

20-5326

No. 18-3040

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE A. GARCIA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSE A. GARCIA
(Your Name)

FCC FORREST CITY, P.O. BOX 3000
(Address)

FORREST CITY, AR 72336
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTIONS PRESENTED

Were Mr. Garcia Due Process Rights violated under the Fifth and Fourteenth Amendment when he was:

- A.) Incorrectly sentenced under U.S.S.G. 4B1-2(c) Term used in section 4B1.1 Career Offender.
- B.) Double counting of the instant offense of aiding and abetting was an abuse of discretion, failure to correct plain U.S.S.G. error that affected Mr. Garcia's substantial rights seriously affected the fair, integrity and public reputation of judicial proceedings
- C.) The P.S.I. in plain error attribute aiding and abetting as a previous prior conviction U.S.S.G. 4A1.1 incorrectly.

United States vs. Olano, 507 U.S. 725

United States vs. Rosales-Mireles, 585 U.S. 138

United States vs. Peugh, 569 U.S. 537

United States vs. Molina-Martinez 578 U.S. 136

Were Mr. Garcia Due Proces Rights violated under the Fifth and Fourteenth Amendment, when he was:

- A.) Determined by the District Court that Mr. Garcia qualified as a career offender pursuant to U.S.S.G. § 4B1-1(a) because he had one prior conviction for "crime of violence" Arkansas Code § 5-2-403 and 5-13-202. Accomplice to second degree battery. Determining the statute of conviction and its Elements.

- B.) Government abuse its discretion when they applied modified

categorical approach and use the "Shepard documents" material surrounding his 2008 conviction are inconclusive.

C.) Compared the elements of the statute of conviction to the definition.

United States vs. Shepard, 544 U.S. 13 (2005)

United States vs. Taylor, 495 U.S. 575 (1990)

United States vs. Mathis, 136 S. Ct. 2243 (2016)

United States vs. Descamps, 134 S. Ct. 1405 (2014)

United States vs. McMillan, 863 F.3d 1053, 1057 (8th Cir. 2017)

Were Mr. Garcia's Due Process Rights violated under the Fifth, Sixth, and Fourteenth Amendments when he was:

A.) Denied motion for Retest when defense of counsel for Mr. Garcia fail to give reasonable explanation why a retest was needed.

B.) The D.E.A. Chemical Analysis Report on the exhibit report was inaccurate. The laboratory accepted the evidence on 5/24/2016 and it shows a gross weight 87-2g which is incorrectly with the seized in relation to Mr. Garcia in count three indicates a gross weight of 55.453 g

C.) Use of actual methamphetamine Guideline the court should have use the methamphetamine mixture guidelines rather than actual in determining his sentencing range that there is no longer an empirical ratio for actual (or ice) methamphetamine versus mixture of methamphetamine.

United States vs. Hayes, 948 F.Supp 3d 969 (N.D. Iowa)

United States vs. Nawanna, 321 F.Supp 3d 943 (N.D. Iowa 2018)

United States vs. Harry, 313 F.Supp 969 (N.D. Iowa 2018)

United States vs. Sepulveda, 15 F.3d 1161, 1198 (1st Cir 1993)

United States vs. Ladd, 885 F.2d 954, 956 (1st Cit. 1998)

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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 judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12-26-2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 13, 2020, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

Sixth Amendment

Fourteenth Amendment

§ 4A1.1(a) Criminal History Category

-predicate offense However for purpose of determining predicate offense, a prior sentence included in the single sentence should be treated as if it received criminal history points. Therefore and individual prior sentence may serve as a predicate offense under career offender guidelines 4B1.2(c)

§ 4B1.2 Definition of term used in section 4B1.1

(1) has an element the use, attempted use, or threatened use of physical force against the person of another or

§ 4B1.2(c)

The term "two prior felony convictions" means the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of crime of violence or controlled substance offense (two felony convictions of crime of violence, two felony convictions of a controlled substance offense of one felony conviction of crime of violence and one felony conviction of controlled substance.

§ 2D1.1(c)(4) Drug Quantity Table

50g but less than 150g of Ice.

STATEMENT OF THE CASE

On September 25, 2017, Jose Alonso Garcia was named in an eight count Indictment filed in the Western District of Arkansas. Count One charged Mr. Garcia with conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) Count Three of the Indictment charged Mr. Garcia with distribution of five (5) grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), 841(b)(B)(viii) and 18 U.S.C. § 2.

