20-6920

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SEAN MOFFITT
_____ — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA
_____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

SEAN MOFFITT c/o # 09910-068
(Your Name)

PO. BOX 3000
(Address)

WHITEDEER PA 17887
(City, State, Zip Code)

(Phone Number)

LIST OF PARTIES

[X] 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:

RELATED CASES

Clark v. United States, 764 F.3d 653 (6th. Cir. 2014)

United States v. Santarelli, 929 F.3d 95 (3rd. Cir. 2018)

Whab v. United States, 408 F.3d 116 (2nd. Cir. 2005)

QUESTION(S) PRESENTED

(1) Does the district court have jurisdiction to entertain a lawfully filed, Subsequent Petition, (i.e. motion to amend) during the pendency of appeal from the initial petition ?

(2) Is defendant denied the "one full opportunity" to seek collateral review when Appellate Courts refuses to follow its own procedures, by denying remand ?

(3) Is defendants Constitutional Rights violated when being denied the same legal procedures (i.e. equal protection of the law) as similar situated person(s) ?

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JURISDICTION

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The date on which the United States Court of Appeals decided my case was: August 26, 2020
The date on which the United States Court of Appeals denied petition for rehearing was: October 6, 2020
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STATEMENT OF THE CASE

This case arises from a highly criticized Sting Operation, involving the robbery of a fictional Narcotics Stash House containing a fictional amount of cocaine (i.e. 5 kilograms or more), these stings are know as Stash House Stings. The said stings are generally based on the same scenario, an undercover ATF agent poses as some one who has information about a stash house containing 5 or more kilograms of cocaine, comes up with scheme to rob the house, and once the suspects are in a certain position, i.e. ready to commit the robbery, they are apprehended, and charged with conspiracy to commit robbery in violation of 18 USC 1951, weapons charge in violation of 18 USC 924(c), a drug conspiracy in violation of 21 USC 846, and rarely an attempt to possess with intent to distribute in violation of 21 USC 846. The circumstances in this case are significantly different, unlike other "stash house" stings, in this case there were no drugs, no guns, no money, no victim, the defendant was not at the scene of the arrest, the suspects at the scene were not trying to commit the robbery, the government did not charge a conspiracy are an attempt to commit robbery, defendant was arrested almost a month later, and charged with a conspiracy to distribute 5 kilograms or more of cocaine and attempt to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 USC 846. And there was no evidence presented during trial that defendants agreed (conspired) to distribute the stolen drugs. And to begin, "ATF" Agent Bruce Stukey, who wil be referred to UC, proposed to defendants to participate in a home invasion style robbery in order to steal a large quantity of fictitious drugs. The objection (i.e. agreement) was straight forward, rob the stash house, acquire the drugs, and divvy them up amongst themselves, what each party did with his share of the drugs after that was his own affair, not the shared objective. The scheme was set in motion with Chad Revis, the cousin of petitioner, on May 2, 2012, Revis called petitioner's cell phone and ask him to meet, when Petioner arrived Revis approched them saying "I'm bout to burn this white dude for a few ounces, ya'll ain't gotta do nothing just chill" then walk off towards UC. Before introducing UC to petitioner, Revis informed UC that he did not tell them anything, nor did they need to know anything, they'll get their orders and march. The UC refused to let them devise up their own plan so he decided to intervene. Once petitioner and codefendant (i.e. Harris) walked up behind Revis, UC, agaisnt Revis' wishes, ask did everyone know what was going on, when he was already told by Revis, they didn't nor did they need to know. Defendants stated "No what's up" UC then described the scenario of the fictitious stash house and his scheme to rob it.

