NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2019

ARTURO DELACRUZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Because Petitioner did not explicitly admit to facts that would support an "otherwise used" weapon enhancement, as opposed to a "brandishing" weapon enhancement, in connection with the group one robbery, was trial counsel ineffective for failing to negotiate a five-level, rather than a six-level increase for Group One?

PARTIES TO THE PROCEEDINGS

The Petitioner is:

Arturo Delacruz

The Respondent is:

United States of America

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On November 21, 2019, the United States Court of Appeals for the Third Circuit affirmed the District Court's denial of Petitioner's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. App. 1-6.

STATEMENT OF JURISDICTION

Arturo Delacruz seeks review of the November 21, 2019 Order of the United States Court of Appeals for the Third Circuit. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 of the United States Constitution, which provides:

> 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 where 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 defense.

Section 2255 of Title 28 of the United States code, reads, in relevant part:

> (a)A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may

move the court which imposed the sentence to vacate, set aside or correct the sentence.

U.S.S.G. § 2B3.1(b)(2) provides:

(A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.

STATEMENT OF THE CASE

On May 18, 2014, a criminal complaint was filed in the United States District Court for the District of New Jersey under Magistrate Number 14-4042. This complaint charged Petitioner, Arturo Delacruz, with conspiracy to commit Hobbs Act robberies in violation of Title 18, United States Code, Section 1951(a).

On November 12, 2014, having waived Indictment, and pursuant to a written plea agreement between the parties, Petitioner appeared before the District Court and entered a plea of guilty to a one count Information which charged him with conspiracy to commit Hobbs Act robberies in violation of 18 U.S.C. § 1951(a). This offense consisted of three predicate robberies, which the Presentence Investigation Report referred to as Groups One, Two and Three. See U.S.S.G. §§ 3D1.2(a)-(d).

The first robbery took place at the Sabor Latino Bar on December 10, 2012 (Group One), the second robbery was at the Rapido Flores Multiservices Agency on March 15, 2013 (Group Two), and the third robbery was at the Gulf Service Station on March 25, 2013 (Group Three).

On March 30, 2015, Petitioner was sentenced on this conviction to a term of imprisonment for 108 months, and upon his release from prison, to be placed on supervised release for three years.

On April 11, 2016, Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 which, pursuant to the District Court's Memorandum and Order dated April 18, 2016, was administratively terminated because Petitioner did not use the correct form. Thereafter, and in accordance with the District Court's Order, Petitioner re-submitted the application using the appropriate form and the case was reopened.

In this application, Petitioner contended that he was denied the effective assistance of trial counsel because his attorney failed to challenge various sentencing enhancements for all three Groups.

By Order dated July 21, 2017, the District Court denied the Petitioner's motion for the reasons set forth in an accompanying Memorandum Opinion. The District Court also ordered that a certificate of appealability shall not issue.

On or about August 17, 2017, Petitioner filed a Notice of Appeal and a request for a certificate of appealability with the Court of Appeals. Petitioner's request for a certificate of appealability was thereafter granted by the Court of Appeals as to the following issue:

> Because it appears that Delacruz did not explicitly admit to facts that would support an "otherwise used" weapon enhancement (as opposed to a "brandishing" weapon enhancement) in connection with the Group One robbery, Delacruz's application for a certificate of appealability ("COA") is granted on the following issue: whether his trial attorney was ineffective for failing to negotiate for a five-level, rather than six-level increase for Group One. See U.S.S.G. § 2B3.1(b)(2)(B) & (C); United States v. Johnson, 199 F.3d 123, 126-27 (3d Cir. 1999)(general pointing or waving about a weapon is "brandishing"; pointing at specific victim or group is "otherwise using" it).

Petitioner's request for a certificate of appealability was denied as to the remaining claims.

On November 21, 2019, the United States Court of Appeals for the Third Circuit affirmed the District Court's denial of Petitioner's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. App. 1-6.

