22-6874

DOCKET NO. 20-778

IN THE SUPREME COURT OF THE UNITED STATES

ANAEL SAINFIL
Petitioner

vs.

UNITED STATES OF AMERICA
Respondant

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

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI
QUESTIONS PRESENTED FOR REVIEW

1. May this Court's decision in 99, S. Ct. 2781, 61 LED 2d 560, 443 U.S. 307 Jackson v. Virginia as to what constitutes insufficient evidence be applied to set aside the conviction in this case?

2. Was due process and right to effective assistance of counsel under the Fifth and Sixth Amendments violated when Petitioner's lawyer did not contest pre-miranda statement and conceded in opening statements to Petitioner being outside bank with no further explanation?

3. Is it proper for Court's to apply body armor enhancement where record is devoid of any evidence that Petitioner had knowledge that one would be used?

4. May this Court's decision in 384 U.S. 436 Miranda v. Arizona be applied to set aside a conviction in this case.

LIST OF PARTIES IN COURT BELOW

Anael Sainfil

United States of America

LIST OF CASES DIRECTLY RELATED TO THIS CASE

I. United States District Court for the Eastern District of New York
Case No. 16-cr-652
United States of America v. Anael Sainfil
October 2, 2019

II. United States Court of Appeals for the Second Circuit
Case No. 20-778
United States of America v. Anal Sainfil
August 10, 2022, decided

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CITATIONS OF OPINIONS AND ORDERS IN CASE

The original conviction of Petitioner in the United States District Court for the Eastern District of New York was reported and set forth at 2019 U.S. Dist. Lexis 171230.

The original conviction of Petitioner was appealed to the United States Court of Appeals for the Second Circuit, which affirmed the conviction in all respects in an opinion reported at 2022 U.S. App. Lexis 22126.

JURISDICTIONAL STATEMENT

The judgement of the United States Court of Appeals for the Second Circuit was entered on August 10, 2022. Rehearing was sought and denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution provides:

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; 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; nor shall private property be taken for public use without just compensation.

The Sixth Amendment, United States Constitution 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.

The Fourteenth Amendment, United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The statutes under which Petitioner was prosecuted, 18 U.S.C. 371, which provided:

If two or more persons conspire either to commit any offense against the United States, or defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. 2113(a), 2113(d), which provided:

(a) Whoever, by force and violence, or intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;or
Whoever enters or attempts to enter any bank, credit union, or a savings and loan association, with intent to commit in such bank, credit union or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny.
(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. 924(c)(1)(a)(i) (C)(1)(A)(ii), 2 which provided:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence

or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in the furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE CASE NOW BEFORE THIS COURT

On January 25, 2018, in a cause than pending in the United States District Court for the Eastern District of New York, entitled United States v. Sainfil, Criminal No. 16-cr-052, Petitioner was found guilty by a jury on an indictment of 3 counts charging violations of 18:371, 18:2113(a), 2113(d)2, 18:924(c)(1)(A)(i), 924(c)(1)(A)(ii),2, for the year 2015.

On August 1, 2018, Petitioner filed a motion to the District Court and Federal Rules of Criminal Procedure Rule 29/33 reverse conviction or order a new trial.

On October 2, 2019, the District Court entered its order denying the motion under F.R.C.P. 29/33.

On February 25, 2020, the District Court entered judgement and Petitioner was sentenced to 60 months on count one, and 135 months on count two, to both run concurrently and 84 months on count three to run consecutively for a total of 219 months. This judgement and sentence was affirmed by the United States Court of Appeals for the Second Circuit, United States v. Sainfil, in Appendix.

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION FOR ARMED BANK ROBBERY AND FIREARMS BRANDISHING

The relevant facts are contained in Petitioner's direct appeal to the Second Circuit Court of Appeals, (See Appendix). Petitioner was arrested on December 21, 2016 and while in route to the FBI office asked the agent what he was being arrested for? (App.3 pg.A-137). The FBI agent instead of giving Petitioner his Miranda Rights or simply stating the charges, went a step further and accused petitioner of being outside bank. Petitioner in turn states that being outside a bank doesn't make you a robber, (App3 pg. A-137).

