

18-9490

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL BROWN,

Petitioner,

VS.

UNITED STATES OF AMERICA,

**Respondent:**

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

PETITION FOR A WRIT OF CERTIORARI

Daniel Brown  
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Philipsburg, PA 16866

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Whether an alien's Sixth Amendment right to counsel is violated in a criminal prosecution for illegal reentry following deportation, where the United States Federal District Courts appointed counsels that are not familiar with the immigration laws and who are not able to challenge the validity of the underlying deportation order that form the basis for the offense?

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#### **IV. PETITION FOR WRIT OF CERTIORARI**

Daniel George Brown, an inmate currently incarcerated at the Moshannon Valley Correctional Center in Philipsburg, Pennsylvania and Pro se, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

#### **V. OPINIONS BELOW**

The decision by the United States Court of Appeals for the Third Circuit denying Mr. Brown's direct appeal has been reported as United States v. Daniel George Brown, 2018 U.S. App. LEXIS 33818. The United States Court of Appeals for the Third Circuit denied Mr. Brown's appeal on December 3, 2018 and the petition for rehearing was denied on March 1, 2019. The order for the denial of the direct appeal is attached at Appendix ("APP.") at A and the order denying the rehearing is attached at App. D.

#### **VI. JURISDICTION**

Mr. Brown's petition for rehearing to the United States Court of Appeals for the Third Circuit was denied on March 1, 2019. Mr. Brown invoke this Court's jurisdiction under

28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the United States Court of Appeals for the Third Circuit denying the petition for rehearing.

#### **VII. CONSTITUTIONAL PROVISIONAL INVOLVED**

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

#### **VIII. STATEMENT OF THE CASE**

Over thirty years ago, this Court held in *United States v. Cronic* that the Sixth Amendment requires not merely the provision of counsel to the accused, but "Assistance of Counsel", which is to be "for his defense." Thus, "the core purpose of counsel guarantee was to assure 'Assistance at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." If no actual "Assistance" "for"

the accused's "defense" is provided, then the constitutional guarantee has been violated. To hold that otherwise, "could convert the appointment of counsel into a sham and nothing more formal compliance with the constitution's requirement that an accused be given the assistance of counsel. The constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." 466 U.S. 654-655.

In 1987, this Court, in *United States v. Mendoza-Lopez*, decided whether an alien who is prosecuted under 8 U.S.C. § 1326 for illegal reentry following deportation may assert in that criminal proceeding the validity of the underlying deportation order and held that due process give the alien that right.

In *Padilla v. Kentucky*, this Court held that, "it appears to acknowledge, thorough understanding of the intricacies of immigration law is not within the range of incompetence demanded attorneys in criminal cases. 176 L.Ed at 295 (immigration laws can be complex, and it is a specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal courts or both, may not be well versed in it"). By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as on a difficult and complicated subject matter with which they are not familiar.

This case present the question of whether an alien who is prosecuted under 8 U.S.C. § 1326 for illegal reentry following deportation has been deprived of the Sixth Amendment right to counsel, when represented by counsel who is not familiar with the immigration laws, and, not able to challenge the underlying deportation order, that was formulated by this Court under United States v. Mendoza-Lopez.

**1. The prosecution of illegal reentry following deportation under 8 U.S.C. § 1326 is the second most prosecuted criminal cases in the United States Federal District Courts and is a landmark issue where aliens are deprived of counsel to challenge the underlying deportation order.**

On October 11, 2011, Daniel Brown was arrested in New Jersey on state criminal charges. After released on bond, New Jersey immigration officials discovered that Daniel Brown is an alien who had been previously arrested and deported from the United States and began to seek Mr. Brown's whereabouts.

On February 23, 2016 Mr. Brown was arrested in Pennsylvania by Philadelphia Police Department for failure to appear stemming from the October 2011 arrest. Immigration officials in Philadelphia, Pennsylvania issued a detainer and move to prosecute Mr. Brown for having been found in the United States as an alien who had been previously arrested and deported from the United States all in violation of 8 U.S.C. § 1326.

