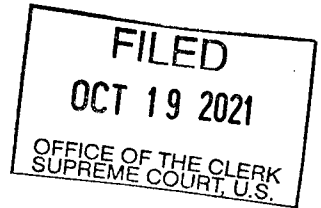


No. 21 - 6544

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



OMAR LEONIDES DIAZ-PRO-SE — PETITIONER
(Your Name)

vs.
THE UNITED STATES OF AMERICA
5TH CIRCUIT COURT OF APPEALS
~~US DIST. COURT N. DIST OF TEXAS~~ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT/NORTHERN DISTRICT OF TEXAS
UNITED STATES COURT OF APPEALS-FIFTH CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

OMAR LEONIDES DIAZ PETITIONER PRO-SE

(Your Name)
COLEMAN FCI-MEDIUM
PO BOX 1032
COLEMAN, FL 33521

(Address)

COLEMAN, FLORIDA 33521

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1). DID THE TRIAL COURT ERR AND SERIOUSLY AFFECT THE FAIRNESS, INTEGRITY OF PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS WHEN IF OVERRULED PETITIONER'S SPECIFIC OBJECTIONS TO THE "IMPORTATION" ENHANCEMENT (WHICH WAS NEVER PROVEN) AND IT'S OVERRULING LED TO AN UNCONSTITUTIONALLY APPLIED SENTENCE?
- 2). DID APPELLANT COUNSEL IN FACT COMMIT INEFFECTIVE ASSISTANCE OF A GREVIOUS NATURE BY FAILING TO RAISE OBJECTIONS TO U.S. ATTORNEY'S "IMPORTATION" ALLEGATIONS WHICH WERE NEVER PROVEN OR SHOWN?
- 3). DID THE TRIAL COURT ERR IN SENTENCING PETITIONER UNDER THE "CONSPIRACY" GUIDELINES, WHEN IN FACT PETITIONER WAS ONLY CHARGED AND CONVICTED OF POSSESSION OF CONTROLLED SUBSTANCE?
- 4). DID THE TRIAL COURT ERR IN IT'S ACCEPTANCE OF PETITIONER'S GUILTY PLEA AND PLEA AGREEMENT AT THE SAME TIME?
- 5). DID THE DISTRICT COURT'S REJECTION OF THE GOVERNMENT'S PROMISED PERFORMANCE TERMINATE THE PLEA AGREEMENT?
- 6). IS PETITIONER'S PLEA WAIVER UNENFORCEABLE BECAUSE DISTRICT COURT STATED THAT PETITIONER HAD A RIGHT TO APPEAL WITHOUT IDENTIFYING ANY RESTRICTIONS AND THE GOVERNMENT FAILED TO OBJECT TO THESE STATEMENTS BY THE COURT?
- 7). WERE PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS VIOLATED BY THE ABOVE STATED QUESTIONS OF LAW AND THEIR ABROGATION OF SAID TRANSGRESSIONS BY THE DISTRICT COURT?

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

HENTZ V. HARGETT, 71 F.3d 1169 (5TH CIR. 1996)
PUCKETT V. UNITED STATES, 556 U.S. 129 (2009)
RICKETTS V. ADAMSON, 483 U.S. 1 (1987)
YESH MUSIC V. LAKEWOOD CHURCH, 727 F.3d 356 (5TH CIR. 2013)
UNITED STATES V. ANDREWS, 857 F.3d 734 (6TH CIR. 2017)
UNITED STATES V. CABRERE, 288 F.3d (5TH CIR. 2002)
UNITED STATES V. CESSA, 626 FED. APPX. 464 (5TH CIR. 2015)
HAINES V. KERNER, 404 U.S. 519 (1972)
UNITES STATES V. ELWOOD, 999 F.2d 814 (5TH CIR. 1993)
UNITED STATES V. FIGUEROA-COELLO, 920 F.3d 260 (5TH CIR. 2019)
UNITED STATES V. GARCIA, 606 F.3d 209 (5TH CIR. 2010)
UNITED STATES V. HARRIS, 702 F.3d 226 (5TH CIR. 2012)
UNITED STATES V. HYDE, 520 U.S. 670 (1997)
UNITED STATES V. JOHN, 597 F.3d 263 (5TH CIR. 2010)
UNITED STATES V. JOHES, 472 F.3d 905 (D.C. CIR. 2007)
UNITED STATES V. MAGWOOD, 445 F.3d 826 (5TH CIR. 2006)
UNITED STATES V. MARTIN, 287 F.3d 609 (7TH CIR. 2002)
UNITED STATES V. OLANO, 507 U.S. 725 (5TH CIR. (1993)
UNITED STATES V. PALACIOS, 844, F.3d 527 (5TH CIR. 2016)
UNITED STATES V. PATTERSON, 962 F.2d 409 (5TH CIR. 1992)
UNITED STATES V. PETERSON, 268 F.3d 533 (7TH CIR. 2001)
UNITED STATES V. REYNA, 358 F.3d 344 (5TH CIR. 2004) (en banc)
UNITED STATES V. ROGERS, 1 F.3d 341 (5TH CIR. 1993)
UNITED STATES V. SERFASS, 684 F.3d 548 (5TH CIR. 2012)
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STRICKLAND V. WASHINGTON,
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UNITED STATES V. BELMONTE MARTIN, 127 FED. APPX. 719, 720 (5TH CIR. 2005)

