovered evidence for inspection. Hill, *supra*, at 59 (discussing failure to investigate potentially exculpatory evidence.

Petitioner avers that Counsel refused to investigate, and refused to provide the evidence for inspection, and informed defendant that her review was enough. Petitioner, once again rejected the advice of Counsel to enter a guilty plea, and ended the meeting. (October 6, 2013)

Petitioner avers that hours later on the same day, Counsel once again met with defendant and begun to advise defendant to enter a guilty plea to the offense of possession, and to consider his age. At this time Counsel has not provided the evidence for inspection, chain-of- custody documents, acquisition report in which provide the SHA1 & MD5 Hash Value, Laboratory log document, and most important, failed to provide any report from computer experts hired for the defense to help defendant understand the forensic examination proceeding, and to assist defendant to make a knowing, voluntary and intelligent decision.

The Pa. R. Prof. Conduct 1.4 (a) (4); established that when a client makes a reasonable request for information, however, paragraph (a) (4), requires prompt compliance with the request, or if a prompt response is not feasible, the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

In addition, Petitioner avers that Counsel's failure to explain to defendant the status of limitation and the jurisdiction, in violation of Pa. R. Prof. Conduct 1.4 (a) (5) and (b); States; "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decision regarding the representation."

Petitioner avers that Counsel's improper, unreasonable advise, and his ineffective actions deprive Petitioner to make a knowing, voluntary, and intelligent decision by withholding information relevant to this case, in violation of Pa. R. Prof. Conduct 1.4 (a) (5) and (b). Counsel was ineffective for improperly advising Petitioner to enter a guilty plea, despite his repeated objections to do so. (Doc. No. 68, 72, 75). Hill, *supra*, at 56, 59.

Petitioner avers that he established on the record that insisted on going to trial and rejected numerous plea agreement offers and Counsel failed to pursue this matter on behalf of defendant. Counsel failed to act with commitment and dedication to the interest of defendant and with zeal in advocacy the defendant's behalf.

Petitioner was prejudice by the denial of the entire judicial proceeding to which he had a right. When a defendant claims that his Counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for Counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill, *supra*, at 59.

This Court established in Strickland, *supra*, that an incompetent advice distorts the defendant's decision making process and seems to call the fairness and integrity of the criminal proceeding itself into question. See, Strickland, *supra*, at 686.

Petitioner avers that he entered a guilty plea under the improper advice of Counsel. Petitioner content that his plea was induced, "involuntary" and "intelligent," and Counsel's advice "was not within the range of competence demanded of attorney in criminal cases." *McMann, supra*, at 771.

Subsequently, Petitioner requested the Court to withdraw the guilty plea, because Counsel failed to seek exculpatory evidence, failed to investigate exculpatory evidence, failed to render adequate legal assistance, and defendant wanted to prove his innocence. (Doc. No. 122) The Court appointed a new Counsel to advise defendant and the Court on the motion to withdraw the guilty plea. Counsel filed a memorandum of law, in which established that defendant's "fair & just reasons" are not strong. The Motion to withdraw the plea was denied by memorandum of law opinion.

Petitioner avers that at the sentencing hearing, defendant requested the Court to appoint new Counsel to appeal the denial of the motion to withdraw the guilty plea. The Court agreed, and established that as soon as a notice of appeal was file they would appoint new counsel. The Court failed to appoint new Counsel, and withhold adviser Counsel. Appellate Counsel (adviser) filed an Ander's Brief, in which established that the case is wholly frivolous, and requested to withdraw. See, *Anders v. California*, 386 U.S. 738, 744 (1967)

CONCLUSION

Petitioner respectfully request this Honorable Court to grant the writ of certiorari for the aforesaid facts and events presented on this motion. Petitioner avers that he clearly established on the record that he insisted on going to trial, by rejecting numerous plea agreement offers. Petitioner was prejudice by the denial of the entire judicial proceeding to which he had a right. See, Roe v. Flores- Ortega, 528 U.S. 470, at 483 (2000)

This Court established in Hill, *supra*, that “when a defendant claims that his counsel deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a “reasonable probability that, but Counsel errors, he would not have pleaded guilty and would have insisted on going to trial”. 474 U.S., at 59. See also, Lee v. United States, 582 U.S. __, __, 137 S. Ct. 1958, at 1965 (2017)

Respectfully Submitted,

