18-9529

ORIGINAL

No. 19-1127

IN THE

SUPREME COURT OF THE UNITED STATES

ANIBAL DEL-VALLE — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, FOR THE FIRST CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anibal Del-Valle
(Your Name)

4004 E. Arkona Road, P.O. Box 1000
(Address)

Milan, MI 48160
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether an attorney's advice to a defendant to plead guilty to aiding and abetting the carry, use and possession of a firearm in furtherance of a crime, when the defendant has plead guilty to drug conspiracy charges, and assuming counsel knew that the defendant was unarmed and had no way of knowing if the daily drugs buyers possessed a firearm, may have been improper based upon this Honorable Court's decision in Justus C. Rosemond, 572 U.S. 65, 134 S.Ct. 1200, 188 L.Ed. 2d 248 U.S. LEXIS (2009); and whether such advice constituted ineffective assistance of counsel under Washington v. Strickland, 466 U.S. 608 (1989), and Hill v. Lockhart, 474 U.S. 52, 106, 306 (1985). If either question can be answered in the affirmative, the Circuit Court's denial of a Certificate of Appealability may constitute a violation of the Fifth Amendment's due process clause and the Sixth Amendment's right to effective assistance of counsel.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 30, 2019.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TABLE OF AUTHORITIES CITED

CASES

STATUTES AND RULES

OTHER

TABLE OF AUTHORITIES (CONT.)

STATEMENT OF THE CASE

On May 24, 2012, Del-Valle, along with 74 other individuals, were indicted in criminal case number 12-414 for a drug trafficking conspiracy taking place at the Luis Llorens Torres Public Housing Project. (CR. D.E. 3). The Indictment identified Del-Valle as a leader within the criminal organization. (Id.) He was a drug point owner and he would also act as an enforcer, runner and drug processor. As an enforcer, he would carry and use firearms during and in relation to the drug trafficking activities. (Id.)

On August 6, 2013, Del-Valle pled guilty to Counts One and Six of the Indictment. (D.E. 1305, 1307). Count One charged a conspiracy to possess with intent to distribute drugs within 1,000 feet of a public housing facility in violation of 18 U.S.C. §§ 841(a)(1), 846 and 860. (D.E.3). Count Six charged Del-Valle for using a firearm in furtherance of a drug traffickin crime in violation of 18 U.S.C. §§ 924(c)(1)(A). (Id.)

As to Count One, Del-Valle was held accountable for at least 5 but less than 15 kg of cocaine which establishes a base offense level of 32 (U.S.S.G. § 2D1.1(c)(4)). (D.E. 1305, pp. 5-6). A 1-level enhancement was applied because the offense was committed within a protected location (§ 2D1.2(a)(2)), another 2-levels were applied for Del-Valle's leadership role (§ 2D1.1(c)) and 3-levels were reduced because he accepted responsibility in a timely manner (§ 3E1.1). (Id.) Therefore, the total offense level was 32, yielding an imprisonment range of 121 to 151 months, assuming without stipulating, a Criminal History Category (CHC) of I.

As to Count One, the parties agreed tha the defendant may request a sentence of 121 months of imprisonment and the United States reserves the right to request a sentence up to 151 months of imprisonment if his CHC is I or II. Should defendant's CHC be II or higher, the parties agree to recommend

the lower end of the applicable guideline range for a total offense level of 32. Since Count Six is precluded from guidelines calculation, Del-Valle agreed to the mandatory minimum term of imprisonment of 60 months to run consecutive to the sentence imposed for Count One. (D.E. 1305, p.6).

The sentencing hearing was held on December 19, 2013. (D.E. 1686). There, the sentencing judge imposed a sentence of 121 months as to Count One and 60 months as to Count Six to be served consecutively with each other, for a total of 181 months of imprisonment. (D.E. 1687). The judgment of conviction was entered on December 19, 2013. (Id.). Since no direct appeal was filed, Del-Valle's conviction became final on January 3, 2014, when the 14-day period to file a notice of appeal expired. See Fed.R.Civ.P. 4(b); see Clay v. United States, 537 U.S. 522, 524-25 (2003) (holding that a conviction becomes final after the time period to appeal or seek review has expired).

On January 21, 2015, Del-Valle's § 2255 motion was entered on docket. (D.E. 2352). He signed and dated the petition on August 4, 2014. (Cv. D.E. 1). On July 6, 2015, a Memorandum of Law was entered on docket. (D.E. 9). In his original petition he claimed that his counsel was ineffective in the "negotiation phase of the case in his failure to clearly explain to the Petitioner that if convicted of the drug and gun charges, his resulting aggregate sentence would run consecutively, not concurrently." (D.E. 1, p.4). He also claimed that his trial counsel was ineffective for failing to object the leadership enhancement in the "guilty plea phase" and at the "sentencing phase." (Id.).