During a status conference hearing on May 12, 2017, Petitioner requested a Speedy trial (App.3 pg A-5). The trial Judge was inclined to give Petitioner a date until the prosecution in an attempt to buy more time states on the record, "I advised him his client is on video in front of the bank", (App.3 pg A-18).

Now from that point on Petitioner assumed, like the agent during the arrest, that they have him on video outside the bank which would not be unusual because he had been there with Homere on multiple occasions where Petitioner waited in car as Homere conducted his business inside. Petitioner never knew that at trial, the Government's allegation would prove false.

Petitioner's lawyer never files a motion to suppress statements made to the FBI without Miranda warnings. Petitioner's lawyer also makes the fatal mistake of stipulating to Homere's banking records which shows that he was for years prior, a frequent customer of the bank, instead of showing it to the Jury. Defense Counsel also contends during opening statements that Petitioner was outside bank and not giving an explanation. "You're going to hear that Anael was outside the bank that

happened. He was outside the bank. That doesn't mean that he participated in this robbery." (App.1 pg A-55).

The Government's position during opening statements is that they will prove their case with video, phone records, co-conspirator testimony and defendant's own words, (App.1 pg A-52;A-53;A-54). At start of trial, the Government offers testimony from co-conspirators and also offers cell phone evidence and video as to who the pre-robbery lookout is. The government's theory at trial is that Petitioner made several calls from the 323-244-0016 number to Homere who was the leader of the robbery about who was in cars in the back parking lot.

The Government also plays video 9 of the drive-thru camera showing a man, who at the time they allege to be the Petitioner, walking past holding a phone. Mccarthy also testifies that he sees Petitioner "Come around to the back through the drive-thru side of the bank", (App.1 pg A-179). Homere's phone was recovered and the data pulled from the phone shows four calls from the lookout. When watching camera 9 at 5:55:09 the man the Government alleges to be the Petitioner/lookout appears on camera holding a phone which is glowing on the screen making his way back to the parking lot, approximately 2 seconds later at 5:55:11pm a call starts for 15 seconds between the 323 number and Homere. No other people can be seen on the video.

Petitioner then alerts the defense that it is not him on tape and defense plays other camera angles that shows man in video is caucasion, and not black as Petitioner.

The Government then attempts to downplay the value of the

video once they realize it is not the Petitioner on tape, in closing arguments "And the video is what it is. If you only had the video in this case, we wouldn't be here, right? But all other evidence in this case shows you the defendant was there". (App.2 pg. A-429). Petitioner is convicted on all counts

The trial lasted three days. The Jury deliberated only for a couple of hours.

One important point that needs noting here. The District Court in denying the F.R.C.P motion for a new trial mentioned defense counsel's failure to move for a mistrial after the Government's introduction of the video. (App.3 pg A-234)

At sentencing Petitioner is given multiple enhancements. Petitioner argued that he should not have a 2 point enhancement for body armor but District Court denied it. (App.2 pg A-478-A-483)

III. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court for the Eastern District of New York, three counts, 18:371, 18:2113 (a), 2113(d)2, 18:924(c)(i)(ii)2. A rule 29/33 was appropriately made in the Court and duly appealed to the Second circuit.

IV. THE COURT OF APPEALS HAS DECIDED TO UPHOLD A CONVICTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE COURT

This is a case based on Ineffective Assistance of Counsel and Insufficient Evidence. The Due Process Clause of the Federal Constitution prohibits the criminal conviction of any person, except upon proof of guilt beyond a reasonable doubt. Jackson v. Virginia 443 U.S. 307.

Petitioner was also denied a right to a fair trial under his Sixth Amendment rights to effective assistance of counsel. The Strictland Test, requiring a showing of prejudice caused by counsel's ineffectiveness, is applicable (1) in cases where the record reflects that an attorney's errors or omissions occurred during an inept attempt to present a defense, or (2) that he or she engaged in an unsuccessful tactical maneuver that was intended to assist the defendant in obtaining a favorable ruling. 466 U.S. 668 Strictland v. Washington.