REASONS FOR GRANTING THE WRIT

BECAUSE PETITIONER DID NOT EXPLICITLY ADMIT TO FACTS THAT WOULD SUPPORT AN "OTHERWISE USED" WEAPON ENHANCEMENT, AS OPPOSED TO A "BRANDISHING" WEAPON ENHANCEMENT, IN CONNECTION WITH THE GROUP ONE ROBBERY, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING NEGOTIATE A FIVE-LEVEL, RATHER THAN A SIX-LEVEL INCREASE FOR GROUP ONE

A basic tenet of the system of justice in the United States is that every person being tried for criminal charges is entitled to the assistance of counsel. U.S. Const. Amend. VI. The right to counsel is the right to effective assistance of counsel, and counsel can deprive a defendant of that right by failing to render adequate legal assistance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). It is beyond dispute that the Sixth Amendment not only provides defendants in criminal proceedings with the right to assistance of counsel, but also guarantees that such assistance be effective. *Culyer v. Sullivan*, 446 U.S. 335, 344 (1980); *United States v. Swinehart*, 617 F.2d 336, 340 (3rd Cir. 1980).

In some instances, counsel has acted in a manner, either by choice or by virtue of the State's or court's actions, so contrary to the interests of his or her client that the courts will judge the performance constitutionally invalid without looking further to the consequences of counsel's actions. More often, however,

counsel's failing will be somewhat less blatant and, while still deficient, not present quite so clear a picture as to the constitutional adequacy of his or her performance.

Therefore, this Court has developed a test for determining whether an attorney has provided effective assistance to his or her client in cases where that attorney has not acted in a way so egregious as to allow the court to make a *per se* finding that he or she has rendered ineffective assistance. *Strickland v. Washington*, 466 U.S. 668 (1984); see also *United States v. Cronic*, 466 U.S. 648 (1984).

In such cases, a claim for ineffective assistance of counsel is evaluated under the two prong standard set forth in *Strickland.* In order to establish a claim of ineffective assistance of counsel, Mr. Delacruz must show (1) that counsel's performance was deficient and (2) that the deficient performance was prejudicial. *Strickland*, U.S. at 687.

The first prong requires Petitioner to show that counsel made errors "so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment." *Id.* This showing can be made by demonstrating that the attorney's performance was unreasonable under prevailing norms. *United States v. Day*, 969

F.2d 39, 42 (3d Cir. 1993); see also *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001).

To establish prejudice under the second prong, appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Mannino*, 212 F.3d 835, 840 (3d Cir. 2000).

To satisfy the deficiency prong of the analysis, the defendant must point to specific errors made by his trial attorney which were unreasonable under prevailing professional norms. *Cronic*, U.S. at 666.

A defendant seeking to vacate his sentence must satisfy both prongs of the *Strickland* test. *Buehl, v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999), *cert. denied,* 527 U.S. 1050 (1999).

When defense counsel fails to object to an improper sentence enhancement under the Guidelines, counsel has rendered ineffective assistance and the questions then becomes "whether defendant suffered prejudice by reason of this failure." *Jansen v. United States*, 369 F.3d 237, 244 (3d Cir. 2004).

With regard to the case at bar, because Mr. Delacruz did not explicitly admit to facts that would support an "otherwise used" weapon enhancement, as opposed to a "brandishing" weapon enhancement, in connection with the Group One

robbery, it is submitted that trial counsel was ineffective for failing to negotiate for a five-level, rather than a six-level increase, for that Group.

U.S.S.G. § 2B3.1(b)(2) provides:

> (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; **(C) if a firearm was brandished or possessed, increase by 5 levels**; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels. [emphasis added]

U.S.S.G. § 2B3.1(b)(2).

In this case, Petitioner maintains that the application of the "otherwise used" firearm enhancement was not warranted. Instead, Petitioner contends that the facts "show that the weapons were brandished." (A85-A86) See *United States v. Johnson*, 199 F.3d 123, 127 (3d Cir. 1999).

In this regard, it should be noted that during the plea, the only questions posed by the Assistant United States Attorney concerning the use of a weapon was as follows:

Q: While in the vehicle and during the commission of the robbery, did you and Cruz each **possess** and **brandish** firearms?

A: Yes. [emphasis added]

The terms "brandished" and "otherwise used" are defined in the commentary to U.S.S.G. §1B1.1:

> (C) "Brandished" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.
>
> (J) "Otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying or possessing a firearm or other dangerous weapon.

U.S.S.G. § 1B1.1, commentary application note 1.

