21-5977 ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In Re RIGOBERTO MELERO AGUIRRE
Petitioner,

-V-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNDER 28 U.S.C. 1651 (a) INVOKING SUPREME COURT RULE 22-3 TO DIRECT THE CASE ASSOCIATE JUSTICE SAMUEL ALITO JR. WHO HAS SUPERVISORY CONTROL OVER THE FIFTH CIRCUIT

RIGOBERTO MELERO AGUIRRE
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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE CONSTRUCTIVE DENIAL OF COUNSEL DURING MELERO AGUIRRE'S JUDICIAL PROCEEDINGS, COUPLED WITH THE WHOLESALE ADOPTION BY THE FIFTH CIRCUIT, OF HON JUDGE FRANK MONTALVO'S ERRORS AND MISTAKES OF LAW, WITHOUT APPLICATION OF THE PLAIN ERROR STANDARD OF REVIEW, CREATED AN IMPRIMATUR FOR A MISCARRIAGE OF JUSTICE, CONSTITUTING AN IMPERMISSIBLE FRAUD UPON THE COURT.

List of Parties are listed below;

Rigoberto Melero Aguirre v. United States of America

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STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. Fist, the Supreme Court can exercise original jurisdiction over 'actions proceeding to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties. "See, Maryland v. Louisiana, 451 U.S. 725, 737 (1981), Second, the Supreme Court also possesses original jurisdiction for "(all) controversies between the United States and another State." 28 U.S.C. 1251 (b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court for "all actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970); United States v. Louisiana, 339 U.S. 699 (1951); United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeals" and "certiorari" as vehicles for appellate review of the decisions o state and lower federal courts, where the statute provides for "appeals" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari, "the Court has complete discretion to hear the matter.

The Court takes the case, if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review virtually eliminated. Now almost all cases to the Supreme court is by writ of certiorari. Pub. L. No. 100-352, 102 Seat, 662 (1988).

WRIT OF PROHIBITION, PURSUANT TO 28 U.S.C. IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court ad all courts established in aid of their respective jurisdiction and agreeable to the usages and principles of law.

(B) An alternative writ or rule may be issue by a Justice (Chief Justice) to whom an application to a Writ of Prohibition is submitted, may refer to the Court for determination.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In conducting harmless error analysis of constitutional violations, including direct appeals and especially habeas generally, the Supreme Court repeatedly has reaffirmed that "(s)ome constitutional violations ...by their very nature are so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999)("We have recognized a limited class of fundamental constitutional errors that defy analysis by "harmless error," standards"...Errors of this type are so intrinsically harmful as to require automatic reversal(i.e. affect substantial rights) without regard to their effect on the outcome.")

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993))"Although most constitutional errors have been held to harmless error analysis, some will always invalidate the conviction" (citations omitted), Id. at 183 (Rehnquist, C.J. concurring); United States v. Olano, 507 U.S. 725, 735 (1993); Jose V. Clark, 478 U.S. 570, 577-78 (1986)("some constitutional errors require reversal without regard to the evidence in the particular=r case...because they render a trial fundamentally unfair"); Vasquez v. Hillery, 474 U.S. 254, 283-264 (1986); Chapman v. California, 386 U.S. 18, 23 (1967)("there are =some constitutional rights so basic to a fair FORMAL that their infraction can never be treated as harmless error ").

JUDICIAL NOTICE/STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 OF THE FEDERAL RULES OF EVIDENCE.

The right to effective assistance of counsel. See, Kyle's v. Whitley, 514 U.S. at 435- 436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 832, 839 (8th Cir. 1994)("It is unnecessary to add a separate layer of harmless-error analysis to bar evaluation of whether a petitioner has presented a constitutionally significant claim for ineffective assistance of counsel).

LAW RELATED TO STRUCTURAL ERROR

Included in the rights granted by the U.S. constitution, is the protection against prosecutorial suppression or manipulation of exculpatory evidence and at the prosecutorial and judicial failures that amount to fraud upon the court. Failure to make available to defendant's counsel, information that could well lead to the assertion of an affirmative defense is material, when 'materiality' is defined as at least a 'reasonable probability that has the evidence been disclosed to the defense, the result of the judicial proceedings would have been different. Kyles v. Whitley, 514 U.S. at 435 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion); Id. at 685 (White, J. concurring in judgment)). Counsel impermissibly withheld evidence of strictissimi juris).