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UNITED STATES V. JONES, 472 F.3d 905, 908-09 (D.C. CIR. 2007)	5
UNITED STATES V. VANEGAS, 633 FED. APPX. 288, 289 (5TH CIR. 2016)	5
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UNITED STATES V. DIAZ No. 20-10569 APPEAL WAS DISMISSED

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APPENDIX E

APPENDIX F

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.

NOT SURE IF PUBLISHED OR UNPUBLISHED, . APPEAL WAS SUMMARILY DENIED

The opinion of the United States district 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.

☐ 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.

1.

JURISDICTION

[] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was JUNE 30, 2021 -DISMISSED
PETITION FOR REHEARING EN-BANC TIMELY FILED

[] 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 _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including AUGUST 20, 2021 (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

- 1.) THE GOVERNMENT VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHTS TO A FAIR TRIAL WHEN IT REJECTED THE PLEA AGREEMENT UNDER RULE 11(c)(1)(A) SET FORTH IN RULE 11(c) OF THE F.R.C.P. THE DISTRICT COURT HAD AN OBLIGATION TO ACCEPT THE AGREEMENT, REJECT IT, OR DEFER A DECISION UNTIL IT HAD REVIEWED THE PRESENTENCE REPORT.
"PLEA BARGAIN AGREEMENTS ARE CONTRACTUAL IN NATURE AND ARE TO BE CONSTRUED ACCORDINGLY" HENTZ.V. HARGETT, 71 F.3d 1169, 1173 (5TH CIR. 1996)
- 2.) THE DISTRICT COURT ERRED AND VIOLATED PETITIONER'S 5TH, 6TH AND 14TH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS WHEN IT ALLOWED BOTH THE "IMPORTATION" AND THE TERM "CONSPIRACY" TO BE USED IN IT'S SENTENCING OF PETITIONER. THE DISTRICT COURT'S FINDING THAT THE METHAMPHETAMINE WAS IN FACT IMPORTED FROM MEXICO WAS NEVER PROVEN. IN POINT OF FACT THERE IS NO INFORMATION WITH SUFFICIENT INDICIA OF RELIABILITY TO SUPPORT THE DISTRICT COURT'S CONCLUSION, AND THIS FINDING CONSTITUTED CLEAR ERROR THAT LED TO AN ARITHMETIC ERROR OF SENTENCING. USSG §2D1.1(b)(5) & U.S. V. SERFASS
- 3.) APPELLANT COUNSEL FOR THE FIFTH CIRCUIT COURT OF APPEALS (DIRECT APPEAL) FAILED TO RAISE THE GROUNDS AND ARGUMENT AGAINST THE "IMPORTATION" WHICH VIOLATED PETITIONER'S RIGHTS TO A FAIR TRIAL, INCLUDING THE APPELLATE PROCESS, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.
- 4.) THE PLAIN ERROR OF THE DISTRICT COURT AFFECTED PETITIONER'S SUBSTANTIAL RIGHTS, WHICH SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS WHEN IT VIOLATED THE PLEA AGREEMENT PROCEDURE. PUCKETT V. U.S. 556 U.S. 129, 135 (2009))
- 5.) DISTRICT COURTS REJECTION OF THE GOVERNMENT'S PROMISED PERFORMANCE TERMINATED THE PLEA AGREEMENT AND RESULTED IN A LENGTHIER SENTENCE AND A VIOLATION OF PETITIONER'S 5TH AMENDMENT RIGHTS TO A FAIR TRIAL, INCLUDING SENTENCING.
- 6.) PETITIONER'S PLEA WAIVER DID NOT BAR THESE CLAIMS BECAUSE THE DISTRICT COURT REJECTED THE PLEA AGREEMENT. SEE: UNITED STATES V. MARTIN, 287 F.3d 609 622 (7TH CIR. 2002) ALSO, THE COURT ADVISED PETITIONER HE "HAD A RIGHT TO APPEAL HIS SENTENCE" WITHOUT ANY SPECIFICITY.
- 7.) PETITIONER'S 6TH AND 14TH AMENDMENT RIGHTS TO DUE PROCESS WERE CLEARLY VIOLATED BY THE ABOVE AND FOREGOING REASONS.

