

AUG 13 2021

OFFICE OF THE CLERK

No. 21-5601

IN THE
SUPREME COURT OF THE UNITED STATES

ABDULLAH HAMIDULLAH — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ABDULLAH HAMIDULLAH
(Your Name)
U.S. Penitentiary-Tucson

P.O. Box 24550
(Address)

Tucson AZ 85734
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. DID THE DISTRICT COURT VIOLATE THE DEFENDANT'S SUBSTANTIAL DUE PROCESS RIGHTS DURING THE MANDATORY RULE 11 COLLOQUY?
2. DID THE COURT ERR WHEN THE COURT DENIED DEFENDANT'S "MOTION TO WITHDRAW GUILTY PLEA?"

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:

TABLE OF AUTHORITIES CITED

CASES		PAGE NUMBER
U.S. v HUNTER	835 F3d. 1320 (11th Cir)	
JONES v U.S.	224 F3d. 1251 (11th Cir 2020)	
U.S. v MEYERS	820 Fed. APPX. 958 (11th Cir 2020)	
v	688 F.2d. 734 (11th Cir 1982)	
HILL v LOCKHART	88 L. Ed. 2d (1985)	
PORTER v McCOLLUM	175 L. Ed. 2d 398 (2009)	13
GLOVER v U.S.	148 L. Ed. 2d 604 (2007)	
U.S. v DAVILA	186 L. Ed. 2d 139 (2013)	7
MITCHELL v U.S.	143 L. Ed. 2d 424 (1999)	11
U.S. v Hussein	2020 U.S. LX 35353	11
STRICKLAND	80 L. Ed. 2d 674	14

STATUTES AND RULES

FEDERAL RULE CIVIL PROCEDURE RULE 52(b)
" " " " RULE 11

OTHER

U.S. CONSTITUTION AMENDMENT SIX

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APPENDIX G COMPLAINT FOR REHEARING ENBANC

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☐ is unpublished.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 Unavailable; 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☒ is unpublished.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 March 01, 2021.

☐ 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: _____, and a copy of the order denying rehearing appears at Appendix B.

☐ 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

FEDERAL RULES CIVIL PROCEDURES RULE 11

AMENDMENT SIX OF THE CONSTITUTION OF THE UNITED STATES

STATEMENT OF THE CASE

Defendant Hamidullah was indicted, along with his wife in a seven-count indictment charging them with various federal sex trafficking offenses. Defendant Hamidullah was charged with conspiring to recruit persons for the purpose of commercial sex. The Inducement and enticement of persons to travel in interstate commerce with the intent that the said persons engage in prostitution.

Petitioner pled guilty to counts 2,3,4,and 5. The court asked Petitioner if he agreed with the government's asseverations regarding the facts it would prove at trial. Petitioner, himself, informed the court that he did not agree to certain facts. Specifically, the fact that he advertised for models instead of escorts, potentially imperiling the guilty plea. The government claimed to have the evidence supporting the allegation that Petitioner misled the women who responded to his ads and advertised for models, including the testimony of the woman hired by Petitioner.

In the end, the court accepted the plea, noting Petitioner's objection and reserving ruling on the issue about the advertising until sentencing, stating that "eventually the ad will likely be presented as an exhibit at sentencing, so I'll make a decision based on that."

Based on this statement by the court, Petitioner believed that if the government did not present the actual advertisements at the sentencing hearing, the court would revisit his plea and allow him the opportunity to withdraw his plea. Of course, no such evidence

STATEMENT OF THE CASE (cont'd)

of the actual advertisement for models was ever presented at the original sentencing hearing.

The first Sentencing was vacated and the Petitioner was resentenced to the same sentence, however, before resentencing, Petitioner, submitted a Motion to Withdraw Plea which was denied.

REASONS FOR GRANTING THE PETITION

The issue of withdrawing a guilty plea is far from a settled issue among the Circuits where the U.S. Attorney has breached a plea bargain and the court has abused its discretion in cases like this.

