Case No. 19-7780

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK HARPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER

(A) HARPER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO CHALLENGE ON APPEAL AND VIA A PETITION FOR CERTIORARI THE DISTRICT COURT'S REFUSAL TO CONSIDER THE STATUTORILY MANDATED CONSECUTIVE SENTENCES FOR HARPER'S 18 U.S.C. §924(c) CONVICTIONS WHEN FASHIONING THE SENTENCES FOR HIS PREDICATE OFFENSE CONVICTIONS IN LIGHT OF HIS SIMILARLY SITUATED CO-DEFENDANTS OBTAINING RELIEF AFTER RAISING THE SAME ISSUE ON APPEAL AND IN THE SUPREME COURT DUE TO THE FORESHADOWING OF THIS COURT'S DECISION IN DEAN V. UNITED STATES, 581 U.S. __, 137 S.CT. 1170 (2017), AND/OR

(B) DEAN V. UNITED STATES, 581 U.S. __, 137 S.CT. 1170 (2017), ANNOUNCED A NEW RULE OF LAW[1] RETROACTIVELY APPLICABLE ON COLLATERAL REVIEW.

A.

Ineffective Assistance of Counsel

Harper's case is uncommon, but not because of some heavily fact-bound scenario unworthy of certiorari. It represents an extraordinary confluence of factors for an ineffectiveness claim demonstrating both deficient performance by counsel and resulting unfair prejudice to petitioner that is not theoretical or speculative, but concrete.

Contrary to the government's assertion (Br. Opp. at 9), when petitioner states that this case has unique facts and circumstances, he is not asking the Court to review evidence or discuss specific facts. What he is saying is that he presents a

[1] Petitioner acknowledges a typographical error in I.B. of his Petition (pp. i, v, 8), i.e., the question should have referred to "a new rule of law" (rather than the erroneously labeled "rule of rule"), as recited above and as treated by petitioner in his Petition and the government in its Brief in Opposition.

situation in which both counsel's deficient performance and the resulting unfair prejudice have actually been shown through what occurred previously in this Court and subsequently in the district court. There is no need to review evidence or facts or to speculate about how the deficient performance of counsel may have affected the outcome or theoretically influenced a decision maker. As discussed below, the record is plain, clear and unchallenged – petitioner was denied the effective assistance of counsel as well as the due process of law, culminating in a most unjust result. U.S. Const. Amend. V; U.S. Const. Amend. VI.

Defense counsel, who represented petitioner at the court of appeals on direct appeal and later in this Court regarding Harper's earlier petition for a writ of certiorari, each time failed to advance the sentencing issue (ala Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017)) raised by separate counsel who had represented petitioner at his sentencing in the district court. This issue, however, was raised and argued at sentencing and in both the court of appeals and this Court by counsel for petitioner's two separately represented and similarly situated co-defendants. All three co-defendants had been tried and convicted of the same offenses and had challenged the discretionary sentencing process (a la Dean) in the district court. But, petitioner's counsel dropped the issue in further proceedings, while his co-defendants took the issue through the court of appeals and then to this Court, where they prevailed.

Following direct appeal proceedings in the court of appeals, petitioner Harper and his co-defendants all filed respective petitions for a writ of certiorari. Harper

did not include the pertinent sentencing issue; his co-defendants did. Importantly, almost three months after those three petitions had been filed, this Court granted certiorari in Dean v. United States, supra, to consider the precise issue raised by all three co-defendants at sentencing in the district court but "dropped" by petitioner's counsel on appeal. At that point, in October 2016, and for the next 2 ½ months until Harper's petition was denied, his counsel knew (or should have known) that the Court was considering the pertinent issue. This was especially apparent because the government – after the grant of certiorari in Dean – filed a brief in the two co-defendants' cases (Bernard Edmond and Phillip Harper) stating that their two petitions for writs of certiorari "should be held pending the Court's resolution of Dean" and disposed of after the decision in that case. Bernard Edmond v. United States, 16-5441; Phillip Harper v. United States, 16-5461, Govt. Br. in Opp. at 2 (filed 11/2/16). Certainly then, Harper's counsel was on notice, and he had the time and opportunity to act. Nonetheless, his counsel failed to act by amending his petition to add the same question presented by his co-defendants in their petitions for a writ of certiorari, which was the same question argued by Harper's counsel at sentencing. Had his counsel filed such an amendment to Harper's petition in this Court, Harper would have obtained the same relief afforded to his similarly situated co-defendants both at this level and later in the district court[2].

[2] This was deficient performance, at least as understood at the trial level. The granting of certiorari has been found to constitute a point in which counsel should be aware of potential changes in the law. Shields v. United States, 653 Fed.Appx. 476, 477-478 (7th Cir. 2016) (counsel should have raised objection to

As it turned out, not receiving the ultimate relief his co-defendants received (substantial reductions in imprisonment time) was severely and unfairly prejudicial to petitioner Harper.