Prior to the filing of an indictment charging Mr. Brown in the Eastern District of Pennsylvania for illegal reentry under 8 U.S.C. § 1326, Philadelphia immigration officials advised Mr. Brown that his attorney may request to transfer the 8 U.S.C. § 1326 violation to the State of New Jersey where venue was proper.

The United States District Court for the Eastern District of Pennsylvania appointed counsel Rossman D. Thompson Jr, from the Philadelphia Federal Defenders Association. At counsel's first meeting with Mr. Brown and prior to the filing of an indictment charging Mr. Brown under 8 U.S.C. § 1326, Mr. Brown requested that counsel transfer the case to the State of New Jersey where venue was proper.

Mr. Brown also requested to counsel that he wanted to challenge the underlying deportation order that form the basis for the offense. Counsel clearly asserts and assured and advised Mr. Brown that: Counsel is not familiar with the immigration laws; that counsel's duty to Mr. Brown by the court under the bar Association do not permit counsel to challenge the underlying deportation order of an alien charged under 8 U.S.C. § 1326 because, the underlying challenge is all immigration and civil in nature; that counsel is not authorized to practice immigration laws; that counsel can only represent Mr. Brown to plead guilty for the illegal reentry charged

because 8 U.S.C. § 1326 is a criminal statute and that counsel license only as a criminal attorney under the bar association; and, that even if Mr. Brown wish to hired an immigrartion attorney that only specialize in immigration laws, the district court will not permit immigration counsel to engage because, immigration attorneys are not permitted to represent aliens during illegal reentry criminal prosecution to challenge the underlying deportation order because 8 U.S.C. § 1326 is criminal and immigrartion attorney's deal with civil matters.

Mr. Brown then filed a motion in the distrcti court, unequivocally asserting his rights to proceed pro se. Mr. Brown made substantial complaint that counsel assert not familiar with the immigrartion laws and is not able to assist Mr. Brown nor able challenge the underlying deportation order as due process required that was formulated by this Court in United States v. Mendoza-Lopez and codified by Congress at 8 U.S.C. § 1326(d).

The district court denied Mr. Brown's unequivocal assertion of his right to proceed pro se. Mr. Brown then filed a pro se motion to dismiss the indictment under 8 U.S.C. § 1326(d). In the meanwhile, Mr. Brown renewed his request to proceed pro se in the distrcti court, including the filing of other motions to remove counsel. In these motions Mr. Brown renewed his argument that counsel supervisor advised Mr. Brown that: The Philadelphia

Federal Defenders Association is not an immigration office, and therefore, counsel cannot assist Mr. Brown with the underlying deportation order in the proceeding under 8 U.S.C. § 1326; and, should Mr. Brown wish to make such challenge, Mr. Brown have to proceed Pro Se.

The district court denied these motions. Mr. Brown made one last request to the district court to remove counsel to avoid a miscarriage of justice and the district court also denied this request.

In an opinion at App. B dated February 16, 2017, the district court denied the pro se motion to dismiss the indictment under 8 U.S.C. § 1326(d). The district court only found that Mr. Brown's deportation was not fundamentally unfair but failed to reach a decision on whether Mr. Brown had exhausted administrative remedies or was denied judicial review as part of the conjunctives required under 8 U.S.C. § 1326(d)(1)-(3).

According to the record, the government's concern of an automatic remand from the United States Court of Appeals for the Third Circuit resulting from the district court's failure to reach a decision on exhausted administrative remedies and denial of judicial review. Almost three months later, at the direction of the government, counsel requested the district court to reopen the record to consider exhausted of administrative remedies and

judicial review to give the government broader leverage in argument on appeal.

Mr. Brown objected to this request as a violation. In his objection, Mr. Brown argued that the standard for reopening the record has not been met because no new evidence has been submitted. The district court did not consider Mr. Brown's objection to the reopening of the record. However, in an opinion at App. C, dated April 24, 2017, the district court considered whether Mr. Brown exhausted administrative remedies or was denied judicial review and concluded Mr. Brown did not.

The record indicated that the district court afforded Mr. Brown only a limited choice to choose between a trial counsel that deprived Mr. Brown of the Sixth Amendment right to counsel and an opportunity to enter a guilty plea. Mr. Brown then acquiesced to counsel's role by accepting a conditional plea to appeal the denial of the motion to dismiss the indictment in order to avoid a unconstitutional trial.

