NO. _____

IN THE
Supreme Court of the United States

KWAME ANDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court must settle an important question of federal law that has not been, but should be, regarding Petitioner's resentence that was imposed three year after his original sentence without an updated presentence report.

2. Whether Petitioner was deprived of his constitutional right to effective assistance of counsel at the sentencing proceeding when no objection was made to the use of the old presentence report to sentence Petitioner.

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America
Kwame Anderson

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

United States v. Anderson., 1:13-cr-00414, is the trial court docket in the Southern District of New York, from which this case originates.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To secure and maintain the uniformity of judicial decisions, it is up to this Court, Petitioner's last resort, to remedy the due process violations and remedy the lower courts' decision in conflict with Federal Rule of Criminal Procedure 32. The refusal to remedy Petitioner's due process violations and the fact that a Court of Appeals has decided an important federal question that has not been, but should be settled by this Court, warrant the grant of the writ.

OPINION BELOW

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A. 1).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued a summary order affirming Petitioner's conviction on May 15, 2020 (A. 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Due Process Clause of the Fifth Amendment and Federal Rule of Criminal Procedure 32.

STATEMENT OF THE CASE

Petitioner was convicted for his role in a narcotics conspiracy. Petitioner was originally charged with one count of conspiracy to distribute controlled substances and one count of using, possessing, carrying, brandishing, and discharging firearms in relation to a narcotics conspiracy in the Bronx, New York. Following the entering of a plea agreement, Petitioner pled guilty to a single-count Information which charged brandishing a firearm in connection with a drug trafficking offense pursuant to 18 U.S.C. § 924(c)(1)(A)(ii) .

The District Court originally sentenced Petitioner to 84 months' imprisonment and 60 months of supervised release. Following Petitioner's appeal, Petitioner's conviction was affirmed but his case was remanded for the limited purpose of resentencing Petitioner with respect to his supervised release term. On remand, the District Court imposed a new term of supervised release of two years. Petitioner appealed his new term of supervised release.

Petitioner's Argument on Appeal

Petitioner argued on appeal that the District Court violated Federal Rule of Criminal Procedure 32(c)(1)(A) because he was resentenced with his 3 year old

PSR and the District Court did not request an updated Presentence Report ("PSR") or express finding that the information in the updated PSR, was sufficient to impose the new sentence. Petitioner also argued that District Court counsel was ineffective for failing to request an updated PRS on Petitioner's behalf.

Panel Decision

On May 15, 2020, a panel of the Second Circuit Court of Appeals affirmed the decision of the District Court. The Court rejected Petitioner's argument that the District Court violated Federal Rule of Criminal Procedure 32(c)(1)(A) because his new sentence was imposed without an updated PSR or an express finding that the information in the updated PSR, was sufficient to impose the new sentence. The Court noted that the District Court did not err in using the original PSR to resentence Petitioner because according to the Second Circuit's decision in *United States v. Quintieri*, 306 F.3d 1217, 1234 (2d Cir. 2002), "we have held that Rule 32 does not require 'an updated PSR in the event of *resentencing*' if, for example, 'the parties are given a full opportunity to be heard and to supplement the PSR as needed.'" (quoting *United States v. Triestman*, 178 F.3d 624, 633 (2d Cir. 1999)). The Court noted that Petitioner was provided a full opportunity to supplement his original PSR and had the chance to update the District Court as to his physical and mental state and status at the resentencing hearing. Additionally, the Court

explained that Petitioner submitted a letter brief to the District Court prior to resentencing addressing the issue of supervised release.

The Court also rejected Petitioner's claim of ineffective assistance of counsel because there was no need for an updated PSR and hence, counsel's conduct did not fall below an "objective standard of reasonableness" under "prevailing professional norms," *Strickland v. Washington*, 466 U.S. 688 (1984), and Petitioner could not show that any prejudice resulted from counsel's alleged deficient performance. The Court noted that at the resentencing hearing, Petitioner updated the District Court on new circumstances since he was originally sentenced.

All arguments raised by Petitioner on appeal were found to be without merit and the Second Circuit affirmed the amended judgment of the District Court.

REASONS FOR THE GRANTING OF THE WRIT

POINT I

THE SECOND CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, THAT PETITIONER'S RESENTENCE, IMPOSED THREE YEARS AFTER HIS ORIGINAL SENTENCE, DID NOT REQUIRE THE USE OF AN UPDATED PRESENTENCE REPORT, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Applicable Law

In accordance with Federal Rule of Criminal Procedure 32, the sentencing court must order a presentence report before the court imposes a sentence. Fed. R. Crim. P. 32.

> (c) Presentence Investigation
>
> (1) Required Investigation
>
> (A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes a sentence unless:
>
> (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
>
> (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains it's finding on the record.

When a defendant is convicted of 18 U.S.C. § 924(c), the district court may impose a term of supervised release following a jail sentence, but a term of supervised release is not mandatory. 18 U.S.C. § 924(c); 18 U.S.C. § 3683 (b).

