No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Respondent,

versus

DAVID BRUCE HARDMAN,
Petitioner.

On Petition for Writ of Certiorari to
United States Court of Appeals for the Eleventh Circuit, Case No. 18-14225

PETITION FOR WRIT OF CERTIORARI

Submitted by:

David Bruce Hardman
Inmate Register No. 69235-018
FCI Jesup-Medium
2680 Highway 301 South
Jesup, GA. 31599

March 2, 2020.

QUESTIONS PRESENTED

FIRST QUESTION:

DID THE CIRCUIT COURT ERR IN REFUSING TO MAKE A DETERMINATION OF THE VALIDITY OF THE APPEAL WAIVER DURING A REVIEW OF THE RECORD, PURSUANT TO ANDERS v. CALIFORNIA?

SECOND QUESTION:

DID THE CIRCUIT COURT ABUSE ITS DISCRETION BY FAILING TO ADDRESS A PROPERLY PRESENTED "BREACH OF PLEA AGREEMENT" CLAIM DURING A ANDERS REVIEW OF THE ENTIRE RECORD?

JURISDICTION

The Date on which the Eleventh Circuit Court of Appeals decided my case was on September 20, 2019.

A timely Petition for Rehearing was denied on November 20, 2019.

A Final Judgement was issued on December 10, 2019.

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

LIST OF PARTIES

All Parties do not appear in the Caption of the Case on the Cover Page. A list of all parties to the proceeding in the Court whose judgement is the subject of this petition is as follows:

The Honorable Judge Carlos E. Mendoza

The Magistrate Judge Daniel C. Irick

Federal Public Defender Aliza Hochman Bloom

Personal Attorney Fritz J. Scheller

Assistant United States Attorney Karen L. Gable

Assistant United States Attorney Nicole M. Andrejko

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(s)**

STATEMENT OF THE CASE

Petitioner was arrested at his home on August 17, 2017 (Doc. #1) and was taken before a Magistrate Judge Gregory J. Kelly, who denied bond and set the matter for a probable cause hearing on August 22, 2017 (Doc. #2)

At that hearing, probable cause was determined, and on September 13, 2017 a two count indictment was returned charging Petitioner with Forcible Assault in violation of 18 U.S.C. §111 and Possession of Child Pornography in violation of 18 U.S.C. §2252A(a)(5)(B) and (b)(2) (Doc. #12)

In September of 2017, Petitioner retained the services of Trial Counsel Fritz J. Scheller. (Doc #14) January 10, 2018 a (5) five count superseding indictment was returned in open court expounding on Petitioner's initial charges adding (3) additional charges. Two for Sexual Exploitation of Minors and One for Possession of Child Pornography. (Doc #34)

April 20, 2018 Petitioner entered into a plea agreement with the government to plead guilty to counts one (1) and count five (5) of the superseding indictment. The other charges were dismissed. (Doc. #45)

On April 26, 2018 Petitioner attended his plea colloquy, where it is presumed the court did not adequately explain the appeal waiver to Petitioner. The court set the matter for sentencing. (Doc. #46)

After the production of the PSR, with objections, (Doc. #48) and a sentencing memorandum by Petitioner, he was sentenced on September 19, 2018 to the statutory maximum imprisonment penalty for the agreed upon counts. 240 months for the Forcible Assault (count 5) and 360 months for the Sexual Exploitation of Minors (count 1) (Doc. #63) (Final judgement was issued on September 25, 2018) Petitioner was forced to file his notice of appeal pro-se. (Docs. #65,66)

Petitioner requested, and the court appointed Aliza Hochman Bloom to represent him on direct appeal to the Eleventh Circuit. (Doc. #76) After a brief consultation with Petitioner, she filed an Ander's Brief and a motion to withdraw. (see 11th Circuit Case 18-14225)

The Eleventh Circuit granted Bloom's motion to withdraw, and affirmed Petitioner's conviction and sentence on September 20, 2019. The Eleventh Circuit subsequently denied Petitioner's motion for Rehearing and Rehearing En Banc on November 20, 2019 by issuing the Final Judgement to this matter on December 10, 2019.

This Petition for Writ of Certiorari follows:

STATEMENT OF FACTS

The following condensed facts were outlined in part from appellant's plea agreement:

From at least in or about 2004 through at least in or about June 2017, [appellant] operated a commercial "teen modeling" business from his residence at 4097 Mount Carmel Lane, Melbourne, FL 32901. During this period [appellant] was officially licensed by the county and city and had paid income taxes to the IRS. The modeling business was sold in June 2017.