STATEMENT OF THE CASE

After this meeting, Harris called UC's phone and request to meet again, without Revis, during this meeting, which was both audio and video, Harris did most of the talking, he informed UC that they wanted to do the robbery without Revis, they were "the guns", that he (i.e. Harris) was the man and (referring to petitioner) is my right-hand. Petitioner, who was sitting in the back seat of the car stated, in reference to Revis, "he's not the boss of us we're the boss of him". A few minutes later there was bragging about past robberies that were never proven, and made in a state of persuasion, one side trying to persuade the other, this is a normal feature in any business conversation, nonetheless, this meeting ended without no agreement by the UC to work with them. On May 3, 2012, there was another meeting at a restaurant, during this meeting, which was also on audio video, there was more talk about the uncharged robbery between Harris and UC, at one point Harris informed Petitioner, who was in another conversation with an individual by the name of "Tone", that UC questioned about the "tools" to do the job with, at this point everyone started laughing, petitioner and Tone started to name actual tools and condiments, this was done in mockery of the UC. It was stated during trial by UC that petitioner made a statement about coming with, "weapons of mass destruction", this was not heard on the audio. On May 9, 2012, Harris meets UC in the Bridgeville area at the Knights Inn. Harris arrived with another individual (i.e. Donald Goodwine), he explained that he had a crew nearby in different cars, Harris then drove with UC to get a van to use for the robbery, when they arrive at the spot where the "van" was suppose to be they were arrested and taken into custody. at this point Harris was questioned and directed, by ATF, to call and try to get petitioner to come meet him, this was done after Harris informed the agents that petitioner was not aware that they were coming to meet UC, he never informed him about this meeting and that he (i.e. Petitioner) was not coming over there to meet him. Harris tries to call petitioner, when petitioner answered the phone, he refuses to meet Harris stating "didn't I tell you not to f***k with that white dude" they get into a heated discussion, when the phone hangs up, petitioner, not knowing that Harris is arrested, calls back, Harris doesn't answer, Harris eventually calls petitioner back they get into another heated discussion for the same reason when Harris' phone hangs up again, petitioner tries to call back but Harris never answers, being that he now knows who Harris is with he calles UC's phone, solely looking for Harris. At this point UC tries to get him to come meet but petitioner denies him, repeatedly asking where his uncle (i.e. Harris) was, UC keeps trying to get petitioner to meet, when finally realizing that petitioner was not going to come and meet him, he tells him "...once I get the call he'll let him know, if he wants to go he better be there if not he was going to do "his own thing" He called and petitioner ignored his call both times.

STATEMENT OF THE CASE

THE INDICTMENT

A grand jury indicted petitioner and alleged co-conspirators, charging them with one count each of, 1). Conspiracy to Distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. 846, and 2). Attempting to Possess with intent to Distribute 5 kilograms of cocaine in violation of 21 U.S.C. 846. The penalties for these violations are subscribed in 21 U.S.C. 841(b)(1)(A)(ii).

TRIAL

Petitioner exercised his constitutional right to trial by jury focusing on his innocence on the charges, charged in the indictment. Trial counsel focused more on whether petitioner agreed to commit the (un)charged robbery, which was not the charge in the indictment, he also argued the fact that Petitioner never knew his alleged coconspirators went to meet UC, which was stated by Harris when he was arrested and questioned, the UC also testified to what Harris told him during trial. It was also said that Petitioner "struggled" to answer certain questions, this is not so, there was an inappropriate strategy by the government as a trial penalty. The Entrapment defense was not argued during trial although District Court gave the instructions. Petitioners defense was not that he was "entrapped" but that he was not guilty of the charge(s) presented in the indictment Without proof of the distribution agreement the jury found Petitioner guilty of both counts.

STATEMENT OF THE CASE

TRIAL PENALTY

For exercising his constitutional right to trial, the government filed a notice under 21 U.S.C. 851, (the "851" notice), establishing that Petitioner had two or more prior felony drug convictions. This notice triggered 21 U.S.C. 841 (b)(1)(A), which mandated a mandatory sentence of life for persons convicted of, inter alia, this was done as a penalty for exercising his constitutional right (i.e. going to trial) In February of 2014 petitioner was sentence to life on both counts

DIRECT APPEAL

On direct appeal, petitioner's, Appellate Counsel, (against petitioner's will) challenged [only] the admission of two prior convictions under Federal Rules of Evidence, 404(b), Petitioner, being a laymen, informed counsel that they were allowed to use the 404(b) to prove motive, he told him not to raise this because it was a sure looser, he instructed counsel to challenge the Conspiracy to Distribute, he informed counsel that an agreement to rob for drugs is not an agreement to distribute them, but counsel refused to listen, petitioner then instructed counsel to remove himself from the case, he continued to refuse, petitioner then filed a complaint against counsel, he also plead with the Appeals Court to remove him off the case, it became clear that counsels intentions was to sabotage the appeal, his compliant was sent to a merits panel who ultimately denied him, at this he was forced to use and left to the mercies of a incompetent counsel in violation of Mcmann v. Richardson, 397 U.S. 759 (1970). The Appeals Court affirmed (i.e. denied appeal) at, United States v. Moffitt, 601 F. App'x 152 (3rd. Cir. 2015).

28 U.S.C. 2255

Petitioner filed a petition to vacate, and or correct conviction, and or sentence alleging multiple claims of ineffective assistance of counsel, which was denied by the district court at United States v. Moffitt, 2016 U.S. Dist. Lexis. 173194.