Under 18 U.S.C. § 3559, an offense that is not specifically classified by a letter grade is assigned a class of felony based upon the maximum term of imprisonment permitted. Appellant was convicted of § 924(c)(1)(A)(ii), which carries a maximum sentence of life imprisonment. Because the maximum term of imprisonment is life, § 924(c)(1)(A)(ii) is a class A felony. 18 U.S.C. § 3559. Under the United States Code, for a class A felony, the maximum authorized term of supervised release is up to five years.[1] 18 U.S.C. § 3583(b).

Argument

The Second Circuit Court of Appeals decision, holding that the use of an updated presentence report was not required at Petitioner's resentencing, decided an important question of federal law that has not been, but should be, settled by this Court.

The District Court did not comply with rule 32(c)(1)(A)(ii), which requires that in order for the court to sentence a defendant without a presentence report, the court must make a finding that the information it already has enables the court to meaningfully exercise its sentencing authority under 18 U.S.C.§ 3553. In Appellant's case, the court did not make such a finding.

[1] The reason for Petitioner's resentence was that at the original sentence the district court mistakenly believed that the mandatory term of supervised release for Petitioner's crime was at least 5 years

Without an updated presentence report, the District Court imposed a supervised release term of two years at Appellant's resentence and ordered that Appellant comply with the standard conditions of supervised release.[2]

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[2]

1. Appellant must report to the probation office in the federal judicial district where Appellant was authorized to reside within 72 hours of his release from imprisonment, unless the probation officer instructs him to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, Appellant will receive instructions from the court or the probation officer about how and when Appellant must report to the probation officer, and Appellant must report to the probation officer as instructed.
3. Appellant must not knowingly leave the federal judicial district where he is authorized to reside without first getting permission from the court or the probation officer.
4. Appellant must answer truthfully the questions asked by his probation officer.
5. Appellant must live at a place approved by the probation officer. If Appellant plans to change where he lives or anything about his living arrangements (such as the people he lives with), he must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, Appellant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. Appellant must allow the probation officer to visit him at any time at his home or elsewhere, and he must permit the probation officer to take any items prohibited by the conditions of his supervision that he or she observes in plain view.
7. Appellant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses him from doing so. If he does not have full-time employment, Appellant must try to find full-time employment, unless the probation officer excuses him from doing so. If Appellant plans to change where he works or anything about his work . . ., Appellant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances,

In order for the court to reasonably come to the conclusion that these terms were appropriate, the court should have considered an updated presentence report that described Appellant's current physical and mental state, his status and circumstances, since his original sentence was imposed over three years earlier. Consequently, there is no basis for the district or appellate Court to conclude that Appellant's supervised release terms were reasonably imposed. Conditions of supervised release must reasonably relate to

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Appellant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. Appellant must not communicate or interact with someone he knows is engaged in criminal activity. If Appellant knows someone has been convicted of a felony, he must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If he is arrested or questioned by a law enforcement officer, Appellant must notify the probation officer within 72 hours.
10. Appellant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. Appellant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that Appellant poses a risk to another person (including an organization), the probation officer may require Appellant to notify the person about the risk and Appellant must comply with that instruction. The probation officer may contact the person and confirm that Appellant has notified the person about the risk.
13. Appellant must follow the instructions of the probation officer related to the conditions of supervision.

> (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

U.S.S.G. 5D1.3(b)(1). The sentencing court could not consider these factors without an updated presentence report. In order for the court to comply with Rule 32(c)(1)(A)(ii), legally consider the terms of supervised release to be imposed in Appellant's case and/or properly consider Appellant's argument that he should not receive any term of supervised release, the court was required to consider an updated presentence report. Without an updated presentence report, the court could not comply with Rule 32, could not appropriately consider Appellant's supervised release terms, and could not properly consider Appellant's argument that he should not be subject to a term of supervised release. Fed.R.Crim.P. 32(c)(1)(A)(ii).

Any argument by the Government that a failure to order an updated presentence report was harmless, or should fail plain error review, should be rejected. Federal Rule of Criminal Procedure 32 specifically and explicitly requires the sentencing court to order a presentence report before the court imposes a sentence, demonstrating the rule's intention that it be followed and not be subject to interpretation. Without the court having an updated presentence report before it, there is no way to know if such an error was harmless. As such, because there was

no updated presentence report available and the Federal Rule was blatantly violated, harmless error should not apply to this particular requirement.

Moreover, "Plain error review requires a defendant to demonstrate that (1) there was error, (2) the error was plain, (3) the error prejudicially affected his substantial rights, and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings." (*United States v. Cook,* 722 F.3d at 481 (2d Cir. 2013); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)).

