19-6391

ORIGINAL

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

..... ♦ .....

ROBERT CHIN,
Petitioner,
vs.

SUPERINTENDENT FAYETTE SCI *et al*
Respondent(s)

..... ♦ .....

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

..... ♦ .....

Robert Chin, JZ-5355
SCI Fayette
48 Overlook Drive
LaBelle, PA 15450

Question(s) Presented

1. Is the due process clause offended where a criminal defendant is found guilty of *conspiracy* to commit third degree murder, which is a homicide that occurs as the *unintended* consequence of a malicious act? Can one conspire to commit an unintentional act?

List of Parties

1. Superintendent of State Correctional Facility at Fayette.
2. Attorney General of Pennsylvania.

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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

- Third Circuit Court of Appeals decision in Chin v. Superintendent Fayette SCI et al, C.A. No. 19-1654 (3d Cir. 2019) (Ambro, Krause, and Porter), denying relief.
- Chin v. Capozza, 2018 U.S. Dist. LEXIS 211728 (E.D. December 17, 2018) (District Judge Wendy Beetlestone).
- Chin v. Capozza, 2018 U.S. Dist. LEXIS 180804 (E.D. October 17, 2019 (Magistrate Judge Marilyn Heffley).

JURISDICTION

The date of which the United States Court of Appeals decided my case was September 30, 2019. Chin v. Superintendent Fayette SCI et al, C.A. No. 19-1654 (3d Cir. 2019) (Ambro, Krause, and Porter).

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

Constitutional and Statutory Provisions Involved

Statement of the Case

Introduction:

Can one conspire to commit an unintentional act?

Logic dictates, and Due Process of Law demands that it is impossible for a person to *intend* to commit an *unintentional* act.

The essence of Third Degree Murder in Pennsylvania is a homicide that occurs as the unintended consequence of a malicious act. A conviction for conspiracy requires an intention to promote or facilitate a crime; in this case Third Degree Murder.

Petitioner asserts that his guilty plea was not given knowingly, intelligently, or voluntarily, where he pled guilty to *conspiracy* to commit *third degree murder,* a crime that did not even exist in the state of Pennsylvania at the time of his guilty plea.

A. Procedural History

On January 24, 2011, Petitioner entered a non-negotiated guilty plea to murder of the third degree, attempted murder, conspiracy, carrying a firearm without a license, carrying a firearm on public streets in Philadelphia, and possessing instruments of crime. N.T. 1/24/11, 41-42.

Sentencing was deferred until April 20, 2011, at which time Petitioner was sentenced to a cumulative

term of 30 to 60 years in prison. N.T. 4/20/11, 90-91. Petitioner did not file post-sentence motions, but instead on May 3, 2011, filed a *pro se* appeal with the Superior Court. Prior to the Pennsylvania Superior Court's decision, Petitioner filed a *pro se* PCRA petition on October 31, 2011, which was dismissed without prejudice by Judge Sarmina on February 2, 2012. On May 4, 2012, the Superior Court affirmed Petitioner's judgment of sentence and, on February 28, 2013, this Court denied Petitioner's petition for Allowance of Appeal.

On October 23, 2013, Petitioner filed a timely *pro se* PCRA petition. Counsel was appointed, and subsequently filed a Finely letter and motion to withdrawal as counsel on June 16, 2016. On July 5, 2016, the PCRA Court issued a Notice of Intention to Dismiss pursuant to Pa.R.Crim.P. 907.

After conducting a hearing pursuant to Commonwealth v. Grazier, 713 A.3d 81 (Pa. 1998), Petitioner elected to be represented by counsel. On November 18, 2016, the PCRA court dismissed the petition and Petitioner filed a timely Notice of Appeal. Petitioner then lodged an appeal with the Pennsylvania Superior Court and on February 16, 2018 that court denied relief. See Commonwealth v. Chin, No. 3849 EDA 2016.

Petitioner filed a timely petition for Writ of Habeas Corpus. On October 17, 2018, Magistrate Judge Marilyn Heffley's issued a Report and

Recommendations proposing that the petition for Writ of Habeas Corpus be denied without a hearing. Petitioner filed timely objections.

