

No. No. 20-5188

IN THE SUPREME COURT OF THE UNITED STATES

ADELSON BARNES,

Petitioner

v.

JANET DOWLING, Warden

Respondent

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

PETITION FOR REHEARING, Rule 44

Adelson Barnes
Prisoner ID# 641200
Dick Conner Correctional Center
129 Conner Road
Homing, Oklahoma 74035

October 26, 2020

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether actual innocence extends to the critical elements of a crime in a change-of-plea proceeding when that burden of proof must be distinguished from a trial proceeding?

RULE 44 COMPLIANCE

The Petition must briefly and distinctly state its grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

The SUBSTANTIAL ground is predicated upon the factor that "Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error [predicated upon Henderson v. Morgan, 426 U.S. 637 (1976) and Hicks v. Franklin, 546 F.3d 1279 (10 Cir. 2008)] in his plea colloquy 'has resulted in the conviction of one who is actually innocent.'" Bousley v. United States, 118 S.Ct. 1604, 1611 (1998).

The CONTROVERSIAL effect held in conflict by the Fourth Circuit from the Tenth Circuit is the Tenth Circuit finding that "while error may have violated Defendant's constitutional right to due process, the Supreme Court has repeatedly recognized that constitutional errors are not always structural errors." United States v. Trujillo, —F3d—, No. 19-2057 (10 Cir. May 27, 2020) at *5. See also infra, at 4-5.

In contrast, the Fourth Circuit "independently find the error [~~of mens rea~~] is structural on the ground that fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea." United States v. Gary, 954 F.3d 194, 206 (4th Cir. 2020).

These intervening laws recognize that ~~mens rea~~ is a critical component in Due Process of Law protections in the PLEA colloquy proceeding to the ACTUAL elements of a charging offense.

PETITION FOR REHEARING

Petitioner Barnes appears ~~pro se~~ respectfully request that this Honorable Court REHEAR the question presented.

PARTIES TO THE PROCEEDING

The petitioner in this case is Adolfo Barnes.

The respondent in this case is Janet Dowling, Warden;
State of Oklahoma, Office of the Attorney General

JURISDICTION

This Court's jurisdiction rests on Supreme Court Rule 44. The order denying certiorari is attached hereto.

GROUND FOR REHEARING

Petitioner contends that ACTUAL INNOCENCE extends to the critical elements of ~~mens rea~~ of a crime in a change-of-plea proceeding when that burden of proof, in the instant case, in accordance with Section IV, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18 App. (2011), must be

distinguished from a trial proceeding, encompassed within the Rules of Evidence.

ARGUMENT

The Fourteenth Amendment guarantees "Due Process of Law" before any State can deprive any person of his liberty. This Due Process minimally guarantees indigent defendants the assurance that his plea be entered intelligently, knowingly and voluntarily. See generally North Carolina v. Alford, 400 U.S. 25, 31 (1970) (The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.)

As a matter of constitutional law, this Court holds for the proposition that "real notice" is a prerequisite to the "basic protections, without which a criminal [change-of-plea proceeding] cannot reliably serve the function as a vehicle for determination of guilt or innocence." See generally Henderson v. Morgan, 426 U.S. at 644-647, 96 S.Ct. 2253 (1976).

In contrary to "clearly established law," Mr. Barnes' lack of "real notice" deprived Petitioner "both the nature of the charge to which he is pleading guilty and

its elements." Henderson, supra.

That is, Petitioner was formally charged with FIRST DEGREE Felony murder with the underlying charges of FIRST DEGREE Burglary, Robbery with a dangerous weapon, and Knowingly concealing or Receiving stolen property. Without "read notice" AND trial court admonishment Petitioner pled guilty to SECOND DEGREE Felony Murder without the adequate finding of any underlying felonies.

Under the particular facts of Mr. Barnes' case, the clear ERROR is that counsel's erroneous advice did not comprehend the law in respect to the "felony-murder" doctrine and the trial court did not cure this error in the law. The Tenth Circuit has determined, in accordance with Oklahoma law, that "once the state has established that a defendant used a dangerous weapon in the course of a robbery that results in death, the offense of second degree murder is no longer an option under Oklahoma law." Wilson v. Simmons, 536 F.3d 1064, 1103-04 (2008) (citations omitted).