ISSUE ONE: CLEAR ERROR: ABUSE OF DISCRETION: PLEA COLLOQUY

The court did not complete the change of Plea Colloquy prior to adjudicating defendant guilty thus violating his substantial due process rights. The guilty plea the court accepted was/is invalid, unknowingly and un-intelligently made due to the error of the court during the Rule 11 colloquy.

"For trial court errors generally, F.R.Cr.P. 52(a) states that any error, defect, irregularity or variance that does not affect substantial rights must be disregarded. Rule 52, in addition to stating the "harmless error rule" in subsection (a), also states in subsection (b), the "plain error rule," applicable when a defendant fails to object to the error in the trial court. Rule 52(b) states:

A plain error that affects substantial rights may be considered even though it was not brought to the trial court's attention. When Rule 52(a)'s "harmless-error rule" governs, the prosecution bears the burden of showing harmlessness. When Rule 52(b) controls, the defendant must show that the error affects substantial rights."

United States v Davila, 186 L.Ed 2d 139 (2013).

In.re.: Hamidullah, appellant herein, Rule 52(b) applies as the error is clear where the court failed to complete the Rule 11 colloquy which left a non-element of the plea agreement insertable at the whim of the court or the government at any later proceeding such as at sentencing. This fact rendered the plea unintelligent and unknowing, thus affecting Appellant's substantial due process rights. Petitioner herein argues, reasonably, that a Motion to Withdraw Guilty was unwarranted and unnecessary where the plea was already invalid. Petitioner further argues that the error qualifies as a structural error as defined by this august tribunal in U.S. v Vonn which states as follows;

"The U.S. Supreme Court has characterized as structural a very limited class of errors that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. Structural errors are fundamental constitutional errors that defy analysis by harmless error standards."
Id. at 152 L.Ed.2d 90

It has been held under rule 52 that the appropriate test for determining whether an error is harmless is whether the reviewing court can say with fair assurance, after considering all the circumstances, that the judgement was not substantially swayed by the error.

In this case, the sentence reflected the court's intent to include punishment for the elements that were not addressed during the plea colloquy and which Petitioner objected to during that same colloquy.

"An error is clear only when the legal issues are inarguable. Further, a motion for reconsideration should be denied where the error...committed is not the sort of clear and obvious error which the interests of justice demand that the court collect."¹

In this case, the record shows the error quite clearly that the Rule 11 colloquy was left incomplete and remained so, over the defendant's objections, when the court errantly accepted the defendant's proffered guilty plea, absent intervention of defense counsel. A plea which was no longer valid by the court's

1. Robbins v Seanna Energy. No.1:08-cv-640-BBM(NDGA 2008) and American Home Assurance, 763 F.2d. 1237(11th Cir 1985)

clear error, leaving the plea colloquy unfinished.² That error was compounded when that same court, on remand for resentencing, denied the defendants's Motion to Withdraw Plea.³ The reasoning invested in the Motion was/is firm and supports withdrawal of the plea per se. However, that Motion to Withdraw Guilty Plea was filed by defense counsel who, reasonably, should have motioned the court for a mistrial/retrial immediately following the incomplete colloquy. Rule 52(b) states,

"(b) Plain error: Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The United States Supreme Court has held that the plain error rule applies only to particularly egregious errors which seriously affect the fairness, integrity or public reputation of judicial proceedings and that a claim of plain error must be evaluated against the entire record of each particular case, rather than applying a per se rule to any particular error.⁴ Errors which affect key issues in a case, particularly where the evidence is closely divided, have been treated as prejudicial error which required the reversal of any conviction resulting from the proceeding, as a plain error which could be reviewed despite the lack of a timely objection.