STATEMENT OF CASE AND PROCEDURAL POSTURE

In 2015, the Supreme Court struck the residual clause of the Armed Career Criminal Act ("CC") for being unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. Johnson, 135 U.S. S.Ct. at 2555-57. "The void-for-vagueness doctrine prohibits the government from imposing sanctions under a criminal law, so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardize, that it invites arbitrary enforcement. "Welch, 136 at 1262 (quoting Johnson, 135 S.Ct. at 2556).

Melero Aguirre was charged with UNLAWFUL DELIVERY F A CONTROLLED SUBSTANCE IN PENALTY GROUP 1-COCAINE in the state of Texas. In light of Hill v. United States, Cause No. A-06-CR-00253-SS (W.D. Tex. Dec. 9, 2016), United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016) and United States v. Tangsley, 848 F.3d 347 (5th Cir. 2017) Melero's prior convictions for unlawful delivery of a controlled substance do not qualify as a "controlled offense" under 4B1.1.

In Hinkle, the Fifth Circuit applied Mathis to find that the "Texas crime of delivery of a controlled substance was no longer a controlled substance offense under U.S.S.G. Section 4B1.1. Further , in United States v. Tangsley, the Fifth Circuit also applied Mathis to also find that the Texas crime of possession with intent to deliver a controlled substance was no longer a controlled substance offense under Section 4B1.1.

The Johnson holing caused a reversal in case. See Morton v. U.S., 550 Fed. Appx. 807 (11th Cir. 2013)(allowing the movant to challenge his ACCA sentence based on new case law in a first 2255 motion despite 5the procedural default.). See also, Simmons v. U.S. 2016 U.S. Dist. LEXIS 117436, 2016 WL 4536092 (S.D. Fla. 2016); Duhart v. U.S. 2016 U.S. Dist. LEXIS 122220, 2016 WL 4720424 (S.D. Fla. 2016); and Garibo-Carmona v. U.S., 216 F. Supp. 3d 1373, 2016 U.S. Dist. LEXIS.

In Johnson, the Supreme Court held that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. Section 924 (e)(1) (the ACCA") was unconstitutionally vague, and therefore void.

REASONS FOR GRANTING

Rigoberto Melero Aguirre contends these two requirements and more, are present and satisfied here. A cursory glance at Rigoberto Melero Aguirre's claims below would attest to the fact that, there are multiple cumulative errors committed by the District Court. Errors that were compounded nd rubberstamped by the Fifth CDircuit Court of appeals. This, underlines the importance of this Honorable Court granting relief, andissuing ygh Writ of Prohibition.

CONSTITUTIONAL QUESTIONS RAISED IN THIS APPLICATION FOR THE WRIT OF PROHIBITION

WHETHER THE CONSTRUCTIVE DENIAL OF COUNSEL COUPLED WITH WHOLESALE ADOPTION BY THE PANEL OF CIRCUIT JUDGES OF HON. JUDGE FRANK MONTALVO'S MISTAKES OF LAW AND IMPERMISSIBLE PREJUDICIAL ERRORS, WITHOUT APPLYING THE PLAIN ERROR STANDARD OF REVIEW, CREATED AN 'IMPRIMATUR FOR A MISCARRIAGE OF JUSTICE' AND CONSTITUTES FRAUD UPON THE COURT, ON HIS JOHNSON - BASED CLAIMS.

STANDARD OF REVIEW

The cumulative effect of errors that are harmless by themselves, could so prejudice the defendant's rights to a fair judicial proceeding. United States v. Ladson, 643 F.3d 1335, 1342 (11th Cir. 2011); United States v. Preciado-Cordobas, 981 F.2d 1206 (11th Cir. 1993); United States v. Adam, 74 F.3d 1093 (11th Cir. 1996); United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995); United States v. Pearson, 746 F.2d 787 (11th Cir. 1984). Assessing the cumulative errors, the court reviews all errors preserved for appeal and all plain errors. United States v. Ladson, supra.

The appellate court reviews whether counts in the indictment were impermissibly amended. The dismissal of an indictment on the grounds of prosecutorial misconduct is a discretionary call. Consequently, the appellate court reviews the district court's decision for an abuse of discretion. United States v. Barner, 441 F.3d 1310 (11th Cir. 2006).