2. The United States Court of Appeals for the Third Circuit failed to consider the substantial question on direct appeal of whether Mr. Brown was deprived of his Sixth Amendment right to counsel where counsel was not familiar with the immigration laws.

On direct appeal, Mr. Brown was granted leave to proceed pro se. Mr. Brown raised two substantial arguments pertaining

to the deprivation of his Sixth Amendment right to counsel. First, Mr. Brown assert that his Sixth Amendment right to Self-Representation was violated when the district court denied his unequivocal assertion of his right to proceed pro se, including the denial of the district court to remove incompetent counsel. Second, Mr. Brown renewed his argument that he was deprived of his Sixth Amendment right to counsel because the district court permit counsel who is not familiar with the immigration laws, and who was not able to challenge the underlying deportation order that form the basis for the offense.

Mr. Brown also argued that his 50 months sentence of imprisonment under the new guideline in effect at the time of sentence violated the ex post facto clause. Mr. Brown assert that the applicable guideline is that was in effect at the time his offense was committed with the applicable guideline of 30-37 months imprisonment.

Mr. Brown argued that the issue surround the guideline in effect at the time of offense for the lesser sentence versus the guideline in effect at the time of sentence relies upon, whether his prior conviction and plea for simple possession of a control substance constitute an aggravated felony for purpose of the Immigration and Nationality Act (INA).

Mr. Brown further argued that the result of the imposition of sentence in the incorrect guideline was a product of counsel not familiar with the immigration laws.

After the government invoke the guilty plea waiver and the waiver becomes an issue Mr. Brown responded and the court of appeals was required to give full consideration to Mr. Brown's pro se response after the government invoke the guilty plea waiver. Mr. Brown responded that the court of appeals should denied the government's request to affirmed the district court's judgment arguing that: The proceeding in the district court and plea agreement was the product of ineffective assistance of counsel because it is premised upon the Immigration and Nationality act laws, and of which laws that counsel is not familiar; that the record is tainted with prejudice and result in a miscarriage of justice, affecting substantial rights and thereby invalidate any waiver to be knowing or intelligent.

In a published and non precedential opinion at App. A, the United States Court of Appeals for the Third Circuit concluded that Mr. Brown's Sixth Amendment right to Self-Representation was bar by the simple fact that Mr. Brown plead guilty. The court of appeals did not consider whether Mr. Brown was deprived of his Sixth Amendment right to counsel where the district court permit counsel to proceed who is not familiar with the immigration laws and who was not able to assist Mr. Brown to challenge the underlying deportation order which form the basis for the charge.

The court of appeals did not give consideration to Mr. Brown's response after the government invoke the guilty plea waiver requesting to affirm the conviction arguing that Mr. Brown issues to Sixth Amendment rights were bar by guilty plea waiver. The court of appeals went on to hold that Mr. Brown's other issues were meritless and bar by guilty plea waiver.

Mr. Brown filed a petition for rehearing with the United States Court of Appeals for the Third Circuit renewing his argument that his Sixth Amendment right to Self-Representation was violated, and the panel decision affirming the district court's decision is conflicting and contrary with all previous opinions and decisions in the third circuit court of appeal; and, that counsel is not familiar with the immigrartion laws upon which the plea agreement, sentence and conviction is premised affected substantial rights, a miscarriage of justice and thereby affirming the district court's judgment will work in a miscarriage of justice. The court of appeals denied the motion for rehearing on March 1, 2019 pointed out that no judges did not voted for a rehearing. App. D.

## IX. REASONS FOR GRANTING THE WRIT

A. This case present a landmark issue and to avoid deprivation of alien's Sixth Amendment right to counsel in the second most prosecuted cases in the United States Federal District Courts, this Court should decide the collateral Constitutionality of "Reasonable Professional Assistance" when an alien challenging the underlying deportation order during a criminal prosecution under 8 U.S.C. § 1326.

In United States v. Mendoza-Lopez this Court adopted a set of prophylactic measures to protect an alien's due process right during an illegal reentry following deportation codified by Congress at 8 U.S.C. § 1326(d). The Mendoza-Lopez court did not decide the collateral Constitutionality of "reasonable Professional Assistance" when an alien challenging the underlying deportation order.

