19-7253

No. ____________

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FABRIZIO DEFRANCISCI,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

Supreme Court, U.S.
FILED
DEC 12 2019
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

WITH APPENDICES

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE DISTRICT COURT AND APPEALS COURT WRONG TO DENY THE RULE 60(b) MOTION AND CERTIFICATE OF APPEALABILITY, REPSECTIVELY, WHEN THIS COURT HAS SPECIFICALLY HELD THAT THE EMPLOYMENT OF AN INCORRECTLY CALCULATED USSG RANGE IS A SUBSTANTIVE VIOLATION OF A CRIMINAL DEFENDANT's DUE PROCESS?

II. IN THE ALTERNATIVE, WAS THE APPEALS COURT WRONG TO DENY A CERTIFICATE OR APPEALABLITY BEFORE HAVING RULED ON PETITIONER DEFRANCISCI's PROPERLY FILED MOTION FOR LEAVE TO FILE SUPLEMENT -- WITH SUPPLEMENT FILED CONTEMPORANEOUSLY THEREWITH -- PRIOR TO ENTERING A FINAL ORDER?

LIST OF PARTIES

All of the parties to this Action are listed in the Caption of the case at the top of this Petition.

CORPORATE DISCLOSURE

None of the parties to this Action are a coporation or related to any coporation.

RELATED CASES

There are no cases related to this Action at this time.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES:

UNITED STATES SENTENCING GUIDELINES:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

And now comes Fabrizio Defrancisci, Petitioner pro se, and hereby respectfully submits his Petition for Writ of Certiorari and prays that it issue in order to review the judgement below.

OPINIONS BELOW

The Opinion of the Second Circuit Court of Appeals appears at Appendix B to this Petition and is unpublished.

The Opinion of the Eastern District of New York District Court, Edward R. Korman, District Judge, Appears at Appendix C.

JURISDICTION

The date on which the Second Circuit decided my case was June 26, 2019. See: Appendix B.

A timely Petition for Rehearing was denied by the Second Circuit Court of Appeals on September, 13, 2019 and a copy of the order denying rehearing apepars at Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> 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 defence.

Sixth Amendment to the United States Constitution.

STATEMENT OF CASE

Petitioner was initially sentenced to 600 months pursuant to a guilty plea in the Eastern District of New York District Court (EDNY) for vilation(s) of the Racketeering Influenced and Corrupt Organization (RICO) statutes. See: EDNY #99-cr-520.

Subsequent to that conviction and resulting sentence, and denial of a direct appeal, Petitioner Defrancisci filed a counseled Motion to Vacate, Set Aside or Correct his Sentence pursuant to 28 U.S.C. § 2255. See: EDNY #02-cv-4822.

While that Motion was pending, Petitioner's co-defendant Was Granted a Vacation of his conviction and received a re-sentencing to a lessor sentence than he had initially been awarded. So Petitioner's then counsel filed to supplement the 2255 Motion to raise the same issue that was the basis of the co-defendant's Moition and basis of the new sentence.

Petitioner was granted the supplement and ultimately was also granted releif on his 2255 Motion and received a reduced sentence. While the District Judge, Edward R. Korman (Judge Korman), did not specifically enter an order Granting the 2255 and vacating the sentence, he did schedule a re-sentencing based on the United States' submission of a new plea agreement. See: Appendix C @ 4, EDNY #06-cv-3743.

Of import to this proceeding is that the only issue raised in the first 2255 Motion at EDNY #4822, was that trial counsel was ineffeictive for not having corrected errors in the presentence report as prepared by the United States Probation Office (USPO) and employed by Judge Korman at (both) the initial and subsequent guilty pleas and sentencings. To wit, while post-conviction was successful in securing the reduction of Petitioner's sentence, he abandoned the reason for having filed the 2255.

While Petitioner does not have a complete right to effective assistance on a post-conviction motion, he does nonetheless have a Consitutional Right to due process to have complete and accurate information used in his guilty plea negoatiations and resulting sentencing proceedings. Which is based in the initial 2255 Claim that the USPO assessed a criminal history point for a "listed offense" that is not to be counted under the United States Sentencing Guidelines (USSG) §4A1.1(c).

This is the reason for having filed the first 2255, and actually the Second one that this proceeding stems from in the form of a Rule 60(b) proceeding. And while Judge Korman did not specifically reference the provisions of the presentence report (PSR), this Court has repeatedly held that the sentencing court must be afforded a complete and correct PSR in order to make an informed decision as to the sentence imposed. And there is nothing in this Court precedent that says when a sentencing court is sentencing pursuant to a guilty plea that there is any less need for a correct PSR.

In fact, when a sentence is to be imposed pursuant to a guilty plea, a correct PSR is all the more relevant because there are many less proceedings with less of a Record having been created; therefore the judge would have a lessor knowledge of the case and defendant before the court. It is beyond peradventure that Judge Korman read the PSR at the first sentence -- and most probably did so before accepting the second plea and resentencing

Petitioner Defrancisci within that new range as agreed to.

