

No.

IN THE SUPREME COURT OF THE UNITED STATES

JORGE MARTIN MENDOZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Does the Sixth Amendment permit a defendant to raise a claim of ineffective assistance of counsel on direct appeal where an appeal waiver contained in the plea agreement bars only appeals of sentence?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Eleventh Circuit Court of Appeals include the United States of America and Petitioner Jorge Martin Mendoza. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JORGE MARTIN MENDOZA, respectfully petitions this Court for a writ of certiorari to review the *Order* dismissing the appeal rendered by the Eleventh Circuit Court of Appeals on November 30, 2017. See Appendix G.

OPINIONS BELOW

The *Order* rendered by the Eleventh Circuit Court of Appeal is attached as Appendix G.

JURISDICTION

The order of the Eleventh Circuit Court of Appeal became final on November 30, 2017. (App.G) This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1) (2017).

Specifically, Petitioner invokes this Court’s jurisdiction under Rule 10(c), because Eleventh Circuit decided a question of federal law which has not been—and should be—settled by this Court, and which directly conflicts with an opinion of the District of Columbia Circuit. See United States v. Soto, 132 F.3d 56 (D.C. 1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

STATEMENT OF THE CASE

In the proceeding below, Petitioner, JORGE MARTIN MENDOZA, appealed to the Eleventh Circuit Court of Appeal and argued ineffective assistance of counsel on direct appeal. Specifically, Mr. Mendoza argued that the appeal waiver contained in his plea agreement did not prohibit claims of ineffective assistance raised on direct appeal.

Previously, Mr. Mendoza pled guilty to one count of possession with intent to distribute five (5) kilograms or more of a mixture and substance containing cocaine in violation of 46 U.S.C. §§ 70503(a) and 70506(a)-(b), and 21 U.S.C. § 960(b)(1)(B)(ii) (2014) pursuant to a plea agreement with Appellee, UNITED STATES OF AMERICA. (App.A) As part of every plea agreement offered by the government in the Middle District of Florida, the written plea agreement contained a waiver of appellate rights by Mr. Mendoza unless: (a) the sentence exceeded the applicable guideline range as determined by the district court (but not determined at the time of entering into the plea agreement); (b) the sentence exceeded the statutory maximum penalty (in this case, life imprisonment); and (c) the ground that the sentence violates the Eighth Amendment of the United States Constitution. (App.A p.15)

In the Presentence Report (PSR), the probation officer found that Mr. Mendoza was 41 years old at the time of sentence (PSR.3), that he had no criminal

history (PSR.7), that he had a continuous and steady employment history (PSR.9), and that he would be deported following any custodial term imposed. (PSR.8) The PSR also listed the names of the co-defendants and the dates of their sentencing hearings. (PSR.1) Nonetheless, defense counsel did not file any sentencing memorandum and did not challenge the PSR prior to the sentencing hearing.

At the sentencing hearing, Mr. Mendoza's testimony was provided via interpreter. (Dkt.115) Defense counsel argued that Mr. Mendoza worked hard as an automotive mechanic in Mexico City, but earned a meager living, and that he agreed to participate in the offense to provide for his family. (App.C p.7) Defense counsel also offered a letter to the district court from Mr. Mendoza's employer, who described him as showing "excellent behavior, is responsible and honest." (App.C p.15)

As for the offense itself, Mr. Mendoza told the district court that the cocaine was already loaded onto the ship when he boarded, and nothing was loaded after he got on the ship. Thus, he was unaware of how much cocaine was aboard the vessel. (App.C p.9) Defense counsel also argued that none of the co-defendants were "less culpable than him," then asked for a minor role adjustment to account. (App.C p.11)

Defense counsel read a letter from Mr. Mendoza, in which he apologized and expressed remorse for his conduct multiple times. (App.C p.13) He told the district

court, “...if it were not for poverty and below-salaries in my country, I would never have even thought of committing a mistake like this.” (App.C p.12) He then told the court that he is married to Cinthia Martinez-Mena and that they have three children together: a 19-year-old son, a 15-year-old daughter, and a 4-year-old daughter. (App.C p.12)

Despite this testimony, defense counsel did not ask the district court to grant a downward variance based on the Section 3553(a) factors and Section 5K2.0.