The Third Circuit has considered the question of whether a firearm was "otherwise used" during a robbery, or merely "brandished." The Court has stated that a firearm is "brandished" when it is waved about in a generally menacing manner during a robbery. See *United States v. Johnson*, 931 F.2d 238, 240-41 (3d Cir. 1991). When, however, that firearm is leveled at the head of a victim, and especially when this act is accompanied by explicit verbal threats, the conduct can be properly classified as "otherwise used." *United States v. Johnson,* 199 F.3d

123, 127 (3d Cir. 1999); see also *United States v. Johnson*, 931 F.2d 238, 240-41 (3d Cir. 1991).

In support of the "otherwise used" firearm enhancement, the facts presented in the Presentence Investigation Report reflect that "[u]pon entering the bar, both Matias Cruz and Delacruz brandished firearms and pointed the firearms at both employees and patrons of the bar. Petitioner maintains that this was insufficient to support the "otherwise used" level-six enhancement.

Finally, with regard to the Robbery of the Sabor Latina Bar (Group One), the plea agreement did reflect that the "Special Offense Characteristic § 2B3.1(b)(2)(B) applies, as a firearm was not discharged but was otherwise used in the connection of the offense. This Specific Offense Characteristic results in an increase of six (6) levels." It is respectfully submitted, however, that in light of the aforementioned facts in this case which negate such a finding, trial counsel was wholly ineffective for failing to negotiate a five-level, rather than a six-level increase for Group One. By failing to negotiate a five-level increase, or otherwise object to the insufficient basis for that enhancements in light of the facts herein, counsel's representation was clearly unreasonable under prevailing norms. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); see also *United States v. Day*,

969 F.2d 39, 42 (3d Cir. 1993); see also *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001).

It is further submitted that said failure(s) can not be deemed harmless. Petitioner maintains that but for defense counsel's ineffective representation concerning this enhancement, the result would have been a five-level increase, instead of the six-level increase that was applied here.

Pursuant to U.S.S.G. § 2B3.1(a), the Sabor Latino Bar Robbery (Group One) resulted in a base offense level of 20. Application of the "otherwise used" enhancement resulted in a six-level increase. U.S.S.G. § 2B3.1(b)(4)(B) was found applicable because at least one victim was physically restrained to facilitate the commission of this robbery. This resulted in a two-level increase. U.S.S.G. § 2B3.1(b)(7)(B) was also found applicable, as more than $10,000, but less than $50,000 was unlawfully taken from the victims during this robbery. This resulted in a one-level increase. Thus, as stated by the trial Court, the Petitioner was "deemed a Level 29, which would leave us with a Criminal History Category of 1 and a range of incarceration from 87 to 108 months, supervised release from 1 to 3 years."[1]

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[1] Although the Presentence Investigation Report indicated that because of a leadership role, a two-level enhancement should have also been applied, the Court agreed to go along with the plea agreement deeming Petitioner a

Ultimately, Mr. Delacruz was sentenced to the maximum term of 108 months imprisonment and 3 years supervised release. Petitioner contends that but for trial counsel's unprofessional errors, the enhancement would have been for "brandishing" instead of "otherwise used" thereby resulting in a five-level increase, rather than the six-level increase. It is further submitted, therefore, the result of the proceeding would have been different. Certainly, with the lower-level enhancement, there was a reasonable probability that, but for counsel's unprofessional errors, appellant would not have been sentenced to the maximum term. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *United States v. Mannino*, 212 f.3d 835, 840 (3d Cir. 2000).

Based upon the foregoing, Mr. Delacruz maintains that he was denied his constitutional right to the effective assistance of counsel. In sum, it is contended that counsel's performance was not reasonable (see *Strickland*, 466 U.S. at 688) and that counsel's deficient performance prejudiced the defendant. *Id.* at 683. Counsel did not bring to bear such skill and knowledge as would have rendered the proceedings a reliable adversarial testing process.

Petitioner maintains, therefore, that he has demonstrated that he received the ineffective assistance of trial counsel and that the District Court erred in denying

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Level 29.

the Petitioner's Motion to Vacate, Set Aside or Correct the Sentence pursuant to 28 U.S.C. § 2255. It is further submitted that, thereafter, the Court of Appeal's erred in affirming the judgment of the District Court.

CONCLUSION

For the reasons stated in this petition, Mr. Arturo Delacruz respectfully requests that a writ of certiorari be issued to review the decision below.

Respectfully submitted,

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