IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF TEXAS (Houston)

UNITED STATES OF AMERICA,

Respondent,

vs. **CASE NO.: 3:19-CV-01005**

THEODORE OKECHUKU,

Petitioner.

SUPPLEMENTAL BRIEF SUPPORTING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Petitioner, THEODORE E. OKECHUKU ("Dr. Okechuku"), by and through undersigned counsel, hereby submits this supplemental brief in support of his motion under 28 U.S.C. § 2255. In support, Dr. Okechuku states:

INTRODUCTION

Dr. Okechuku filed a Petition under 28 U.S.C § 2255 in this Court on April 26, 2019, in which he sought to vacate the sentence entered against him on March 30, 2016. (DE. 480) (Docket No.: 3:13-cr-00481-B-1). The essential facts and jurisdictional information are set forth in Dr. Okechuku's April 26, 2019 Petition. In this supplemental brief Dr. Okechuku presents the additional arguments herein.

ARGUMENT

I. THE PROSECUTION FAILED TO OFFER SUFFICIENT EVIDENCE THAT PETITIONER WAS DELIBERATELY IGNORANT TO THE CONSPIRACY, SINCE PETITIONER'S MERE NEGLIGENCE CANNOT PROVE AGREEMENT TO CONSPIRE.

Petitioner reiterates in this Brief that the Prosecution failed to offer sufficient evidence that Petitioner's alleged deliberate ignorance involved him in the conspiracy, since the only evidence the Prosecution offered supported Petitioner's mere negligence—and as a question of law—negligence cannot constitute agreement to a conspiracy. Throughout the trial in all evidence presented before the jury, the Prosecution attempted to argue that the Petitioner had direct knowledge of the criminal activity taking place around his clinic. And as alleged in the § 2255 Petition, the Prosecution failed to even discuss "deliberate ignorance" until it came time to charge the jury and issue them their instructions. The only evidence that actually came forward at trial demonstrated—at best—that Dr. Okechuku was negligent.

But negligence is not enough. The Fifth Circuit Court of Appeals recently reiterated in a very comparable medical conspiracy case that there cannot be a negligently entered conspiracy. *United States v. Ganji*, 880 F.3d 760, 776 (5th Cir. 2018). As the Court of Appeals explained:

> The Government's attempt to ascribe [the Defendant] with knowledge and agreement because of her position in the company falls far short of the

> necessary requirement for guilt beyond a reasonable doubt. One cannot negligently enter into a conspiracy. *See Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 526 (5th Cir. 2016) ("Civil-RICO conspiracy, however, cannot be premised on negligence. It requires an actual agreement between conspirators—they must specifically intend the illegal conduct."); *see also* Model Penal Code § 5.03 cmt. 2(c)(i) (1985) ("[W]hen recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime... there could not be a conspiracy to commit that crime.").

United States v. Ganji, 880 F.3d 760, 776 (5th Cir. 2018). Applied to this case, this clear statement from the Fifth Circuit means that the Prosecution must have, as a matter of law, failed to prove Petitioner Dr. Okchuku was subjectively aware of the illegal conduct, which is the first prong in the two-part test. *United States v. Farfan-Carreon*, 935 F.2d 678, 680 (5th Cir. 1991).

As to the second prong, whether the Petitioner purposely avoided learning about the illegal conduct, there was simply no evidence that Petitioner willfully avoided learning of the alleged Pill Mill conspiracy. Just the opposite, the evidence presented at trial suggests Petitioner Dr. Okchuku did everything possible to interdict the conspiracy and report the criminal conduct to the authorities as soon as he knew about it. The record clearly establishes that Petitioner did what a reasonable person would do upon learning about serious criminal conduct: report it to the police. For example, when Petitioner first found out that Ezenagu was forging prescriptions and bringing non-staff into the clinic—against the stated office policy that Petitioner had established—Petitioner immediately reported the

forgery to the DEA. What's more, inconsistent to someone consciously trying to avoid learning about incriminating knowledge, Petitioner himself confronted the problem head-on as soon as he discovered it, and fired Ezenagu. Petitioner did not do this in an attempt to avoid prosecution, since he took these actions before the government issued the indictment.

II. Despite the Lower Courts' Contrary Findings, There Was Insufficient Evidence that Petitioner Repeatedly Met With the Drug Dealers Who Operated the Pill Mill.

