

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CASE NO.: 12-15231

BHARDWAAJ SEECHARAN,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure and Rules 26.1-1 through 26.1-3 of the 11th Circuit Rules, Appellant hereby lists the trial judges, attorneys, and parties who have an interest in this appeal.

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- 2) Cooperstein, Theodore (Counsel for U.S.A.)
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- 6) Lynch Jr., The Honorable Frank J. (United States District Court Magistrate)
- 7) Martinez, The Honorable José E. (United States District Court Judge)
- 8) Neustein, Charles L. (Trial Counsel for Mr. Seecharan)
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- 10) Schultz, Anne (Counsel for U.S.A.)
- 11) Seecharan, Bhardwaaj (Appellant)
- 12) Seecharan, Gergawattie (Appellant's Wife and Co-Defendant)

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18 U.S.C. § 3553(a)(2)(D)*passim*

INTRODUCTION

In its Brief, the Government argues Mr. Seecharan's sentence is procedurally and substantively reasonable. First, the Government contends the district court's general statement - that it considered the factors set forth in 18 U.S.C. § 3553(a) - is sufficient to demonstrate procedural reasonableness (Gov't Brief at 28). This argument fails because the record makes clear that the district court did *not* assess whether the Bureau of Prisons ("BOP") could provide for Mr. Seecharan's medical needs pursuant to § 3553(a)(2)(D), regardless of any statement to the contrary. The argument also fails because even if the court's statement was adequate to satisfy procedural reasonableness, any determination that the BOP could care for Mr. Seecharan's medical needs was based on clearly erroneous facts. As argued in the Initial Brief, there is simply no information in the record to support the court's finding that the BOP can "handle anything." The Government's Brief contains no response to this argument. The Government's failure to respond should be deemed a concession of error.

The Government also argues that Mr. Seecharan's sentence is procedurally reasonable because the district court's consideration of the BOP's ability to care for Mr. Seecharan's medical issues was, in fact, "substantial, thoughtful, and proper." (Gov't Brief at 31). The Government's support for that argument is that the district court "agonized" over Mr. Seecharan's need for medical care during

two sentencing hearings which were primarily focused on Mr. Seecharan's medical issues. (*Id.* at 31). The amount of time the district court spent "agonizing" over Mr. Seecharan's medical condition is irrelevant. Pursuant to § 3553(a)(2)(D), the district court's duty was to ensure the BOP could accommodate Mr. Seecharan's medical needs. Because the district court failed to review any evidence regarding the BOP's ability to care for Mr. Seecharan, his sentence cannot be procedurally reasonable.

Finally, the Government contends that Mr. Seecharan's procedural unreasonableness argument is not preserved because he failed to "point out to the court the purported failures for which he now faults the court on appeal." *Id.* at 29. This argument is without merit because Mr. Seecharan argued that home confinement was better suited to accommodate his medical needs, and that he might die in prison because of his precarious physical state. This was sufficient to preserve the procedural reasonableness challenge he raises on appeal.

In support of its argument that Mr. Seecharan's sentence is substantively reasonable, the Government maintains that Dr. Negron's affidavit "puts to rest Seecharan's argument that the BOP is incapable of providing him with necessary and effective medical care." In so doing, the Government seems to ignore the fact that this Court has already found Dr. Negron's affidavit inadequate to show that the BOP can care for Mr. Seecharan's medical needs. The affidavit is simply

another iteration of its argument that the BOP can “handle anything” and is woefully inadequate to prove the BOP can safely provide for Mr. Seecharan’s medical needs.

ARGUMENT

I. MR. SEECHARAN’S SENTENCE IS PROCEDURALLY UNREASONABLE BECAUSE THE RECORD IS CLEAR THAT THE DISTRICT COURT FAILED TO CONSIDER § 3553(a)(2)(D), EVEN IF IT “AGONIZED” ABOUT MR. SEECHARAN’S MEDICAL CONDITION.