LEGAL ANALYSIS/DISCUSSION

CONSTITUTIONAL DEFECTS THAT MAY HAVE TAINTED THE JUDGMENT OF THE THREE PANEL CIRCUIT JUDGES, HIGGINBOTHAM, SMITH, and ENGELHARDT IN THEIR DENIAL OF AGUIRRE'S SECOND SUCCESSIVE MOTION IMPLICATING RES JUDICATA AND WHY A REHEARING IS NEEDED TO REVEAL FRAUD UPON THE COURT, AND AVOID A MISCARRIAGE OF JUSTICE

As a threshold matter, Aguirre avers, as the Arkansas Supreme Court has described, that Res Judicata as a Rule of Justice is to be applied in particular situations as fairness and justice require, and that it is not so rigidly applied as to defeat the ends of justice or so as to work an injustice. An adverse judgment, free from fraud or collusion, as Rigoberto Melero Aguirre would demonstrate, prevents a second claim involving the same issues. See, Page 2 & 3, Paragraph 4, Document 00515871437 Date filed 05/21/2021

> "IT IS ORDERED that Aguirre's motion for authorization to file successive motion is DENIED. This is Aguirre's second motion for authorization to file a successive Section 2255 motion, and one of his claims he now seeks to raise is essentially identical to the claims he identified in his prior motion for authorization. Accordingly, Aguirre is WARNED that the filing of repetitive or frivolous motions for authorization to file successive Section 2255 motions will invite the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

NOT TRUE.

Listed hereunder are some of the pivotal issues at stake that would negate and alleviate the above referenced warning from the Honorable three Circuit Judges.

Aguirre avers that a limitation arises when a court recharacterizes a pro se litigant's motion as a first 28 U.S.C.S. Section 2255 motion. Aguirre's first Section 2255 motion was dismissed procedurally without a merits determination. So, as a matter of law, it doesn't count as a section 2255 for purposes of a second successive petition. Further, the record would show that his next petition was a Section 2241 Writ of Habeas corpus, which Hon. Judge Frank Montalvo re-characterized as a Section 2255 motion without a 'Castro' warning. It may have been memorialized as a Section 2255 motion, which it wasn't.

In such circumstances, the district court must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent Section 2255 motion will be subject to the restrictions on "second or successive' motions, and provide the litigant an opportunity to withdraw or amend the motion so that it contains all the Section 2255 claims he believes he has.

If the court fails to do so, the motion cannot be considered to have become a Section 2255 motion for purposes of applying to later motions the law's "second or successive' restrictions Section 2255, Para. 8. An unwarned recharacterization of a motion cannot count as a 22 U.S.C. Section 2255 motion for purposes of the 'second or successive provision of Section 2255, whether the unwarned pro se litigant does, or does not take an appeal.

LEGAL LIMITS THAT NINE CIRCUITS HAVE PLACED ON RECHARACTERIZATION

See Adams v. United States, 155 F.3d 582, 583 (CA2 1998))(per curiam); United States v. Miller, supra, at 6467 (CA3); United States v. Emmanuel, 288 F.3d 644, 646-647)CA4 2002); In re Shelton, 295 F.3d 620, 622 (CA6 2002)(per curiam; Henderson v. United States, supra, at 710-711 (CA7); Morleas v. United States, 304 F.3d 764, 767 (CA8 2002); United States v. Seesing, 234 F.3d 456, 483 (CA9 2000); United States v. Kelly, supra, at 1240-1241 (CA10); United States v. Palmer, 296 F.3d at 1146 (CADC(; see also 290 F.3d at 1273, 1274 (case below)(suggesting that courts provide such warning)

THE LAW OF THE CASE DOCTRINE DOES NOT APPLY TO AGUIRRE'S CASE

Aguirre contends that the law of the case doctrine does not apply in this case. The law of the case doctrine simply expresses common judicial practice; it does not limit the courts' power. It cannot prohibit a court from disregarding an earlier holding in an appropriate case. The law of the case doctrine cannot pose an insurmountable obstacle to the courts' reaching this decision. It simply 'expresses common judicial practice, it does not "limit' the court's power. See Messenger v. Anderson, 225 U.S. 436, 444, 56 L.Ed 1152, 32 S.Ct. 739 (1912)(Holmes, J). It cannot prohibit a court from disregarding an earlier holding in an appropriate case, which for the reasons set forth, we find this case to be.