On April 24, 2018 Mr. Garcia appeared before Honorable P.K. Holmes III, for a change of plea hearing. Mr. Garcia was represented by his court appointed attorney Russell A. Wood and entered a conditional plea of guilty to Count Three of the Indictment pursuant to a written plea agreement that was filed with the court on the same date. The court accepted Mr. Garcia's conditional guilty plea and expressed approval of the plea agreement pending completion of the P.S.R.

The P.S.R. was prepared by the United States Probation Officer and the final version of the report ultimately filed with the court on August 1, 2018. On September 12, 2018 the court then accepted the Presentence Investigation Report with the appropriate changes. The court took up the Career Offender enhancement objection regarding the argument that the Aiding and Abetting charge was not "Controlled Substance Offense" the district court concluded that U.S.S.G. § 2X2.1 controls, making the Aiding and Abetting charge the same as the underlying offense.

The court next addressed the argument that a conviction of Accomplice to Battery 2nd, is not a "a crime of violence." The court noted that the offense of Battery in the 2nd is an offense that also includes an element for which a person can be convicted of the mental intent recklessness as opposed to purposeful intent. The court also noted that the Eighth Circuit has stated that Battery 2nd is not a crime of violence and since the statute is divisible the court will use what is called the modified categorical approach to determine whether or not the defendant's conviction actually occurred with purposeful intent as opposed to reckless intent. The court stated that under modified approach, the court is permitted to look at the charging documents to determine the extent of defendant's criminal conduct and to determine whether it is crime of violence.

The court then marked as court Exhibit 1 a copy of the felony information which charged Mr. Garcia with Accomplice to Battery 2nd. The court then went on to read Count One of the information with alleged Garcia aided the other person in committing with the purpose of causing physical injury another person and determined that under the categorical approach the court found that the particular conviction for Battery 2nd is in fact, a crime of violence.

The court then acknowledged that Mr. Garcia's plea agreement was a conditional plea because Mr. Garcia filed a motion for retesting the drug quantity and quality and a motion for approval of expenditures and that the court denied that motion. The court

advised Mr. Garcia that should he prevail on his appeal of the denial of that motion he would be allowed to withdraw his guilty plea. The court discussed 3B1-2 requirements and 5 factors to consider.

The court then narrowed its consideration from the phone calls where Mr. Garcia made while incarcerated in the county jail months later to simply "the facts as they relate to that particular transaction." On May 19, 2016. The court applied the factors, the court determined that Mr. Garcia was not entitled to a reduction for minor or minimal role participant. The court then proceeded to set forth the sentencing options in the case. The court calculated Mr. Garcia's total offense level to be 31 and criminal history category to VI based on these calculations, the guidelines recommended a sentence of 188 to 235 months.

On November 19, 2018 defense counsel Mr. Woods filed a direct appeal in the United States Court of Appeals for the Eighth Circuit following a decision for the United States District Court in the Western District of Arkansas. His appeal was denied. Mr. Garcia next filed a petition for Rehearing En banc timely and a Rehearing by the panel was denied.

Mr. Garcia asserts that his previous aiding and abetting distribution of methamphetamine conviction is not a controlled substance offense. The Court of Appeals concluded that the district court did not err in considering Garcia's previous conviction for aiding and abetting distribution of methamphetamine as a controlled substance offense for purposes of the Career Offender sentencing

enhancement.

Garcia also asserts that his conviction as an accomplice to second degree battery under Arkansas law cannot qualify as a crime of violence for the purpose of the career enhancement because it does not have an elements "the use attempted used, or threatened use physical force as required by U.S.S.G. § 4B1-2(a) force clause. The use of the modified categorical approach to determine for which crime the defendant actually pleaded guilty. The district court relied on a document felony information underlying Garcia's state conviction includes the following relevant languages alleging that by striking and kicking another causing a fractured orbital socket and pallet. The Court of Appeal were satisfied that the record of conviction demonstrates Garcia was convicted for.

The United States Court of Appeals for the Eighth Circuit view Mr. Garcia's first claim the denial of his motion for retesting of drug quality and quantity and for approval of expenditures because the purity of the drugs was in question and the district court, at the very least, should have conducted an exparte hearing on the motion. For the reason they set forth in United States v. Escalante, No. 18-3033, they conclude the district court did not abuse its discretion in denying the motion.

