19-5504

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: JOEL DIAZ HINIRIO

_____ ____PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA

_____ ____RESPONDENT(S)

ON PETITION FOR A WRIT OF PROHIBITION PURSUANT TO
THE ALL WRITS ACT 28 U.S.C. 1651(a) DIRECTED TO
JOHN ROBERTS C.J, WITH SUPERVISORY CONTROL OVER
THE FOURTH CIRCUIT UNDER SUPREME COURT RULE 22-1

U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

(NAME OF COURT THAT LAST RULED ON THE MERITS OF YOUR CASE

PETITIONER FOR A WRIT OF PROHIBITION

JOEL DIAZ HINIRIO - FED. REG. #08513-094
(Your Name)

FEDERAL CORRECTIONAL INSTITUTION
(Address)

P.O. BOX 3000, ANTHONY NM/TX 88021
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

WHETHER DENIAL OF APPOINTMENT OF COUNSEL TO PETITIONER BY THE SUPREME COURT IN THIS INSTANT CASE, WOULD BE TANTAMOUNT TO PETITIONER JOEL DIAZ HINIRIO, FACING INCARCERATION ON A CONVICTION THAT HAS NEVER BEEN SUBJECTED TO "THE CRUCIBLE OF MEANINGFUL ADVERSARIAL TESTING.

LIST OF PARTIES

IN RE: JOEL DIAZ HINIRIO
-V-

UNITED STATES OF AMERICA

THE NAMES OF ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE. THERE ARE NO ADDITIONAL PARTIES.

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STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." See, Maryland v. Louisiana, 451 U.S. 725, 737 (1981). Second, the Supreme Court also possesses original jurisdiction for "(all) controversies between the United States and a State." 28 U.S.C. Section 1251 (b)(2).

Finally, Section 1251 provides for original jurisdiction in the Supreme Court, for "all actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970); United States v. Louisiana, 339 U.S. 699 (1951); United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeals" and "certiorari" as vehicles for appellate review of the decisions of state and lower federal courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari," the Court has complete discretion to hear the matter.

The Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review virtually eliminated. Now almost all cases come to the Supreme Court by writ of certiorari. Pub. L. No. 100-352, 102 Stat., 662 (1988).

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651(a) IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court and all courts established in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(B) An alternative writ or rule may be issued by a justice (Chief Justice Roberts) to whom an application to a writ of Prohibition is submitted may refer to the Court for determination.

STATUTORY AND CONSTITUTIONAL PROVISIONS

As relevant, the Fifth Amendment provides: "No person shall be...deprived of life, liberty, or property, without due process of law."

STATEMENT OF CASE AND PROCEDURAL POSTURE

On May 4, 2012, the Grand Jury returned a ten-count indictment against Hinirio, charging him with drug and firearm offenses. Joel Diaz Hinirio moved to suppress certain physical evidence and statements. On February 22, 2013, the Court entered an order (1) granting in part and denying in part Hinirio's motion to suppress certain physical evidence; and (2) denying Hinirio's motion to suppress certain statements.

On March 18, 2012, Hinirio entered a guilty plea. On July 16, 2013, the Court sentenced Hinirio. subsequently appealed the court's denial of his motions to suppress (the "direct appeal"). The (2018 U.S. Dist. LEXIS 2) Third Circuit remanded the case to the district court state the court's essential findings for the record. On December 10,2016, the Court entered a memorandum opinion explaining the rationale for its February 22, 2013, order. On January 2, 2018, Hinirio filed a motion for relief pursuant to 28 U.S.C. Section 2255. Since the December 10, 2016, memorandum opinion , the Third Circuit has not yet ruled on Hinirio's direct appeal.

REASONS FOR GRANTING

It is settled, that a decision of the Supreme Court of the United States, based solely upon its construction of Rule 11 of the Federal Rules of Criminal Procedure, with regard to the acceptance of a guilty plea, is made pursuant to the Supreme Court's Supervisory Power over the lower courts. See, e.g. Arizona v. California, 373 U.S. 546 (1963); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 300 (1888), Kennedy v. Denison, 65 U.S. (24 How) 66, 98 (1860).

As a logical corollary of this Supreme Court Supervisory Power, Petitioner Joel Diaz Hinirio is bringing this petition for a Writ of Prohibition to the Supreme Court, and invoking Rule 22-1 of the Supreme Court Rules, which in pertinent part states the following;

> "1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned, if an individual Justice has the authority to grant the relief sought."