STATEMENT OF THE CASE

CERTIFICATE OF APPEALABILITY

Third Circuit Court of Appeal, granted petitioner "Certificate of Appealability", which was limited to two questions: 1). whether counsel was ineffective for failing to argue that Petitioner should have been sentence to a lesser drug quantity because the government unfairly exaggerated the quantity of cocaine which he was charged and 2). whether counsel was ineffective for failing to request a jury instruction that would have allowed the jury to find petitioner guilty of a lesser drug quantity for the same reason. The assigned panel denied at, United States v. Moffitt, 797 Fed. Appx 708 (3rd. Cir. 2020), It also stated that, neither the Supreme Court nor the Third Circuit has endorsed Sentence Entrapment, quoting, United States v. Washington, 869 F.3d 193 (3rd. Cir. 2017), it also stated that, "Courts of Appeals have divided on whether to recognize the doctrines as legal defenses.

PETITION FOR REHEARING
IN ACCORDANCE WITH FED. R. APP. P. 40.

upon denial of "COA" petitioner filed a petition for Rehearing, accordance with Fed. R. App. P. 40. this petition must state with particularity each point of law and or fact petitioner believes court has overlooked or misapprehended and petitioner must argue in support of petition id. Petitioner raised two points he believed and he argued in support of them.

POINT ONE OF PETITION FOR REHEARING

Petitioner argued, that panel focused exclusively on what constituted, one of the many criteria's for, Sentence Entrapment defense, while acknowledging, in their reason(s) why "COA" was granted, the actual claim was one that constituted a criteria for Sentence Manipulation. In its decision it explained the "COA" was granted because the exaggerated quantity of cocaine, which is the conduct of the government, i.e. Sentence Manipulation, yet it reviewed the claim evaluating defendants conduct. Sentence Entrapment is a general term used for both doctrines, but the standards of review, in certain instances, are different, but in some they are used interchangeably, the Third Circuit, states that, Sentence Entrapment focuses on defendants conduct, yet in the same breathe it focuses on governments e.g., Tykarsky, 446 F.3d 458 (3rd. Cir. 2006) (Holding that, Sentence Entrapment is when government enlarges the scope or scale of the crime...) According to its broadest formulation...it is a violation of the Due Process Clause, that occurs when government unfairly [exaggerates] defendants sentencing range... United States v. Whitfield, 649 Fed. Appx. 192, 199 (3rd. Cir. 2016)

STATEMENT OF THE CASE

POINT TWO OF PETITION FOR REHEARING

In accordance with the language of Fed. R. App. P. 40. Petitioner directed the courts attention to another point of law he believed the court misapprehended or overlooked, Third Circuit. Local Appellate Rule 22.1(b). This rule authorizes the Appellate Court to expand the scope of the "COA", sua sponte.

Petitioner request that the court revisit his conflict of interest claim which was put in during Direct Appeal, which was ultimately denied by a merits panel, he cited Villot v. Varner, 373 F.3d 327 (3rd. Cir. 2004), in this case the Third Circuit exercised its discretion to expand the "COA" to revisit a panels ruling on a conflict of interest claim at n. 13. being that the appeal was denied, the courts could now see that counsels claim was weaker than the one he was instructed to raise. The heart of effective appellate advocacy involves the process of winnowing weaker issues and focusing on those more likely to prevail See, Smith v. Murray, 477 U.S. 527, 536 (1986), counsel clearly refused to do this. and the fact that petitioner was forced to use counsel was a violation of his Constitutional rights , defendants cannot be left to the mercies of incompetent counsel, and judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases... See, Mcmann v. Richardson, 397 U.S. 759, 771 (1970). Being that Appellate Court forced petitioner to use incompetent counsel, it could now use its discretion to revisit the claim, and give Petitioner a chance to raise a meaningful appeal, which he was denied by the merits panel, who decided to force the use of such incompetent counsel with out any regards as to petitioners actual claim of conflict that, by now, has hindered Petitioners appeals process in a severe manner.