Moreover, at the second sentencing Petitioner raised at the allocution stage the issue of the incorrect PSR; to which the Judge Korman resonded "Well, I don't know what to do with that but since we have an agreed upon guidelines range -- -- I assume that we can proceed as we did before." See: Appendix D. The parties proceeded as such, even though the ineffective claim was the original cause of action vis incorrect CHC.

Petitioner later filed a Second 2255 Motion trying to correct the PSR and withdraw his plea to enter negotiations with the United States with a correeect sentencing range to begin with. See: EDNY #06-3743. The Second 2255 was denied and Petitioner did not appeal to this Court; but later moved to Reconsider the Judgment pursuant to Rule 60(b) and this Court's Holding in Molina-Martinez v. United States, 136 S.Ct. 1338 (2016)(holding that the employment of an incorrectly calculated PSR USSG sentencing range is an err whcih survives the plain error review).

Petitioner now seeks this Court's review of whether or not the existence of an incorrect PSR criminal history category survives the substantial rights plain error review in order to Grant a post-conviction motion and/or reconsideration to correct it and allow the parties to revisit their negotiation of a proper plea agreement sentencing range. This error so infects this case as it has been perpuated since the first plea negotiations and that incorrect PSR was even referenced in the first plea agreement as signed by the parties. And incorporated by inference in the second plea agreement, even though the proceedings leading to that plea was originally directed at its correction.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT WAS WRONG TO DENY THE RULE 60(b) MOTION AS PETITIONER's DUE PROCESS IS BEING VIOLATED, AND THE SECOND CIRCUIT WAS WRONG TO DENY AN APPEAL OF THE DISCTRICT COURT's ERROR.

As a general matter, this Court has repeatedly determined that while the granting of a COA should not be a matter of course, it has nonetheless found on numerous occasion that when the likelihood of a constitutional violation could have occurred, that the petitioner should be "encouraged" to proceed. See generally: Miller-El v. Cockrell, 537 U.S. 322(2003).

Petitioner notes that the Miller-El Court was faced with a fairly blantant issue of an error that was memoralized in the exhibits, much like the present case. The Record of this Cause clearly contains a PSR that is incorrectly calculated and also was once sought to be corrected.

At this point, without the benefit of the complete briefing in order to reach the merits of a claim, the Court is presnted with an issue that is fresh in recent case law. And the fact that the incorrect criminal history category (CHC) is part of the record is sufficient to warrant a review. As the issue of the incorrect CHC has not been disputed by the United States, only argued that since it was not a direct factor in the sentencing that the Court was "bound" by the plea agreement. [Petitioner would not waste the Court's precious resources to entertain that prospect, as the sentencing courts are never bound by plea agreements.

Which is all the more releavnt as the claim that resulted in the resentencing of the co-defedant and ultimately Petitioner -- was one that the district court had been involved in the initial plea negotiations.]

In sum, Judge Korman found in the second 2255 and in denying the reconsideraton motion under Rule 60(b), that Petitioner was sentenced pursuant to a negotiated range and therefore the PSR error was not a substantive error that violated Petitioner's rights and therefore did not warrant granting the 2255 or the reconsideration. But since it was referenced in the first plea agreement, the PSR is relevant and is understood for all parties to be the starting point of plea negotiations. So Petitioner's substantive rights are being violated not only via the incorrect advice to the sentencing court, but also to the attorney in order to effectively negotiate a plea for his client. See generally: Sixth Amendment to the United States Constitution.

Of even more interest is the fact that the Molina-Martinez court determined that even sans an objection having been raised to preserve the incorrect PSR, the err was still cognizable in the appellate court. This plain error survival shows how central to the sentencing process that the PSR is and that it can be raised at any time.

So, first, Judge Korman was necessitated to reach the merits of the CHC calculation and whether or not the claim was correct; then enter an order either outlining why the claim was without merit, or to enter an order to reschedule the sentencing of Petitioner in order for the parties to review their positions with respect to the correct range with a corrected CHC.

Petitioner would contend that when Judge Korman was faced with the Second Circuit case of United States v. Morales, 239 F.3d 113 (2d Cir. 2000) (holding that the exact same statute from New York State Penal Code was similar to the listed crimes under USSG §4A; that it was not to be counted for criminal history points); he was forced to grant the 2255 and enter an appropriate order. There is no way that he was not bound by Circuit precedent. See also: Peugh v. United States, 569 U.S. 530 (2013) and Freeman v. United States, 564 U.S. 522 (2011) (both holding that the USSG and due process mandate that a correct Guideline calculation be done for sentencing).

So while the incorrect PSR violated Petitioner's substantive rights, his right to effective assistance of counsel was also violated. At all critical stages to the criminal process Defrancisci was entitled to effective assistance of counsel, and plea negotiations are a critical stage. See generally: Moran v. Burbine, 475 U.S. 412 (1986). And the Second Circuit has long recognized this and held that a criminal defendant must be properly and adequately advised in relation to plea advice. See: Boria v. Keane, 99 F.3d 492 (1996) and also United States v. Day, 969 F.2d 39 (3d Cir. 1992).