In reaching its decision to affirm, the Court below decided that these settled principles were not to be applied to the case at bar because:

1. The Court states that there was sufficient evidence to support the conviction and even if defendant was not present that evidence did not have to show that he was present because participation in planning would sufficed to establish guilt on all three counts (2nd Cir. Brief).

2. Petitioner was not prejudiced by trial counsel's failure to move for suppression of his pre-Miranda statement because he made similar post-Miranda statement that was undisputedly admissable.

3. Petitioner's counsel wasn't deficient when he conceded before the Jury that Sainfil was outside the bank on the day it was robbed, in light of Sainfil's post-Miranda admission, and abundant witness testimony placing Sainfil outside the bank.

4. The Court states that it was reasonably foreseeable that a co-conspirator would wear body armor.

We respectfully urge that all aspects of this decision are erroneous and at variance with this Court's decisions as explained in the argument below.

ARGUMENT FOR ALLOWANCE OF WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS THAT THE EVIDENCE WAS SUFFICIENT

The Government's theory at trial was that Petitioner was a pre-robbery lookout who called the other co-conspirators who then commenced to rob the bank. They presented exact times that showed when the lookout supposedly examined the cars in the back of the bank. One piece of evidence was the phone records (App.3 pg A-175;A-176) of Homere that shows the critical call in question from the 323-244-0016 number which starts at 5:55:11pm and lasts for 0:00:15 seconds.

The next piece is testimony from co-conspirator McCarthy, that states "five to seven minutes later M came around to the back through the drive-thru side of the bank walking in with a hoodie on. When asked how does he know it's the defendant? He states Q was directing him by name. He doesn't claim to see Petitioner's face.

Gahagen also testifies that he believed it to be Petitioner but couldn't see his face. (App.2 pg A-292.) The last and most crucial piece of evidence to corroborate the cell phone evidence and co-conspirators testimony, was the channel 9 video which shows the person the Government assumed to be Petitioner on the phone, walking by the drive-thru camera on the way to the back parking lot like McCarthy testified to. The man steps into the frame of the camera at 5:55:09pm and walks to cars in the back; gets in and drives off. That time fits perfectly with the phone

records of the call with the 323-244-0013 number.

Petitioner requested at trial to show other angles from different cameras that shows it is not Petitioner but a caucasion male, Petitioner is black.

Once the Prosecution realizes their mistake, they in turn try to downplay the value of the video.

In their decision to affirm, the Court of Appeals states that they believe Petitioner did not have to be at the robbery to be convicted on count 2 or count 3. The Court finds the Petitioner as leader and organizer whereas district court at sentencing finds Petitioner to have no such role. (App.2 pg A-488;A-489;A-490)

The four point enhancement the Probation Department gave petitioner was taken off and the Government agreed not to hold a hearing and stated on the record that Homere was the most culpable. There is no evidence on record to show Petitioner was a leader or organizer of this robbery, all evidence states Homere.

The Appeals Court's decision to affirm is at odds with past decisions of this Court such as Jackson v. Virginia 443 U.S. 307. The Constitution prohibits the criminal conviction of any person except upon proof sufficient to convince the trier of fact of guilt beyond a reasonable doubt. Cf. ante. at 309, 61 L. Ed 2d at 567. This rule has prevailed in our courts "at least from our early years as a nation".