In order to amount to collateral challege during an illegal reentry prosecution the alien must prove first, he "exhausted any administrative remedies that may have been available to seek relief against the deportation order"; second, "the deportation proceeding at which the order was issued improperly deprived the alien of the opportunity for judicial review"; and, third, "the entry of the order was fundamentally unfair". 8 U.S.C. § 1326(d) (codifying Mendoza-Lopez, 481 U.S. 835-837.

In United States v. Cronic, this Court (1) identified several specific situations, implicating a criminal defendant's right to counsel, in which prejudice would presumed; and

(2) determine that one such situation occurred when counsel entirely failed to subject to the prosecution's case to meaningful adversarial testing. 466 U.S. 653-655. Under the principles announced in United States v. Cronic, the constitutional guarantee has been violated when no actual assistance for the accused's defense is provided as is does here in Mr. Brown's case.

In a criminal prosecution under 8 U.S.C. § 1326 as here, the government must prove that the alien was lawfully deported as required for the prosecution's case to survive. The adversarial process in a 8 U.S.C. § 1326 prosecution as here, is not protected by the Sixth Amendment principles under United States v. Cronic to challenge the underlying deportation order formulated by this Court under United States v. Mendoza-Lopez.

This adversarial process is not so protected because counsel is not familiar with the immigration laws (a specialty of its own) does not give the alien's counsel acting role of an advocate as the right to effective assistance of counsel. Moreover, attorneys who only specialized in immigration laws are not permitted to represent aliens in federal district courts to challenge the underlying deportation order because, the district courts classified 8 U.S.C. § 1326 violation as criminal and detached the underlying deportation order as a civil matter.

In Mr. Brown's case, the Sixth Amendment meaning of counsel loses it's character as a confrontation between adversaries and the constitutional guranty is violated. The Sixth Amendment right to counsel include not only to have an attorney appointed by the court in certain cases, but also the right of an accused to fair opportunity to secure counsel of his own choice.

The United States Federal District Courts not permitted aliens to engage immigartion counsel as here violated due process not only on trial of the underlying deportation order, but also deprived aliens of counsel for all part of the pretrial proceedings. This infect an absense of that fundamental fairness essential to the very concept of justice. In this case, aliens are stripped of their rights to be defended by counsel which the accused believe best to engage in the proceeding.

Across the United States, in all illegal reentry following deportation cases and here, it appears as it seems a landmark issue where aliens have been appointed criminal attorneys that is not familiar with the immigration laws. This is because federal district courts requires the Sixth Amendment merely the provision of the illegal reentry as a criminal offense itself, but does not extend counsel to challenge the underlying deportation order of which the assistance should be for the alien's defense and the core purpose of the charged, that the courts considered to be civil matter.

Counsel not familiar with the immigration laws cannot ensure assistance at trial when the alien is confronted with both the intricacies of the immigration laws and the advocacy of the prosecutor when a true adversarial trial has been conducted as here in Mr. Brown's case.

Counsel's ignorance at a point of law that is fundamental here to Mr. Brown's case combine with failure to perform on that point is "quintessential example of unreasonable performances". In Mr. Brown's case here, the attorney knew that he was not familiar with the immigration laws and assert that he could not assist Mr. Brown to challenge the underlying deportation order and the district court was well informed.

The district court could not appoint competent immigration counsel because immigration attorneys who only specialized in immigration laws are not permitted to represent aliens in a illegal reentry prosecution under 8 U.S.C. § 1326, even though 8 U.S.C. § 1326 is a civil immigration statute under Immigration and Nationality Act (INA) § 276.

Mr. Brown's requested to proceed pro se, and, or to remove incompetent counsel arise when the district court appointed incompetent counsel. Mr. Brown show good cause to proceed pro se when he raised substantial complaints that counsel is not familiar with the immigration laws to challenge the underlying deportation order combined with numerous pro se filings seeking relief

against the charged in the district court.

The Principles of United States v. Cronic applies here in Mr. Brown's case where counsel was either absent or preventing from assisting a critical state of the proceeding. 466 U.S. 660.