STATEMENT OF THE CASE

ON NOVEMBER 7, 2019, PETITIONER WAS CHARGED IN A ONE-COUNT SUPERCEDING INDI INDICTMENT FOR POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, 21 U.S.C. §841. ON NOVEMBER 15, 2019, PETITIONER PLED GUILTY TO COUNT 1 OF THE INDICTMENT, PURSUANT TO A WRITTEN PLEA AGREEMENT.

ON JUNE 9, 2020, THE DISTRICT COURT SENTENCED PETITIONER. AT SENTENCING THE DISTRICT COURT ANNOUNCED THAT THE PLEA OF GUILTY WAS NOT MADE PURSUANT TO A PLEA AGREEMENT. THE DISTRICT COURT CONCLUDED THE SENTENCING WITH THE FOLLOWING ADMONITION: "MR. DIAZ, YOU DO HAVE A RIGHT TO APPEAL YOUR SENTENCE SIR, IF YOU DO DECIDE TO APPEAL YOU ALSO HAVE THE RIGHT TO APPLY FOR WHAT'S CALLED LEAVE TO APPEAL IN FORMA PAUPERIS IF YOU'RE UNABLE TO PAY FOR THE COST OF APPEAL."

THE DISTRICT COURT' "NOTICE OF RIGHT TO APPEAL" DID NOT MENTION THE PLEA AGREEMENT. FURTHER, THE DISTRICT COURT DID NOT STATE ON THE RECORD THAT THE REMAINING CHARGES ADEQUATELY REFLECTED THE SERIOUSNESS OF THE ACTUAL OFFENSE BEHAVIOR AND THAT ACCEPTING THE PLEA AGREEMENT WOULD NOT UNDERMINE THE STATUTORY PURPOSES OF SENTENCING OR SENTENCING GUIDELINES.

PETITIONER CONTENDS THAT AS A FIRST TIME OFFENDER WITH ZERO CRIMINAL HISTORY POINTS THE COURT ERRED IN IT'S USE OF "CONSPIRACY" AND "IMPORTATION" ENHANCEMENTS" WHEN IT SENTENCED HIM TO 336 MONTHS, BASED OF NOTHING MORE THAN SPECULATION.

ON REMAND, THE DISTRICT COURT CORRECTED THE CLERICAL ERROR IN THE WRITTEN JUDGEMENT FOR THE "CONSPIRACY" PART OF THE INDICTMENT, BUT FAILED TO CORRECT THE ACTUAL SENTENCE.

REASONS FOR GRANTING THE PETITION

APPELLANT COUNSEL WAS CLEARLY DEFICIENT AND INEFFECTIVE WHEN IF FAILED TO RAISE SPECIFIC GROUNDS IN PETITIONER'S DIRECT APPEAL.

FURTHER, IN PETITIONER'S PLEA AGREEMENT THE GOVERNMENT AGREED TO REFRAIN FROM ASSERTING CERTAIN CHARGES AND AGREED TO MOVE TO DISMISS VARIOUS OTHER CHARGES AT THE TIME OF SENTENCING. ACCORDINGLY PETITIONER'S PLEA AGREEMENT FELL UNDER RULE 11(c)(1)(A) OF THE F.R.C.P.

BECAUSE PETITIONER HAD A RULE 11 (c)(1)(A) PLEA AGREEMENT, THE DISTRICT COURT HAD AN OBLIGATION TO ACCEPT IT, REJECT OR DEFER. THE DISTRICT COURT ULTIMATELY REJECTED THE PLEA AGREEMENT AND IN DOING SO ERRED BY VIOLATING THE PLEA AGREEMENT PROCEDURE SET FORTH IN RULE 11(c) OF THE FRCP. ACCORDINGLY, THIS HONORABLE COURT SHOULD VACATE PETITIONER'S JUDGEMENT OF CONVICTION AND SENTENCE AND REMAND FOR FURTHER PROCEEDINGS.

FURTHER, THE DISTRICT COURT'S FINDING THAT THE METHAMPHETAMINE WAS IMPORTED FROM MEXICO WAS NEVER PROVEN AND IN FACT THERE EXISTS NO INFORMATION WITH SUFFICIENT INDICIA OF RELIABILITY TO SUPPORT THESE STATEMENTS BY THE U.S. ATTORNEY, AND THE RESULTING SENTENCING WHICH WAS ARTIFICIALLY INFLATED BY SAID STATEMENTS SHOULD BE VACATED AND REMANDED BACK TO THE LOWER COURT FOR FURTHER PROCEEDINGS.

FOR THE ABOVE AND FOREGOING REASONS SET FORTH AND IN PETITIONER'S MEMORANDUM OF LAW, PETITIONER PRAYS THIS HONORABLE COURT GRANT THIS PETITION.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

OMAR LEONIDES DIAZ, PETITIONER PRO-SE

Date: OCTOBER 16, 2021