But of even more relvance is the fact that Judge Korman's reference to the agreed to sentencing range does nothing to reduce the relevance of the arguments. Ever since this Court's holding in the seminal case of Booker making the USSG advisory, the Second Circuit has recognized that the USSG range is always a "frame of reference" when imposing sentences, even with an agreement, as the court nonetheless must determine if the agreed upon range is an appropriate setnence. To wit, whether it is "sufficient, but not greater than necessary" for the charge. See: United States v. Rubenstein, 403 F.3d 93 (2d Cir. 2005).

In fact, Judge Korman was worng from the start when he advised Petitoiner Defrancisci that he did not know what to do with the incorrect criminal history category. With the incorrect criminal history category Judge Korman was unable to determine whether the sentencing range in the plea agreement was appropriate, as the USSG range would change by years. [An issue that will require more space to present and better set out in the Briefing when the Certiorari is Granted.]

II. THE SECOND CIRCUIT WAS WRONG TO RULE ON THE PENDING CERTIFICATE OF APPEALABILITY WHEN THERE WAS A TIMELY MOTION FOR SUPPLEMENT THAT WAS NOT DISPOSED OF.

This Court has no need of extensive briefing on the fact that the court below was mandated to resolve all pending motions prior to, or at the same time, as it disposed of the COA. Defrancisci had filed for, and filed contemporaneously therewith, a Supplemental Brief to the COA, prior to the decision by the Panel to deny the Certificate of Appealability.

Petitioner Defrancisci will be glad to brief this subject in a brief, but deems that the central question of the propriety of a case being "ripe" before making a ruling is one that has been long deliniated. To wit, due process and finality of the judicial process, as well as the Rules as adopted by this Court, all clearly call for all properly filed pleadings to be disposed of before or in any final order of the court.

In this case, the Second Circuit had a pending pleading that was directed at the scope of th ereview that was being sought and therefore needed to be resolved prior to the disposition of the COA. In fact, the Panel ruled on the COA before the time for the opposing party, United States, time to file its responsive pleading had run. And while this course would undoubtedly be acceptable to the United States, as they were mainly interested in the COA being denied; it further supports the need to have ruled on the Supplement as it was an unopposed motion at the time of the COA ruling and therefore normally would be grnated simply as a matter of course -- as unopposed motions, by court rules are understood to be of the nature that would be granted per se.

Wherewithal, this Court understands the need for the public reputation of the lower courts to be maintained, which is why there is a set of rules that are in place to govern the proceedings in them. And at this tim rules have not been honored and have clearly and unequivocally been violated, as well as Petitioner Defrancisci's due process. Which he was diligently trying to protect and exercise.

Petitioner would set out the relevant case law in his brief, as this matter is better handled if the Court summarily remands or GVR's this case in order to have the Supplement ruled on so that those issues can be porperly raised to this Court.

CONCLUSION

Petitioner Defrancisci has been trying to get the error of his incorrect criminal history category corrected now for nearly two decades. But all the other parties refuse to acknowledge that it is wrong and that it should be corrected. In fact, no party has to date specifically stated, found or held that the claim is wihtout merit: only that "I don't know what to do about that." Hardly a legal determination.

Moreover, no party has held, found or stated that counsel is/was not ineffective for not having corrected the error. In fact, no ruling has been made on that claim in and of itself. Even though Petitioner has repeatedly brought the claim to the district court. Though Judge Korman has admitted that should he resentence again, he would need an updated presentence reoprt and to hear from Petitioner in person. See: Appendix C @ p.53.

All of the proceedings that occured with the incorrect PSR were either under the mandatory USSG regime, all the more necessary to have a correct PSR, or since Booker was passed. For which this Court has spent roughly a decade and a half reiterating that the USSG must be effectively and fully complied with for any sentencing to be correct. Which shows why Molina-Martinez was necessary, as the lower courts have repeatedly downplayed the importance of the USSG implementation and the seriousness of not faithfully following them.

Finally, this Court's rules and those of the Second Circuit have been violated as the case is still not fully adjudicated as there were motions filed in that Court that have not been resolved. So while Petitioner is timely filing a certiorari petitoin with this Court, the cause is still pending in the court below.

WHEREFORE PETITIONER PRAYS THAT THIS HONORABLE COURT WILL Grant him a Writ of Certiorari to review the fact of an incorrect crimnal history in his presentence report, as adopted by the sentencing court.

OR, IN THE ALTERNATIVE, to review the fact that this case was not final at the time that the Second Circuit entered the order denying the certificate of appealability.

DECLARATION

I, Fabrizio Defrancisci, hereby declare and affirm under the penalty of perjury pursuant to 28 U.S.C. §1746(2), that the foregoing is true and correct to the best of my knowledge and recollection, this 12th day of December, 2019.

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