Accordingly, plain on its face, the process afforded Petitioner is ILLEGAL, therefore constitutionally defective.

Similar to Henderson v. Morgan, Petitioner "did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment entered without due process of law." Id. 426 U.S. at 647, 96 S.Ct. 2253. Because Petitioner's pro se claims must be "liberally construed," Mr. Barnes argues distinctly that AEDPA's statute of limitations did not apply to his case implicating the trial court's jurisdictional power to impose judgment. See and compare McQuiggin v. Perkins, 133 S.Ct. at 1932 (The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage.).

In the recently analogous case of United States v. Trujillo, — F.3d —, No. 19-2057, 2020 WL 2745526 (10th Cir. May 27, 2020), the Tenth Circuit found that "while error may have violated Defendant's constitutional right to due process, the Supreme Court has repeatedly recognized that constitutional errors are not always structural errors." Id. at *5.

To the opposite, the Fourth Circuit "independently find the error [of mens rea] is structural on the ground that fundamental unfairness results when a defendant

is convicted of a crime based on a constitutionally invalid guilty plea." United States v. Gary, 954 F.3d 194, 206 (4th Cir. 2020).

Of course, Trujillo, supra and Gary, supra analyzed Rehaif v. United States, -U.S.-, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019). "Rehaif changed the established law such that, now, to secure a conviction under 18 U.S.C. § 922(g)(1), the Government must also prove that the defendant knew "he had the relevant status" as a felon when he possessed the firearm. Id. at 2194." Trujillo, supra at *1.

Nonetheless, the Trujillo Court relied on first, Henderson v. Morgan, supra to "explain that a defendant can show his plea was involuntary under Henderson if he:

(1) establishes that the omitted element was a critical element of the crime charged; (2) overcomes the presumption that his attorney explained the element to him at some time prior to his guilty plea; and (3) shows that, prior to entering his plea, he did not receive NOTICE OF THE ELEMENT from any other source. Id. at 1284."

Trujillo, at *3 (citation omitted) (emphasis added).

Petitioner duly asserts, based upon "clearly established law" that his plea is involuntary.

It must be noted that "the defendants in both Henderson and Hicks were proceeding on collateral review, and thus, neither court applied plain error standards. See 426 U.S. at 638, 96 S.Ct. 2253; 546 F.3d at 1280." Trujillo, at *3.

Undoubtedly, the Trujillo Court, next, applied this Court's structural error classifications under the rationale of Weaver v. Massachusetts, 137 S.Ct. 1899 (2017).

Similar here, without the requisite "real notice" "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest" notably the "plea colloquy" requirement; alternatively Rule 4.1, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2011). See also Bousley v. United States, 118 S.Ct. 1604, 1611 (1998) ("Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his PLEA COLLOQUY 'has resulted in the conviction of one who is actually innocent.'").

The ERROR here is not "harmless beyond a reasonable doubt" and "always results in fundamental unfairness" where the court DID NOT advise the defendant of the charges he is facing (as a general matter), the maximum statutory penalties he would face if he were convicted, the strength of the government's evidence (or at least the factual basis for the plea), and the rights he is waiving by pleading guilty.

In the instant case, Petitioner "faced" SECOND DEGREE Felony Murder amended orally charges and no critical elements were expressed to Petitioner. Thus Petitioner was deprived the subsequent Due Process protections.

CONCLUSION

Petitioner prays the instant Petition for Rehearing in Case No. 20-5188 be GRANTED. As a matter of constitutional law of Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 LEd. 2d 108 (1976), Petitioner's convictions are fundamentally defective and his pleas are involuntary. As a matter of structural error, the right at issue is to the integrity of Oklahoma's charge-of-plea process where it is always fundamentally unfair to convict a defendant on charges without "real

notice."

As a matter of equity, AEDPA's bar to habeas relief is misplaced in Petitioner's particular miscarriage of justice exception where the plea colloquy supports actual innocence.

October 26, 2020

Respectfully submitted,

Adelso Barnes

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