[Appellant] advertised and sold the modeling DVDs through his website "Dave's Models" at www.modelingdvds.com. This website was publicly hosted from a Atlanta, GA based web hosting company, not the "dark web." Customers paid about $66 for a set of DVD's via credit card. [Appellant] shipped the DVDs to customers throughout the United States and other countries. Items shipped overseas were inspected through customs.

In running this licensed business, [appellant] befriended several mothers of his [models] who responded to publicly posted modeling ads from public modeling resource websites. [Appellant] paid the parents (mothers/fathers) to drive their daughters to his house on the weekdays for "modeling shoots" and other public locations throughout Florida. [Appellant] also paid referral fees if the mothers and daughters recruited other girls for him to photograph. [Appellant] also paid for hotel rooms so the parents and girls would have a place to stay and sleep prior to the next day's modeling session. These hotels were not used for modeling sessions. [Appellant] paid the girls including minor daughters extra money if they would model skimpier attire and engage in more enticing conduct.

PLEASE NOTE: What is entirely bereft in the factual basis of the plea agreement is the clear and extremely important fact that mothers/fathers

and/or legal guardians assigned to escort or drive the models to the modeling shoots that the parents/mothers and legal guardians were **always** on location and physically present during the "modeling shoots." There was never any nudity, sexually explicit contact, or inappropriate touching by the appellant, or between the models.

On August 17, 2017, Agent Kaufman, along with other FBI Special Agents and Officers from the Melbourne Police Department executed a federal search warrant at [appellant's] residence. When the FBI arrived at [appellant's] residence, [they] knocked for several minutes and received no answer. The agents walked to the rear of the house and knocked on... the rear sliding door announcing their presence. After waiting several minutes and not receiving a response, a[n]...officer broke the sliding glass door so that law enforcemant... could enter the residence and execute the the search warrant.

Once inside the residence, Agent Kaufman and Agent Hyre, kicked a [locked bedroom] door open. [The Officers] entered the room... and immediately saw [appellant] crouching down in the bathroom. [Appellant] held a handgun in his left hand and attempted to chamber a round. [Appellant] turned towards [Agent] Hyre and Officer Sigety as he attempted to chamber a round and pointed the handgun at [Agent] Hyre and Officer Sigety.

[Agent] Hyre and Officer Sigety ran towards [appellant] and attempted to subdue him by tackling him. [Appellant] dropped the gun as the agents tackled him. Once on the ground, [appellant] fought [Agent] Hyre and Officer Sigety as they attempted to handcuff him.

Law enforcement seized the firearm and identified it as a Ruger 9mm. [Agent] Kaufman advised [appellant] of his Miranda Rights, and [appellant]

stated [inter alia] that he did not fire the pistol because he did not have time to load it.

[Appellant] was ultimately taken into custody and charged with Child Pornography and Assault on or about September 23, 2017.

FIRST QUESTION

Did the Circuit Court err in refusing to make a determination of the validly of the appeal wavier during a review of the record, pursuant to Anders-v-California?

RELEVANT BACKGROUND

As part of Petitioner's plea agreement, he waived the right to appeal his sentence on any grounds, except: (A)..that the sentence exceeds [Petitioner] applicable guideline range as determined by the court..(B) the sentenced exceeds the statutory maximum penalty; or (C) the sentence violates the Eighth Amendment to the Constitution.

However, during the plea colloquy, the District Court did not adequately address the appeal waiver. The following exchange occurred:

The Court: Finally, you've also expressly waived your right to appeal your sentence in accordance with the limitations set forth in your plea agreement. Again sir, does all that sound familiar?
[Petitioner]: Yes sir!

Thereby, the District Court did not sufficiently review the appeal waiver contained in Petitioner's plea agreement, nor discuss it's exceptions. As a result, Appellate counsel Eliza Bloom, in her Ander's Brief to the Eleventh Circuit offered that "the District Court did not sufficiently review the appeal wavier contained in Petitioner's plea agreement." (Anders Brief n. 1&3) Petitioner asserts that such a determination is mandatory even in the face of an Anders Brief.

