Supreme Court, U.S.
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In the
Supreme Court of the United States

CARLOS FLEITAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

When a defendant's sentence is enhanced based a non-experts testimony should a higher standard, apart from that permitted by Fed. R. Evid. 1101(d)(3) apply. With that foundation, the following question is presented to the court for consideration:

> Should a writ of certiorari be granted to determine if the Eleventh Circuit and district court erred in permitting non-expert testimony to justify a sentence enhancement where an expert was required.

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 Eleventh Circuit and the United States District Court for the Southern District of Florida.

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

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PETITION FOR WRIT OF CERTIORARI

Carlos Fleitas, 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 Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision in *Fleitas v. United States*, 21-14260-C was entered on April 15, 2022, and is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, Southern District of Florida whose judgment was appealed to be reviewed, is an unpublished opinion in *Fleitas v. United States,* 1:20-cv-22362 S. D. Fla. Oct. 25, 2021) is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on April 15, 2022.

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

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id.

STATEMENT OF THE CASE

After a Complaint was filed on April 28, 2017, and on May 15, 2017, Fleitas, Armando Pedroso ("Pedroso"), and Reynel Rodriguez-Hernandez ("Rodriguez-Hernandez") were charged with a 13-count Indictment alleging several violations of possessing 15 or more counterfeit credit cards and producing, trafficking in, and possessing device making equipment in violation of 18 U.S.C. § 1029(b)(2) and aggravated identity theft and possession of access device-making equipment, in violation of 18 U.S.C. §1029(a)(4).[1] On July 20, 2107, Fleitas pled guilty to Counts1, 2, and 3 pursuant to a plea agreement. Counts 4 and 5 were dismissed. (Doc. 61). Before sentencing, Rodriguez-Hernandez filed Objections to the Presentence Investigation Report (Doc. 76) and a Sentencing Memorandum. (Doc. 80). The objections addressed the loss amounts which held him accountable for 3,659 credit card account numbers found on Pedroso's computer when his home was searched. (Doc.76 p. 2-9). Fleitas also filed Objections to the PSI and adopted Rodriguez-Hernandez's objections. (Doc. 87). Fleitas further objected to his

[1] Fleitas and Rodriguez-Hernandez were both charged with conspiracy to commit access device fraud by possessing 15 or more counterfeit credit cards and producing, trafficking in, and possessing device making equipment in violation of 18 U.S.C. § 1029(b)(2) (Count 1). (Doc. 28). Fleitas was also charged with possession of access device-making equipment, in violation of 18 U.S.C. §1029(a)(4) (Counts 2, 5), and aggravated identity theft, in violation of 18 U.S.C. §1028A(a)(1) (Counts 3-4). *Id.*

sentencing based on pending and dismissed charges, where the PSR referred to allegations based on solely a police report. *Id.* at 2-6.

At sentencing, Fleitas argued there was no factual connection between himself, who installed and retrieved skimming devices at gas stations, and the 3,659 credit card numbers found on Pedroso's computer. *Id.*[2] In response, the government called Detective Sebastian Monros ("Monros") from the Miami Dade Police Department to testify. *Id.* at 5. Monros has never declared an expert on skimming devices, nor was the model or make of the devices discussed, although he was permitted to testify extensively on the skimming devices utilized.[3] Monros testified that the numbers found on the computer were consistent with numbers that came from skimming devices and that he saw Pedroso and Fleitas use this laptop, *id.* at 6-8, but he did not cross-reference the numbers obtained by Fleitas and Hernandez with the numbers on the computer. *Id.* at 14. It should be noted that the conspiracy only lasted 50 days. *Id.* at 9. The forensic examiner, (who did not testify and according to Monros) could not say when the numbers in the computer were inputted or downloaded, *id.* at 15, 17, they could have been inputted before

[2] Pedroso was involved in another conspiracy in front of Judge Gayles, so the numbers could be from that conspiracy. There was no evidence they were connected to Fleitas' conspiracy. *Id.*

[3] The manufacture, model, nor type of skimming device was presented at sentencing. Neither was there any explanation of the type of alleged skimming device that was utilized.

the conspiracy began, even up to six months prior, *id.*, and he could not tell the court how long Fleitas and Pedroso had been working together. *Id.* at 16. Monros was not an expert nor was it ever determined his statements had any indicia of reliability.

The Court relying on Monros' testimony found that the loss amount was correctly calculated, overruled the objections, and determined that the calculation of Fleitas' guideline range was 70 to 84 months (plus a two-year mandatory consecutive sentence for aggravated identity theft). *Id.* at 24. After stating that the crime reflects "an unbelievable degree of callousness" since Fleitas committed it while out on bond, *id.* at 24, the court varied upward to 120 months plus the two-year mandatory consecutive sentence, for a total sentence of 144 months with an additional consecutive term of 6 months imprisonment for having committed felony offenses while on pretrial release in another federal criminal case (Doc. 94, 114, p.28).