It can hardly be said that counsel's failure to amend the original petition for a writ of certiorari was "strategic". After the certiorari grant in Dean, the relevant sentencing issue became even more prominent. For Harper, the consequences were significant. Had he been afforded the same relief as his two co-defendants, his sentence of imprisonment likely would have been reduced by 97 months[3]. Any suggestion that it was a judgment call for his counsel not to amend Harper's petition to re-join the issue raised at his sentencing by adding the question granted certiorari in Dean is simply not supported by the procedural history of this case and not reasonable under the circumstances.

After certiorari was granted in Dean, it was incumbent upon Harper's counsel to amend his petition to include the sentencing issue. While Ross v. Moffit, 417 U.S. 600, 612-618, 94 S.Ct. 2437 (1974), stands for the proposition that a

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crack/powder disparity at sentencing after grant of certiorari in Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558 (2007); "we find it particularly troubling that his Federal Defender did not preserve the argument, against the backdrop of the Supreme Court's grant of certiorari in a high-profile case with such clear relevance to Shields's situation.").

[3] This amount of prison time is based on Harper's sentence of 97 months over the mandatory sentences required by statute in 18 U.S.C. §924(c)(1)(A), (C). When his co-defendants were resentenced, they each received only the mandatory terms and no months over those terms, per the district court's exercise of its Dean discretion.

criminal defendant does not have a constitutional right to counsel to pursue an application for discretionary appellate review, Harper's counsel had filed a petition for a writ of certiorari in this Court. This is not a situation involving a failure to file or an untimely filing. This is a situation where the petition was properly before the Court along with those of the two co-defendants. While all three of the petitions were pending, certiorari was granted in Dean. Counsel for Harper was actively in engaged in his representation and the obligation to represent him effectively did not diminish or evaporate. Not to amend the petition to include the Dean issue, which had been raised on Harper's behalf at sentencing and was now highlighted by the Dean proceedings, was deficient performance.

Nor should Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300 (1982), be decisive here. (Br. Opp. at 15). Wainwright is frequently cited as taking the next step from Ross v. Moffit, supra, i.e., since there is no right to counsel for a discretionary appeal, the late filing of such an appeal does not constitute deficient performance. However, there was no ability to show prejudice in Wainwright since the petition to the Florida Supreme Court was dismissed sua sponte. 455 U.S. at 586, fn.1. But in the instant case, a petition was filed and not amended even though certiorari had been granted in Dean. It proved to be deficient performance of counsel with resulting and severe and unfair prejudice to petitioner Harper.

The government contends that the district court's finding of a lack of prejudice shows that Harper was not similarly situated to his co-defendants. (Br. Opp. at 13, fn.1). But, this contention misses important procedural context.

Harper's 28 U.S.C. §2255 motion was denied before his co-defendants were resentenced by the district court (after the Dean opinion was issued). At the point of this denial, his co-defendants had been granted resentencing, but it had not yet occurred. Later, when their resentencings did take place, prejudice to Harper was confirmed – the district court specifically reduced his co-defendants' sentences solely on the basis of the harsh nature of the 18 U.S.C. §924(c) mandatory sentences, irrespective of how any 18 U.S.C. §3553(a) factors might influence it otherwise. The district court explained as follows:

> "As I indicated in stating the reasons for the sentence, the Court will include the reference to the length of the 924(c) violations as the -- as the reason for the downward variance in the sentences imposed.
>
> Is there anything else that you think that we should address? I specifically do think it would go too far for the Court to consider the adjustment that the defendants have made, and it makes no difference in the outcome here, because I do agree that the sentences prescribed by the 924(c) violations combined in each instance is sufficient to address the purposes of the statute."

(Resent. Hrg., R. 316, Page ID#4727-4728). The resentencing results for both of Harper's co-defendants are properly part of the record in the instant case since the court of appeals granted judicial notice of them. (6th Cir. No. 18-1202, R. 25, 38-2).

The prejudice here is as clear as any could be. Harper was not afforded the relief granted to his two similarly situated co-defendants due to his counsel's failure to represent him in an obviously effective manner by amending his petition to rejoin the issue raised at his sentencing and pursued throughout the proceedings by his co-defendants. There is no doubt that Harper would have received a substantial

reduction in prison time as did his co-defendants, i.e., all of the years which exceeded the mandatory terms would have been removed from his sentence.

There is no question about deficient performance and no question about unfair prejudice. The only question is whether petitioner is entitled to effective assistance of counsel when involved in proceedings in this Court and petitioner maintains that the answer is "yes".

CONCLUSION AND RELIEF REQUESTED

For all the above reasons, and the reasons in the petition previously filed[4], petitioner Frank Harper requests that this Court grant his petition for a writ of certiorari.

In the alternative, Harper moves for summary reversal under Rule 16.1, based on his Argument I, with a remand for resentencing in accordance with Dean v. United States, 581 U.S. __, 137 S.Ct. 1170 (2017).

Respectfully Submitted,

By: s/Dennis J. Clark
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Attorney for Petitioner
Frank Harper

Dated: June 9, 2020

[4] Harper relies on his arguments in his petition for a writ of certiorari concerning other issues and arguments not otherwise addressed in this reply brief.