The channel 9 video and phone records is the key piece of evidence that the Government introduces that shows that it is an impossibility for the co-conspirators to see Petitioner at the

time in question once it was showed that it wasn't Petitioner on tape, the only thing left for the Jury was to acquit all facts gain color from others. Even Sentencing Judge duly noted that defense counsel should have requested a mistrial. (App.3 pg A-234)

II THE COURT OF APPEALS ERRED BY DETERMINING THAT PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

If Counsel would have made a pre-trial motion to suppress the statement to the FBI it most likely would have succeeded. The agent engaged in a two-step interrogation technique under 446 U.S. 291 Rhode Island v. Innis. The agent never read Petitioner his rights and when he did, Petitioner "declined to speak" agent notes (App.3 pg A-137). A hearing also would have determined if the second questions even too place. Petitioner's counsel than makes the fatal error of saying in opening statements, that Petitioner was outside bank. In this Court's previous decision in Murray v. Carrier 106 S. Ct 2639, the Court observed that a criminal defendant's right to effective assistance of counsel may, in a particular case, be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudical.

Counsel in this case fails to subject the Prosecution's case to any meaningful adversarial testing. Even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to it's heavy burden of proof beyond a reasonable doubt.

Here in a case where the Government's theory is that Petitioner was lookout, there is no reasonable explanation to not contest statement or to concede that Petitioner was outside bank. Without those statements, prosecution's case becomes very weak where cooperators statements on identification is weak and phone/video evidence proves that the man wasn't Petitioner.

Some of the strongest evidence comes from Counsel's professional errors. The verdict without the mistakes could have very likely been an acquittal. The two prong test developed under Strickland v. Washington 466 U.S. 668 is satisfied in this case at bar.

III THE COURT OF APPEALS ERRED BY DETERMINING IN EVERY ARMED BANK ROBBERY IT IS REASONABLY FORESEEABLE THAT CO-DEFENDANTS WILL WEAR BODY ARMOR

It is unsettled among the Circuit courts if in any bank robbery it is reasonably foreseeable that a co-defendant would be wearing body armor. There is no evidence that Petitioner had any advance knowledge that body armor would be used. At sentencing, the District Court accepted the fact that defendant did not know about body armor (App.3 pg A-244). The Government also agreed to that fact.

They affirmed the enhancement on the basis that is it always reasonably foreseeable to everybody that body armor will be worn. Judge Jacob's dissents in a separate opinion agreeing that it is not reasonably foreseeable that Petitioner knew body armor would be used. Judge Jacobs agreed with the District Court's assessment

that Petitioner wasn't in room while it was being put on. Judge Jacobs states "the affirmance of the body armor enhancement reduces reasonable foreseeability to a guess, and results in an unjustified piling on of sentencing enhancements.

IV. THE COURT OF APPEALS ERRED BY NOT REVERSING CONVICTION ON THE GROUNDS THAT PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT WERE VIOLATED

When Petitioner was arrested, there is no doubt as to if the FBI agent issued Miranda warnings or not. When Petitioner asks why he is being arrested, agent could have just stated charges and said nothing more. Once he determined positive guilt towards suspect, he knows that he can in turn get incriminating response back.

Petitioner should be afforded the opportunity to have a fair trial without statements which were given without Miranda warnings. This court has established that when warnings are not given, that statement should be excluded from trial. 384 U.S. 436 Miranda v. Arizona.

V. THE QUESTIONS RAISED IN THIS CASE ARE IMPORTANT

The Second Circuit has decided to affirm a conviction on principles that have long been settled by this Court. But in affirming, they raise new questions:

1. Can a conviction stand where a crucial element like the

identification of lookout be upheld even if Petitioner is not present at the scene of crime.?

2. Is it reasonably foreseeable in a robbery that body armor will be used?

3. May a conviction that is based in substantial part of coerced statement be allowed to stand when it is such a big part of link in evidence to convict.

CONCLUSION

The judgement from the Second Circuit is a unique departure from past decisions of this Court that require that convictions on insufficient evidence or ineffective assistance of counsel be set aside at anytime after conviction.

As such it represents a breach in the wall erected by the Fifth and Sixth Amendment of the Constitution and the decisions of this Court that were designed to protect a citizen from self-incrimination and the right not be deprived of liberty without due process of law.

This petition for Writ of Certiori should, therefore respectfully be granted.

Petitioner respectfully asks this Court to vacate conviction or send back to the District Court for a new trial.

Dated 1/2/23

Respectfully Submitted