The Government argues in its Brief that Mr. Seecharan’s sentence was procedurally reasonable because “the court’s consideration of Seecharan’s medical care was substantial, thoughtful, and proper.” (Gov’t Brief at 31). As evidence, the Government notes that Mr. Seecharan’s medical condition was the subject of both sentencing hearings and argues that the district court “agonized” about Mr. Seecharan’s need for medical care. *Id.*

The Government misses the point. Simply because a sentencing court perseverates over a defendant’s medical condition does not, *ipso facto*, mean it considers whether the BOP can actually care for the defendant. Mr. Seecharan acknowledged in his Initial Brief that the district court appeared to appreciate the severity of Mr. Seecharan’s physical condition. (IB at 8). The district court failed, however, to consider whether a sentence of imprisonment would provide Mr. Seecharan with needed medical care in the most effective manner. 18 U.S.C. §

3553(a)(2)(D).

Evidence of that failure is the absence of any information in the record on which the district court could have determined the BOP is able to provide Mr. Seecharan with necessary medical care in the most effective manner. Mr. Seecharan provided letters from three of his treating physicians outlining his medical needs and the risks associated with imprisoning Mr. Seecharan. (IB at 7). The Government did not attempt to undermine the medical opinions. Instead, it acknowledged the severity of Mr. Seecharan's condition and the possibility that his fragile health would preclude him from completing his sentence. (IB at 8-9). No information from the Bureau of Prisons was presented to suggest that it "could take all comers" or that it "could handle anything." (IB at 8). Given the absence of any information in the record suggesting the BOP can provide Mr. Seecharan with necessary medical care in the most effective manner, there is no way the district court could have considered § 3553(a)(2)(D)¹.

The district court, however, stated that it considered all the § 3553(a) factors. That is why Mr. Seecharan used the terms "meaningful" and "adequate" to qualify the district court's obligation to consider § 3553(a)(2)(D). The Government takes umbrage with the use of these adjectives, and argues that whether the district court

¹ Mr. Seecharan's argument is that the district court failed to consider § 3553(a)(2)(D). He is not contending that the district court improperly weighed the factors, as suggested by the Government. (Gov't Brief at 28).

actually considered the factors or not, all that is required for procedural reasonableness is a statement from the district court that it considered the factors. (Gov't Brief at 28). Mr. Seecharan's argument is that if a district court claims it considered each § 3553(a) factor, but the record belies that claim, the claim is meaningless. In other words, a district court's consideration of a § 3553(a) factor must be meaningful or adequate to the extent that each factor must actually be considered. Adjectives aside, it is well-established that a sentencing court is required to consider *all* the § 3553(a) factors. *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). Here, the district court failed to consider § 3553(a)(2)(D). That is the first reason Mr. Seecharan's sentence is procedurally unreasonable.

II. THE GOVERNMENT'S BRIEF FAILS TO RESPOND TO MR. SEECHARAN'S ARGUMENT THAT HIS SENTENCE IS PROCEDURALLY UNREASONABLE BECAUSE THE DISTRICT COURT SELECTED A SENTENCE OF IMPRISONMENT BASED ON CLEARLY ERRONEOUS FACTS.

The second reason Mr. Seecharan's sentence is procedurally unreasonable is that the district court based Mr. Seecharan's sentence on clearly erroneous facts. *See Gall v. U.S.*, 552 U.S. 38, 51 (2007) (holding that an appellate court reviewing a sentence imposed by the district court "must first ensure that the district court committed no significant procedural error, such as...selecting a sentence based on clearly erroneous facts" regardless of whether the sentence imposed falls inside or

outside the guidelines range). This was specifically argued in the Initial Brief (IB at 19-21). The Government did not attempt to respond to this contention in its Brief. The Government's failure to rebut Mr. Seecharan's argument that the determination that the BOP could safely provide necessary care was based on clearly erroneous facts should be viewed by this Court as a concession that Mr. Seecharan's sentence is procedurally unreasonable.

III. MR. SEECHARAN PRESERVED THE ARGUMENT THAT THE DISTRICT COURT FAILED TO CONSIDER WHETHER THE BOP COULD SAFELY PROVIDE NECESSARY MEDICAL CARE.

According to the Government, Mr. Seecharan's argument that the sentencing court failed to consider the BOP's ability to provide necessary medical care is made for the first time on appeal. (Gov't Brief at 29). Thus, the Government argues, Mr. Seecharan has "blind side[d]" the district court's sentencing decision. *Id.* The Government's argument is unavailing.

