

No. _____

In the Supreme Court of the United States

October Term, 2018

DAVID OROZCO, *PETITIONER*,

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT**

VIVEK GROVER
ATTORNEY AT LAW
711 Myrtle Avenue
El Paso, Texas 79901
Phone: (915) 838-9355
Fax: (915) 351-1817

*Counsel of Record for Petitioner
David Orozco*

QUESTION PRESENTED FOR REVIEW

1. Whether the waiver of appeal rights contained in the Plea Agreement is unenforceable since the Plea Agreement is invalid because it is an unconscionable contract, that affected Orozco's substantial rights and seriously affected the fairness, integrity and public reputation of judicial proceedings.
2. Whether the district court imposed a sentence that is greater than necessary to satisfy the sentencing goals in 18 U.S.C. § 3553(a).

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Petitioner, David Orozco asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 5, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the unpublished order of the court of appeals, *United States v. Orozco*, No. 17-50689 (5th Cir. April 5, 2018), is attached to this petition as an Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The order dismissing Orozco’s appeal was entered on April 5, 2018. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law[.]”

STATEMENT

David Orozco (‘Orozco’) pleaded guilty pursuant to a plea agreement, which contained a waiver of appellate rights. He was convicted of Conspiracy to Possess with Intent to Distribute 5 grams or More of Methamphetamine, in violation of 21 U.S.C. §841(a)(1), 21 U.S.C. §841(b)(1)(B)(viii) and 21 U.S.C. § 846. The district court sentenced Orozco to 96 months’ imprisonment.

On appeal, Orozco argues that the waiver of appellate rights contained in the plea agreement is unenforceable, since the plea agreement

is an unconscionable contract that violated Orozco's substantial rights. Upon signing the one-sided plea agreement, Orozco gave up nearly all his appellate rights and received very little in return. Thus, his substantial rights were affected by the plea agreement. In addition, this one-sided plea agreement foreclosed appellate review thus affecting the fairness, integrity and public reputation of the judicial proceedings. *See United States v. Olano*, 507 U.S. 725, at 736 and *United States v. Vonn*, 535 U.S. 55, 58-59 (2002).

Finally, respectfully, Orozco also argues that his 96-month sentence is unreasonable and greater than necessary based on the facts and circumstances of his case and as measured by the sentencing goals of 18 U.S.C. § 3553(a).

According to the facts of this case as explained in the PSI, the government used a confidential informant to purchase cocaine and or methamphetamine from Osvaldo Daniel Rodriguez and others. (ROA. 130-134). In these transactions, it appears that several individuals are involved including the defendant Orozco. (ROA. 130-134). However, what is most important is that Orozco is a very small part of these transactions. In fact, he is a participant only in 2 out of the 8 transactions that are the subject of this case. (ROA. 130-134).

Specifically, on June 6, 2016, the confidential source arranged to purchase an ounce of cocaine from Rodriguez. It appears that Orozco,

the subject of this appeal, was not involved in this transaction. On June 8, 2016, the confidential source arranged to purchase two ounces of cocaine from Rodriguez. It appears that Orozco, the subject of this appeal, was not involved in this transaction. On June 14, 2016, the confidential source arranged to purchase an ounce of cocaine from Rodriguez. It appears that Orozco, the subject of this appeal, was not involved in this transaction. On July 27, 2016, the confidential source ordered two ounces of cocaine from Rodriguez. It appears that Orozco, the subject of this appeal, was not involved in this transaction. On August 11, 2016, the confidential source arranged to purchase an ounce of cocaine from Rodriguez. It appears that Orozco, the subject of this appeal, was not involved in this transaction. (ROA. 130-132).

On September 1, 2016, the confidential source arranged to purchase two ounces of cocaine from Rodriguez. It appears that Orozco, the subject of this appeal, was involved in this transaction. He provided Rodriguez with 27 grams of methamphetamine. Orozco was ultimately held accountable for this transaction. On September 14, 2016, the confidential source arranged to purchase four ounces of cocaine from Rodriguez. Although present at the scene, it appears that Orozco, the subject of this appeal, was not held accountable for this transaction under the terms of his plea agreement. (ROA. 105-107, 130-134). On September 15, 2016, the confidential source arranged to purchase six ounces of cocaine from

Rodriguez. It appears that Orozco, the subject of this appeal, was not involved in this transaction. On September 19, 2016, the confidential source arranged to purchase four ounces of cocaine from Rodriguez. It appears that Orozco, the subject of this appeal, was not involved in this transaction. (ROA. 130-134).

Subsequently, Orozco was arrested, indicted and charged with the aforementioned federal criminal offenses. He pleaded guilty pursuant to a plea agreement that held him accountable for 27 gm of methamphetamines. (ROA. 124, 125, 130). At sentencing, the judge granted an adjustment for minor role and for acceptance of responsibility. He also followed the plea agreement and Orozco was held responsible for 27 gm of methamphetamines. The judge determined that Orozco range of punishment under the advisory guidelines was 77-96 months. Then the judge sentenced Orozco to the top of the guidelines, 96 months imprisonment. (ROA. 105-118).

Respectfully, the court did not adequately take Orozco's background and circumstances into account when the court sentenced Orozco to the top of his advisor guideline range. Orozco suffered a very difficult and traumatic childhood. His circumstances and criminal history bear that out, as explained in the PSI. Therefore, respectfully, a sentence of 96-months of incarceration is greater than necessary. As a result, Orozco appeals his sentence. (ROA. 59). The Government filed a motion to

dismiss Orozco's appeal, arguing that the challenge to his sentence was barred by the appeal waiver. The United States Court of Appeals for the Fifth Circuit agreed and dismissed the appeal.

