

No. _____

In the Supreme Court of the United States

October Term, 2020

EDGARDO GRANDE, *PETITIONER*,

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

1. Whether the waiver of appeal rights contained in the Plea Agreement is unenforceable since the Plea Agreement is invalid because it is an unconscionable contract, that affected Grande's substantial rights and seriously affected the fairness, integrity and public reputation of judicial proceedings.
2. Whether the district court imposed a sentence that is greater than necessary to satisfy the sentencing goals in 18 U.S.C. § 3553(a).

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Petitioner, Edgardo Grande asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 14, 2020.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the unpublished order of the court of appeals, *United States v. Grande*, No. 19-50272 (5th Cir. April 14, 2020), is attached to this petition as an Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The order dismissing Grande's appeal was entered on April 14, 2020. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

STATEMENT

Edgardo Grande ('Grande') pleaded guilty pursuant to a plea agreement, which contained a waiver of appellate rights. He was convicted of Importation of 500 grams or more of Methamphetamine, in violation of 21 U.S.C. §952(a), 960(a)(1), 960(b)(1)(H). The district court sentenced Grande to 108 months of imprisonment.

On appeal, Grande argues that the waiver of appellate rights contained in the plea agreement is unenforceable, since the plea agreement is an unconscionable contract that violated Grande's

substantial rights. Upon signing the one-sided plea agreement, Grande gave up nearly all his appellate rights and received very little in return. Thus, his substantial rights were affected by the plea agreement. In addition, this one-sided plea agreement foreclosed appellate review thus affecting the fairness, integrity and public reputation of the judicial proceedings. *See United States v. Olano*, 507 U.S. 725, at 736 and *United States v. Vonn*, 535 U.S. 55, 58-59 (2002).

Finally, respectfully, Grande also argues that his 108-month sentence is unreasonable and greater than necessary based on the facts and circumstances of his case and as measured by the sentencing goals of 18 U.S.C. § 3553(a).

According to the facts of this case as explained in the PSI, Grande and a passenger applied for admission into the United States from Mexico via the Ysleta Port of Entry in El Paso, Texas. d-methamphetamine hydrochloride was the driver of a 2018 Toyota Camry bearing Texas registration. A subsequent inspection of the vehicle, utilizing a narcotic detecting canine, revealed 10.44 kilograms (after a 10% reduction) of d-methamphetamine hydrochloride in the front fender and rear bumper of the vehicle. A lab report revealed that the purity of the d-methamphetamine hydrochloride was 100%. (ROA. 110).

In his statement to authorities, Grande stated that he had "small knowledge" that "something" was in the vehicle and that he was to deliver the vehicle to Dallas, Texas. Grande explained that he met "Tony" the recruiter in Mexico who worked for "Don Mar" who was the top boss of the drug trafficking organization ('DTO'). Grande stated that this DTO delivers narcotics to various cities in the United States. Grande also admitted to delivering narcotics to other cities in the past, based upon direction and instruction from others. Grande also stated that the DTO also laundered money via bank accounts in the past. He admitted being involved with laundering in the past as well. (ROA. 110-111).

Grande also gave information to authorities during his PSI interview. He stated that he participated in drug smuggling for others and at their behest on three prior occasions. Most importantly, he did not know the type of narcotics that he was transporting in the instant offense or in the three prior occasions. (ROA. 111-112).

Subsequently, Grande was arrested, indicted and charged with the aforementioned federal criminal offenses. He pleaded guilty pursuant to a plea agreement that held him accountable for 10.44 kilograms of d-methamphetamine hydrochloride. (ROA. 112).

At sentencing, the judge granted an adjustment for minor role and for acceptance of responsibility. Grande was not held

accountable for any relevant conduct; also, it appears that his criminal history points were not considered at sentencing. The judge determined that Grande's range of punishment under the advisory guidelines was 87-108 months of incarceration "because methamphetamine is such a serious drug." Then the judge sentenced Grande to 108 months of imprisonment. (ROA. 103-104, 113).

Respectfully, the court did not *adequately* take into account the nature and circumstances of the offense and the history and characteristics of the defendant, when the court sentenced Grande to 108 months of incarceration. His sentence was greater than necessary in violation of the sentencing statute, 18 U.S.C. § 3553(a).

Grande, it appears, suffers from chronic and debilitating alcoholism and severe mental illness. (ROA. 119). Apparently, he became involved in a series of similar drug based criminal ventures where he worked for others and delivered narcotics. In each of these unfortunate instances, it appears he did not even know what he was delivering. Therefore, respectfully, a sentence of 108-months of incarceration is greater than necessary. As a result, Grande appeals his sentence. (ROA. 100-104, 112).