At the second sentencing hearing, defense counsel for Mr. Seecharan made the following argument:

We hear that the Bureau of Prisons can handle him. But when you look at the letter from Dr. Gibson, possible loss of limbs, possible loss of life, can they handle him up until the time he loses one limb? Can they [handle] him up until the time he loses a second limb? Can they handle him up until the time he's dead? . . . And with all due respect to the Bureau of Prisons, I'm sure they do the best they can, they're not going to do what his family could do. And we're in reality talking about a man who can lose limbs and life. . . . I would ask your Honor to allow him to serve his sentence in home confinement where he can

get the care that he needs.

(*Dkt.* 147 at 19). By arguing that home confinement, as opposed to incarceration with the BOP, was the only way Mr. Seecharan could safely receive the medical “care that he needs,” defense counsel tracked the language of § 3553(a)(2)(D). This is sufficient to preserve his argument on appeal.

Mr. Seecharan acknowledges that trial counsel did not specifically reiterate his argument that sentencing Mr. Seecharan to prison was procedurally unreasonable following the district court’s inquiry pursuant to *United States v. Jones*, 899 F.2d 1097 (11th Cir. 1990) *cert. denied*, 498 U.S. 906 (1990), *overruled on other grounds*, *United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993) (*en banc*). As a practical matter, however, the purpose of the preservation requirement is simply to allow the district court the first opportunity to correct the error and provide for a complete record on appeal. *U.S. v. Costales*, 5 F.3d 480, 488 n. 3 (11th Cir. 1993).

In this case, the purpose of the *Jones* rule has been satisfied. Mr. Seecharan’s trial counsel objected to imprisonment because of the risk it would impose to Mr. Seecharan’s health, and the district court rejected the argument. *See U.S. v. Weir*, 51 F.3d 1031 (11th Cir. 1995) (holding that argument advanced at sentencing was preserved for appeal because the district court clearly understood the party’s position and specifically rejected it). In addition, further objection to

the district court's determination that the BOP could provide for Mr. Seecharan's medical needs would have been futile. The district court acknowledged the severity of Mr. Seecharan's condition and inquired as to the BOP's ability to handle someone in Mr. Seecharan's condition. The BOP's response that it could "handle anything" was sufficient for the district court. Therefore, further argument that the BOP could not handle Mr. Seecharan's medical needs would have been futile. If the BOP could handle anything, it could handle Mr. Seecharan, regardless of his medical needs or the severity of his condition.

Even if this Court finds Mr. Seecharan's procedural unreasonableness argument was not sufficiently raised below, his sentence should still be reversed. Either the district court failed to consider § 3553(a)(2)(D) when it determined the BOP could provide necessary medical care for Mr. Seecharan, or it based its decision on clearly erroneous facts. Either scenario amounts to plain error under the facts of this case.

To establish plain error, a defendant must show there was: (1) an error, (2) that is plain and (3) that affects substantial rights. In addition, he must show that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *U.S. v. Machado-Gonzalez*, 391 F. App'x. 842, 844 (11th Cir. 2010). "An error is plain if it is obvious and clear under current law." *United States v. Eckhardt*, 466 F.3d 938, 948 (11th Cir. 2006). "An error that affects substantial

rights is one that affected the outcome of the district court proceedings.” *United States v. Henderson*, 409 F.3d 1293, 1308 (11th Cir. 2005) (quotations omitted).

Here, the first two prongs of the plain error test are satisfied because the sentencing court was required to consider § 3553(a)(2)(D) without relying on clearly erroneous facts, pursuant to case law from the United States Supreme Court and this Circuit. *See Pugh*, 515 F.3d at 1191 (sentencing court required to consider *all* the § 3553(a) factors) (emphasis added); *see also Gall*, 552 U.S. at 51 (district court commits procedural error when it selects a sentence based on clearly erroneous facts). The district court’s failure to consider § 3553(a)(2)(D) without relying on clearly erroneous facts affected Mr. Seecharan’s substantial rights because no information presented at sentencing suggested the BOP could provide Mr. Seecharan with necessary medical care in the most effective manner. Thus, the outcome of the sentencing proceedings would have been different because had the district court considered § 3553(a)(2)(D) in light of the information adduced at sentencing, Mr. Seecharan would not have been sentenced to prison.