REASONS FOR GRANTING THE PETITION

Petitioner filed a habeas petition in accordance with 28 U.S.C. 2255, the petition was denied, upon denial he filed a petition for a Certificate of Appealability which the Third Circuit Court of Appeals granted, during the pendency of the appeal, petitioner filed a "Subsequent Petition" in the district court, in accordance with the holding in United States v. Santarelli, 929 F.3d 95 (3rd. Cir. 2019), in which the Court held that such petition should be filed in the district court in the first instance id. The district court denied the petition agreeing with the government on two points (1) petition was a "Second or Successive" that must be authorized by the Appeals Court in accordance with 28 U.S.C. 2244 and (2) that it did not have jurisdiction to entertain the petition. Petitioner then filed a motion for "Reconsideration" in accordance with Fed. R. Civ. P. 59. and 62.1. In this motion petitioner cited Santarelli, which set forth the procedure in the Circuit as to dealing with "Subsequent Petitions", this motion was also denied. Petitioner then filed an Application to the Appeals Court, in this Application he requested two forms of relief, i.e., a Certificate of Appealability and or at the very least a Remand, which was the procedure set forth in Santarelli id. In regards to the COA, the Court of Appeals, in its opinion, held that while the District Court did not follow procedures set forth in Santarelli, it did not arguably err in determining that it lacked jurisdiction over petitioners "Subsequent Petition" Citing, United States v. Santarelli, 929 F.3d at.106 (3rd. Cir. 2019) (describing procedure for handling Subsequent Petition filed while appeal is pending). Concluding that jurists of reason would not debate that petitioner has not stated a valid claim of denial of a constitutional right, See App. Ct. decision. In regards to the request for Remand, (i.e. the motion to clarify) the Court determined that because the District Court did not err, there is no basis to remand case to the district court. In Santarelli, the Third Circuit Court of Appeals held that a "Subsequent" habeas petition filed during the pendency of an appeal from the initial petition is not "Second or Successive" with in the meaning of 28 U.S.C. 2244 or 2255(h), and that such petition should be construed as a "motion to amend" the initial petition, further holding that such liberally construed "motion to amend" should be filed in the district court first because such a motion is not a "Second or Successive" habeas petition and therefore petitioner need not seek authorization from the Appeals Court pursuant to 28 U.S.C. 2244 and 2255, yet in the same breath it says the district lacks jurisdiction to entertain the petition id. 105-06.

REASONS FOR GRANTING THE PETITION

If the Appeals Court has held that a "Subsequent Petition" (i.e. motion to amend) is not Second or Successive, petitioner does not need authorization to file it pursuant 28 U.S.C. 2244, and that such petition should be filed directly in the district court in the first instance, who then has the jurisdiction to entertain the petition ? If district court does not have jurisdiction to entertain the petition why would the Appeals Court direct that it be filed there, see, Santarelli, 929 F.3d at 105-106, and what gate keeping function is the Appellate Court keeping if there is no need for petitioner to seek authorization from them ? The law/ruling should not be confusing, as to require petitioner to file, simultaneously, in both, the district and appeals courts in order to avoid the risk of filing in the wrong court.

28 U.S.C. 2255 created a new postconviction remedy in the "sentencing court" and provided that habeas petition may not be entertained elsewhere, Swain v. Pressley, 430 U.S. 372, 378 (1977), therefore habeas petition under 2255 must be filed in district court, at least in the first instance, before it can be entertained elsewhere, 28 U.S.C. 2255(a), (e). Congress granted the district court with broad remedial powers... in the 2255 context, e.g. it granted reviewing court power to determine issues, make fact findings , and conclusions of law... 2255(e), Boumedine v. Bush, 553 U.S. 723, 776-77 (2008) from this it is clear that district has "jurisdiction" in respect to any "new claims" raised under section 2255, at least in the first instance, Rule 12 of the rules governing 2255 proceedings for district courts says that when special collateral attack rules do not include special provision for circumstance, the court should be guided by the Rules of Civil Procedure. Because the rules governing 2255 proceedings or district courts does not deal with amendments for collateral review, district court should turn to Fed. R. Civ. 15(a). This Rule provides that even after answer has been filed and right to amend has lapsed, court should grant leave freely when justice so requires e.g., Johnson v. United States, 196 F.3d 802, 805 (7th. Cir. 1999)

No one supposes amendments to complaint in pending litigation violates principles of claim preclusion (res judicata), even if identical claim is raised in another suit it would be precluded, just so with amendments and AEDPA, which ensures every prisoner "one full opportunity" to seek collateral review, e.g. Blystone v. Horn, 664 F.3d 397, 413 (3rd. Cir. 2011), part of that opportunity--part of every civil case--is an entitlement to add and drop issues while the litigation proceeds, see e.g., Littlejohn v. Artuz, 271 F.3d 360, 363 (2nd. Cir. 2000).

