No. ____________________

____

IN THE

SUPREME COURT OF THE UNITED STATES

____

MICHAEL BOLDEN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL BOLDEN #07225-097
(Your Name)
Federal Correctional Institution
3600 Guard Road, Lompoc CA 93436
(Address)

____
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. The law of this land is that the Sixth Amendment guarantees the right to counsel at critical stages of a criminal proceeding, Montejo v. Louisiana, 556 U.S. 778, 786 (2009), and that "the plea bargaining stage [i]s a critical stage at which the right to effective assistance of counsel attaches." United States v. Day, 969 F.2d 39, 43 (3rd Cir. 1992); see also Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012)(protection attaches to plea negotiations). In this case, Petitioner's pre-superseding indictment counsel, Johnny L. Griffin III, rejected a five-year plea deal offered by the government during pre-superseding indictment plea negotiations. After a superseding indictment charging Petitioner with several counts of fraud issued on September 14, 2011, Johnny Griffin III backed off from the case due to a conflict of interest and new counsel, Michael Hansen, was appointed by the District Court, who advised Petitioner that it was in his best interests to accept a far less favorable plea deal (i.e., a "20-year" deal). Petitioner filed a motion pursuant to 28 U.S.C. § 2255 to vacate or set aside his federal conviction/sentence based on ineffective assistance of counsel during plea negotiations concerning the federal charges. The government argued that because Petitioner had no Sixth Amendment right to counsel regarding plea negotiations conducted prior to the filing of the superseding indictment against him, counsel could not be constitutionally ineffective. The District Court agreed with the government and denied the petition without reaching the merits of the ineffective assistance of counsel claim based thereon. Because the lower courts "are split as to whether the Sixth Amendment right to counsel attaches in preindictment plea negotiations," Turner v. United States, 848 F.3d 767, 771 (6th Cir. 2017), and this Court has unequivocally stated that it will "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to ... have effective assistance of counsel[,]" United States v. Gouveia, 467 U.S. 180, 195 (1984), Petitioner posits the following question: Should this Court grant Certiorari to settle the issue of whether the Sixth Amendment right to counsel attaches in preindictment plea negotiations once and for all; or alternatively, to carve out an exception to the brigth-line rule established in Kirby v. Illinois, 406 U.S. 682 (1972) in a case where the posture of the government toward Petitioner had shifted from investigatory to prosecutorial (even though he had not yet been technically indicted by the time of plea negotiations)?

II. The law of this land is that a District Court shall undertake an "examination of the event [pre-trial confrontation] in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary," United States v. Ash, 413 U.S. 300, 313 (1973). The District Court shall also determine whether the prosecution "has committed itself to prosecute," and whether the "adverse positions of the government and defendant have solidified." Kirby v. Illinois, 406 U.S. 682, 689 (1972). In this case, the District Court failed to employ these standards set forth by this Court when determining whether the protections of effective counsel attached to the pre-superseding indictment plea negotiations in question. Therefore, Petitioner posits the following question: Should this Court grant Certioari and invoke its Supervisory Powers to correct this error of law and enforce strict compliance with its standards?

III. Should this Court grant Certiorari review to determine whether the courts below erred in denying Petitioner a Certificate of Appealability as to his claim of ineffective assistance of counsel?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] 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:

Turner v. United States, 848 F.3d 767 (6th Cir. 2017)

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STATUTES AND RULES

OTHER

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,
[X] is unpublished.

The opinion of the United States district court appears at Appendix __B__ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] 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.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 18, 2017.

[x] 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 ____________ (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

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

U.S. Const. Amend. 6

STATEMENT OF THE CASE

On September 14, 2011, Petitioner and four others were charged in a twenty-seven count superseding indictment with wire and mail fraud charges related to a Ponzi scheme. On December 12, 2013, Petitioner pleaded guilty to one count of the superseding indictment pursuant to a written plea agreement. On September 12, 2014, Petitioner was sentenced to twenty years in prison.