Finally, the district court’s failure to consider § 3553(a)(2)(D) without relying on clearly erroneous facts seriously affected the fairness, integrity, and public reputation of judicial proceedings. To wit, after acknowledging the severity of Mr. Seecharan’s condition and expressing a desire to ascertain whether incarceration with the BOP would “kill him,” the district court sentenced Mr.

Seecharan to prison based on the BOP's wholly unsubstantiated claim that it could "handle anything." In addition, a miscarriage of justice will occur if this Court declines to notice the procedural errors which occurred during Mr. Seecharan's sentencing. *See Johnson v. U.S.*, 520 U.S. 461, 470 (1997) (declining to notice unpreserved error on appeal because no miscarriage of justice would result).

IV. DR. NEGRON'S AFFIDAVIT DOES NOT "PUT TO REST" MR. SEECHARAN'S ARGUMENT THAT THE BOP IS INCAPABLE OF PROVIDING HIM WITH NECESSARY AND EFFECTIVE MEDICAL CARE.

Before addressing the inadequacy of Dr. Negron's affidavit, two threshold problems with the Government's reliance on the affidavit merit discussion. First, the affidavit was never presented to the district court. It materialized for the first time in response to this Court's order. The affidavit cannot be used to argue that the sentence imposed by the district court was substantively reasonable because the affidavit was not before the district court when it sentenced Mr. Seecharan to prison. In fact, the Government introduced nothing in the district court concerning the BOP's ability to care for Mr. Seecharan. In a thinly-veiled attempt to mask that failure, the Government argues that it was Mr. Seecharan's burden to present evidence showing the BOP could not care for him, and that he failed to carry that burden because his physicians' letters did not indicate any familiarity with BOP facilities or prison conditions. (Gov't Brief at 32-35).

The Government is wrong. Mr. Seecharan presented letters from his treating

physicians suggesting he risked amputation or death if sent to prison. Those statements were fueled by the concern he would contract an infection. A doctor does not need to visit a prison to know the risk of infection is significant, and certainly higher than in a home confinement setting.

The Government's argument on appeal that Mr. Seecharan did not present sufficient medical evidence to show the BOP is ill-equipped to care for him is especially dubious considering its statements at sentencing. For instance, based on the evidence Mr. Seecharan submitted at sentencing, the Government noted, "there is an open question as to whether and how much of that duration this defendant could successfully serve." (*Dkt.* 146 at 13). If the Government is correct that Mr. Seecharan failed to show the BOP could not safely care for him, whether he could serve his sentence "successfully" in prison would not have been an "open" question at sentencing.

The second threshold issue with the Government's reliance on the affidavit is that this Court has already considered it, and found it inadequate to show the BOP can safely provide Mr. Seecharan with necessary medical care. After reviewing Mr. Seecharan's emergency motion for continued home confinement pending appeal, as well as the Government's response, this Court temporarily granted the motion in a November 26, 2012, order. Therein, this Court directed the Government to supplement its response in opposition "with documentation from

the Bureau of Prisons setting out the Bureau's ability to address Appellant's medical needs while he is in the Bureau's custody." In response, the Government filed Dr. Negron's affidavit.

On February 22, 2013, this Court granted the motion for continued home confinement. Therefore, it appears this Court has "put to rest" the argument that Dr. Negron's affidavit shows the BOP can provide for Mr. Seecharan's medical needs while in custody. Nonetheless, in its Brief, filed five days after this Court ordered Mr. Seecharan's continued home confinement pending appeal, the Government maintains that Dr. Negron's affidavit "puts to rest [Mr.] Seecharan's argument that the BOP is incapable of providing him with necessary and effective medical care." (Gov't Brief at 37). Thus, while it appears this issue has been resolved, because the affidavit is the only information the Government has provided to this Court in support of its argument that sentencing Mr. Seecharan to prison is substantively reasonable, Mr. Seecharan will address Dr. Negron's affidavit.

The affidavit is a reiteration of the Government's argument at sentencing that imprisonment is appropriate for Mr. Seecharan because the BOP can "handle anything." The affidavit fails to identify where Mr. Seecharan is going and whether *that facility* can accommodate his fragile condition. Instead, the Declaration speaks broadly of the Federal Bureau of Prisons. This glowing

nationwide assessment of the state of affairs in federal prisons is not only inaccurate (see Exhibit "A" to Mr. Seecharan's Reply in Opposition to the Government's Supplemental Response to his Emergency Motion for Bond Pending Appeal, filed with this Court on December 5, 2012), but is also insufficient to rebut the medical opinions of Mr. Seecharan's doctors. Mr. Seecharan's life cannot be left to the chance of being housed at a facility that lacks the ability to accommodate his dire medical condition.

