C

No. 19-5215 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

LOWRELL NEAL — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

LOWRELL NEAL
(Your Name)

FCI ELKTON/P.O. Box 10
(Address)

LISBON, OHIO 44432
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

1. DID THE SIXTH CIRCUIT ERR BY HOLDING THE DISTRICT COURT PROPERLY APPLIED THE LAW-OF-THE-CASE TO AN ISSUE PRESENTED IN 2255 MOTION WHEN PRIOR APPELLATE COURT DECISION WAS CLEARLY ERRONEOUS AND RESULTED IN A MANIFEST INJUSTICE?

   Petitioner's suggestion is yes.

   Respondent's suggestion is no.

2. DID THE SIXTH CIRCUIT ERR BY DENYING PETITIONER'S MOTION TO EXPAND COA ISSUES TO INCLUDE A CLAIM THE DISTRICT COURT FAILED TO ADDRESS AND DECIDE ON THE MERITS?

   Petitioner's suggestion is yes.

   Respondent's suggestion is no.

LIST OF PARTIES

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

[ ] 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:

TABLE OF AUTHORITIES CITED

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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[X] is unpublished.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[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

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

The date on which the United States Court of Appeals decided my case was March 19, 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

Under 28 U.S.C. § 2253(c)(1)(A), a Certificate of Appealability ("COA") will not issue unless the petitioner has made a substantial showing of the denial of a federal constitutional right and reasonable jurists could disagree with the district court's resolution of his constitutional claims or that jursits could conclude the issues presented are adequate to deserve encouragement to proceed further.

The Fifth Amendment Due Process Clause provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ..."

STATEMENT OF THE CASE

In 2017, the Sixth Circuit Court of Appeals on direct appeal determined that despite the district court's error in relying on undisclosed proffers to calculate Lowrell Neal's Sentencing Guideline range, the error was harmless because the district court made clear during the hearing that Neal's sentence would be the same even "without the proffers." see United States v. Smith, 681 F. App'x 483, 486-87 (CA 6, 2017). That conclusion, as the district court found, is the law-of-the-case and foreclosed Neal's claim to the contrary in his § 2255 motion. Neal also raised the following issues: (1) that counsel rendered ineffective assistance in failing, (b) to object to, and file an interlocutory appeal challenging the district court's intervention into the investigation process, (b) failing to argue the district court violated Federal Rule of Criminal Procedural 32(h) when it did not provide notice that it was considering using a higher guideline range; (2) that the district court improperly intervened in the plea negotiations by directing the government to consider proffers to calculate drug quantity; by failing to comply with Rule 32(h), and by denying an opportunity to investigate or challenge the proffers. Neal also contended that his plea was not entered knowingly and voluntarily because he was "surprised" by the district court's decision to use a higher sentencing guidelines range and by counsel's failure to object and file an interlocutory appeal. see Ex. B @ 2.

As noted above, the district court denied Neal's claim regarding its reliance on "undisclosed proffers" -- under the law-of-the-case doctrine and that his ineffective assistance of counsel claims were without merit. It found that Neal's second claim, to the extent that it challenged the court's reliance on the proffer statement was precluded by the appellate court's decision on direct appeal. It further held that Neal's plea agreement barred his claim that the court violated Rule 32(h). However, the district court did grant Neal a Certificate of Appealability ("COA") on the issue of whether the court abused its discretion by

considering the proffer statements for sentencing purposes. Id.

In the Sixth Circuit, Neal sought to expand the COA to the rest of his claims, including his claim the plea was not entered knowingly and voluntarily; and also argued that the district court judge should have recused himself under 28 U.S.C. § 455. see Ex. B (Order of 11/29/18, denying Motion To Expand COA).

On direct appeal, Neal argued that the district court should have addressed the merits of his claim regarding the use of the proffer statements in light of this Court's decision in Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018). He further contended that by doing so the district court violated his rights under the Confrontation Clause by considering the proffer statements at sentencing, that the district court failed to provide notice of its intent to depart from the guideline calculations contained in the plea agreement, and that his plea was entered unknowingly and unintelligently. Ex. A.

The Sixth Circuit declined to here claims other than the one certified for appeal -- i.e. that the district court erred by considering the proffer statements at sentencing. Id. @ 3. With regard to that issue the appellate court found that the "district court correctly found that [it] addressed the claim on direct appeal. Id Specifically, the noted on direct appeal it "held that the district court erred by considering the proffer statements at sentencing because ... a criminal defendant must be provided adequate access to information the court will use to calculate a sentence and afforded an opportunity to contest that information. Id. (citing cases); Ex. A. However, the noted it ultimately held the error was harmless "because the district court expressly stated at sentencing that it would imposed the same sentence if a lower guidelines range applied." Id.