Garcia next asserts that the district court erred by failing to award him a minor participant or minimal role offenses level reduction in calculating his Guidelines sentencing range. The court concluded that Esclante seemed to "have had a little bit more involvement in the transaction" but concluded that Garcia

and Esclante played very similar roles and the "the culpability of these two individuals is fair comparable." Although the district court determined there was no evidence that Garcia participated in planning the transaction or exercised and decision-making authority the district court determined the other factors weighed against awarding the reduction. The Court of Appeals concluded No clear error in the district court's denial of the minor participant or minimal reduction.

REASONS FOR GRANTING THE WRIT

A.) Mr. Garcia Due Process Rights were violated under the Fifth and Fourteenth Amendment, when he was incorrectly sentenced under U.S.S.G. 4B1-2 (C) Term used in section 4B1-1 Career offender. Although Mr. Garcia defense of counsel did not brought to the district court's attention and on Mr. Garcia direct appeal that he does not have a previous state conviction of aiding and abetting Fed. R. Crim. P. 52(b) provides that a plain error that affects substantial rights. May be considered, United States v. Olano, 507 U.S. 725. Defense of counsel for Mr. Garcia did not object to the error in the district court not on the direct appeal which relied on the miscalculaed Guidelines range of career offender recommended by the probation office. Level 34 category VI 262 to 327 months.

Because under the § 4B1-2(c) the term "two prior felony convictions" use in section § 4B1-1 is inconsistent in the case of Mr. Garcia, this error of a previous aiding and abetting use as a predicated offense is plain that is to say clear or obvious. This error have affected Mr. Garcia substantial rights. As a result of this error resulting in a higher range than the Guidelines provide. Mr. Garcia without the career offender status would of started at level 30 category VI calculated range would have been 168-210 months. Mr. Garcia would have been subject to a different sentence but for the error. United States v. Molina-Martinez, 578 U.S. ____ 136.

Mr. Garcia have met the conditions established in Olano, 507,

U.S. 725. This Court should exercise its discretion to correct the forfeited error. This error affects the fair, integrity reputation of judicial proceedings. Id at____, 136 S. Ct. 1338, 194 L Ed 2d 444.

B.) Double counting of the instant offense of aiding and abetting. The probation officer in its presentence investigation report mistakenly counted the instance offense of aiding and abetting twice. Once for the instance offense and second for a prior conviction predicate offense under the 4B1-1, which Mr. Garcia does not have on his record or P.S.I. Mr. Garcia Substantial Rights were violated United States v. Rosales-Miracles, 585 U.S. 138. The district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct and failure to calculate the correct Guidelines range constitutes procedural error United States v. Peugh, 596 U.S. 537.

Mr. Garcia Guidelines with the error of Career Enhancement yield a Guideline range of 267-327 months. Three point reduction for owing to his responsibilities arrive at 188-235 months and received the low end without this error, Mr. Garcia correct Guidelines with owing to his responsibilities three point reduction would of been 130-162 months. This error affected Mr. Garcia substantial rights United States v. Rosales-Miracles, 585 U.S. 138. Because Mr. Garcia sentence of 188 months fell beyond unreasonable and the error by itself would shock the conscience of due process.

C.) The probation officer in Plain Error attribute aiding and abetting as a state prior conviction U.S.S.G. 4A.1 incorrectly.

Mr Garcia does not have any previous state conviction of aiding and abetting that added points in his P.S.I. under § 4A1.1.

Mr. Garcia sentence was based on a mistake made in the presentence investigation report by the probation office, who works on behalf of the District Court. This error seriously affects the fairness, integrity or public reputation of judicial proceedings United States v. Molina-Martinez, 578 U.S.. There is a reasonable probability that without correction of the Guidelines error, Mr. Garcia will spend more time in prison than the District Court otherwise would have considered necessary United States v. Rosales-Mireles, 850 F.3d at 244. Therefore this error violates Mr. Garcia Substantial Rights. Fed. R. Crim. P. 52(b) should be considered under Olano, 507 U.S. 725.