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant Certiorari to Determine Whether the Waiver of Appeal Rights Contained in a Plea Agreement Is Unenforceable Since the Plea Agreement Is Invalid Because It Is an Unconscionable Contract that affected Grande's Substantial Rights.

Grande was represented by counsel and he signed a plea agreement that was essentially one sided. He gave up several important rights in the plea agreement, and got very little in exchange. Sound public policy warrants that defendant Grande's waiver of appeal rights contained in the plea agreement be held unenforceable, and the court review this appeal on the merits, rather than dismissing this appeal based upon the waiver of appellate rights.

"The term 'unconscionable' does not have a precise legal definition, but in general it describes a contract that is unfair because of its *overall one-sidedness or the gross one-sidedness* of its terms. *Chubb Lloyds Ins. v. Andrew's Restoration*, 323 S.W.3d 564, 578 (Tex. App.-Dallas 2010, pet. denied); *Lawson v. Archer*, 267 S.W. 3d 376, 382 (Tex. App.-Houston [14th Dist.] 2008, no pet.).

Unconscionability includes two aspects: (1) procedural unconscionability which refers to the circumstances surrounding the adoption of the contract terms in controversy; and (2) substantive unconscionability, which refers to the fairness of these terms. *Le-Blanc v. Lange*, 365 S.W. 3d 70, 88 (Tex. App.-Houston [1st Dist.]

2011, no pet.); *Fogal v. Stature Constr., Inc.*, 294 S.W. 3d 708, 714 (Tex. App.-Houston [1st Dist.] 2009, pet. denied); *Lawson v. Archer*, 267 S.W. 3d 376, 382 (Tex. App.-Houston [14th Dist.] 2008, no pet.).

In deciding the fairness of a court's substantive terms, the court must also consider whether there were procedural abuses, such as an unfair bargaining position between the parties at the time the agreement was made. The party asserting unconscionability must prove both procedural and substantive unconscionability. *LeBlanc v. Lange*, 365 S.W. 3d 70, 88 (Tex. App.-Houston [1st Dist.] 2011, no pet.); *In re Green Tree Servicing, LLC*, 275 S.W.3d 592, 603 (Tex. App.-Texarkana 2008, no pet.); *b River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136, 139 (Tex. App.-Waco 2005, pet. denied).

In this case, there is an unequal bargaining position between the Grande and the government. The defendant stands to lose his freedom for a considerable period of time. So, he was willing to do whatever he could to remedy the situation. In terms of substantive unconscionability, an analysis of the plea agreement itself shows that it is grossly one sided, and that the defendant gave up numerous important rights and in exchange received very little, if anything:

1. First, by signing the plea agreement, the defendant gave up his constitutional right to a jury trial. In return the government agreed not to oppose the two-level adjustment for acceptance of responsibility if the court were to grant that adjustment. In addition, the government agreed to move for the third level of acceptance. (ROA. Plea Agreement page 2).
2. Second, defendant waived his right to additional discovery, and the right to appeal his sentence for any reason, except for claims of ineffective assistance of counsel and prosecutorial misconduct. Specifically, the agreement states as follows: "By entering into this agreement, and as a term and condition of this agreement, Defendant knowingly and voluntarily waives and gives up Defendant's right to appeal Defendant's conviction or sentence on any ground, including but not limited to any challenges to the constitutionality of the statute(s) of conviction, any claim that Defendant's conduct did not fall within the scope of the statute(s) of conviction, any challenge to the determination of any period of confinement, monetary penalty or obligation, term of supervision and conditions thereof, and any appeal right conferred

by 18 U.S.C. §3742 or 28 U.S.C. §1291. (ROA. Plea Agreement page 4).

3. Other than claims of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension, defendant seemingly bargained away his right to appeal his sentence for *any and every possible error* that may occur in his case. Respectfully, how can a concession of this magnitude be considered a fair bargain? (ROA. Plea Agreement page 4).
4. In exchange, for giving up nearly all of his rights, the defendant received the following concessions from the government:
 - a. The government agreed not to oppose an award for acceptance of responsibility in the plea agreement. (ROA. Plea Agreement page 2).
 - b. However, defendant would have been eligible for this adjustment regardless, by simply pleading guilty to the indictment without a plea agreement.

For all of the above reasons, defendant respectfully requests the court to find that the plea agreement is an unconscionable contract. Grande also respectfully requests the court to find that the waiver of appeal rights contained in the Plea Agreement is unenforceable. This one-sided plea agreement affected Grande's

substantial rights and seriously affected the fairness, integrity and public reputation of judicial proceedings.

2. The Court Should Decide Whether the District Court Imposed an Unreasonable Sentence in Light of the Sentencing Factors of 18 U.S.C. § 3553(a)(2).