Neal now petition the Court to review this matter and issue a Writ of Certiorari reversing the judgment of the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

This case turns on whether the Sixth Circuit's holding that this Court's decision in Rosales-Mireles, supra. can not be considered an intervening change of law or otherwise contemplated as an exception to the law-of-the-case doctrine. In Arizona v. California, 460 U.S. 605, 618; 103 S.Ct. 1382; 75 L.Ed.2d 318 (1983), this Court ruled that "[u]nder the law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice," and instead, "[l]aw of the case directs a court's discretion, it does not limit the tribunal's power." In light of this discretion, the Sixth Circuit has held that an exception to the law of the case doctrine can arise where there is "a subsequent contrary view of the law by the controlling authority." U.S. v. Campbell, 168 F.3d 263, 269 (CA 6, 1999)(quoting U.S. v. Moored, 38 F.3d 1419, 1421 (CA 6, 1994)).

Here, Neal contends that Sixth Circuit holding pertaining to the law-of-the-case doctrine improperly concluded the district court had limited power to consider his 2255 claim that the district court's use of the proffer statements was not harmless and that counsel rendered ineffective assistance for failing to object in the sense that consideration of the proffer statement undermined the voluntariness of the guilty plea. Correspondingly, Neal also contends that the Sixth Circuit erred by denying his request to extend COA to include the issue "that his guilty plea was entered unknowingly and involuntarily because he was unaware that the district court would apply a higher base offense level than the base offense level contemplated by the plea agreement." see Ex. C @ p. 5.

(a). Law of the Case Doctrine:

In his 2255 motion, Neal contended defense counsel was ineffective because, inter alia,"he should have objected to and appealed the use of undisclosed

proffer statements in the calculation of [his] sentencing Guidelines range." see Neal v. United States, 2018 U.S. Dist. LEXIS 92664 *5 (N.D. Ohio, May 31, 2018). Rather than address this issue, the district court referenced the Sixth Circuit's opinion on direct appeal "that while [the district court] erred in allowing the use of the proffer statements, the error was harmless due to the district judge's statement that he would have imposed the same sentence regardless of the recommended sentencing Guideline range." Id. @ 8. Importantly, on direct appeal, it is noted that "[t]he government concede[d] ..." that the district court erred." see United States v. Neal, 681 Fed. Appx 483, 486 (CA 6, March 7, 2017). However, the government did not demonstrate how the record at sentencing supported the error was harmless. United States v. Robinson, 174 Fed. Appx. 809 (CA 5, 2006), app. after remand, 2008 U.S. App. LEXIS 18309 (CA 5, Aug. 21, 2008)(The government bears the burden of demonstrating that error was harmless by demonstrating beyond reasonable doubt that the federal constitutional error of which defendant complains did not contribute to sentence that he received.). Instead, the appellate court concluded -- that "the district court made clear on the record that the sentence would have been the same regardless of Neal's base offense level (which was increased on the basis of the proffers)." United States v. Neal, 681 Fed. Appx @ 487 (parenthesis in original). More particularly, the appellate court stated:

> The district court adequately explained its reasoning for at Neal's sentence, and in this case, the district court's reasoning was sound, both with regard to the downward departure from what the district court believed the correct guidelines calculation to be and with to the upward departure from what Neal maintained was the correct calculation.

(Neal, 681 Fed. Appx @ 487).

The problem with this conclusion is two-fold. First, the district court's did not give a fact-specific basis to support why it would depart from the correct guideline calculation upward to a more severe sentence. Second, the explanation for doing so apparently was conflated with information derived from the proffer

statements. Further, the Sixth Circuit failed to consider the due process implications.

Specifically, while considering the harmless error analysis, the Sixth Circuit -- on direct appeal -- assigned error based on precedent holding that "a criminal defendant must be provided adequate access to the information the court will use to calculate a sentence and afforded an opportunity to contest that information." Neal, 681 Fed. Appx @ 486 (citations omitted). Mr. Neal submits that it is not possible to determine whether the district court's explanation that it would have imposed the same sentence absent the error is adequate when the record is devoid of information a defendant presented to mitigate adverse or inaccurate information considered by the sentencing court. see United States v. Hazelwood, 398 F.3d 792, 801 (CA 6, 2005)(holding that district court sentencing error affected the sentence imposed, where the judge's explanation was not specific enough to conclude the judge would have imposed the same sentencing sans the error). Stated differently, it is no way to know if the guidelines calculations error "did not effect the district court's selection of the sentence imposed." Williams v. United States, 503 U.S. 193, 203; 112 S.Ct. 1112; 117 L.Ed.2d 341 (1992).

