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No:

20-5478

**In the
Supreme Court of the United States**

FERNANDO HERNANDEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Fernando Hernandez
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ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

Was Hernandez' due process rights violated when the district court abused its discretion in relying on Hernandez' domestic violence past in sentencing him on his current drug trafficking offense.

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the First Circuit.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Fernando Hernandez, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is unpublished *United States v. Hernandez*, 18-1209 (1st Cir. March 27, 2020) is reprinted in the separate Appendix A to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on March 27, 2020.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1654(a) and 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Id. Fifth Amendment U.S. Constitution

STATEMENT OF THE CASE

A. The Offense Conduct

Hernandez was charged in a one-count indictment with a count of conspiracy to distribute and possess with intent to distribute heroin and fentanyl, in violation of 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C). PSR ¶4. As described in the PSR the offense conduct related to a wire investigation that revealed Hernandez and his co-conspirators were selling heroin and Fentanyl in and around Rhode Island and Massachusetts. PSR ¶¶ 8-78. Specifically, the Drug Enforcement Administration (“DEA”) intercepted Hernandez’s cell phone from June 22 to July 21, 2016, and from August 1 to August 30, 2016. During those two months, investigators intercepted drug-related calls. Hernandez would arrange for the transportation of the drugs from Providence to Taunton, and then coordinate the delivery of the drugs to a dozen or more regular users who also distributed drugs.

B. The Guilty Plea

On November 6, 2017, Hernandez appeared before the Honorable Leo T. Sorokin in the District of Massachusetts and pleaded guilty to the Indictment described above, without a plea agreement. At the outset of the plea, counsel for Hernandez noted that, in earlier discussions with the government, it was contemplated that the low end the sentencing range might be 108 months’ imprisonment, which was acceptable to Hernandez. However, counsel noted, later

discussions revealed that Hernandez was a Criminal History Category VI, and thus, the range would be 188 to 235 months. Counsel for Hernandez then asked the district court to explain to Hernandez the consequences of pleading guilty and the possible sentences, including the possibility of a sentence higher than 108 months. Just before doing so, the government explained to the court and defendant that it was contemplating filing a superseding indictment that charged a 10-year mandatory minimum, and/or a notice under 21 U.S.C. § 851, which would increase the mandatory minimum to 20 years. The district court then explained Hernandez's right to a trial, the need for a presentence report, the district court's right to disagree with the parties' Guidelines calculations and make its calculation. When Hernandez stated that he "came today to plead guilty for 108 months," the court explained that it could not tell him what sentence he might receive until the Presentence report came back and after he heard from counsel at a sentencing hearing. The court also informed Hernandez that if he pleaded guilty and his sentence was longer or harsher than he anticipated or different than what his counsel predicted, "those facts alone are not a basis to withdraw your plea of guilty."

The court also noted the possibility of Hernandez's sentencing exposure being increased based on the government's potential to seek a superseding

indictment with a mandatory minimum and to double that minimum with a § 851 notice. Counsel and Hernandez then conferred, and Hernandez decided to move forward with the guilty plea. The court then had the government state the maximum penalties and the mandatory minimums, and the court repeated them, including supervised release, fines, forfeiture, and special assessment. The court also explained its obligations to calculate the Guidelines range and to consider that range and other factors. When Hernandez stated that he had not discussed the operation of the Guidelines with his lawyer, the district court took a break in the proceedings and asked counsel to do so. After approximately 30 minutes, the proceedings resumed and the district court confirmed that Hernandez discussed the Guidelines with his counsel, was satisfied with his counsel and wanted to plead guilty. The court then described the operation of the presentence report and the Guidelines, again stating that he could not withdraw his plea if the court did not sentence him within the range his lawyer might have predicted.