Were Mr. Garcia Due Process Rights violated under the Fifth and Fourteenth Amendment when he was:

A.) Determined by the District Court that Mr. Garcia qualified as a career offender pursuant to U.S.S.G. § 4B1-1(a) because he had one prior conviction for "crime of violence" Arkansas Code § 5-2-403 and 5-13-202 accomplice to second degree battery. In determining the statute of conviction and its elements. The District Court cited the felony information to determine whether the prior conviction for accomplice to Battery 2nd was a "crime of violence" the Government applied the modified categorical approach and only analyzed Ark Code § 5-13-202(a) but erred to analyze § 5-2-403 accomplice statute. Exhibit 1 count one states with purpose of promoting or facilitating the commission of an

offense they aided the other person in committing. This part of the inquiry was ignored by the government and they only address Ark Code § 5-13-202(a). This plain error affect Mr. Garcia's Substantial Rights and the right to a fair trial. Namely, to help courts determine which statutory phrase within the statute listing several different crimes was the basis of conviction. Courts may not apply the modified categorical approach to sentencing under A.C.C.A. when the crime of which the defendant was convicted has a single, indivisible set of elements; Courts may only apply this approach of the statute is divisible *Descamp v. United States*, 134 S. Ct. 1405 (2014). Ark Code Ann § 5-2-403 accomplice has indivisible set of elements. Therefore is not a predicate offense. (See Exhibit 2 Ark. Code 5-2-403)

B.) Government abuse its discretion when they applied modified categorical approach and use the "shepard documents," material surrounding his 2008 conviction are inconclusive. The Government relied on a felony information where they only analyze half of the inquiry Ark 5-13-202(a) but left out Ark Code § 5-2-403 when analyzing which words or phrases of a statute form the elements of a crime and when you leave out part of that phrases or word, makes a huge difference of the interpretation of the phrases or word *United States v. McMillian*, 863 F.3d 1053, 1057 (8th Cir. 2017).

Additionally an information is only allegations and the government did not present any evidence of the facts to which Mr. Garcia actually plead guilty to in state court. *Shepard v. United States*, 544 U.S. 18 (2005) Under the A.C.C.A., is limited to the terms of the charging document, the term of a plea agreement or trans-

cript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information. The Government court violated Mr. Garcia's Due Process Rights in basing his determination of allegations in the information where they only analyze battery 2nd and Not accomplice Mr. Garcia's was convicted of. Mr. Garcia was sentence under two statutes. Exhibit 1 count one alleges only that with the purpose of promoting or facilitating the offense, he aided the codefendants. This conduct is not attempted, threatened or actual use of force. Additionally, the information states that "defendants" struck and kicked another person. It does not identify the defendants or what part Mr. Garcia play in this prior conviction. If Mr. Garcia engaged in this conduct, he would have been charge with battery 2nd degree not as an accomplice. The statutory language is inconclusive, state court decisions fails to provide clear answers and the record materials do not speak plainly Mathis v. United States, 136 S. Ct. 2243 (2016).

C.) The Court must always limit its analysis to comparing the elements of the predicate offense to the applicable definition. The Court may not look to the underlying conduct even where the parties have access to the allegations or even to uncontroverted proof, about the predicate offense. Even where courts are authorized to review the documents authorized by "Sherpard" to determine the elements of statute of conviction, the focus of the inquiry does not become the underlying conduct, but instead remains only on determining the statute of conviction. In Mr. Garcia prior conviction pleaded case there were no statements of

factual basis for the charge shown by a transcript plea colloquy or by written plea agreement present to the court could generally tell from such material whether this prior conviction plea had "necessarily" rest on the fact Taylor v. United States, 495 U.S. 575 (1990). The Government erred in basing his determination of allegation in the information rather fact legally required to be stated in court to support the battery 2nd conviction. In Taylor, conclusion required confining generic conviction evidence to the conviction court's records approach the certainty on the record of conviction in a generic crime state that was the heart of Taylor decision.

In Johnson v. United States 559 U.S. at 137 Court held all of these definitions suggest a degree of power that would not be satisfied by the merest touching. Mr. Garcia's prior conviction of accomplice to a battery 2nd , does not have elements violent force. The Government compared the elements in the statute Ark. Code § 5-13-202 to the elements of the generic definition to qualify this prior conviction guidelines provision. The Government violated Mr. Garcia's Due Process Rights and Substantial Rights because Mr. Garcia was sentenced under two statutes 5-2-403 accomplice and battery 2nd 5-13-202. The Government ignored the elements of accomplice to compared to generic definition because it is overbroad that is it proscribe a large sphere of conduct then is targeted by the generic offense accomplice to battery 2nd does not qualify. Mathis v. United States 136 S. Ct. at 2251.