On August 17, 2015, Petitioner filed a timely motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In that, Petitioner alleged that his pre-indictment counsel, Johnny L. Griffin III, rendered ineffective assistance of counsel in violation of the Sixth Amendment by rejecting a five-year plea deal offered by the AUSA's office. The petition was denied by the District Court and no certificate of appealability was issued. Petitioner now presents this Court with a timely petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

(SEE ATTACHED MEMORANDUM OF LAW IN SUPPORT)

FROM: 07225097
TO:
SUBJECT: ... MEMORANDUM IN SUPPORT OF CERTIORARI
DATE: 11/14/2017 02:35:07 PM

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IN THE SUPREME COURT OF THE UNITED STATES
***

MICHAEL BOLDEN,
Appellant-Petitioner,

vs.

UNITED STATES OF AMERICA,
Appellee-Respondent.
______________________________/

Case Nos. 2:15-cv-01744-TLN-CKD;
2:11-cr-00054-TLN-CKD-2
C.A. No. 17-15183

MEMORANDUM IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY A PRISONER IN FEDERAL CUSTODY

COMES NOW, Michael Bolden, the "Petitioner" in this action, appearing without the benefit of counsel, and respectfully submits the instant Memorandum of Points and Authorities in Support of his Petition for Writ of Certiorari to the Supreme Court of the United States.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

I. REASONS FOR GRANTING THE WRIT

A. The law of this land is that the Sixth Amendment guarantees the right to counsel at critical stages of a criminal proceeding, Montejo v. Louisiana, 556 U.S. 778, 786 (2009), and that "the plea bargaining stage [i]s a critical stage at which the right to effective assistance of counsel attaches." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992); see also Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012) (protection attaches to plea negotiations). In this case, Petitioner's pre-superseding indictment counsel, Johnny L. Griffin III, rejected a five-year deal offered by the government during pre-superseding indictment plea negotiations. After a superseding indictment charging Petitioner with several counts of fraud issued on September 14, 2011, Johnny Griffin III withdrew from the case due to a conflict of interest and new counsel, Michael Hansen, was appointed by the District Court, who advised Petitioner that it was in his best interests to accept a far less favorable plea bargain (i.e., a "20 year" deal). Petitioner filed a motion pursuant to 28 U.S.C. Section 2255 to vacate or set aside his federal conviction based on ineffective assistance of counsel during plea negotiations concerning the federal charges. The government argued that because Petitioner had no Sixth Amendment right to counsel regarding plea negotiations conducted prior to the filing of the superseding indictment against him, counsel could not be constitutionally ineffective. The District Court agreed with the government and denied the petition without reaching the merits of the ineffective assistance of counsel claim based thereon. Because the lower courts "are split as to whether the Sixth Amendment right to counsel attaches in preindictment plea negotiations," Turner v. United States, 848 F.3d 767, 771 (6th Cir. 2017), and this Court has unequivocally stated that it will "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to ... have effective assistance of counsel[,]" United States v. Gouveia, 467 U.S. 180, 195 (1984), this Court should grant Certiorari to settle the issue of whether the Sixth Amendment right to counsel attaches in preindictment plea negotiations, especially when the posture of the government toward Petitioner had shifted from investigatory to prosecutorial (even though he had not yet been technically indicted by the time of plea negotiations), once and for all.

1. Applicability of the Sixth Amendment to July 2011 Plea Negotiations

The "core purpose" of the Sixth Amendment right to counsel is to guarantee effective assistance at trial. United States v. Ash, 413 U.S. 300, 309 (1973). The Sixth Amendment, however, guarantees more than simply a right to a fair trial. United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994). It "serves to protect the reliability of the entire trial process." Nunes v. Mueller, 350 F.3d 1045, 1052 (9th Cir. 2003). For this reason, the right to effective counsel has been extended to certain pretrial proceedings that "might appropriately be considered parts of the trial itself," such as where the defendant is "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." Ash, 413 U.S. at 310. There are often "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, 338 U.S. 218, 224 (1967). Accordingly, the right to the effective assistance of counsel extends to "all critical stages of the criminal process." Nunes, 350 F.3d at 1052.