On March 14, 2019, while conducting legal research on the LEXIS NEXIS database located in the prison's law library, Petitioner was made aware of District Judge Wendy Beetlestone's denial of habeas corpus relief. Chin v. Capozza, 2018 U.S. Dist. LEXIS 211728 (E.D. December 17, 2018). This is the first time Petitioner was made aware of Judge Beetlestone's denial. Petitioner immediately filed a Notice of Appeal invoking Rule 4(a)(5)(A)(ii) of the Federal Rules of Petitioner Procedure which states in relevant parts that "The district court may extend the time to file a notice of appeal: .. [r]egardless of whether its motion is filed before or during the 30 days after the time prescribed by the this Rule 4(a) expires, that party shows excusable neglect or good cause." Petitioner then requested the Third Circuit Court of Appeal to grant him Certificate of Appealability, which was denied on September 30, 2019. Chin v. Superintendent Fayette SCI et al, C.A. No. 19-1654 (3d Cir. 2019) (Ambro, Krause, and Porter).

B. Factual History:

Petitioner pled guilty to attempted murder relating to a shooting involving Vonthean Vonn and

to conspiracy to commit third degree murder relating Nathaniel Lopez.

C. Argument

Petitioner was denied due process of law and effective assistance of counsel under the United States and Pennsylvania Constitutions, where he pled guilty to conspiracy to commit third degree murder, a crime which did not exist under the laws of Pennsylvania at the time of his plea.

The essence of Third Degree Murder is a homicide that occurs as the unintended consequence of a malicious act. A conviction for conspiracy requires an *intention* to promote or facilitate a crime; in this case Third Degree Murder. Logic dictates, and Due Process of Law demands that it is impossible for a person to intend to commit an unintentional act.

On collateral review Petitioner raised a claim that he was denied due process of law and effective assistance of counsel under the United States and Pennsylvania Constitutions, where his attorney advised him to plead guilty to conspiracy to commit Third Degree Murder, a crime which did not exist under the laws of Pennsylvania at the time of his guilty plea.

Although Petitioner raised this claim in his initial PCRA petition and appealed the negative ruling

to the Pennsylvania Superior Court, the Superior Court declined to adjudicate upon it. Instead the Superior Court focused their inquiry on Petitioner's claim that his sentence violated section 903(c) of the Crimes Code. (See p. 7 of Superior Slip Opinion.) Thus, Petitioner's claim is entitled to *de novo* review.

Petitioner was entitled to *de novo* review of his ineffectiveness claim in the absence of the trial or Superior Court's adjudication on the merits. Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir. 2012) cert. denied. 133 S.Ct. 669, 184 L.Ed, 2d 479 (U.S. 2012) (citing Bond v. Beard, 539 F.3d 256, 263 (3d. Cir. 2008)). Where the state court has not adjudicated a claim on the merits, §2254(d) does not apply and a federal habeas court must review pure legal questions and mixed questions of law and fact *de novo*. Simmons v. Beard, 590 F.3d 223, 231 (3d Cir. 2009) (citing Appel v. Horn, 250 F.3d 2013, 210 93d Cir. 2001)). A state court has adjudicated a claim on the merits, where it is "a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural or other, ground." Rompilla v. Horn, 355 F.3d 233, 247 93d Cir. 2004), rev'd on other grounds sum nominee Rompilla v. Beard, 545 U.S. 374 (2005) (quoting Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001)).

A criminal defendant has the right to effective counsel during a plea process. Iowa v. Tovar, 541 U.S. 77, 81 (U.S. 2004). Here, Petitioner's plea counsel did not explain to Petitioner that the crime of *conspiracy* to commit third degree murder was not a crime with which Petitioner could be convicted of.

The Pennsylvania Superior Court has recognized that it is impossible for a person to *intend* to commit an *unintentional* act. Commonwealth v. Clinger, 833 A2d 792, 796 (Pa. Super. 2003) citing Commonwealth v. Spells, 612 A2d 458, 461 n.5 (1992) ("an attempt to commit second or third degree murder would seem to require proof that a defendant *intended to perpetrate an unintended killing* – which is logically impossible.")

At the time of Petitioner's 2011 guilty plea, Clinger, *supra,* was the controlling precedent of the Commonwealth of Pennsylvania holding that it is impossible under the law to commit the crime of conspiracy to commit murder in the third degree.