Were Mr. Garcia's Due Process Rights violated under the Fifth, Sixth and Fourteenth Amendments when he was:

Denied motion for retest when defense of counsel for Mr. Garcia fail to give reasonable explanation why a retest was needed. Defense of counsel for Mr. Garcia fail to object to the errors in the analysis report. If Mr. Garcia was granted retest of the drug, he could prove that he was sentence in the incorrect guideline of actual methamphetamine. There was no expert testimony to established the quality of the drug in question. The gross wieght of 87.2g was not the weight seized in chain of custody. This errors cause Mr. Garcia unfair trial.

B.) The D.E.A. chemical analysis report on the exhibit report (Exhibit 3) was inaccurate. The laboratory accepted the evidence on 5/24/2016 and it shows a gross weight 87.2g which is incorrectly with the seized in relation to Mr. Garcia in Count three indicates a gross weight of 55.453g. The proof offered of the chain of custody of drug between seizure and analysis was insufficient. In order to meet its burden of demonstrating drug quantity, the government must perforce make a satisfactory showing of the identity of the drug weighed with the drug seized. Where there is some indication that the drugs weighed may not be the drugs seized, the Government will have to go further to demonstrate a chain of custody providing identity United States v. Ladd, 885 F.2d 954, 956 (1st Cir. 1989).

In Mr. Garcia's case there was not such indication, credible testimony that the drugs were in official hands at all times.

① The description of the drug receipt were not offer in Mr. Garcia drug seized in Count three of the indictment only that he was involved in a transaction of 55.453g. This is inconsistent with the state lab descriptions of 87.2g gross weight it received on 5/24/2016 and there was no testimony at hearing trial of agent Keene nor the D.E.A. of the drug quantity seized were the same drugs as were turned over to the state lab. Therefore this affect Mr.Garcia substantial rights and the right to a fair trial. It is the government's burden at sentencing to prove drug quantity by a preponderance of the evidence United States v. Sepulveda, 15 F.3d 1161, 1195 (1st Cir. 1993) The drug found by the court was unsupported by such a preponderance.

② In the case of Mr. Garcia granted of the Retest would of support Mr. Garcia's assertions but he was denied a fair trial. Defense of counsel for Mr. garcia fail to object to the admisible of the evidence on this exhibit detail evidence and explain why a retest was requested.

C.) Mr. Garcia was sentence under the actual methamphetamine Guidelines. The court hould have use the methamphetamine mixture rahter than the actual.because:

1.) The 10:1 ratio established in the Guidelines is not bases on empirical evidence creating Guidelines ranges for (actual and ice) methamphetamine that are excessive not "heart-land."

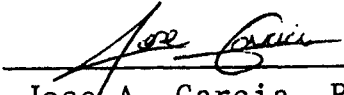
③ 2.) Drug purity is not an accurate proxy for culpability in light of the fact that methamphetamine trafficked in recent years

has been substantially pure. United States v. Hayes, 948 F.Supp 2d at 1031, United States v. Nawanna 321 F.Supp 3d 969 (N.D. Iowa) and United States v. Harry, 313 F.Supp 3d 969 (N.D. Iowa). If Mr. Garcia's motion for retest of drug would have been granted, Mr. Garcia would have been provided a fair trial and would of demonstrated he was sentence under the wrong Guidelines.

CONCLUSION

The Government erred by using the aiding and abetting as a prior conviction under the 4B1-1 Career Offender provision - The Government erred in ruling that accomplice to battery is a crime of violence under the Career Offender provision and abuse its discretion when they apply the modified categorical approach and use the underlying conduct to demonstrate culpability instead of fact findings of the state court records. Affecting Mr. Garcia Substantial Rights and Due Process Rights. The Government also abuse its discretion by denying Mr. Garcia's motion for Retest of Drug Quantity and Quality and motion for approval of expenditures and it was prejudicial to Mr. Garcia ability to mount a defense, exposing him to an excessive sentence. Mr. Garcia respectfully request that this Court reverse and remand.

Respectfully Submitted,



Jose A. Garcia, Petitioner Pro Se