2 See Rule 11 Colloquy, attached Exhibit E .

3 U.S. v , 815 Fed. Appx 501(11th CA-2020)

4 See U.S. v Young, 740 U.S. 1: 84 L. Ed.2d 1

ISSUE TWO: BREACH OF PLEA AGREEMENT

There were two plea agreements in this case. The first would have the defendant pleading guilty to placing an advertisement for "Models" and "Sexual Assault" which the defendant did not plead guilty to. (appendix "C" Pg 18, ln 12). Defendant refused that plea bargain for that reason. After some negotiation, the government had REWROTE the plea agreement to exclude all reference to "models" and "Sexual Assault" due to the fact the government had no evidence that the defendant had ever placed an advertisement and there was no evidence to support any "sexual assault." (see Appendix "D" pg18 ln 11) and all parties involved signed that second Plea Agreement. During the change of plea colloquy, the court brought up the issues of "ads for models" and "sexual assault" that the government deleted from the plea agreement for lack of evidence. Once again, the defendant objected. (see Appendix "E", pg 18, ln 11). As the courtCourt stated, "...eventually the model advertisement will likely be presented as an exhibit at sentencing, so I'll make a decision based on that." (see DOC 128 at pp 15-18). Based on this statement by the court, Mr Hamidullah believed that if the government did not present the actual advertisements at the sentencing hearing, the Court would revisit his plea and allow him the opportunity to withdraw his plea. Instead, the court, WITHOUT EVIDENCE AND NO MENTION IN THE PLEA AGREEMENT, raised both issues in the fashioning of the defendant's sentence.

The government remained silent on both subjects and the court went on to sentence the defendant. The government breached the plea agreement by failing to inform the court that the issues were not

included in the 2nd plea agreement due to lack of evidence and that they were pivotal elements during plea negotiation. The government breached the plea agreement with its silence and failed to act in good faith.

"Plea agreements are like contracts and are interpreted in accord with what the parties intended. Therefore, the government is bound to any material promises made to induce the defendant to plead guilty. To evaluate whether the government breached a plea agreement, the appellate court must determine the scope of the government's promises and ask whether the government's conduct was inconsistent with the defendant's reasonable understanding when [he] entered his guilty plea. A plea agreement's unambiguous meaning, absent some indication that the parties intended otherwise."
United States v Meyers, 820 Fed. Appx. 958 (11th CA 2020)

The Rule 11 colloquy is to ascertain the validity of the defendant's guilty plea. If any part of the defendant's guilty plea is called into question, that question MUST be resolved before the colloquy can proceed and the plea can not be given nor accepted absent a completed Rule 11 colloquy.

"The purpose of a plea colloquy is to protect the defendant from an unintelligent and involuntary plea." Mitchell v United States, 143 L.Ed.2d. 424 (1999)

Going into the sentencing phase with an unresolved element on which the guilty plea pivots, renders the plea both unintelligent and involuntary.

"When a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."
United States v Hussein, 2020 U.S. LX 35353

When the court brought up "Models" and "Sexual Assault, the resounding silence of the Prosecutor

violated the terms of the accepted plea agreement at its most basic level.

The terminology of "Model" and "Sexual Assault" were excluded from the Plea Agreement which was rewritten and endorsed by all parties.

"...entering into a plea agreement forms a contract between the defendant and the government and it is the defendant's rights that are violated when the government breaks its promises in the agreement. By agreeing to plead guilty pursuant to a plea agreement, the defendant waives his rights not in exchange for the actual sentence or impact on the judge but for the prosecutor's statements in court." United States v Hunter, 835 F.3d. 1320. (11 CA)

In this case, when the judge brought up the subjects of "Model ads" and "sexual assault" the prosecutor was contractually bound to put the court on notice that the prosecutor agreed that these topics would not be considered which would entail the removal of these topics from the P.S.R. prior to delivery to the court.