REASONS FOR GRANTING THE PETITION

The law (i.e. AEDPA) ensures every prisoner "one full opportunity" to seek collateral review, Blystone v. Horn, 664 F.3d 397, 413 (3rd. Cir. 2011), which means, in this context, until petitioner has exhausted all his appellate remedies with respect to his initial habeas petition or after the time for appeal has expired. See, e.g., United States v. Santarelli, 929 F.3d 95, 105 (3rd. Cir. 2019), part of this opportunity is the right to amend this right is not only optional, rather it is part and parcel of Petitioners "one full opportunity" to seek collateral review See 28 U.S.C. 2242, the Third Circuit held that, a "Subsequent Petition" filed during the pendency of an appeal from the initial habeas petition (i.e. 2255 motion) is not "Second or Successive" and therefore should be filed directly in the district court in the first instance id. In Santarelli, the Third Circuit, held that because Santarelli filed her "Subsequent Petition" during the pendency of her appeal from the initial petition, her "Subsequent Petition" was not "Second or Successive" under 28 U.S.C. 2244 and 2255(h), thus she should have filed it directly in the district court, In the case at hand, Petitioner, following the procedures set forth in United States v. Santarelli, and not to waste the courts time in a matter already decided by the Circuit Court, filed his " Subsequent Petition" directly in the district court citing, as his authority, Santarelli, the district court denied petition, ignoring the cited authority, concluding that "Subsequent Petition" was,"in fact", "Second or Successive" and that it did not have jurisdiction to entertain the petition. Petitioner filed a motion for reconsideration under Fed. R. Civ. P. 59 and 62.1. pleading with district court to follow the procedure set forth in Santarelli, the district court refused to do so and denied motion for reconsideration as well. Petitioner filed an Application for Certificate of Appealability and or, at the very least, Remand, in hopes that Appellate Courts would follow its own procedures and, at the very least, Remand as it did in Santarelli, but this was not the case, instead, Appeals Court denied "COA", stating, while the District Court did not follow procedures set forth in Santarelli, it did not err in determining that it lack jurisdiction over petition, also holding that jurist of reason would not debate that he did not state a valid claim of denial of a constitutional right, same was sent for Petitioners motion to clarify the Remand.

REASONS FOR GRANTING THE PETITION

A defendant is entitled, by law, to the same legal procedures and to be treated the same as similar situated persons, Reed v. Reed, 404 U.S. 71, 76 (1971), when the panel evaluated the application, it should have applied the same procedures that was applied in Santarelli id. there is no reason why there was a different procedure applied in this case, petitioner filed a lawfully "Subsequent Petition" in the correct procedure set forth by the Circuit Court, the equal protection clause directs that all persons similarly situated shall be treated equally, City of Cleburne living Ctr., 473 U.S. 432, 439 (1985). The liberty protected by the 5th Amendment Due Process Clause contains within it the prohibition against denying to any person the "equal" protection of law, See, Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). The equal protection of the 14th Amendment makes the 5th Amendment right more specific and all the more better understood and preserved. Discrimination that is unjustified violates due process, Schlesinger v. Billard, 419 U.S. 498, 500 n.3 (1975). Had the district court followed the correct procedures set forth by the Circuit Court, petitioner would not have had to file to the Appeals Court, with the understanding that Appeals Court would follow its own procedure (i.e. Santarelli) unfortunately the same procedure was not followed (i.e. applied), instead petitioner was denied both "COA" and Remand without justification. Once again, the Circuits ruling in Santarelli should have been applied to petitioner. Underscoring the above, petitioner has thoroughly demonstrated that certiorari is necessary not only to avoid petitioners rights being violated in respect to the equal protection of the law, he is also being denied the "one full opportunity" to seek collateral review, which was ensured by the AEDPA, and his lawfully filed claims we be lost with out right.

CONCLUSION

It is understood that a petition for writ of certiorari will be granted [only] for reason(s) that are compelling, one of this court functions is to resolve matters in which the United States Court of Appeals has entered a decision that is in conflict with another with the decision of another United States Court of Appeals on the same important matter, S. Ct. Rule 10 (a). In the case at hand, the Third Circuit Court of Appeals has entered a decision, not only, in conflict with another United States Court of Appeals, but its decision is in conflict with itself, and it has cause a clear confusion as to the correct procedure (i.e. law) that it itself has established in regards to the matter at hand. Because the actual question(s) presented in this petition raises matters of exceptional importance, petitioner respectfully request for this respectable court to exercise it supervisory powers to clarify the correct procedure in regards to the matter, as this respectable court has never gave a clear understanding as to the matter at hand, and until there is a decision the door for conflicting procedures will continue to appear with in the Appellate Courts, with the above being stated the petition for writ of certiorari should be granted by this respectable court.

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Respectfully Submitted

Date Jan 4, 2021