

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL A. RAMOS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

MIGUEL A. RAMOS
(Your Name)

Reg. No. 42711-279
United States Penitentiary
P.O. Box 33

(Address)

Terre Haute, Indiana 47808

(City, State, Zip Code)

(Phone Number)

LIST OF PARTIES

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

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:

QUESTION(S) PRESENTED

WHETHER THE PETITIONER WAS DENIED PROCEDURAL DUE PROCESS BY ENHANCEMENTS TO HIS GUIDELINES SENTENCE WITHOUT ANY PROOF TO SUPPORT THOSE ENHANCEMENTS?

WHETHER EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT IS ADMISSIBLE DURING A SENTENCING HEARING?

WHETHER A PROBATION OFFICER CAN PURSUE CRIMINAL CHARGES BASED ON THE SAME EVIDENCE USED TO OBTAIN A WARRANT AGAINST THE PETITIONER FOR VIOLATING THE TERMS AND CONDITIONS OF HIS SUPERVISED RELEASE?

WHETHER THE RIGHT OF CROSS-EXAMINATION SHOULD APPLY TO THE SENTENCING HEARING PROCESS?

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JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was May 16, 2018.

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

Fifth and Sixth Amendments

U.S.S.G. § 6A1.3

STATEMENT OF THE CASE

After pleading guilty March 2, 2017, to "Corruptly Trying to Influence a Witness" (18 U.S.C. § 1512(b)), the petitioner Miguel Antonio Ramos was sentenced on June 8, 2017, to 84 months imprisonment. Although the indictment charged him with the offense of tampering with a witness, Miguel Ramos denied committing that offense. The district court then agreed to his entering a guilty plea to "Corruptly Trying to Influence a Witness". Prior to sentencing, the court held a hearing on his "Objections" to the Pre-Sentence Report.

The above-recited offense had its genesis in telephone calls made by the petitioner from the county jail where he was held after being charged with a supervised release violation. Those calls were made to the petitioner's girlfriend - Valerie Morales. It was a verbal disagreement between the petitioner and his aforesaid girlfriend which led to his being cited for violating the terms and conditions of his supervised release. The parties verbal and physical altercation arose from the unfaithfulness of Valerie Morales toward the petitioner.

Petitioner Miguel Ramos...was arrested as a consequence of police officers being called to his mother's house at 7439 ..

Cessna Drive, pursuant to a 911 dispatch. The petitioner was not present at that residence when the officers arrived. Thus, the petitioner was not questioned by the officers, nor was he arrested over the incident.

Meanwhile, Valerie Morales (petitioner's girlfriend), also departed from 7439 Cessna Drive, and went to visit some friends. When Valerie's mother later learned about the fight between the petitioner and Valerie, she contacted his probation officer - Bryce Stark - and complained about petitioner's conduct toward her daughter. Valerie was then informed by her mother that the probation officer might be calling about the incident. The petitioner was then asked by Valerie as to what she should say if contacted by the probation officer. Valerie also stated that she had no desire to speak with the probation officer, but, if it became unavoidable, what should she say to him? In response, the petitioner informed Valerie that she was under no obligation to answer his questions unless she wanted to. Subsequently, Valerie attempted to avoid speaking to the probation officer, however, when the petitioner was taking her to the C.V. Pharmacy, Valerie saw where he was attempting to contact her on her cellphone. Valerie asked the petitioner as to what she should do about answering it? It was the petitioner's response that she could do whatever she felt

like doing, and, again, stated that it was her option. Valerie decided to answer the probation officer's telephone call, so, the petitioner exited the vehicle to allow her to speak in private.

Following the probation officer's telephone call with the petitioner's aforesaid girlfriend, the district court was requested to revoke petitioner's probationary status on the following technical violations: (1) not reporting within ten days of changing addresses; (2) curfew violation; (3) absent from a single anger management class; (4) failure to notify probation within 72 hours, of having contact with law enforcement personnel. The petitioner was arrested and placed in a local jail. During petitioner's stay in the county jail, Valerie visited him on regular basis, and insisted upon him staying in daily contact thru telephone calls. Those recorded conversations revealed some heated exchanges between them over whether Valerie was being unfaithful.

The jailhouse recordings were reviewed by petitioner's probation officer for no apparent reason other than a motive to charge petitioner with a criminal offense of some type. No warrant was first obtained by the probation officer before he listened to those recordings. Instead of questioning Valerie as to whether she felt threatened by the petitioner, the pro-

probation officer applied his own personal interpretation to recorded telephone conversations and, concluded that the petitioner was attempting to obstruct justice. Based on his aforesaid conclusions, which were denied by Valerie Morales, criminal charges were pursued by the probation officer. It is clear that the probation officer was not authorized to investigate potential charges against the petitioner as opposed to possible violations of the terms and conditions of petitioner's probation. United States v. Waters, 158 F.3d 933, 945 (6th Cir.1998)(ruling probation officer exceeded his authority in requesting revocation of defendant's supervised release rather than merely reporting alleged violations (18 USC § 3603(8)(B)).