Petitioner Joel Diaz Hinirio, respectfully invokes Rule 22-1 for the Supreme Court Rules to utilize the powers granted it to address two pressing issues. Firstly, to compel the Third Circuit Court of Appeals to render a ruling on his Direct Appeal which has been pending for over three years. Secondly, to appoint appellate counsel, since erstwhile counsel was incarcerated on a separate matter, during the pendency of Joel Diaz Hinirio's judicial proceedings. He further invokes this rule for the following reason;

(1) Joel Diaz Hinirio has no other adequate means to obtain relief.
(2) He is prepared to show a clear and indisputable right to the writ.
(3) The court must be satisfied that the writ is appropriate under the circumstances.

To underscore the abuse of discretion Joel Diaz Hinirio alleges, Petitioner Joel Diaz Hinirio is by no means giving up his appellate issues and conceding defeat, by raising what appears to be another peripheral but important issue, for which he will be remiss if he did not draw the attention of this Honorable Court to the District Court's failure to credit him with Sentencing Reduction, pursuant to Amendment 784 under 18 U.S.C. 3582(c)(2), especially in light of the Supreme Court recent ruling in Hughes v. United States (citations omitted).

Applying the analytical framework for sentence reduction under 18 U.S.C. 3582(c)(2) based on the Amendment 782 which lowered the base offense levels in the drug quantity table of U.S.S.G. Section 2D1.1(c) petitioner avers the denial of relief by the district court, constitutes among other reasons, "an imprimatur for a miscarriage of justice," for which the legal standards adopted by the Third Circuit are appropriate.

The 782 Amendment revises the guidelines, inter alia, of to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table of Section 2B1.1 (unlawful manufacturing, importing or trafficking, including possession with intent to commit these offenses); Attempt or conspiracy incorporate the statutory minimum for such offenses.

When Congress passed the anti-Drug Act in 1086, PUB 1, 99-570, the Commission responded and extrapolating upward and downward to set guidelines sentencing ranges for all drug quantities. The quantity thresholds into he drug quantity table were set so as to provide base offense levels, corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five year statutory minimum were assigned a base level (level 26) corresponding to a sentence of 63-78 months for a defendant with a Criminal History Category 1 (a guideline range that exceeds the five year statutory minimum for such offenses by at least three months).

Similarly, offenses that trigger a ten year minimum were assigned a base offense level (level 32) corresponding to sentences guideline range that exceeds ten year statutory minimum for such offenses by at least one month. The base levels for drug quantities above an d below the mandatory minimum threshold quantities. See 2B1.1 comment (backg'd) with a minimum base offense level of 6 and a maximum offense level of 38 for drug offenses.

This analysis is very critical in assessing the degree for the goals of the Amendment, not only by the district court, but the

wholesale adoption of it by the Court of Appeals. Critically, the amendment stresses how the applicable statutory mandatory minimum penalties are incorporated in the Drug Quantity table while maintaining consistency with such penalties. See 28 U.S.C. 994(b)(1)(providing that each sentencing range must be "consistent with all penalties of Title 18, United States Code"); See also 28 U.S.C. Section 994(a) providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any federal statute."

The Amendment also reflect the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times in response to congressional directives to provide greater emphasis on the defendant's conduct and role in the offense, rather than the drug quantity. The version of Section 2D1.1 in effect at the time of this amendment contains fourteen enhancements and three downward adjustments (including the "mitigating role cap" provided in Sub-Section (a)(5).

These numerous adjustments, both increasing and decreasing offense levels, based on specific conduct, reduce the need to rely on drug trafficking offenders like Joel Diaz Hinirio as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

WHETHER DENIAL OF APPOINTMENT OF COUNSEL TO PETITIONER BY THE SUPREME COURT IN THIS INSTANT CASE, WOULD BE TANTAMOUNT TO PETITIONER JOEL DIAZ HINIRIO, FACING INCARCERATION ON A CONVICTION THAT HAS NEVER BEEN SUBJECTED TO "THE CRUCIBLE OF MEANINGFUL ADVERSARIAL TESTING'

As a threshold matter, Joel Diaz Hinirio avers that an indigent party like him has a right to an attorney in a particular proceeding, given the fact that, his Direct Appeal has lingered in the Third Circuit Court of Appeals for well over three years, with no signs of resolution in the immediate future..Hinirio's averment of a right to counsel is anchored on three different sources of law;

(1) The Fifth Amendment Due Process Clause. Gagnon v. Scarpelli, 411 U.S. 778 (1973)(requiring counsel to be appointed whenever fundamental fairness demands it);

(2) The Sixth Amendment Right to Counsel which requires that counsel be available during all critical stages of a criminal prosecution, including during the first appeal as of right; and;

(3) 18 U.S.C. Section 3006A(c), the Criminal Justice Act, which requires that counsel be available at every stage of the proceedings from his initial appearance before a magistrate Judge through his appeal, including ancillary matters appropriate to the proceedings.