On April 20, 2018, Del-Valle filed a motion pursuant to Rule 59(e) asking the District Court to reconsider its denial of Appellant's § 2255 motion, or to grant C.O.A. However, on November 30, 2018, the District Court denied said motion.

On May 30, 2018, Appellant filed his notice of appeal with the District

Court of Puerto Rico, also a motion to stay the notice of appeal pending the resolution of his Rule 59(e) motion. The District Court of Puerto Rico granted Appellant's request for both motions and motion for leave to appeal in forma pauperis.

On January 1, 2019, Petitioner filed Petition for a Certificate of Appealability and on April 30, 2019, said petition was denied.

REASONS FOR GRANTING THE PETITION

Issues for Review

Petitioner asserts that based on the following, the Sixth Circuit erred in denying his Petition for a C.O.A. Petitioner Del-Valle asserts that his defense counsel failed to explain the element of the offense, the lack of evidence and facts to meet the element of the offense or the consequences of defendant's plea to an offense that he is actually innocent of committing, was no evidence to support the 924(c)(1)(A) offense because defense counsel knew that there was no evidence being that he received full disclosure from the Government. See United States v. Streater, 70 F.3d 1314 (D.C. Cir. 1995)(Defendant's guilty plea was not made knowingly or voluntarily where it was induced on counsel's flawed advice).

The Petitioner asserts that in the year 2013, when he was advised by the sentencing court, by his own attorney and the prosecutor that mere assembly with his co-conspirators would trigger an offense of aiding and abetting in the carry and use of a firearm in furtherance of a drug trafficking crime would support a conviction under 924(c)(1)(A), he received critically incorrect advice. The fact that all his advisors acted in good faith does not mitigate the impact of that erroneous advice. Its consequences for Petitioner were just as unfair, as if the Court and counsel knowingly misled him in order to induct him to plead guilty to a crime that he did not commit. Smith v. Grady, 312 U.S. 329 (1941); Henderson v. Morgan, 426 U.S. 637 (1976). Petitioner's conviction and punishment on the 924(c)(1)(A) charge "are for an act that the law does not make criminal." See Justos C. Rosemund v. U.S., 572 U.S. 65; 134 S.Ct. 1240 L.Ed. 2d 248.

Accordingly, Mr. Del-Valle submits that an unarmed accomplice like him cannot aid and abet a violation of 18 U.S.C. Section 924(c)(1)(A) unless he

has foreknowledge that his confidant will commit "the offense with a firearm, and as he can tell he never saw anyone carry or use a firearm while dispensing (selling) 3 to 6 dollars worth of cocaine to a drug user. The prosecutor himself stated that in Count One of the Indictment, see Exhibit A, Criminal Indictment Count One over act. Del-Valle's role in the drug business was to buy every other day $200.00 worth of packed cocaine, each pack cost two dollars, and he sold to the user for three dollars. Hence, he made one dollar profit per each pack. That is 1/20 of a gram. However, since he was also a user, the profit made was almost nothing. He never possessed ounces or kilograms quantities. He never reached that level, because he was a user himself. Del-Valle honestly submits that he has never owned a gun or any type of weapon other than, at times, a packed knife. The best proof to that was that he was often searched by the narcotic agent or by the police while he was driving, and they never found any gun or any type of weapon on him nor in the car he was driving. Also, he would like to point out that although he dealt with the user, in no way, shape or form he was a leader of anyone. He only bought two or three hundred dollars of packed cocaine and used some while selling the rest for three hundred dollars each.

Moreover, he finished high school and attended several college classes. See Exhibit B Sentencing Tr. P. 14. Also PSR. Also, and very important, is the fact that the prosecutors had no evidence that Del-Valle possessed any type of weapon, or that he was a leader of anyone. In fact, when he was arrested, he asked his first attorney, Mr. Fernando Carlos, what type of evidence the prosecutor had against him and counsel Mr. Ferndando Carlos told him was that he asked the Government for the discovery and the Government told counsel Mr. Fernando Carlos that the only evidence that they had against Mr. Del-Valle was the testimony of two of his co-conspirators, and he recalled that he told his counsel that he knew them because they were drug users like him. He also told

his first counsel that the dates in the Indictment were not right because in some of those years he was in the United States, in Boston and Florida looking for a job as a barber or male nurse. However,p because the language barrier being a problem, he was not able to continue. Hence, he returned to Puerto Rico. Moreover, Del-Valle respectfully submits that the conviction for aiding and abetting, the use and carry of a firearm in violation of Title 18 U.S.C. § 924(c)(1)(A), in Count Number Six is constitutionally invalid and must be set aside in the interests of Justice because Del-Valle was not informed of important constitutional right, nor provided with effective assistance of counsel, in that counsel failed in explaining the element of the offense, the lack of evidence and the fact to meet the element of the offense or the consequences of Del-Valle's plea to Count Number Six of the criminal Indictment.