The statute governing sentencing, “as modified by *Booker*, contains an overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing” in 18 U.S.C. § 3553(a)(2). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). Grande sentence is greater than necessary to meet these goals and therefore is unreasonable.

Standard of Review.

The appellate court is to “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 51 (2007). In so doing, the Court presumes that a within-guideline sentence is reasonable. *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006). “The presumption is rebutted” if “the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors.” *United States v. Cooks*, 589 F.3d 173 (5th Cir. 2009).

The District Court Made a Clear Error in Judgment in Sentencing Grande to 108 Months of Imprisonment.

The statute governing sentencing requires the district court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)” of that provision. See 18 U.S.C. § 3553(a).

Those purposes are:

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.] 18 U.S.C. § 3553(a)(2).

In fashioning a sentence to meet these purposes, the courts are directed to consider a broad range of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant. See 18 U.S.C. § 3553(a)(1)–(7).

Respectfully, in Grande’s case, the sentence imposed by the district court is greater than necessary to meet § 3553(a)’s requirements and it is unreasonable.

First, Grande did not even know what type of drugs or contraband that he was carrying at the behest of others, who were in charge of the operations that led him to his arrest, indictment and the lengthy incarceration: "Grande added that he did not know what type of narcotics he was transporting in the instant offense or in the three prior occasions. (ROA. 4-5). Since it was 500 grams or more of methamphetamine, he was placed in a high punishment range. The sentencing judge stated as follows: "But even without any of the scoring for criminal history, because you are talking about methamphetamine, you would be looking at 87 to 108 months in jail, because methamphetamine is such a serious drug, okay?" (ROA. 103).

Second, based upon the PSI, it becomes readily apparent that Grande suffers from mental and psychological issues including substance abuse. His past criminal behavior is also indicative of these issues. He was arrested twice for DWI and plead guilty to these offenses. In addition, in the past he has received mental health evaluation and treatment. Specifically, he was diagnosed with post-traumatic stress disorder, insomnia, depression, generalized anxiety disorder, panic disorder, and social phobia. For these numerous mental health issues, he has ingested Prozac, Trazodone, Benadryl, Tramadol, Clonazepam, and Triamcinolone. (ROA.

114-116, 119,120). Furthermore, he has consumed numerous intoxicants in the past (presumably) to deal with some of his mental health issues. The PSI states that he has used alcohol, marijuana and methamphetamine. (ROA. 114-116, 119,120).

Respectfully, someone with these multitude of mental health issues and substance abuse issues needs medical help more so than a lengthy incarceration. In fact, Grande has even held steady employment during these years where he suffered the mental health and substance abuse issues. (ROA. 120).

In addition, it was determined that he was a minor participant who was working at the behest of others and did not possess information concerning the type of narcotics that he has been asked to deliver. (ROA. 112-113).

Respectfully, a sentence of incarceration of 108 months was far greater than necessary in this case. A lower sentence that was focused on addressing his mental health issues and substance abuse issues would have been sufficient.

Grande stated the following during his allocution at his sentencing:

"I would like to just apologize for my actions at the time. At the time, I wasn't thinking about my family and my daughter, just -- I can tell you this is the last time I will be in any court. And

I'll try to proceed with a program of anything that will help me stay off alcohol, so I can continue and be a better – better father to my daughter.” (ROA. 102).

These words seem to indicate that Grande is indeed capable of reform and redemption - especially with the help and guidance of a system that can recognize his potential. Respectfully, a sentence of 108 months incarceration was greater than necessary. A lesser sentence would have been more appropriate. Based upon his history and characteristics, Grande's sentence is far more than necessary. It is likely that, with regards to the instant offense(s), Grande was probably just trying to support himself financially and survive the mean streets of El Paso, Texas. While this motive does not excuse Grande's conduct, it does mitigate its seriousness. *See Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (defendant's motive for committing offense an important sentencing factor); *see also* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.3(b) (2d ed. 2003) (“Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives.”); *cf.* 18 U.S.C. § 3553(a)(2)(A).

Respectfully, in sentencing Grande, the district court did not adequately account for his personal history and circumstances. The idea of just punishment under § 3553(a)(2)(A) includes the concept of retribution. *Rita v. United States*, 551 U.S. 338, 348 (2007). And retribution is a concept that “requires an assessment of the relative culpability of the offender[.]” *United States v. Roach*, No. 00-CR-411, 2005 WL 2035653, at *4 (N.D. Ill. Aug. 22, 2005). In Grande’s case, there is not a significant need for retribution. Grande made a terrible mistake when he committed the instant offense(s), but it is not one for which society need demand great retribution.

CONCLUSION

FOR THESE REASONS, Grande asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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