REASONS FOR GRANTING THE WRIT

1. **The Court Should Grant Certiorari to Determine Whether the Waiver of Appeal Rights Contained in a Plea Agreement Is Unenforceable Since the Plea Agreement Is Invalid Because It Is an Unconscionable Contract that affected Orozco's Substantial Rights.**

Orozco was represented by counsel and he signed a plea agreement that was essentially one sided. He gave up several important rights in the plea agreement and got very little in exchange. Sound public policy warrants that defendant Orozco's waiver of appeal rights contained in the plea agreement be held unenforceable, and the court review this appeal on the merits, rather than dismissing this appeal based upon the waiver of appellate rights.

"The term 'unconscionable' does not have a precise legal definition, but in general it describes a contract that is unfair because of its overall one-sidedness or the gross one-sidedness of its terms. *Chubb Lloyds Ins. v. Andrew's Restoration*, 323 S.W.3d 564, 578 (Tex. App.-Dallas 2010, pet. denied); *Lawson v. Archer*, 267 S.W. 3d 376, 382 (Tex. App.-Houston [14th Dist.] 2008, no pet.).

Unconscionability includes two aspects: (1) procedural unconscionability which refers to the circumstances surrounding the adoption of the contract terms in controversy; and (2) substantive unconscionability, which refers to the fairness of these terms. *LeBlanc v. Lange*, 365 S.W. 3d 70, 88 (Tex. App.-Houston [1st Dist.] 2011, no pet.); *Fogal v. Stature Constr., Inc.*, 294 S.W. 3d 708, 714 (Tex. App.-Houston [1st Dist.] 2009,

pet. denied); *Lawson v. Archer*, 267 S.W. 3d 376, 382 (Tex. App.-Houston [14th Dist.] 2008, no pet.).

In deciding the fairness of a court's substantive terms, the court must also consider whether there were procedural abuses, such as an unfair bargaining position between the parties at the time the agreement was made. The party asserting unconscionability must prove both procedural and substantive unconscionability. *LeBlanc v. Lange*, 365 S.W. 3d 70, 88 (Tex. App.-Houston [1st Dist.] 2011, no pet.); *In re Green Tree Servicing, LLC*, 275 S.W.3d 592, 603 (Tex. App.-Texarkana 2008, no pet.); *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136, 139 (Tex. App.-Waco 2005, pet. denied).

In this case, there is an unequal bargaining position between the Orozco and the government. The defendant stands to lose his freedom for a considerable period of time. So, he was willing to do whatever he could to remedy the situation. In terms of substantive unconscionability, an analysis of the plea agreement itself shows that it is grossly one sided, and that the defendant gave up numerous important rights and in exchange received very little, if anything:

1. First, by signing the plea agreement, the defendant gave up his constitutional right to a jury trial; in return the government agreed to hold Orozco accountable for 27 grams of methamphetamine. The government also agreed not to oppose the two-level

adjustment for acceptance of responsibility if the court were to grant that adjustment. In addition, the government agreed to move for the third level of acceptance. (ROA. 120-125).

2. Second, defendant waived his right to additional discovery, and the right to appeal his sentence for any reason, except for claims of ineffective assistance of counsel and prosecutorial misconduct. Specifically, the agreement states as follows: “By entering into this plea agreement, and as a term of this plea agreement, the Defendant voluntarily and knowingly waives any right to appeal the sentence on any ground, including any appeal right conferred by 18 U.S.C. §3742. (ROA.122-123). Other than claims of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension, defendant has seemingly bargained away his right to appeal his sentence for any and every possible error that may occur in his case. How can a concession of this magnitude be considered a fair bargain? (ROA.122-123).
3. In exchange, the defendant received the following concessions from the government: First government agreed not to oppose an award for acceptance of responsibility in the plea agreement. (ROA. 120-125). However, defendant would have been eligible for this adjustment anyway by simply pleading guilty to the

indictment - without a plea agreement. In addition, the government agreed that Orozco would be held responsible for 27 grams of methamphetamine. (ROA.125). However, it appears that was what the government could have proven in a trial. It really wasn't much of a compromise by the government. (ROA.106-107).

For all of the above reasons, defendant respectfully requests the court to find that the plea agreement is an unconscionable contract. Orozco also respectfully requests the court to find that the waiver of appeal rights contained in the Plea Agreement is unenforceable. This one-sided plea agreement affected Orozco's substantial rights and seriously affected the fairness, integrity and public reputation of judicial proceedings.

2. The Court Should Decide Whether the District Court Imposed an Unreasonable Sentence in Light of the Sentencing Factors of 18 U.S.C. § 3553(a)(2).

The statute governing sentencing, “as modified by *Booker*, contains an overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing” in 18 U.S.C. § 3553(a)(2). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). Orozco's within-guideline sentence is greater than necessary to meet these goals and therefore is unreasonable.

CONCLUSION

FOR THESE REASONS, Orozco asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

/s/Vivek Grover

VIVEK GROVER
ATTORNEY AT LAW
711 Myrtle Avenue
El Paso, Texas 79901
(915) 355-8483
Fax: (915) 351-1817

Attorney for Defendant-Appellant

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