The right to appointed counsel in a federal Criminal proceeding has earlier been recognized in Johnson v. Zerbst, 304 U.S. 458 (1938). In Argersinger v. Hamlin, 407 U.S. 25 (1972), t he Court held that defense counsel must be appointed in a criminal prosecution, "whether classified as petty, misdemeanor, or felony." Id. at 37. In Alabama v., Shelton, 535 U.S. 654 (2002), the court held that if the trial court imposes a sentence of incarceration, but immediately suspends the sentence, the defendant is still entitled to appointed counsel. The court wrote;

> "Deprived of counsel when tried, convicted and sentenced, and unable to challenge the original judgment at a subsequent-probation revocation hearing, a defendant in Shelton's circumstances faces incarceration in a conviction that has never been subjected to "the crucible of meaningful adversarial testing"
>
> ...."

The Sixth Amendment does not countenance this result." 122 S.Ct. at 1772. The Eleventh Circuit later held that Shelton recognized a "new" right that was retroactively applicable on collateral review, thus triggering a new one-year statute of limitations to bring a habeas petition petition challenging a conviction. Howard v. United States, 374 F.3d 1068 (11th Cir. 2004).

The Sixth Amendment right to counsel attaches when a prosecution commences. that does not necessarily mean as soon as the defendant is arrested; it does not mean as late as the time of indictment and formal arraignment. Rather, the right attaches when the defendant is brought before the court for an initial appearance before a judicial officer, when the charges are announced and his liberty is subjected to restriction. Rothgery v. Gillespie County, Texas, 128 S.Ct. 2578 (2008).

The Constitutional right to counsel also includes the right the of counsel on appeal. Halbert v. Michigan, 125 S.Ct. 2582 (2005); Douglas v. California, 372 U.S. 353 (1963), though this right is limited to what have been characterized as "first level appeals," Ross v. Moffit, 417 U.S. 600 (1974). Halbert concluded that the right to counsel on appeal includes appeals following the entry of a guilty plea.

The Constitutional guarantee of counsel under the Sixth Amendment has been construed to include four rights; the right to counsel, the right to effective right of counsel, the right to a preparation period sufficient to ensure a minimal level of quality of counsel, and the right to be represented by counsel of one's own choice. United States v. McCutcheon, 86 F.3d 187 (11th Cir. 1996).

If the right to counsel of choice is violated __that is, if the trial court improperly prevents a defendant from being represented by his counsel of choice __this qualifies as "structural error" and is not subject to harmless error analysis. United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

CONCLUSION

WHEREFORE, Premises considered, Petitioner Joel Diaz Hinirio, respectfully moves the Associate Justice with Supervisory Control over the Third Circuit, to compel the Court of Appeals to grant his request for relief, by making a ruling on his Direct Appeal that has been pending for over three years, and for appellate counsel to be appointed, as erstwhile counsel was incarcerated, on a separate matter.

Date: May 17, 2019.

Respectfully Submitted,

Joel Diaz Hinirio

JOEL DIAZ HINIRIO
FED. REG. # 08513-094
FEDERAL CORRECTIONAL
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P.O. BOX 3000
ANTHONY, NM/TX 88021

OFFICE OF THE CLERK
UNITED STATES SUPREME COURT

IN Re Joel Diaz Hinirio
A Petitioner.

Appeal No:

CORRECTION OF DEFICIENCY PURSUANT TO THE CLERK OF THE SUPREME COURT'S LETTER DATED 20 TH JUNE, 2019.

Pursuant to the above referenced cause, Petitioner respectfully seeks leave of the Clerk of the Supreme Court to entertain the above referenced cause. The petition was returned for the following reasons:

> "The petition does not show the writ will be in aid of the Court's appellate jurisdiction, what exceptional circumstances warrant the exercise of the Court's discretionary powers, and why adequate relief cannot be obtained in any other form or from any other court. Rule 20.1"

The deficiencies highlighted above and incorporated in the Clerk's letter have been duly corrected, and conformed copies have been sent to all relevant parties, including the Solicitor General of the United States of America.

The changes are addressed hereunder;

(1) The sworn affidavit has been dated per the Clerk's instructions.

(2) The invocation of 28 U.S.C. 1651(a) will be in aid of the honorable Court's appellate jurisdiction, and why adequate relief cannot be obtained in any other form or from any other court. Rule 201 is also further discussed below.

DISCUSSION

Petitioner avers that the Supreme Court has original jurisdiction of a Writ of prohibition, pursuant to the All Writs Act 28 U.S.C. 1651. An extraordinary writ under 28 U.S.C. may be appropriate to prevent trial court and the Court of Appeals for the Fifth circuit from making discretionary decisions where the statute effectively removes form the realm discretion. In re Estelle (1975, CA5) 516 F.2d 480).