The probation officer's infringement upon petitioner's Fourth Amendment entitlement to privacy resulted in criminal charges being filed for violating 18 USC § 1512(b), or witness tampering. Based on defense counsel's advice, the petitioner entered a guilty plea. The district court proceeded to combine the sentencing on the § 1512(b) offense with the probation violations. Probation Officer Bryce Stark was the government's single witness at the sentencing hearing. See Sentencing Hearing Transcript, at pages 19-38.

Bryce Stark testified to having spent 90 hours listening to the telephone conversations between the petitioner and his girlfriend - Valerie Morales. Id. at pp. 40-41. Although the probation officer proceeded without a search warrant in listening to the parties recorded conversations, and his admitting to the fact that investigating probation violations was part of his job duties, federal prosecutors sought an enhancement for the time spent by Bryce Stark reviewing those conversations. The district court sustained the government's position by enhancing petitioner's base offense level by three-points. Id. at page 50.

Although making threats to a witness was an essential element of the § 1512 offense, the district court enhanced petitioner's base offense level by another eight points due to those alleged threats. Id. An objection was registered to both enhancements. Three points were deducted from the base offense level for petitioner's "acceptance of responsibility" which produced a base offense of "22". Combining that with a Criminal History Category of "V", resulted in a sentencing range of "77-96" months under the Sentencing Guidelines. Id. at page 51. The district court imposed a sentence of 84 months. Id. at page 54.

REASONS FOR GRANTING THE WRIT

A federal criminal sentence is subject to direct appellate review for both procedural error and substantive reasonableness. Gall v. United States, 552 U.S. 38 (2009); United States v. Feemster, 572 F.3d 455, 461 (8th Cir.2009)(en banc). The substantive reasonableness of a sentence is reviewed under a deferential abuse of discretion standard.

Gall, 552 U.S. at 38, 41:

An abuse of discretion may occur if a sentencing court ignores a relevant factor that should have received significant weight, gives too much weight to an irrelevant or improper factor, or commits a clear error of judgment even when weighing only appropriate factors. If the District Court imposes a within-Guidelines sentence, this court presumes the sentence is reasonable, and [the defendant] bears the burden to rebut the presumption.

United States v. Beasley, 688 F.3d 523, 535 (8th Cir.2012). Although substantive review is deferential to the district court, it is not a "hollow exercise", because "district judges at times make mistakes that are substantive" and "circuit courts exist to correct such mistakes when they occur." Rita v. United States, 551 U.S. 338, 354 (2007).

The district court placed excessive emphasis on the Appellant/Petitioner's criminal history, and conduct that comprised an element of the offense for which he was convicted, when framing the base offense level for violating 18 USC § 1512. In Gall, *supra*, the Supreme Court stated that a district court "may not presume that the Guidelines range is reasonable", and that it must make an individualized assessment based on the facts presented. Id. 552 U.S. at 38, 50(citing Rita, 551 U.S. 338, 351). Instantly, the district court did not make that assessment. It did not adequately consider the petitioner's family situation, his mental health issues, the history of the relationship between the petitioner and the alleged victim - Valerie Morales, and the fact that it was the alleged victim (Valerie Morales) who refused to abide by a court order to refrain from having any contact or communications with the petitioner when she continuously visited him in the county jail and insisted on him calling her, daily, on the telephone.

Further, the district court's failure to grant a downward variance resulted in a substantively unreasonable sentence that was greater than necessary to comply with the purposes of § 3553(a). The latter statute requires a district court to impose a sentence no greater than necessary to ac-

count for the nature and seriousness of the offense and the defendant's history and characteristics, as well as to provide just punishment, to protect the public, and to avoid unwanted sentencing disparities. United States v. Cooks, 589 F.3d 173, 186 (5th Cir.2009).

The district court did not comply with the § 3553(a) factors when it enhanced petitioner's base offense level for causing the Probation Officer to spend 90 hours reviewing the jailhouse recorded telephone calls between Valerie Morales and the petitioner. Overlooked was the Fourth Amendment violation committed by the Probation Officer in listening to private conversations whose content was recorded by the Jail for strictly reasons of security. Inmates are given notice that their respective calls are monitored for reasons of security, and not that they are waiving their right to privacy under the Fourth Amendment. Thus, the Probation Officer required a judicial warrant before gaining access to the recorded calls. Therefore, the Probation Officer's testimony should have been stricken in regards to the content of those conversations, especially when Valerie Morales voluntarily participated in several telephone conversations on a daily basis with the petitioner. Overall, there were more than 800

recorded telephone conversations between the petitioner and Valerie Morales. There is no evidence that in each recorded call, threats were made by the petitioner, or that he made attempts in each call to convince Valerie Morales to change her story. The Probation Officer lacked probable cause to violate the Fourth Amendment privacy rights of the parties. He unconstitutionally invaded those rights through a warrantless intrusion of those rights.