C. Sentencing Hearing.

Hernandez was sentenced on February 26, 2018.³ A64. At the outset of sentencing, the court confirmed that he had received the sentencing memoranda and PSR. Counsel for Hernandez also supplied the court with additional copies of a supplemental memorandum, which included two letters on the

defendant's behalf. The court then confirmed that Hernandez had not raised any objections to the presentence report and that the government's one the objection regarding Hernandez's citizenship was resolved. The court then described the sentencing calculations from the PSR, namely, a base offense level of 30, four points added for being a leader, three points less for acceptance, leading to a total offense level of 31, and that his Criminal History Category was VI, based on 26 criminal history points. The parties agreed with these calculations. The court also noted and confirmed with the parties that that, although probation determined that Hernandez was a career offender under the guidelines, the court was not applying the enhancement because the normal guidelines calculation was higher. Accordingly, the court stated that the guidelines range was 188 to 235 months' imprisonment, three years supervised release, a fine range of \$30,000 to \$1 million, no restitution, and a \$100 special assessment. The government spoke about its request for a sentence of 204 months' imprisonment and noted that it was based on the seriousness of the offense and the defendant's serious criminal history. The government went on to explain that Hernandez was supervising a drug trafficking operation in Taunton that, daily, sold 20-50 grams of heroin and fentanyl at a time to customers who were demonstrably and severely addicted to those opioids. The government also revealed its disbelief of Hernandez's claimed severe addiction to drugs, given what the surveillance revealed about his ability to

operate his drug distribution network “on a daily basis, with calls coming and going throughout the day.” The government then referenced Hernandez’s “remarkable” criminal history, stating that Hernandez had double the points “it takes [] to get the highest criminal history category.” Counsel for Hernandez argued that the government’s recommendation was excessive for an individual like Hernandez. A73. He noted Hernandez’s difficult upbringing, which included drugs in the home, his substance abuse issues, as well as the fact that Hernandez had never previously been charged with narcotics trafficking. Counsel also noted how Hernandez’s family loved supported him, as reflected by their letters and presence at sentencing.

The court then detailed the basis for the sentence, noting the guidelines, the applicable guidelines range, the 18 U.S.C. § 3553(a) factors, the “beautiful” letters from Hernandez’s family, the fact of Mr. Hernandez’s bringing Arias into the conspiracy, his violence against women, and the nature of the offense, which was a “sustained, organized” drug distribution network. The court also noted Hernandez’s personal history, including his substance abuse, his lack of any regular employment, his long criminal history. The court noted that it “did not impose this sentence lightly,” that it was imposed based on “the totality of the circumstances, under § 3553,” and that it was a “hard” sentence, but a “just and appropriate one.” The court imposed a guidelines sentence of 188 months’

imprisonment, to be followed by for 3 years supervised release, and a special assessment of \$100.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10 CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

WAS HERNANDEZ' DUE PROCESS RIGHTS VIOLATED WHEN THE DISTRICT COURT ABUSED ITS DISCRETION IN RELYING ON HERNANDEZ' DOMESTIC VIOLENCE PAST IN SENTENCING HIM ON HIS CURRENT DRUG TRAFFICKING OFFENSE.

During the sentencing hearing, the following statements were presented by the court:

THE COURT: All right. Fine. So please stand, Mr. Hernandez. There are a number of things I want to comment on that are -- I have the guidelines, I have the applicable guideline range, I've considered all of section 3553 factors. Let me tell you a number of things that I've been thinking about. First, I start with what I received last, which is the letters from your two children. They are beautiful letters. They are thoughtful, they're personal. They speak well of you, Mr. Hernandez. They're heartwarming. And I consider them. And they highlight, in a clear and emotionally painful way, and obvious way, the consequences that -- the harmful consequences that other people suffer when people go to prison, and the harmful consequences that they, though young, clearly very perceptive young people, understand that they will suffer while you're in prison, however long you're in prison. And I give those letters weight. But there are a number of other things that I consider, too. When I look at the presentence report, one of the things that you said is you've never done anything bad to your son, Mr. Arias, and I disagree with that. I think that's incorrect. Mr. Arias was a young man, who, when he came back to the United States, had no criminal record. It was you who drew him into the drug distribution, not the other way around. And he was your son, you had a duty to protect him, to do right by him in the way these letters describe that you did to your other children. So I don't say -- and I'm not saying that you were violent to him or anything like that, but drawing him into the drug conspiracy was not a -- was a bad thing, not a good thing. And it's made worse by the fact that one of the things he has now is a federal felony conviction. And he was someone who was your child, he came back to the United States, he hadn't seen you in many years and, as I pointed out a few moments ago, it's clear he has some sort of cognitive disability, which makes him more vulnerable. And so with the factual means, you took advantage of him for your own drug business. So I weigh that in my mind.