Criminal punishment for a crime that is logically and legally impossible to commit cannot be regarded as fair and in line with the United States Constitution's due process clause. The commonsensical theory that a defendant cannot be convicted of a crime which does not exist is so embedded in America's notion of fairness that few controversies surrounding the subject have even

reached the courts. However, the cases that have reached the courts clearly show that Petitioner is entitled to relief. In Commonwealth v. Bangs, 393 A.2d 720 (1978), the defendant was charged with five counts of statutory rape of a fourteen year old victim. While the criminal action against him was pending, the statutory definition of statutory rape was amended, reducing the age of consent from sixteen to fourteen. The Pennsylvania Superior Court dismissed the charges against the defendant since the legislature determined that the conduct with which the defendant was charged was no longer criminal.

Additionally, as a point of persuasion Petitioner draws this Court's attention to a decision from the United States Court of Appeals for the Fifth Circuit. In Adams v. Murphy, 653 F.2d 224 (CA5 (Fla. 1981), the Court found that Florida Law does not recognize attempted perjury as a crime. In that case, even though defense counsel invited the error by requesting that the jury be charged with attempted perjury, the Court found that habeas relief was warranted. "*Nowhere in this country can a man be condemned for a non-existent crime.*"

It was error for the trial court and counsel's infectiveness which led to Petitioner pleading guilty to *conspiracy* to commit Third Degree Murder, a crime not recognized under Pennsylvania law at the time of his guilty plea.

In 2013, the Pennsylvania Supreme Court in Commonwealth v. Fisher, 80 A.3d 1186 (Pa. 2013) (Chief Justice Saylor and Todd dissenting) found that a defendant could be convicted of conspiracy to commit third degree murder. However, this does not negate the fact that at the time of Petitioner's guilty plea the controlling law was that a defendant could not be convicted of conspiracy to commit third degree murder. Tellingly, the attorney who argued that Fisher could not be convicted of conspiracy to commit third degree murder was Lee Mandell—the same attorney who represented Petitioner during his plea process.

To the extent that this Court finds that his claim was not properly presented to the State Court, then Petitioner is still entitled to review via the mandates of Martinez v. Ryan, 132 S.Ct 1309 (U.S. 2012).

Magistrate Heffley asserted that Petitioner's issue was not appealed to the Pennsylvania Superior Court, but only raised in the initial stage of his collateral review proceeding, thus his claim is procedurally defaulted. The Magistrate is wrong.

This claim was raised to the Pennsylvania Superior Court, but that court simply refused to abide by their obligation to construe *pro se* pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520-21 (U.S. 1976). The policy of liberally construing *pro se* submissions is "driven by the understanding that

implicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." Higgs v. AG of the United States, 655 F.3d 333, 339. (3d. Cir. 2011).

Here, Petitioner's pleading to the Superior Court, while inarticulate, did fairly present the argument that his plea was unknowing, involuntary, and unintelligent, where he pled guilty to *conspiracy* to commit third degree, a crime which did not exist in Pennsylvania at the time of his guilty. Petitioner even attached the 2010 Pennsylvania Superior Court decision in Musante v. Coleman, No. 300 WDA 2009 (Pa. Super. 2010), to his pleading for the proposition that one cannot be found guilty of conspiring to commit third degree murder.

The Magistrate Judge also found Petitioner's claim to be procedurally defaulted. However, even if procedurally defaulted, Petitioner can establish cause and prejudice to excuse his default. A claim that was not raised in the state court is typically considered procedurally defaulted. In order to overcome a procedural default a habeas Petitioner must establish cause and prejudice. The United States Supreme Court's decision in Martinez v. Ryan, 566 U.S. 1, (U.S .2013), permits a Petitioner to establish "cause" if the Petitioner either lacked habeas counsel or, under the standard established in Strickland v. Washington, 466

U.S. 688 (U.S. 1984), state habeas counsel was ineffective. Martinez, 132 S.Ct. at 1318. "Prejudice" is established if "the underlying ineffective-assistance-of-trial-counsel is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id*, at 1318-19. Also See Pizzuto v. Ramirez, 783 F.3d 1171, 1179 (9th Cir. 2015).