AGUIRRE WAS SENTENCED AS A CAREER OFFENDER, NOT ON QUANTITY OF DRUGS

1(c) The Panel's assertion that Aguirre is not a career offender and was not sentenced as a career offender but on the quantity of drugs would raise serious constitutional questions. Aguirre was over 18 years of age when he committed this offense, and it was allegedly a 'controlled substance' within the meaning of USSG Section 4B1.1(a). his sentence was therefore allegedly subject to being enhanced under he "Career offender' guidelines provision of USSG Section 4B1.1, if he had 'at lease two prior felony convictions either a "controlled substance offense' or a crime of violence." The PSR construed USSG Section 4B1.1 which defines a 'controlled substance offense' and crime of violence." In this instant case, the interpretation of Controlled Substance has changed since Aguirre's sentence was enhanced for his case involving "Delivery" in the State of Texas. Enhancement Under 21 U.S.C. Section 851 and Section 4B1.1 became null and void.

Since Aguirre's judicial proceedings the guidelines have been amended several times in response to congressional directives, to provide greater emphasis on the defendant's conduct and role in the offense, rather than the drug quantity. the assertion that Aguirre was sentenced on drug quantity is ludicrous because the practice of finding sentencing-enhancing drug quantities at sentencing was a violation of the Sixth Amendment right to trial. See e.g. Alleyne v. United States, 133 S,.Ct. 2151 (2013)While Congress enacted Section 404 to rectify wrongs. it would be untenable to assume that Congress, when acting to rectify wrongs meant to direct courts to perpetuate unconstitutional practices.

Aguirre's pivotal argument in his application for a second or successive Section 2255 motion is a state crime cannot qualify as

an Armed Career criminal Act (ACCA) predicate if its elements are broader than those of a listed generic offense. How a given defendant actually perpetrated the crime ---what the Supreme Court has referred to she underlying brute facts or means of commission ---makes no difference, even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence.

In sum, Aguirre's instant Section 2255 is his first, because the first was dismissed procedurally, and the second was a Writ of Habeas Corpus. See Case 2:20-cv-00109-KWR-SCY Document 1, filed 02/06/2020) transferred to U.S. District Court , El Paso, where it was recharacterized, as a Section 2255 without a 'Castro' warning. In light of this, the three Panel of Circuit Judges' Admonition in the final paragraph of its judgment, should not apply to Aguirre. The panel was misled by Hon. Judge Frank Montalvo.

WHETHER PETITIONER IS ELIGIBLE FOR RELIEF UNDER THE FIRST STEP ACT, PURSUANT TO UNITED STATES V. GRAVES, No.. 2:04-cr-070, 2019 WL 3161746 *4-5 (E.D. Tenn. July 15, 2019) ET AL.

The First Step Act is certainly far reaching in its scope, reforming certain sentencing provisions and the B.O.P's programming and time calculations. However, the First Step Act does not authorize plenary sentencing and the retroactivity of the Fair Sentencing act. It applies only to "covered offenses" i.e. crack cocaine. But see, United States v. Graves, No. 2:040CR070, 2019 WI 3161746 at *4-5 (E.D. Tenn. July 15, 2019)(finding that the First Step Act authorizes the defendant's sentencing reduction motion because "the enhanced statutory term of imprisonment for drug quantity found by the jury in this case (50 grams or more of cocaine base) was reduced by section 2 of the Fair Sentencing Act from a range of twenty years to life to a range of ten years to life.".

For this reason, petitioner is eligible for relief. See e.g. United States v. Terrell. No. 2:09-CR-)#, at *3 (E.D. Tenn., July 20190; United States v. Thompson, Bo. 3:07-CR-30034, 2019 WL 3308334 at *6 (W.D. La July 23, 2019); United States v. Medina, No. 3:05-CR-00058 (D. Conn. July 17, 2019); ECF No. 1466 (collecting cases). To reiterate, Section 2 of the fair Sentencing Act, entitles petitioner for relief under the First Step Act *3 (E.D. Tenn. July 29, 2019)finding that the First Step Act authorized the defendant's sentence reduction motion because "the enhanced statutory term of imprisonment for the drug quantity found by the jury (50 grams or more of cocaine base) was reduced by Section 2 of the Fair Sentencing Act from a range of twenty years to life to ten years to life.

In point of fact, it will be inappropriate to rely on drug quantities found at sentencing to raise the mandatory minimum. See 7-8 (citing Alleyne v. United States, 133 S.Ct, 2151 (2013). The clear weight of persuasive authority revert to petitioner's position. See, United States v. White, No. 99-CR-628-04, 201909" Almost every court to address this issue agrees with White's interpretation, that eligibility under the Act is not based on drug quantities drug at sentencing."