I also weigh the -- in considering the different factors, the violence that's described in the presentence report that you perpetrated on -- perpetrated against some of the women in your life at different points. It was serious violence that's described there.

So for all those reasons, and considering the factors under section 3553, I find -- not only do I find the guideline range an applicable and appropriate range for this criminal conduct in this case, based on your history, but also that there's an aspect to this of a substantial public safety factor to the sentence, given what's in the presentence report regarding the violence and -- well, primarily that.

Id. Dkt. 334 at 34-35.

The District Court's reliance on the unsubstantiated allegations of violence is in direct conflict with the factors that are permitted to be considered in Title 18 U.S.C. § 3553 and Hernandez' due process rights. Hernandez has a due process right to be sentenced based on accurate information. Reliability is a central ingredient of the due process analysis: where the district court sentences a defendant based on prior acts alleged in the Presentence Investigation Report, ("PSI") it must find the government's information sufficiently reliable to determine by a preponderance of the evidence, that the alleged acts occurred. Where a district court relies on evidence that substantially increases the sentence, it must take care in determining the accuracy of that evidence. A criminal defendant has a due process right to be sentenced based on accurate information. *United States v. Tucker*, 404 U.S. 443, 447, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). Also, when Hernandez raised his objections to the PSR's allegations, the District Court

discredited him without inquiring more about the matter. "When I look at the presentence report, one of the things that you said is you've never done anything bad to your son, Mr. Arias, and I disagree with that. I think that's incorrect: Dkt. 334 at 34. The court noted in *United States v. Marks*, 864 F.3d 575 (7th Cir. 2017), that the general rule is that "a sentencing judge may rely on a 2020 U.S. App. LEXIS 2655, *10 presentence report if it is well-supported and appears reliable." Id. at 580 (collecting prior cases highlighting the same general rule).

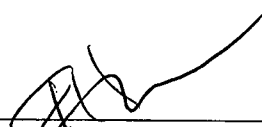
Under those circumstances, the defendant bears the burden of coming forward with facts demonstrating that the information in the PSR is inaccurate or unreliable. See id.; see also *United States v. Sunmola*, 887 F.3d 830, 839 (7th Cir. 2018) ("Only when the defendant's objection creates real doubt as to the reliability of the information in the PSR does the government have the burden of independently demonstrating the accuracy of the information."). The *Marks* court also took care to caution that where these reliability attributes are altogether absent and the PSR instead asserts "nothing but a naked or unsupported charge," the defendant's denial of that information suffices to cast doubt on its accuracy. *Marks*, 864 F.3d at 580; see also *United States v. Moreno-Padilla*, 602 F.3d 802, 809 (7th Cir. 2010) (describing situations in which the general rule does not apply, such as where the PSR omits crucial information).

Hernandez made it clear that the allegations raised in the PSR were inaccurate as to the allegations he had harmed his Son. Facing an objection, the district court must take some steps to ensure that the PSI has a modicum of reliability. *Cf. United States v. Robinson*, 164 F.3d 1068, 1070 (7th Cir. 1999) ("While it's not required that a judge hear personally from witnesses under oath at a sentencing hearing, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for, as here, 97 percent of a defendant's relevant conduct."). It remains within the district court's discretion to determine that step. The sentencing record here did not contain enough to find the Probation Officer's information sufficiently reliable to influence the final ultimate sentence. Due process requires a resentencing hearing.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the First Circuit.

Done this 24 day of June 2020.



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