A four prong test has been established to set the parameters for Martinez's cause and prejudice analysis. They are as follows: (1) the underlying claim of ineffective assistance of trial must be a "substantial" claim; (2) the "cause" for the procedural default consists of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" collateral review proceeding where the IATC claim could have been brought; and (4) state law requires that an IATC claim be raised in an initial-review collateral proceeding, or by "design and operation" such claims must be raised that way, rather than on direct appeal.

Magistrate Heffley claimed that Petitioner cannot establish cause or prejudice for the default because the problem initiated from the claim not being presented to the Pennsylvania Superior Court rather than the initial review stages of Petitioner's collateral review proceedings. What the Report and Recommendation overlooked was that Petitioner's appointed counsel filed a Finely "no-merit" letter.

Therefore, it was Counsel's failure to amend Petitioner's PCRA petition with this claim that caused the default.

Martinez prejudice is derived from the fact that this is a substantial claim. A criminal defendant has the right to effective counsel during a plea process. Iowa v. Tovar, 541 U.S. 77, 81 (U.S. 2004). Here, Petitioner's plea counsel did not explain to Petitioner that the crime of *conspiracy* to commit third degree murder was not a crime with which Petitioner could be convicted of.

As previously explained, the Pennsylvania Superior Court has recognized that it is impossible for a person to *intend* to commit an *unintentional* act. Commonwealth v. Clinger, 833 A2d 792, 796 (Pa.Super.2003) citing Commonwealth v. Spells, 612 A2d 458, 461 n.5 (1992) ("an attempt to commit second or third degree murder would seem to require proof that a defendant *intended to perpetrate an unintended killing* – which is logically impossible."). At the time of Petitioner's 2011 guilty plea, Clinger, *supra,* was the controlling precedent of the Commonwealth holding that it is impossible under the law to commit the crime of conspiracy to commit murder in the third degree.

Counsel's actions or inactions must be evaluated based on the law as it existed in 2011, *not* 2013. The Supreme Court of the United States has been clear on this point: "An attorney's ignorance of a

point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 134 S.Ct 1081, 1089 (U.S. 2014).

Lastly, the Report and Recommendation claimed that Petitioner is not entitled to relief since he did not plead guilty to conspiracy to commit third degree murder. This is a misinterpretation of the facts. The facts are clear: Petitioner pled guilty to attempting to murder Vonthean Vonn by shooting a firearm at him. Petitioner's co-defendant, Chantha Tok, pled guilty to shooting and murdering Nathaniel Lopez. Petitioner pled guilty to *conspiring* with his co-defendant to murder Nathaniel Lopez—Petitioner did not pled guilty to actually shooting at Mr. Lopez.

REASONS FOR GRANTING APPEAL

Can one conspire to commit an unintentional act?

This Court should grant this appeal in order to determine whether the due process clause is offended where a criminal defendant is found guilty of *conspiracy* to commit third degree murder, which is a homicide that occurs as the unintended consequence of a malicious act.

Conclusion

The overwhelming majority of criminal cases in our system are resolved via plea bargains.[1] In order for a system to be functional, which is largely compromised of plea bargains, it is of paramount importance that courts ensure the pleas are done in a fair and comprehensible manner. This was not done here.

Petitioner has made a substantial showing of a denial of his constitutional right to effective assistance of counsel and due process of law which resulted in a fundamental miscarriage of justice. He has demonstrated that the issues raised are debatable among jurist; that a court could resolve the issue differently; and lastly and surely, that the question deserves further proceedings. 28 U.S.C. § 2253 (C). Accordingly, the Third Circuit Court of Appeals should have granted certificate of appealability.

Petitioner requests that this Court grant him certiorari.

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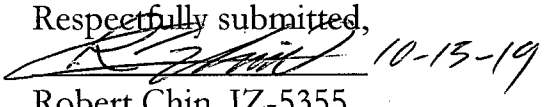
[1] Nearly 95% of felony cases in the federal and state courts are resolved by guilty pleas. See Class v. United States, 138 S.Ct. 798 (U.S. 2018)(Alito Dissenting).

Respectfully submitted,



10-15-19

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