"These courts have concluded that defendants who were indicted before 2010 for certain cocaine charges are also eligible under Section 404. Even if the facts admitted in a guilty plea or trial or shown in a presentence report would make the defendant accountable for a higher sentence under the Fair Sentencing Act," (granting a re-sentencing hearing); See also United States v. Wright. No. 03 CR 362-2, 2019 WL 3231383, AT *2-*4 (N.D.. 111 July 18, 2019)(agreeing with the weight of authorities that in determining whether a defendant is eligible, the court should look to whether the offense of conviction was modified by the Fair Sentencing Act and not to the conduct of the defendant to determine eligibility), United States v. Thomas, No. 9-117, 2-19 WL 2375133, 1 *2 (S.D. Ala, June 2, 2019)(holding that the court looks to the conduct of the defendant not to drug quantity to which the defendant later agrees in a federal regime); See also United States v. Martin, No. 03-CR-795, 2019 WL 2571148 at *4-*5 (E.D.N.Y.) June 20, 2019)(granting relief despite the defendant's stipulating that his offense involved at least 1.5 kilograms of crack) United states v. Stanbeck. No. 02-CR-30020.

WHETHER THE DISTRICT COURT WILL BE ACTING WITHIN ITS DISCRETION, IF IT GRANTS PETITIONER RELIEF, IN LIGHT OF THE RECENT SUPREME COURT RULING IN UNITED STATES V. HUGHES, (2018)(CITATIONS OMITTED).

STANDARD OF REVIEW

The United States Sentencing Commission recently reviewed the United Sentencing Guidelines ("USSG") applicable to drug trafficking offenses by changing how the base offense base in the drug quantity tables incorporate the statutory minimum penalties for such offenses. Specifically, Amendment 782 subject to Section (e)(1) alters threshold amounts in the drug quantity tables in USSG Section 2D1.11, many, but not all drug quantities will have a base level that is two levels lower than before Amendment 782 (subject to sub-section 3582(e)(1).

LEGAL ANALYSIS

As a threshold matter, petitioner avers that regardless of defendant's eligibility for resentencing, a district court's decision to modify a sentence under 18 U.S.C. Section 3582(c)(2) is discretionary and as such, is reviewed by the Court of Appeals for abuse of discretion. Petitioner contends that the district court would be acting within its discretion were it to grant the two points based n the facts of petitioner's case by using the authority under Section 3582(c)(2).

The 782 Amendment revises the guidelines applicable to drug trafficking offenses by changing how the base levels in the Drug Quantity Table table in Section 2D1.1 (Unlawful manufacturing, Importing or Trafficking) including Possession with intent to commit these offenses); Attempt or Conspiracy, incorporate the statutory minimum penalties.

When Congress passed the Anti-Drug Act of 1986. Pub. L. 99-570, the Comission responded and extrapolating upward and downward to set guidelines sentencing ranges for all drug quantities. The quantity thresholds in the drug quantity table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties.

Accordingly, offenses involving drug quantities that trigger a five year statutory minimum were assigned a base level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant with a Criminal History Category 1 (a guideline range that exceeds the five year statutory minimum for such offenses by at least three months.

Similarly, offenses that trigger a ten year statutory sentence were assigned a base offense level (level 32) corresponding to a sentence guideline range that exceeds the ten year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above or below the mandatory minimum thresholds quantities, see 2D1.1 comment (backg'd) with a minimum base offense of 6 and a maximum base offense level of 38 for drug offenses.

This analysis is very critical in assessing the degree of departure from the goals of the Amendment. The Amendment changes how the applicable statutory mandatory penalties are incorporate into the Drug Quantity table while maintaining consistency with such penalties. See 28 U.S.C. Section 994(b)(1)(providing that each sentencing range must be "consistent with all the pertinent provision of Title 18, United States Code"), also see 28 U.S.C. Section 994(a)(providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any federal statute").

The Amendment also reflect the fact that guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times often in response to congressional directive __to provide a greater emphasis on the defendant's conduct and role on the offense, rather than drug quantity.

The version of Section 2D1.1 in effect at the time of the Amendment contains fourteen enhancements and three adjustments including the "mitigating role cap" provide in subsection (a)(5).

CONCLUSION

WHEREFORE, Petitioner Rigoberto Melere Aguirre, premises permitted, based on the irremediable constitutional violations, that are so basic that their infractions without regard, rendered his judicial proceedings, fundamentally unfair, that they are not susceptible to harmless error analysis. The only fair outcome is to se Petitioner free in the interest of justice.

Date: September 5, 2021

Respectfully Submitted,

Rigoberto Melere Aguirre.