Where, as here, the court of appeals' decision is clearly erroneous or would work a manifest injustice, the district court had discretion to review Neal's ineffective assistance of counsel claim where that claim fully developed would had afforded Neal opportunity to obtain the proffer statements and to argue for a lesser sentence pursuant to the sentencing factors in 18 U.S.C. § 3553(a). Because Neal's plea agreement stipulated his advisory sentencing range to be 77 to 96 months, but the sentenced imposed was 105 months' imprisonment, the error was not harmless. A writ of certiorari sought therefore be granted.

Additionally, Neal submits that the Sixth Circuit also erred by not expanding COA to review his claim that his guilty plea was not knowingly and voluntarily

made.

(b). Sixth Circuit Erred By Not Expanding COA To Invalid Guilty Plea Issue:

In its order dated November 29, 2018, the Sixth Circuit denied Neal's motion to expand the COA to address the other issues presented in his § 2255 motion. Ex. B. The appeals court framed the issue and decided it as follows:

> Finally, Neal argues that his guilty plea was entered unknowingly and involuntarily because he was unaware that the district court would apply a higher based offense level than the base offense level contemplated by the plea agreement. The district court also did not squarely address this claim. Nevertheless, reasonable jurists would agree that this claim does not deserve encouragement to proceed further. Neal's agreement stated that he was subject to a statutory maximum term of 20 years of imprisonment, and the district court informed him of that at the plea hearing. The plea agreement also stated that the guidelines were advisory and that sentencing was wholly within the discretion of the district court. The parties agreed at the plea hearing that Neal's sentence would be determine by calculating the applicable guideline range and considering the § 3553(a) sentencing factors and that there was "no agreement that the sentence should be within the guideline range."

(Ex. B @ pp. 5-6)(emphasis added).

In Buck v. Davis, 137 S.Ct. 759; 197 L.Ed.2d 1 (2017), this Court reiterated the proper standard for considering whether a COA should issue. Specifically, the stated that "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could concluded that the issues presented are adquate to deserve encouragement to proceed further." Buck, 137 S.Ct. @ 773. The Court further emphasized that [t]his threshold question should not be decided without full consideration of the factual or legal basis adduced in support of the claims." Id. (internal quotation marks omitted).

Here, the question of whether Neal's guilty plea was knowingly and voluntarily made was, as noted by the appellate court, never "squarely address[ed]" by the district court. Ex. B @ 5. The panel considering Neal's COA could not have applied the COA standard if the district court "did not squarely address this

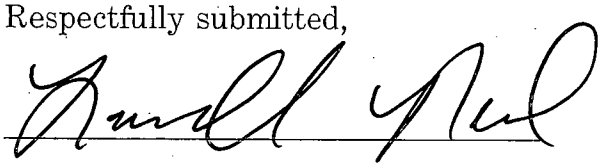
claim." Id. In fact, the failure to adjudicate claims presented on habeas review is a defect that undermines "the integrity of the federal habeas proceedings." see Gonzalez v. Crosby, 545 U.S. 524, 532; 125 S.Ct. 2641; 162 L.Ed.2d 480 (2005); United States v. Eziolisa, 2013 U.S. Dist. LEXIS 114131 (S.D. Ohio, Aug. 13, 2013). Accordingly, in the absence of a resolution of Neal's challenge to the validity of his guilty plea, the Sixth Circuit had no factual basis from which to apply the standard of review for a COA. Instead, its decision constitutes one on the merits in violation of 28 U.S.C. § 2253. see Buck, supra. 137 S.Ct. @ 773 ("When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.").

As in the Buck v. Davis, the court of appeals "phrased its determination in proper terms" -- but "it reached [its] conclusion [to deny a COA] only after essentially deciding the case on the merits." Id.; see also Ex. B @ 5 ("The district court also did not squarely address this claim. Nevertheless, reasonable jurists would agree that this claim does not deserve encouragement to proceed further."). Because, as this Court has reiterated, the Sixth Circuit's ruling on Neal's motion to expand the COA issues on appeal is inconsistent with the statute, he request the Court grant relief by remanding the case to the Sixth Circuit with instructions to reconsider this issue in light of the district court's failure to even pass on it, and allow it to be argued on appeal for a potential remand to the district court for an actual decision on its merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: June 17, 2019