DISCUSSION

In Douglas-v-California 372, U.S. 353,357 9 L.Ed. 2d. 811,83 S.Ct. 817 (1963) The United States Supreme Court held that [it] was required to appoint counsel for an indigent criminal defendant in a first appeal as of right, as the court noted that (1) an appeal of right yielded an adjudication on the merits; and (2) prior to first-tier review, the defendants claims had not been presented by a lawyer and passed upon by a appellate court.

An indigent appellant's right to "advocacy," does not extend to pursuing an appeal on frivolous grounds. Although an indigent, whose appeal is frivolous has no right to have an advocate make his case to the Appellate Court, such an indigent in all cases have the right to have an attorney zealous for the indigent's interests, evaluate his case and attempt to discern non frivolous arguments. Ellis 356 U.S. @675, 2L.Ed, 2d 1060, 78 S.Ct. 974; Anders-v-California, 386 U.S. 738, 741-743, 18 L.Ed. 2d. 493, 87 S.Ct. 1396 (1967)

Justice Stewart, in his dissent in Anders was the first to make [] criticism of the procedure set out by the Anders majority: "[] if the record did present any such 'arguable' issues, the appeal would not be frivolous." 386 U.S. @746, 18 L/Ed. 2d. 493, 87 S.Ct. 1396

While this Court has never recognized a "Constitutional right to an appeal" it has "held that if an appeal is open for those who can pay for it, an appeal must be provided for an indigent. Jones-v-Barnes 463 U.S. 745,751,103 S.Ct. 3308, 77 L.Ed. 2d. 987 (1983) See also Douglas-v-California 372 U.S. 353, 83 S.Ct. 814,9 L.Ed. 2d. 811 (1963)

That being said, Petitioner's counsel on his direct appeal after zealously reviewing Petitioner's case, inter alia, discovered that the District Court

did not properly cover the appeal waiver during the Rule 11 plea colloquy. As a result, appellate counsel in her Anders brief, deemed the appeal waiver either "invalid" or "UNENFORCIBLE". However, even in the face of that fact, felt Petitioner had no other claims that were non-frivolous.

In a wholly separate pleading, Petitioner concurred with appellate counsel's findings about the appeal waiver, but went on to outline errors he believes were committed in his case as briefed in the "Opposition to the Anders Brief."

To the fact of the validity of the appeal waiver, the Eleventh Circuit's final order completely avoided giving any indication of acknowledgement of the issue - and only stated that "counsel's assessment of the relative merit of the appeal is correct." This statement fails to inform as to whether Petitioner's appeal waiver is enforceable, to the extent of barring certain claims from collateral review.

The Supreme Court in Garza-v-Idaho 139 S.Ct. 738 (2018) in dicta stated that the determination of whether a appeal waiver is invalid or unenforceable was a claim that is "non-frivolous for contending an appeal."

All circuits of appeal holds that a defendant "may waive his right to appeal his sentence as long as his decision is knowing, intelligent and voluntary." United States-v-Buchanan, 131 F.3d. 1005.1008 (11th Cir 1997) Federal courts, when allowing a defendant to waive his or her right to appeal a conviction require that the waiver be made intelligently, voluntarily and with understanding of the consequences." id @1009.

Clearly, appellate counsel did not feel that this standard was met during Petitioner's guilty plea hearing, so she elucidated that the appeal waiver was invalid. When the Eleventh Circuit affirmed appellate counsel's findings

without distinguishing it's holdings of the status of Petitioner's appeal waiver, subjects Petitioner to undue prejudice in any forth coming collateral challenge.

Leaving this non-frivolous issue unresolved permits the District Court to glean any status it feels suitable in any collateral proceeding, as the Circuit Court's decision is completely ambiguous.

On one hand, the District Court could presume the Eleventh Circuit deemed appellant's appeal waiver is valid, based on the interpretation that the Court affirmed his conviction and sentence without giving any consideration to the six issues raised by Petitioner in opposition to the Anders Brief. Thus acquiescing the District Court's review of the appeal waiver with Petitioner during his Rule 11 plea colloquy was sufficient.

On the other hand, the District Court could presume the Eleventh Circuit deemed the appeal waiver invalid, based on the fact the court's opinion twice stated "the entire record was reviewed;" something that would be strictly forbidden in the face of a valid plea agreement - and as a result of this conclusion, the District Court could bar all six of the claims Petitioner presented for direct appeal in the opposition to the Anders based on the theory that: they were considered by the Eleventh Circuit and rejected."