A "critical stage" is any "trial-like confrontation, in which the potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice." United States v. Leonti, 326 F.3d 1111, 1117 (9th Cir. 2003). It includes all circumstances in which "certain rights might be sacrificed or lost," or where "[a]vailable defenses may be irretrievably lost." Wade, 388 U.S. at 225. The essence of a critical stage is "not its formal resemblance to a trial but the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." Leonti, 326 F.3d at 1117. In determining whether the right to counsel applies, "the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." Ash, 413 U.S. at 313. Courts look to whether the prosecution "has committed itself to prosecute," and whether the "adverse positions of the government and defendant have solidified," such that the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Kirby v. Illinois, 406 U.S. 682, 689 (1972).

The adversarial nature of the July 2011 plea negotiation, combined with the possibility that Petitioner's right to trial could have been sacrificed or lost, makes clear that it was a critical stage of the criminal process. The AUSA contacted attorney Griffin, told him that a superseding indictment was forthcoming in which Petitioner would be indicted, and then presented Petitioner with a specific plea bargain that, if accepted, would have required him to surrender his constitutional right to both indictment and trial, and serve five years in prison. This is proof that the government made a commitment to prosecution, and that the parties' adverse positions had solidified in much the same way as when formal charges are filed. This was not a casual conversation, but a formal negotiation. The AUSA made clear that Petitioner was facing "serious charges of fraud" that would undoubtedly expose him to a "lengthy, 20-year sentence," and then offered a specific term of imprisonment in exchange for Petitioner's guilty plea and continued cooperation. Under these specific circumstances, the July 2011 plea negotiation was the functional equivalent of the initiation of formal adversarial proceedings against Petitioner.

Put differently, because plea bargaining is now regulated by Fed. R. Crim. P. 11, which gives the District Judge ultimate supervision over plea bargains, it can strongly be argued that plea bargaining is itself a judicial proceeding in the sense contemplated by Kirby. In the instant case, Petitioner's right to counsel was in effect prior to the filing of the superseding indictment, because it is obvious that prior to that date, the government had made a commitment to prosecute him. This argument is based on the fact that the government had entered into plea negotiations with attorney Griffin. Once the government enters into plea bargaining, it is apparent that the adverse positions of the parties have solidified, and the prospective defendant is plainly faced with the prosecutorial powers of the government. See United States v. Moody, 206 F.3d 609, 615-616 (6th Cir. 2000) ("There is no question in our minds that at formal plea negotiations, where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified."). Consequently, the right to counsel must begin with the commencement of plea bargaining in the rather unusual case, such as that presented here, where plea bargaining precedes arrest, being entered into the system, or the filing of a superseding indictment. Cf. Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012)("During plea negotiations, defendants are 'entitled to the effective assistance of competent counsel.'")(quoting McMann v. Richardson, 397 U.S. 759, 771 (1097)); see also United States v. Fuller, 941 F.2d 993, 995 (9th Cir. 1991)("[A] defendant has the right to assistance of counsel in deciding whether or not to plead guilty"); Day, 969 F.2d at

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SUBJECT: ... MEMORANDUM IN SUPPORT, PART 2
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43 ("[T]he plea bargaining stage [i]s a critical stage at which the right to effective assistance of counsel attaches ..."); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982)("[T]he decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."). The lower courts erred in holding otherwise.

B. The law of this land is that a District Court shall undertake an "examination of the event [pre-trial confrontation] in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary," United States v. Ash, 413 U.S. 300, 313 (1973). The District Court shall also determine whether the prosecution "has committed itself to prosecute," and whether the "adverse positions of the government and defendant have solidified." Kirby v. Illinois, 406 U.S. 682, 689 (1972). In this case, the District Court failed to employ these standards set forth by the Supreme Court when determining whether the protections of effective counsel attached to the pre-superseding indictment plea negotiations in question. Therefore, the supervisory powers of this Court are required to correct this error of law.