The government did not argue that Mr. Mendoza was more culpable than any of the three other co-defendants, but simply asked the court not to assign him a minor role in the offense. (App.C p.18) The government also did not dispute the adverse impact on this family, his extreme remorsefulness, or his hard-working character.

Ultimately, the district court accepted the factual basis contained in the presentence investigation report. Although not alleged in the factual basis contained in the plea agreement or even in the presentence investigation report, the district court denied the request for a role adjustment on the basis that the court believed Mr. Mendoza to be a “load guard.” (App.C p.18) Thus, court determined the Offense Level as 35 and Criminal History Category I, with a guideline range of 168- to 210-months imprisonment. (App.C p.18-19) Thereafter, the district court sentenced Mr. Mendoza to 168-months imprisonment. (App.C p.19)

Five days prior to Mr. Mendoza's sentencing hearing, the same district court judge sentenced co-defendant Marcos Gamboa Aragon to the statutory mandatory minimum sentence of 120-months imprisonment. See United States v. Aragon, 8:15-cr-363-JSM-AEP (Dkt.90) (M.D.F.L. March 3, 2016). Immediately following Mr. Mendoza's sentencing, the same district court judge sentenced co-defendant Segundo Boya Velasco to the statutory mandatory minimum sentence of 120-months imprisonment. See United States v. Velasco, 8:15-cr-363-JSM-AEP (Dkt.100) (M.D.F.L. March 8, 2016).¹

Thereafter, Mr. Mendoza appealed to the Eleventh Circuit and argued that it was evident from the face of the record that defense counsel deprived Mr. Mendoza of effective assistance the Presentence Report identified at least nine different mitigating factors, yet defense counsel failed to ask the district court for a downward variance based on the Section 3553(a) factors identified in the PSR. Procedurally, Mr. Mendoza argued that the appeal waiver did not bar collateral claims of ineffective assistance of counsel. (App.D)

The government moved to dismiss the instant appeal on the basis that: (1) the appeal waiver contained in the plea agreement bars the claim of ineffective

¹ The district court judge sentenced a third co-defendant, Paulino Jimnez Biojo, whom the PSR identified as the "master/person in charge of the vessel", see PSR.5, to 240-months imprisonment after determining his total Offense Level as 37, with a Criminal History Category III, and a sentencing range of 262- to 327-months imprisonment. See United States v. Paulino, 8:15-cr-363-JSM-AEP-1 (Dkt.87) (M.D.F.L. March 2, 2016).

assistance of counsel on direct appeal, and, (2) in the alternative, the record is insufficiently developed to resolve the claim on direct appeal. (App.E) Specifically, the government argued that the appeal was procedurally barred, because claims of ineffective assistance of counsel do not fall within any exception to the waiver. (App.E)

Mr. Mendoza responded that the difference lies in the remedy. He argued that a challenge of sentence asks a court to invalidate the sentence imposed as substantively or procedurally unreasonable; the remedy for a successful appeal of sentence is for resentencing where the judge may not impose the same sentence. But a challenge of effective assistance of counsel asks a court to invalidate the proceeding itself (not necessarily the sentence), because the defendant did not receive the effective assistance of counsel the Sixth Amendment requires; the remedy for a successful appeal alleging ineffective assistance is for a de novo sentencing proceeding where the district court is free to impose the same sentence if the facts and circumstances so warrant. (App.F)

The Eleventh Circuit granted the motion to dismiss and found that the appeal waiver contained in Mr. Mendoza's plea agreement bars him from challenging the effectiveness of his counsel on direct appeal. (App.G)

This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE WRIT

- I. Under the Sixth Amendment is a claim of ineffective assistance of counsel cognizable on direct appeal, where the appeal waiver contained in the plea agreement bars only a direct appeal of sentence?

This Court has never addressed whether an appeal waiver that prohibits only challenges to sentence also bars collateral claims on direct appeal.