In the context of guilty pleas, the U.S. Supreme Court announced that counsel must give objectively reasonable advice before the presumption of effectiveness will be applied. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). A defendant should be made aware of the relevant circumstances and likely consequences so that he can make an intelligent choice." Teague v. Scott, 60 F.3d 1167, 1170 (5th Cir. 1995). Ineffective Assistance of Counsel at the plea stage of a proceeding will render the plea involuntary. Hill, 474 U.S. at 56, 106 S.Ct. at 369. Counsel owes a duty to "assist his client in deciding whether to plead guilty." Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974)(citing Walker v. Caldwell, 476 F.2d 213, 224 (5th Cir. 1973)).

Proper investigation requires an attorney to consult with the client on matters regarding defense strategy. Florida v. Nixon, 534 U.S. 175, 179, 125 S.Ct. 551, 555 (2004). 'Meaningful discussion with one's client is one of the 'cornerstones of effective assistance of counsel.'" Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983)(citing Gaines v. Hopper, 575 F.2d 1147, 1149-50

(5th Cir. 1978).

The Sixth Amendment to the U.S. Constitution guarantees that criminal defendants are entitled to the assistance of counsel in presenting their defense. The High Court has stated, "The right to counsel is a fundamental right of criminal defendants; it assures the fiarness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Furthermore, the court has recognized that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970) (emphasis added).

Further, as set forth in this petition, there was no evidence or facts upon which Del-Valle could have entered a plea of guilty to the aiding and abetting weapon charge. At best, from the reading from the agent's report, Mr. Del-Valle was never present when other individuals engaged in acts with the agents interpreted as a drug transaction, nor the criminal complaint or the Indictment mentioned any overt act done by Del-Valle to prove the aiding and abetting charge in Count Number Six of the criminal Indictment. It appears that no firearms were ever recovered nor does the record denote that any firearms were seized nor were ever submitted for fingerprint testing and evaluation.

Furtheremore, Petitioner Del-Valle submits that the criminal record is silent as to any admission by Del-Valle that he would allow other members of the conspiracy to carry and use firearms in furtherance of a drug trafficking crime. It should be noted that Del-Valle never "debriefed the prosecutor," nor he ever met with the prosecutor. Mr. Del-Valle was not present when his defense counsel negotiated the plea agreement with the prosecutor. Consequently, when the prosecutor asserts that Del-Valle acknowledges that he would use and carry a firearm during and in relation to the drug trafficking activities, and would allow other members of the

conspiracy to carry and use a firearm, he was not quoting anything that Del-Valle said because he never spoke to the prosecutor. In support of these allegations, Del-Valle presents, as evidence, the Plea Agreement Transcript of his change of plea hearing and the Sentencing Transcript as Exhibits A, B and C. Also, very important was the fact that in Del-Valle's best recollection is that he only saw his defense counsel, Mr. Zayas, on his court dates, and one of the reasons was because of overcrowding at the Puerto Rico facility he and many others were transferred to U.S.P. Atlanta over a period of four months. Moreover, the District Court, at sentencing, used the statement that was made by the prosecutor at the change of plea hearing at p.12, lines 1-2, these statements were not made by Del-Valle directly, yet this prosecutor's unfounded statement was highly prejudicial. In addition, defense counsel also failed to explain the drastic consequences of the effect of such a conviction, that being it will operate as an enhancement to a subsequent offense such that will mandate substantial incarceration be it within the jurisdiction of the states or within Federal jurisdiction. Federally, this unconstitutional prior conviction would not be allowed a prisoner to go to a camp, or the residential 500-hour drug program and many more dubious effects.

When the evidence that could be produced by the prosecutor at trial is insufficient to sustain a conviction and the attorney fails to raise a challenge to the evidence, e.g. Boykin v. Alabama, 235 U.S. 398 (1969) (ineffective assistance of counsel when an attorney fails to raise sufficiency of the evidence challenge at sentencing when the evidence was insufficient to sustain a conviction. In the instant case, Del-Valle was convicted in Count Six pursuant to an admission of guilt based on the advice of his defense counsel that the offense could be proven beyond a reasonably doubt. See Cooks v. United States, 401 F.2d 530, 532 (5th Cir. 1972) (where counsel has induced defendant to plead guilty on the patently erroneous

advice that if he does not do so he may be subject to a sentence six times more severe than that which the law would really allow, the proceeding surely fits the mold we describe as a "farce and mockery of justice").

