

20-5477
No. _____

Supreme Court, U.S.

FILED

JUN 10 2020

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SUPREME COURT OF THE UNITED STATES

ELVIS HENRY IDADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should This Court Address the Sixth Amendment Deprivations Created by the Government's Pervasive Restrictions on Defendants' Access to Discovery?

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PETITION FOR WRIT OF CERTIORARI

Elvis Henry Idada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is unpublished and included in Petitioner's Appendix (Pet. App.) at A. The opinion of the district court's denial is unpublished and is included in Pet. App. at B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343. On appeal, he argues that: (1) the district court's amended judgment imposing restitution was untimely, and (2) his guilty plea was not knowing and voluntary. The Court of Appeals for the Ninth Circuit dismiss in part and affirm in part.

SUMMARY OF ARGUMENT

Petitioner acknowledges, that he intends to bring a motion under 28 U.S.C. section 2255 to fully develop his Sixth Amendment claims, including the claim that the Government's Protective Order served to deprive him of the ability to meaningfully participate in his defense. Petitioner raised the issue in his direct appeal to the extent he can, given the limited record, and wishes to emphasize its importance to the Court, because it is an issue that affects many, many defendants in the Central District and other districts with similar policies. Petitioner asked that if the Court of Appeals affirmed the judgment. That the Court recommend, in its written disposition of the case, that he be appointed counsel to assist with his section 2255 motion.

Furthermore, that the Court of Appeals should review and vacate the restitution order. Because the Court of Appeals has discretion to excuse violations of claims-processing rules, and that this issue is important and requires clarification by a higher Court.

Finally, Petitioner alleged that his guilty plea was not knowing and voluntary, because the terms of a protective order prevented him from adequately reviewing and analyzing discovery material in his jail cell, and his defense team could not properly investigate and prepare the case. But the parties stipulated to the protective order.

ARGUMENT

This case illustrates the constitutional quagmire the Government has created in the Central District, and in other districts with similar policies, by drastically restricting defendants' access to discovery. Petitioner understands that the record on direct appeal is limited to the record before the District Court, and that it is impossible, without additional evidentiary proceedings, to develop a full record of the constitutional impact of those policies. What this case needs is a full evidentiary hearing regarding the exact effect of the Protective Order's restrictions on Petitioner's ability to participate in his defense. That will happen in litigation of his section 2255 motion.

The unfortunate fact, however, for Petitioner and all similarly-situated defendants, is that he has no right to an attorney in his forthcoming section 2255 motion. Petitioner requested that the Government agree to supplement the record in this appeal, and offered the Government an opportunity to submit additional briefing addressing any supplemental material. The Government would not agree.

Petitioner requested that the panel recommend, in its written disposition of this case, that counsel be appointed for him for his section 2255 motion. And, the Court Should Review and Vacate the Restitution Order. That the Court of Appeals should take this opportunity to clarify it.

The legal landscape is set out clearly in the Opening Brief, and can be succinctly summarized as follows: (1) the plain language of the statute requires holding the hearing within 90 days; (2) the Dolan decision, Dolan v. United States, 560 U.S. 605 (2010), as the District Court recognized, arguably does not control on these facts, when the defendant specifically objected, and when the delay was the Government's doing, and not the defendant's; the more-recent Lagos decision, Lagos v. United States, 138 S. Ct. 1684 (2018), rejects the Dolan approach of disregarding the statutory language of 18 U.S.C. section 3664(d)(5) based on Congress's assumed intent not to provide an enforceable right to defendants.

Other courts have questioned the Government's broad reading of Dolan. See, e.g., United States v. Zagon, No. 2:11-cr-65-GZS, 2012 WL 1253057, at *2 (D. Me. Apr. 13, 2012) (denying Government motion to impose restitution after statutory time period, and rejecting Government argument that the statutory period was not mandatory under Dolan); State v. Poole, 359 P.3d 667, 671 (Utah 2015) (declining to adopt a "Dolan analysis" of analogous Utah statute and construing the mandatory statutory language as indeed mandatory).

The District Court in this case expressly and correctly questioned whether it had the power to hold a restitution hearing after the statutory period had expired, over the objections of the defendant, when the delay was caused entirely by the Government. The District Court was correct to flag this issue as one calling for appellate consideration and resolution.

It is undisputed that the restitution amount increased from \$3,445,671 to \$4,371,478.32 between the change of plea date and the restitution hearing date. Petitioner set out the details in his Opening Brief, at p.20.

The Government does not rebut those facts, or the critical underlying fact, that “the Government’s position on the amount of restitution changed markedly during the period of unlawful delay—its restitution demand increased by a million dollars.” This Court should recognize that Lagos undermined the foundations of Dolan, and thus that section 3664(d)(5) means what it says, and should be applied according to its plain language.

Finally, Petitioner’s Plea Agreement—Which the Government Drafted—Preserves His Right to Appeal the Restitution Order. The Plea Agreement provides Petitioner the right to appeal any order above the stated amount of \$3,445,671. He is attempting to do just that. Yet the Government argues that his appeal should be dismissed. This Court Should Address the Sixth Amendment Deprivations Created by the Government’s Pervasive Restrictions on Defendants’ Access to Discovery.

The Government argues that a prosecutor may claim that evidence has been “disclosed” for constitutional purposes, where the defense lawyer has access to the evidence but the defendant himself is never able to meaningfully access it or assist his counsel in its analysis. The Government makes this claim expressly, but cites no authority for it. The Government does not argue that Petitioner was in fact able to meaningfully participate in the analysis of the discovery; rather, the Government appears to argue that that the discovery in this case was sufficiently “disclosed” to Petitioner if his lawyer was able to see it, even if he himself could not meaningfully review it or participate in its analysis. This Court should address and reject that contention.

This Court should hold that the Sixth Amendment right to meaningful participation by the defendant in his or her own defense requires meaningful participation in analysis of discovery. Judge Ferguson’s words in dissent in *United States v. Mouzin* apply with equal force here: The right to counsel contains several guarantees, including the right to competent counsel, the right of a defendant to participate meaningfully in the defense and make important decisions, the right to receive important information. The right to participate in one’s defense becomes meaningless without the concomitant right to be informed of important developments in the case. Without information, the defendant cannot make intelligent decisions. *United States v. Mouzin*, 785 F.2d 682, 701 (9th Cir. 1986) (Ferguson, J., dissenting, and collecting cases).

The Constitution guarantees defendants a meaningful, effective defense, and it is time for

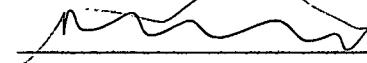
the courts to intervene and hold that the Constitutional right to defend against criminal charges and to have the assistance of counsel in so doing requires that the defendant himself or herself be able to meaningfully participate. The Central District's protective orders are unconstitutional in application.

If a new case, with full evidentiary proceedings, is required to establish just how much Petitioner defense was impaired by the restrictions on his access to evidence, then Petitioner will do his best to obtain and set forth that evidence in his section 2255 proceeding. The interests of justice would be well served if Petitioner received a court-appointed attorney to represent him in that case. Such an appointment will be much more likely if this Court notes in its opinion the importance of this issue and the value of appointed counsel.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



Elvis Henry Idada, pro-se

DATED: June 8th, 2020.