In addition, Dr. Negron states in his Declaration, "[t]here is an inherent risk of infection in public settings, and the BOP recognizing such has established Clinical Practice Guidelines to deal with such infections as MRSA, and we also have infectious disease staff and infection control plans established in order to deal with such issues." This explanation is underwhelming because Dr. Negron's Declaration does not address how the risk of infection is prevented and seems to insinuate that infections in a public setting are unpreventable.

More importantly, it does not account for the heightened risk infection poses to Mr. Seecharan. Mr. Seecharan has a permanent and gaping wound that runs the length of his leg and down to his bone. According to his doctors, an infection can result in amputation or death. Mr. Seecharan should not be exposed to the inevitable risk of infection in prison, which could lead to amputation or death. This is especially true in light of his non-violent offense, the imposition of a

restitution payment in excess of \$2 million, the excruciating pain he lives with daily, and when home-confinement with appropriate restrictions will ensure he poses no risk to the public.

Dr. Negron's affidavit also fails to provide a specific plan to accommodate Mr. Seecharan's medical needs. *See, e.g., United States v. Pineyro*, 372 F. Supp. 2d 133 (D. Mass. 2005) (ruling that "the BOP has not remotely met its burden of showing that it can provide the defendant with 'needed ... medical care, or other correctional treatment in the most effective manner'" because BOP offered no treatment plan whatsoever and nothing comparable to what defendant was receiving; BOP's conclusion that it could provide "necessary and appropriate treatment" was not only vague, it did not meet the statutory requirements that the defendant receive "the most effective" treatment). Dr. Negron's explanation does not address whether Mr. Seecharan's special sleeping or bathroom arrangements can be met. Nor does it state Mr. Seecharan will be provided with special laundry services (necessary to prevent infection) or the ongoing therapy that is needed to prevent further deterioration of his physical state. Most importantly, when Mr. Seecharan does contract an infection, it does not identify which facility would be equipped to perform surgery, or other emergency measures.

Finally, Dr. Negron's affidavit is insufficient because it reflects Dr. Negron only reviewed the three letters from Mr. Seecharan's physicians. However, at

sentencing, Mr. Seecharan introduced evidence of his physical therapy schedule (*Dkt.* 136-1), which reflects that from at least May 10, 2012, through September 7, 2012, Mr. Seecharan attended physical therapy sessions approximately three times per week. Dr. Negron does not opine on whether any BOP facility is equipped to provide similar care. In addition, Dr. Negron does not reference the x-rays that were submitted during sentencing. (*Dkt.* 139-1). Not only does this contradict the Government's claim that the physician letters were the only information submitted by Mr. Seecharan at sentencing regarding his condition (Gov't Brief at 33), it also reveals that Dr. Negron is not sufficiently aware of Mr. Seecharan's condition to opine on the BOP's ability to care for him.

CONCLUSION

At sentencing, the Government had an opportunity to show that the BOP could adequately care for Mr. Seecharan in response to his physicians' warnings that incarceration may result in death or amputation. Despite its failure to make that showing, Mr. Seecharan requested that this Court remand for resentencing in his Initial Brief. However, this Court gave the Government a second opportunity to show Mr. Seecharan's medical needs can be met in a BOP facility and it again failed to do so. This Court should not force Mr. Seecharan to travel from Orlando to Miami and pay for representation at a third sentencing hearing to give the Government yet another opportunity to do what it should have at sentencing and in

response to this Court's order. Mr. Seecharan owes over \$2 million in restitution, his wife is serving a lengthy prison sentence, and he lives with unbearable pain every day. This Court should vacate his sentence of imprisonment and order that he serve the remainder of his sentence in home confinement.

DATED this 15th day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished to the Court and all counsel of record via electronic filing through the CM/ECF system on March 15, 2013. Paper copies were sent to the Court on March 15, 2013.

/s/Michael M. Brownlee
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
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Date: March 15, 2013

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