Moreover, Mr. Del-Valle submits to this Honorable Court that he never carried or used or possessed any kind of firearm, nor did he ever see a co-conspirator with a firearm or allowed anyone to carry or use a firearm. He clearly did not have the power to tell anyone what they should or should not do. Also, the Plea Agreement contradicted the prosecutor's statements that he allowed other members of the conspiracy to carry and use a firearm. Please see Plea Agreement, pg.2, lines 11-18:

"I. Counts to which Defendant Pleads Guilty"
(End of quote pg.1 and pg.2 of the Plea Agreement).

Based upon the above, it is clear that the prosecutor overarched as to the contents of the Plea Agreement, since it is clear that in the Plea Agreement, Guilty Plea, Transcript and at the Sentencing Hearing, Del-Valle, at no time, said that he allowed anyone to carry or use a firearm. It is clear that the knowledge that his co-conspirators had a firearm. It is clear that the prosecution overarched on the subject matter of Count Six and this was prejudicial because in the manner in which the sentencing Court applied Del-Valle's sentence, as those statements were made by Del-Valle. See Exhibit C, Sentencing Transcript, pg.11.

A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." Brady v. United States, 397 U.S. 742, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970). We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329, 334, 85 L.Ed. 859, 61 S.Ct. 572 (1941).

Since Del-Valle did not receive adequate notice of the offense to which

he pleaded guilty as to Count Six of the Indictment, in violation of § 924(c)(1)(A), his plea was involuntary and the judgment of conviction in that count was entered without due process of law. The plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless Del-Valle received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329, 334, 85 L.Ed. 859, 61 S.Ct. 572. Where the record discloses that defense counsel did not purport to stipulate that Del-Valle had the requisite intent or explain to him that his plea would be admission of that fact, and he made no factual statement of admission necessarily implying that he had such intent, it is impossible to conclude that his plea to the unexplained charge of aiding and abetting the carrying, use and possession of a firearm in furtherance of a drug trafficking crime and allowed some of his co-defendants to carry and use the firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). See Rosemond, 572 U.S. 65 (2015).

A jury convicted defendant of using a gun in connection with a drug trafficking crime, in violation of 18 U.S.C. § 924(c), and the U.S. Court of Appeals for the Tenth Circuit rejected defendant's argument that an instruction and district court gave the jury on aiding and abetting the commission of an offense under § 924(c) was erroneous and affirmed the conviction. The U.S. Supreme Court granted certiorari. Trial court's instruction that the jury could find defendant guilty of violating 18 U.S.C. § 924(c), as an aider and abettor, if he knowingly participated in drug traifficking crime and knew that accomplice used a firearm in committing that crime was erroneous as it failed to require proof that defendant knew in advance that accomplice was armed. Rosemond, U.S. 572 U.S. 65.

Defendant was charged with using a gun in connection with a drug

trafficking crime, in violation of 18 U.S.C. § 924(c), or, in the alternative, aiding and abetting that offense under 18 U.S.C. § 2, after he participated in an attempted sale of marijuana to two buyers and shots were fired at the buyers after the buyers took the marijuana and ran. The district court instructed the jury that they could find defendant guilty of violating § 924(c), as an aider and abettor, if the evidence showed that he knowingly and actively participated in a drug trafficking crime and knew that an accomplice used a firearm in the commission of a drug trafficking crime, and the jury found the defendant guilty of violating § 924(c). The Supreme Court held that the district court's instructions were erroneous because they failed to require proof that defendant knew in advance that one of his cohorts would be armed. In telling the jury to consider merely whether defendant "knew his cohort used a firearm," that did not direct the jury to determine when defendant obtained the requisite knowledge, i.e., to decide whether defendant knew about the gun in sufficient time to withdraw from the crime. Del-Valle, like Rosemond, the defense counsel failed to advise the sentencing Court that the Government did not have any evidence that Del-Valle aided and abetted anyone in the conspiracy to carry and use a firearm in furtherance of the drug trafficking crime. Also, Mr. Del-Valle, minutes before his sentencing, he had a motion to withdraw his guilt. Plea at Sentencing, pages 3, 4 and 5, lines 1-125. The Indictment failed to mention that the defendant knew in advance that his accomplice was armed. Without knowledge, there is not act of aiding and abetting to violate § 924(c)(1)(A) as in Del-Valle's case.

Ortal D. Valle
40047-069

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 5-28-2019