Fleitas proceeded on appeal, however, on March 12, 2019, the Eleventh Circuit affirmed the District Court's upward variance. *See, United States v. Fleitas,* 766 F. App'x 805 (11th Cir. 2019). A writ of certiorari was not sought. Fleitas filed a timely Title 28 U.S.C. § 2255 alleging his attorney was ineffective for not challenging that Detective Monro's testimony as an expert, was an error (Doc. 3-1 p. 13) and that counsel was ineffective for not utilizing a forensic expert

to testify during Fleitas sentencing hearing. (Doc. 13 p. 16). The district court denied the failure to object to Monro's testimony under the position that under "Fed. R. Evid. 1101(d)(3), ... a court may consider evidence regardless of whether it would be admissible at trial of "(1) the evidence has sufficient indicia of reliability, (2) *the court makes explicit findings of fact as to credibility*, and (3) the defendant has an opportunity to rebut *United States v. Hernandez*, 906 F.3d 1367, 1369 (11th Cir. 2018). That decision was in error. The court determined under *Hernandez* that "Monroe testified how he had investigated over one hundred cases of credit card fraud, had examined over one hundred thousand files of credit card data, and had familiarity with credit card skimming devices" (Doc. 12 p. 5), no *makes explicit findings of fact as to credibility* were made as required under *Hernandez.* Regarding the allegations that counsel was ineffective for not calling a forensic expert to testify at sentencing, the court determined that Fleitas' "assertions were conclusory and speculative" (Doc. 12, p. 6), but offered no analysis of why Fleitas's position was unattainable. That decision was an error as well. In the end, the district court denied the 2255 without an evidentiary hearing.

The Eleventh Circuit refused to grant a Certificate of Appealability. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH 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 therefor. 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

SHOULD A WRIT OF CERTIORARI BE GRANTED TO DETERMINE IF THE ELEVENTH CIRCUIT AND DISTRICT COURT ERRED IN PERMITTING NON-EXPERT TESTIMONY TO JUSTIFY A SENTENCE ENHANCEMENT WHERE AN EXPERT WAS REQUIRED.

The District Court and the Eleventh Circuit denied a COA on Fleitas' motion on the premise according to the Eleventh Circuits decision in *United States v. Hernandez*, 906 F.3d 1367, 1369 (11th Cir. 2018). However, there is one distinction, *Hernandez* requires "explicit findings of fact as to credibility." That never occurred and Fleitas argued that without that finding, allowing Monros to testify absent that finding was extremely prejudicial to his sentencing hearing. Before a witness can testify as an expert, the party presenting his testimony must, among other things, show that the witness "is qualified to testify competently regarding the matters he intends to address." *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). Suffice it to say that the government tendered Monros as an expert witness, but failed to establish, by a preponderance of the evidence, see *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1107 (11th Cir. 2005), that he was qualified as an expert.

The Eleventh Circuit's position that an objection to Monros' testimony would have been considered meritless misses the argument. It would have shifted the burden to the government to establish his expertise. At that stage, Fleitas could have presented his expert to contradict and explain Monro's inadequate findings.

This Court's opinion in *Miller-El* made clear that whether to grant a COA is intended to be a *preliminary* inquiry, undertaken before full consideration of the petitioner's claims. *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003) (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); *Id.* at 1040 (noting that "a claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail") (emphasis added); *Id.* at 1042 (noting that "a COA determination is a separate proceeding, one distinct from the underlying merits"); *Id.* at 1046-47 (Scalia, J., concurring) (noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such "full consideration" in the course of the COA inquiry is forbidden by § 2253(c). *Id.* at 1039 ("When a court of appeals side steps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is, in essence, deciding an appeal without jurisdiction."). *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003). Here this Court must only agree that based on the record, Fleitas is entitled to have the case proceed further, *not that he will be victorious* on the merits of his claim. Even if the District Court has denied all the claims without an evidentiary, (an error in this case) this Court has the authority to grant the relief and expand

upon it. *Valerio v Dir. of the Dep't of Prisons,* 306 F3d 742 (9th Cir. 2002), cert den (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788) (court of appeals not only has power to grant COA where a district court has denied it as to all issues but also to expand COA to include additional issues when the district court has granted COA as to some but not all issues.) This is especially beneficial to Fleitas since the record establishes that a forensic expert could have shed light on Monros' inadequate testimony. As such, this court must agree, that a jurist of reason would agree that there is a strong possibility that Fleitas was prejudiced due to counsel's errors.

By granting the writ of certiorari the Supreme Court will be allowed the opportunity to clarify if, testimony that will be presented to enhance a defendant's sentence, must be presented from adequate sources, such as experts.

CONCLUSION

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

Done this 9, day of July 2022.

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