"Whether the government has breached a plea agreement is reviewed de novo, however, where a defendant has failed to raise the issue before the district court, the appellate courts review only for plain error."
U.S. v Meyers, 820 Fed. Appx. 958(11th CA 2020)

In.re.:Hamidullah, the defendant raised objection to the inclusion of both topics at the Plea Colloquy and at sentencing. Defense counsel remained silent in both instances.

In re.; Hamidullah, the defendant raised objection to the inclusion of both topics, at the Plea Colloquay and at sentencing. Defense counsel remained silent in both instances.

Again, in the instant action, the issues of "Models ads" and "Sexual assault" were, by express agreement of the parties, removed from the plea agreement due to the fact that the government had no evidence as the government claimed to have in its possession at the change of plea hearing, however, was unable to produce at that time nor at sentencing.

"The court may not exceed the parameters of the facts to which the defendant has plead guilty to.

Because of the Court's error and the foregoing breach of the Plea Agreement, the court, reasonably, should have granted the Defendant's Motion to Withdraw Guilty Plea and allowed defendant to proceed to trial.

ISSUE THREE: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Prior to resentencing, defense counsel submitted a Motion To Withdraw Plea based on contentions regarding "Model ads" and "Sexual Assault," however, failed to address the fact that the plea Colloquy was/is insufficient which resulted in a plea that was unknowing and unintelligently made.

Federal Rule of Criminal Procedure 11(d) provides , in relative part, that a defendant may withdraw a guilty plea after the court accepts the plea, but before it imposes sentence. Because the the first sentence was vacated and before the resentencing had begun, it is arguable that the defendant acted within the proper time to withdraw his plea in accordance with Rule 11(d), if the defendant can show a fair and just reason for requesting the withdrawal. Fed.R.Cv.P. 11(d)(2)(B)

"...a defendant has a Sixth Amendment right to counsel and this right extends to the plea bargaining process." Hill v Lockhart, 88 L.Ed.2d.

Defense counsel had an obligation to object when the court broached the subjects that had been eliminated from the plea agreement, however remained silent while the defendant, alone, debated with the court.

"We do not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding." Porter v McCullum, 175 L.Ed.2d 398 (2009)

In this case of Hamidullah, the ineffective assistance of counsel is clear and prejudicial where counsel allowed the court

to go beyond the restraints of the plea agreement without objection. During sentencing, the court did take those issues into account and fashioned the sentence accordingly without objection from defense counsel and over the objections of the defendant.

When the court commits an error, the defendant is helpless to correct the error and is dependant upon his attorney to OBJECT in order to preserve the issue to be resolved at the proper time or manner or both. In this case, petitioner's attorney failed to object at the change of plea colloquy and again at sentencing regarding "Models Ad" and "Sexual Assault" which were used by the court in fashioning the unreasonable sentence that was imposed, vacated and reimposed upon resentencing.

Having a warm body sitting beside a defendant that just happens to have a licence to practice law does not amount to representation if S/he doesn't advocate for the client in a timely and professional manner.

"...claims of ineffectiveness at sentencing are governed by STRICKLAND'S general requirment that (1)counsel's performance be deficient, and (2) there is a reasonable probability that but for the attorney's error, the outcome of the proceeding would have been different." Strickland, 80 L.Ed.2d. 674

See Glover v United States, 148 L.Ed.2d. 604(...in asses sing whether counsel's deficient performance prejudiced a defendant, any amount of actual jail time has a Sixth Amendment significance.")

Clearly, the court erred when the court denied Hamidullah's Motion to Withdraw Plea before resentencing.

Cumulitively, the three issues should have sufficient bearing

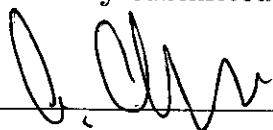
on this case that reasonable minded jurors could debate. It is not unreasonable, then, for the Petitioner herein to seek leave to withdraw his guilty plea.

Wherefore, based on the preceeding, Petitioner does pray that this Honorable Court take up the questions presented herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: August 11, 2021