1. Reversal of the Decisions of the Courts Below is Necessary to Ensure that the Correct Standard of Review is Applied to Petitioner's IAC Claim

As stated, Petitioner filed a motion under 28 U.S.C. Section 2255 challenging counsel Griffin's ineffectiveness with respect to the July 2011 pre-indictment plea negotiations. Although the standard applicable to gauging the effectiveness of defense counsel in any critical proceeding is that articulated by this Court in Strickland v. Washington, 466 U.S. 668 (1984), the standards applicable to gauging (1) whether or not the right to counsel exists at all in a particular proceeding, or (2) whether a particular proceeding is "critical" within the meaning of the Sixth Amendment, are those articulated by this Court in Ash and Kirby. See Ash, 413 U.S. at 313 ("the test utilized by this Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary."); Kirby, 406 U.S. at 689 (courts look to whether the prosecution "has committed itself to prosecute," and whether the "adverse positions of the government and defendant have solidified," such that the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law" when faced with determining whether the protection of the Sixth Amendment attaches). In this case, the District Court did not employ these standards. Instead, it relied exclusively on the fact that no superseding indictment charging Petitioner had been issued prior to the commencement of plea negotiations. Because the law requires a District

Court to conduct specific fact-based inquiries that were not employed in the proceedings below, and because concluding that Petitioner had no right to counsel in evaluating the government's plea offer simply because the government had not yet obtained a formal superseding indictment elevates form over substance, and undermines the reliability of the pre-superseding indictment plea negotiations, this Court should grant Certiorari and reverse the decisions of the courts below so as to prevent future situations "rais[ing] the specter of the unwary defendant agreeing to surrender his right to trial in exchange for an unfair sentence without the assurance of legal assistance to protect him," Moody, 206 F.3d at 615, and further, to ensure strict compliance with this Court's standards.

C. The Courts below erred in denying Petitioner a Certificate of Appealability on the issue of whether he was denied his right to effective assistance of counsel during pre-superseding indictment plea negotiations.

1. A Certificate of Appealability ("COA") Should Have been Granted on this Issue

Petitioner can appeal the denial of his Section 2255 motion to the Ninth Circuit Court of Appeals only if a COA is issued pursuant to 28 U.S.C. Section 2253(c)(1)(B). A COA should be issued only if the defendant can make a substantial showing of the denial of a constitutional right per 28 U.S.C. Section 2253(c)(2), or raise an issue that is debatable among jurist of reason or deserving of further proceedings. Slack v. McDaniels, 529 U.S. 473, 484 (2000). The courts below ruled that, although Petitioner's IAC claim is debatable among reasonable jurists, he made no showing of a denial of a constitutional right. (See Appendix A and B). Petitioner disagrees for the following reasons.

As an initial matter, it is well settled in our nation that "[d]uring plea negotiations, defendants are 'entitled to the effective assistance of competent counsel,'" Lafler, 132 S.Ct. at 1384, and that "[t]he plea bargaining stage [i]s a critical stage at which the right to effective assistance of counsel attaches," Day 969 F.2d at 43. Moreover, several jurists of reason have stood for the proposition that defense counsel can deprive a criminal defendant of his Sixth Amendment protection to the effective assistance of counsel by rendering inadequate legal advice during pre-indictment plea negotiations. See United States v. Wilson, 719 F. Supp. 2d 1260 (Dist. Ore., March 1, 2010); see also Moody, 206 F.3d at 616 (discussing the circuit split as to whether the Sixth Amendment right to counsel attaches in preindictment plea negotiations, and referencing discussions that favor a change in the rule). Accordingly, a COA should have issued. See Section 2253(c)(2); Slack, 529 U.S. at 484.

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CONCLUSION

For the good reasons adduced herein, this Honorable Court should grant Petitioner's request for a Writ of Certiorari and settle these important matters once and for all. *1

RELIEF REQUESTED: Petitioner requests that the decisions of the Courts below be reversed and remanded with instructions.

RESPECTFULLY SUBMITTED THIS 14 DAY OF NOVEMBER, 2017.

Michael Bolden
MICHAEL BOLDEN #07225-097
Pro Per

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*1
Petitioner respectfully requests that his Objections to the Magistrate Judge's Findings and Recommendations (attached hereto as EXHIBIT #1) be incorporated herein, and used in furtherance of his position in connection with infras A, B and C.