Leaving the question of whether or not, an appeal waiver is valid, unanswered in the law of the case doctrine of Circuit Courts is a derelict of the basic responsibility setout in the Anders procedure of assuring that any 'arguable issue' presented in the record must be resolved.

By the fact alone that appellate counsel and Petitioner properly presented this issue before the Circuit Court means the Circuit Court erred in refusing to make the determination of the validity of the appeal waiver during their review of the record...during the Anders procedure.

Therefore, this claim should be considered before the full Court to resolve this issue among the lower Circuits.

SECOND QUESTION

Did the Circuit Court abuse it's discretion by failing to address a properly presented "Breach of Plea Claim" during an Ander's review of the entire record?

RELEVANT BACKGROUND

After appellate counsel filed an Ander's Brief and motion to withdraw, Petitioner filed an opposition to the Anders Brief, and requested to proceed pro-se. In which, one claim outlined the Government's breach of Petitioner's Plea Agreement.

In return, the Eleventh Circuit panel's opinion Affirmed Petitioner's conviction and sentence, granted appellate counsel's motion to withdraw and denied Petitioner's motion to proceed pro-se as moot. As for the remainder of the issues, the panel stated: "our independent review of the entire record reveals that counsel's assessment of the relative merit of the appeal is correct;" and "...independent examination of the entire record reveals no arguable issue of merit.."

DISCUSSION

In the Eleventh Circuit, United States-v-Copeland, 381 F.3d. 1101,1105 (11th Cir 2004) provides that 'appeal waivers' do not bar an argument of of "Breach of Plea Agreement" on appeal. Given that Breach of Plea claims fall into that special category of errors that can be corrected regardless of their effect on the outcome. U.S.-v-Olano 507 U.S. 725, 736 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)

Santobello-v-New York 404 U.S. 257, 92 S.Ct 495 30 L.Ed. 2d. 427 (1971) does hold that automatic reversal is warranted when objection to the government's breach of a plea agreement has been preserved, but the holding rested upon the premise that plea breach errors are (like "structural" errors) somehow not susceptible or not amenable, to review for harmlessness, but rather upon a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining. An essential and highly desirable part of the criminal process. Santobello-v-new York 404 U.S. 257, 92 S.Ct. 495 30 L.2d. 427 (1971).

Breach of plea agreement claims, not preserved in the district court are subject to plain error review. Puckett-v-United States 556 U.S. 129,135, 129 S.Ct. 1423, 173 L.Ed. 2d. 266 (2009)

When the district court discerns whether the government violated the terms of a plea agreement, an appellate court must consider whether the government's conduct is consistent with defendant's reasonable understanding of the agreement United States-v-Sosa 782 F.3d. 630, 637 (11th Cir 2015)

The Eleventh Circuit in this matter issued a 'Per Curium' opinion which summarily affirmed the matter without any reference (expressed or tacit) of the plea agreement, or the terms therein. Not all breaches of plea agreements are clear and obvious on the record, but in this instant, Petitioner touted his restitution order was illegal and thus violated the agreed upon terms in his plea agreement.

Clearly all defendants whose plea agreement has been broken by the government, will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway, or because he likely would not have obtained those benefits in any event. Regardless of the

outcome, the mention of a breach on direct appeal - especially in the face of an appeal waiver - require the contemporaneous attention of the Circuit Court in any type of review, albeit an Anders review of the record.

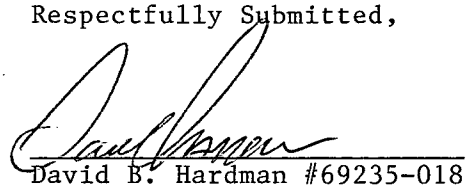
The fact Petitioner did not initially raise this claim before the District Court gives the Eleventh Circuit some discretion on how to proceed. But, under no circumstance can the issue be wholly ignored properly brought before the court. In this case, breach of the plea agreement was one of six district trial errors presented by Petitioner to the Circuit Court in an "Opposition to the Ander's Brief" It was never acknowledged by the Eleventh Circuit.

This issue has been clarified in dicta in multiple cases for decades and should be straight forwardly resolved in this matter for clarification for the lower Circuits.

CONCLUSION

WHEREFORE, David Bruce Hardman, Petitioner urges this court to Grant the Writ of Certiorari to fully resolve these issues among the lower courts.

Respectfully Submitted,



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