In the proceeding below, Petitioner, JORGE MARTIN MENDOZA, directly appealed to the Eleventh Circuit on the substantive basis that his counsel's ineffectiveness was evident from the face of the record, and procedurally, the appeal waiver contained in the plea agreement did not bar collateral challenges—only direct challenges to sentence. (App.D)

The Eleventh Circuit dismissed the appeal, finding that the appeal waiver contained in Mr. Mendoza's plea agreement bars him from challenging the effectiveness of his counsel on direct appeal. (App.G)

Reaching the opposite conclusion, the District of Columbia Circuit held that, where a defendant appears on the face of the record to satisfy the standards for a downward adjustment of sentence, yet counsel fails to request the downward adjustment, this omission constitutes ineffective assistance of counsel cognizable on direct appeal. United States v. Soto, 132 F.3d 56 (D.C. 1997).

In Soto, it was evident from the record that the defendant qualified for a sentencing reduction based on minimal or minor participation in the offense

pursuant to Section 3B1.2, United States Sentencing Guidelines. Id. at 57. However, “her counsel did no more than cite section 3B1.2 in the course of arguing for a downward departure under section 5K2.0...” Id. at 58. The court further pointed out that counsel failed to request the downward adjustment pursuant to Section 3B1.2 in the sentencing memorandum or at the sentencing hearing: “[C]ounsel cannot properly invoke a particular Guidelines provision ‘merely by reciting to the court a list of mitigating facts.’” Id. (citing United States v. Sergio, 934 F.3d 875, 881 (7th Cir. 1991)). Because it was evident on the face of the record without any additional fact-finding, the court held that the Strickland² standard was satisfied on direct appeal, because the downward adjustment would have decreased the defendant’s sentence by at least seventeen months had defense counsel requested the downward adjustment pursuant to Section 3B1.2. Id. at 59.

Citing Soto, Mr. Mendoza argued to the Eleventh Circuit that a claim of ineffective assistance of counsel on direct appeal is not procedurally prohibited by the appeal waiver. The agreement contained a waiver of the right to directly appeal the sentence only as follows:

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant’s sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the

² Strickland v. Washington, 466 U.S. 668 (1984).

defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution...

See App.A p.15 (emphasis added). According to the agreement, Mr. Mendoza argued he was only prohibited from directly appealing his sentence. The plain language of the agreement did not prohibit Mr. Mendoza from challenging the performance of counsel during sentencing—and thus asserting his constitutional right to effective assistance of counsel at all critical stages of the proceeding.³ Indeed, he argued that it was in the interest of judicial economy to permit Mr. Mendoza to challenge the effectiveness of his counsel now, rather than in a separate habeas corpus proceeding, as the record was already fully developed on the issue. (App.D)

Moreover, Mr. Mendoza argued to the Eleventh Circuit that the difference between a challenge to sentence and a challenge to the effectiveness of counsel lies in the remedy. He argued that a challenge of sentence asks a court to invalidate the sentence imposed as substantively or procedurally unreasonable; the remedy for a successful appeal of sentence is for resentencing where the judge may not impose

³ See “Notes of the Advisory Committee 1993”, Fed. R. Crim. P. 32 (“We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the ‘bottom-line’ for the defendant, particularly where the defendant has pled guilty.”)

the same sentence. But a challenge of effective assistance of counsel asks a court to invalidate the proceeding itself (not necessarily the sentence), because the defendant did not receive the effective assistance of counsel the Sixth Amendment requires; the remedy for a successful appeal alleging ineffective assistance is for a de novo sentencing proceeding where the defendant is not represented by the same counsel, but the district court is free to impose the same sentence if the facts and circumstances so warrant. (App.F)

Given this Court's recent recognition of the prevalence of plea bargains in the current American criminal justice system⁴, Mr. Mendoza calls upon this Court to settle the conflict between circuits of this important question of federal law: whether the Sixth Amendment permits a defendant to raise a claim of ineffective assistance of counsel on direct appeal, where an appeal waiver contained in the plea agreement only bars challenges to sentence.

⁴ See Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. ... The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.")

CONCLUSION

Petitioner requests that this Court grant a writ of certiorari and consider this important question of federal law where there is conflict between the circuits on the matter.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to
SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of
Justice, 950 Pennsylvania Ave. NW, Washington, DC 20530-0001, by U.S. Mail this
7th day of February 2018.



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