Subjecting a criminal defendant to supervision and a potential jail sentence if he violates supervision, without the consideration of Appellant's pertinent and accurate background information, prejudicially affects Appellant's substantial rights and affects the fairness, integrity and public reputation of judicial proceedings. Specifically, without considering Appellant's updated and current circumstances, the risk of harm in subjecting Appellant to an unjust punishment or sentence is great. Appellant should have been sentenced pursuant to an updated presentence report, as required by the Federal Rules, instead of an inapplicable or three-year old report. The error seriously affected the fairness and integrity of the proceedings, as well as the public reputation of the proceedings. As a matter of preserving the integrity and justice-driven demeanor of the judicial system, courts should be required to follow all legal rules that are explicitly and plainly set, rather than be allowed to violate any requirements they so choose. Failing to remedy a

clear violation of a core constitutional principle would be error "so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice." *United States v. Ogba*, 526 F.3d 214, 237-238 (5th Cir. 2008).

While the Second Circuit in *Quintieri*, 306 F.3d at 1234, held that "Rule 32 does not require 'an updated PSR in the event of *resentencing*' if, for example, 'the parties are given a full opportunity to be heard and to supplement the PSR as needed,'" (quoting *Triestman*, 178 F.3d at 633)), there was no mention of the presentence report at Petitioner's resentencing that established the presentence report was discussed with him. While sentencing courts customarily ask defendants whether they have reviewed the presentence report with their attorneys, this did not occur at Petitioner's resentencing, which took place three years after his original sentencing proceeding. There is thus no evidence that Petitioner was given a full opportunity to be heard and to supplement his presentence report as needed. Furthermore, while the defendant in *Quintieri*, 306 F.3d at 1234-35, submitted a detailed letter to the court, Petitioner did not submit a letter updating the court on his current physical/mental or changed circumstances. While the court was aware of Petitioner's update on classes, this did not take into account everything needed to resentence him, such as any physical or mental changes.

Thus, the Second Circuit Court of Appeals decision affirming the District Court's holding that the use of an updated presentence report was not required at Petitioner's resentencing, decided an important question of federal law that has not been, but should be, settled by this Court.

POINT II

THE COURT OF APPEALS' DECISION DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. ACCORDINGLY, PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PROCEEDING.

Applicable Law

A defendant to a criminal prosecution has a Sixth Amendment right to the effective assistance of counsel at all critical stages of the prosecution where his substantial rights may be affected, and sentencing is one such stage. *Glover v. United States,* 531 U.S. 198 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134-137 (1967).

In order to succeed on a claim of ineffective assistance of counsel, a claimant must meet the two-pronged test established by *Strickland v. Washington,* 466 U.S., 668, 687 (2d Cir. 1984). The defendant must show that counsel's performance was deficient, so deficient that, "in light of all the circumstances, the

identified acts or omissions were outside the wide range of professionally competent assistance," *id*. at 690; and that the deficient performance prejudiced the defense, *id*. at 687, in the sense that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Id*. at 694. *Gonzalez v. United States*, 722 F.3d 118, 130 (2d Cir. 2013)(quoting *Bennett v. United States*, 663 F.3d 71, 84 (2d Cir. 2011). The performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact and are reviewed *de novo*. *Bennett* at 85 (quoting *Strickland*, 466 U.S. at 698).

Argument

Under the *Strickland* test, to establish an ineffective assistance claim, Appellant must show that his counsel's conduct "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694 (1984).

At sentencing, counsel, who represented Petitioner at his re-sentencing proceeding even though he had moved to be relieved as counsel, was ineffective for failing to argue that Appellant should be sentenced with an updated presentence report. This failure was outside the wide range of professionally competent assistance. A competent attorney would have asked to reschedule resentence

pending his motion to be relieved and raised the overt and evident issue of the outdated presentence report to the District Court, especially considering that the presentence report requirement is explicitly codified in the Federal Rules. Over three years had passed since the last presentence report was submitted to the court, and it was the old presentence report that the court considered in determining whether Appellant would be subject to supervised release upon his release from incarceration or not. At Appellant's first sentencing hearing, the court expressed its belief that Appellant was on his way to a law-abiding life. An updated presentence report would have allowed the court to make an informed decision three years later. Instead, Appellant was sentenced as if nothing had happened within the last three years to change his status from his original sentence. This is unreasonable and affects the integrity of the proceedings. Moreover, if counsel had requested that an updated presentence report be submitted to the district court to inform the court as to Appellant’s current status and progress with rehabilitation, Appellant would have likely been resentenced with the court having an updated presentence report to consult for information about Appellant, increasing the probability that Appellant would have been resentenced to a lesser term or no supervised release at all, especially considering that the court believed Appellant was on his way to a law-abiding life three years prior.

The Second Circuit Court of Appeals' decision affirming the District Court's holding that an updated presentence report was not required and thus, counsel was not ineffective, surrounds an important question of federal law that has not been, but should be, settled by this Court.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: August 12, 2020

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