The district court failed to consider each of the factors set-forth in 18 USC § 3553(a). It simply made a broad generalized assessment:

The Court has considered the advisory guidelines sentencing factors set forth in 3553. Court Finds the sentence imposed is sufficient, but not greater than necessary to impose appropriate sentence. Court finds the sentence promotes respect for the law and provides just punishment.

Sentencing Transcript, at pages 55-56: The aforesaid inadequate analysis has "produce[d] an unwarranted disparity between him and similarly situated defendants in other cases." United States v. Davilla, No. 16-20081 (5th Cir. May 16, 2018) (recalling its mandate as the initial decision was "demonstrably wrong").

It is significant that the alleged victim of the offense did not appear at the sentencing hearing. Instead, the court

based its sentencing decision on hearsay from the Probation Officer. While there is no Sixth Amendment violation when a court uses hearsay evidence at sentencing, United States v. Beydoun, 469 F.3d 102, 108 (5th Cir.2006), it must be reliable. United States v. Harris, 702 F.3d 226, 230 (5th Cir. 2012); and United States v. Ollison, 555 F.3d 152, 164 (5th Cir.2009). The record clearly demonstrates that the alleged victim was not the person who contacted local police officers about the petitioner's conduct, nor did she make any effort to pursue charges of assault against him. To the contrary, the record evinces Valerie Morales as someone who continued to maintain contact with the petitioner by visiting him at the county jail, and speaking to him on the telephone several times daily throughout his incarceration at the county jail. The record shows that she made it difficult for the Probation Officer to interfere her, and did so unwillingly and only after repeated attempts by the Probation Officer. It is apparent from the record and the Probation Officer's testimony that he was on a mission to obtain new charges against the petitioner because of a personal animus against him, for some undisclosed reason. Thus, under a totality of the circumstances, the district court abused its discretion by accepting the Probation Officer's uncorroborated testimony as

a basis for enhancing the base offense level by eight levels. His testimony was not reliable, and it violated petitioner's due process rights. U.S.S.G. § 6A1.3. United States v. Cisneros-Gutierrez, 517 F.3d 751, 764 (5th Cir.2008). Due Process requires that information relied upon in sentencing have some indicia of reliability. As stated in United States v. Mejia-Orosco, 867 F.2d 216, 219 (5th Cir.1989), the "district court's fact-finding power is an important guarantor of the practical judgment essential to any just sentencing procedure." A "just sentencing procedure" implies that the court cannot abandon its truth-finding function in the sentencing phase. The information relied upon by the sentencing judge is broad but must be reliable. United States v. Baylin, 696 F.2d 1030, 1040 (3rd Cir.1982).

The Probation Officer's account of the petitioner's conduct and actions toward the alleged victim is, at best, a third-party account based on pure speculation. The right to confront and cross-examine witnesses promotes reliability in criminal cases. Lee v. Illinois, 476 U.S. 530, 539-40 (1986). California v. Green, 399 U.S. 149, 158 (1970), called cross-examination the "greatest legal engine ever invented for the discovery of the truth", citing 5 Wigmore § 1367. If the guidelines are to operate properly, then the truth must

be properly determined and determined to be of paramount importance. Unreliable and untruthful input will result in an unjust and unreliable output. Thus, if counsel is deemed important during the sentencing phase of a criminal proceeding, then the same reasoning should apply to truth-seeking at the sentencing. Mempa v. Rhay, 389 U.S. 128 (1967). Unreliable allegations are not to be considered at sentencing. United States v. Ortiz, 993 F.2d 204 (10th Cir.1993). However, the foregoing principle is contradicted by holdings that rule "facts contained in the PSR are considered reliable. . ." United States v. Parker, 133 F.3d 322, 329 (5th Cir.1998). Then when a defendant attempts to show that the allegation is materially untrue, inaccurate, or unreliable, he or she is likely to lose points for "Acceptance of Responsibility", and possibly suffer added points for obstruction of justice. This disincentive makes seeking the truth quite a gamble for a defendant. Thus, the Sixth Amendment right to confront an accuser through cross-examination should be extended to a defendant's sentencing hearing. See Justice Scalia's scholarly exploration of history in Crawford v. Washington, 541 U.S. 36, 50-51 & 68 (2004); and Davis v. Washington, 547 US 813 (2006).

WHEREFORE, it is submitted that the district court com-

mitted error in assessing petitioner's sentence as it exceeded that which was necessary to fulfill the purposes of 18 USC § 3553(a). The sentence of 84 months was substantively and procedurally unreasonable. Based upon the facts and legal authorities herein, petitioner prays the court to resentence, or to remand, this matter with directions to resentence him, without any enhancements to the base offense level.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Miguel Rivas".

Date: July 11, 2018