To prove Petitioner was independently involved in the conspiracy, at trial the Prosecution contended that Petitioner met repeatedly with the drug dealers at his clinic. However there is insufficient evidence these meetings ever took place. The only evidence presented at trial that Petitioner actually met with the drug dealers in person came from statements made by Ezenagu and Hernandez, the employees who were the chief architects of the alleged Pill Mill conspiracy. But the testimony of Ezenagu and Hernandez should not have been given any weight by the Court; as these rogue employees have no credibility since they were co-conspirators themselves. While there was some video evidence presented at trial that depicts the drug dealer entering the clinic at the same time Petitioner was there, this evidence was, at best, inconclusive, and cannot be enough to demonstrate Petitioner was independently involved in the Pill Mill. This insufficient evidence should be reviewed and reversed for legal insufficiency.

III. **<u>The Trial Court Commited an *Alleyne* Error in Failing to Require the Jury to Establish that Petitioner Actually "Brandished" a Firearm With Intent to Intimidate as Defined in § 924(c), Therefore the Court Erred in Allowing the Alleged Brandishing to Increase Petitioner's Sentence. Additionally, Trial Counsel's Failure to Raise this Crucial Issue Was Ineffective Assistance of Counsel.</u>**

The trial court committed an *Alleyne* error by allowing an unresolved question of fact increase Petitioner's sentence without submitting the question to the jury. The jury was not required to establish that Petitioner actually "brandished" a firearm with intent to intimidate, as that phrase is defined by law, and therefore the sentence enhancement for brandishing a firearm was applied in error to Petitioner and should be reversed.

Under clear Supreme Court precedent when a disputed question of fact could possibly increase the sentence for a crime, that question of fact must be submitted to a jury for review. *Alleyne v. United States*, 133 S.Ct. 2151, 215 (2013) ("Any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an element that must be submitted to the jury."); *see also United States v. Payne*, 763 F.3d 1301, 1304–05 (11th Cir. 2014) (reviewing an *Alleyne* error in the 924(c) brandishing context).

In this case, under 18 U.S.C. § 924(c)(1)(A)(ii) "if [a] firearm is brandished, [the Defendant shall] be sentenced to a term of imprisonment of not less than 7

years…" The statute further clarifies under 924(c) (4) that "For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." The Prosecution failed to adequately establish whether Petitioner intended to "intimidate" anyone.

The Fifth Circuit Court of Appeals has not yet had the chance to squarely interpret what the phrase "in order to intimidate" means in the brandishing context. But interpretations from other Circuits are helpful. *United States v. Bowen*, 527 F.3d 1065, 1075 (10th Cir. 2008) (holding that even where the gun was used to bludgeon not to shoot, that is equally brandishing to "intimidate" for the sentencing enhancement's purposes); *and see United States v. Carter*, 560 F.3d 1107, 1114 (9th Cir. 2009) ("Because it is unclear whether the district court found the firearm was brandished, we must vacate the seven-year sentence and remand for re-sentencing on the charge of violation of 18 U.S.C. § 924(c).").

In Petitioner's case the Court failed to submit this important question of fact to the jury, and the basic facts that were presented demonstrate the gun was not brandished with an intent to intimidate. The gun was merely brandished by a security guard the Petitioner had hired to ensure his clinic was a safe environment to treat patients. This was very reasonable considering that the clinic was located

in a crime-ridden neighborhood. Petitioner did not brandish the weapon as a bludgeoning device, like in *Bowen*, the gun was simply displayed in the officer's holster. The mere display of a gun is not an intimidation tactic, rather, it's presence in the holster of a security officer was intended to make patients feel safe.

The Court's failure to submit this question to the jury was an *Alleyne* error, and trial counsel's failure to raise this issue arises to ineffective assistance of counsel under *Strickland*, further supporting the arguments in Petitioner's April 26, 2019 Petition for Texas Appeals Post Conviction 2255 relief.

CONCLUSION

WHEREFORE for the reasons discussed above, THEODORE E. OKECHUKU, respectfully requests that this Court enter an Order:

A. Granting this Motion;

B. Vacating the Judgment Sentence; or in the alternative;

C. Reducing his Sentence;

D. Scheduling an evidentiary hearing;

E. Granting any further relief deemed appropriate.

DATED this 26th day of April, 2019.

Respectfully Submitted,

/s/ Robert L. Sirianni, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2019 a copy was filed and furnished to opposing counsel via the CM/ECF filing system.

/s/ Robert L. Sirianni, Jr.
Robert L. Sirianni, Jr.