In Mr. Brown's case here, the court of appeals failed to made finding or even consider Mr. Brown's substantial question on whether Mr. Brown was deprived of his Sixth Amendment right to counsel where counsel was not familiar with the immigration laws upon which the plea agreement, sentence and conviction is premised.

Had the court of appeals made finding from the record that Mr. Brown did not enjoy the right to counsel. It would also find that Mr. Brown did not knowingly and intelligently waived his rights to immigration counsel, nor his sentence and any waiver of appeal would hold to be invalid. It would follow that the trial court did not have jurisdiction to proceed to judgment and conviction of Mr. Brown and would therefore have his request granted.

A guilty plea cannot be attacked base upon inadequate legal advise unless counsel was not 'reasonable competent attorney' and advise was not within the 'range of competence demanded attorneys in criminal cases". Here in Mr. Brown's case, the government conceded in its brief reply that Mr. Brown was deprived

of his Sixth Amendment right to counsel where counsel was not familiar with the immigration laws and the court of appeals fails to made any finding on this issue.

The court of appeals also plainly incorrect that Mr. Brown's Sixth Amendment right to Self-Representation is bar by guilty plea waiver that fall outside the scope of the plea agreement. Accordly, a conviction such as Mr. Brown's here was obtained in violation of the Sixth Amendment right to self-representation and the deprivation of his Sixth Amendment right to counsel which normally bar conviction of the accused.

The particular aspect of the Sixth Amendment right here at issue, the rule that the constitutional guranty has been violated when no actual assistance for the accused's defense provided, or when counsel cannot provide "Assistance" "for" the accused's "defense" when confronted with both the intricacies of the law and the advocacy of the public prosecution.

Despite Mr. Brown argue in the court of appeals twice, both in his direct appeal brief as a substantial question and in his reply brief after the government invoke the guilty plea waiver that, counsel was not familiar with the immigrartion laws bar his conviction under the Sixth Amendment right. The court of appeals proceeded with its anlysis without any acknowledgement that Mr. Brown deprivation of counsel may have affected his Sixth Amendment right.

Incompetent advised as here in Mr. Brown's case distort an alien decision making process. A review of the court of appeals decision at App. A, reveal that Mr. Brown unknowingly waived his rights to judicial review of the underlying deportation order during his first illegal reentry charged in 2001. In the 2001 illegal reentry prosecution, Mr. Brown was also represented by counsel who is not familiar with the immigration laws. In a illegal reentry following deportation, the federal district court Judges nor counsel do not advise aliens that by pleading guilty, he/she is waiving rights to seek judicial review of the underlying deportation order as here in this case.

This Court consideration of this case would not create any upheaval in the law or statute, but rather determine a fair and reasonable solution to the second most prosecuted criminal cases in the United States Federal District Courts where aliens as here, are represented by counsel who cannot challenge the underlying deportation order that form the basis for the offense.

This case present less than whether to challenge the underlying deportation order is categorically removed from the scope of counsel's duty under the Sixth Amendment which is civil in nature. Rather, this case present issue of whether an alien has being deprived of the Sixth Amendment right to counsel when due process requires that an alien may challenge

the underlying deportation order, and federal district courts permit only criminal counsel that is not familiar with the immigration laws, and, who cannot challenge the underlying deportation order that is the element of the offense.

Neither Congress nor this Court, nor any provision of the Immigration and Nationality Act (INA), nor the statute of charged indicated a intent to bar counsel who is familiar with the immigration laws. Mr. Brown did not waived rights to be represented by counsel who is familiar with the immigration laws.

This case present this Court with an opportunity to decide whether aliens are being deprived of the Sixth Amendment right to counsel in an illegal reentry prosecution, where counsel is not familiar with the immigration laws and who is not able to challenge the underlying deportation order which form the basis of the offense.

Absent intervention by this Court, the federal district courts will continue to appoint counsels who do not familiar with the immigration laws will work to undermine the constitutional right to enjoy counsel under the Sixth Amendment. Safeguards would be remove as here in criminal proceedings in the second most prosecuted cases in the federal district courts and will remain a landmark issue.

X. CONCLUSION

For the foregoing reasons, Mr. Brown respectfully request this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.