

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARKOS N. PAPPAS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Markos Pappas, #12622-014

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(City, State, Zip Code)

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(Phone Number)

QUESTION(S) PRESENTED

1. Does the certificate of appealability ("COA") requirement of 28 U.S.C. § 2253(c) that explicitly applies to motions under 28 U.S.C. § 2255, also apply to motions under Federal Rule of Civil Procedure 60(b) that relate to a section 2255 proceeding even though there is no language in section 2253(c) indicating the COA requirement applies to anything other than the denial of a section 2255 motion?
2. Because in denying Petitioner's Federal Rule of Civil Procedure 60(b)(4) motion (which raised a due process issue based on the court's application of a 21 U.S.C. § 851 enhancement for the first time in Petitioner's 28 U.S.C. § 2255 proceeding), the district court decided it was debatable that a hearing should have been held as to whether a section 851 enhancement was applicable at all, is it appropriate for this Court to either issue a COA, or GVR to the U.S. Court of Appeals for the Second Circuit for further consideration in light of this Court's holding clarifying the standard for issuance of a COA in Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759 (Feb. 22, 2017)?
3. Should this Court issue a COA, or GVR to the U.S. Court of Appeals for the Second Circuit for further consideration in light of this Court's recent holding in Rosales-Mireles v. United States, 585 U.S. ___, 138 S.Ct. 1897 (June 18, 2018)?

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:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION.....	16

INDEX TO APPENDICES

APPENDIX A Excerpt of Ruling on Defendants' Motions Pursuant To
28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence

APPENDIX B July 7, 2017 Ruling and Order

APPENDIX C December 27, 2017 Ruling and Order

APPENDIX D June 7, 2018 Summary Order

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>United States v. Collado</u> , 106 F.3d 1097 (2d Cir. 1997)	4
<u>United States v. Ortiz</u> , 143 F.3d 728 (2d Cir. 1998)	5
<u>Pappas v. United States</u> , 362 Fed. Appx. 175 (2d Cir. 2010)	7
<u>Gonzalez v. Crosby</u> , 545 U.S. 524 (2005)	10
<u>Buck v. Davis</u> , 580 U.S. ___, 137 S.Ct. 759 (Feb. 22, 2017)	10
<u>Rosales-Mireles v. United States</u> , 585 U.S. ___, 138 S.Ct. 1897 (June 18, 2018)	13

STATUTES AND RULES

18 U.S.C. § 371	4
18 U.S.C. § 1513(b)(2)	4
21 U.S.C. § 841(b)(1)(A)	4
21 U.S.C. § 841(b)(1)(C)	5
21 U.S.C. § 851	4, 5, 6, 14
28 U.S.C. § 2253(c)(1)(B)	11
Fed.R.Civ.P. 60(b)	<u>passim</u>

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

{xx} For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix D to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
{xx} is unpublished.

The opinion of the United States district court appears at Appendix A-C to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
{xx} 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 June 7, 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

The Fifth Amendment provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property without due process of law[.]

Title 21 U.S.C. § 851(a)(1) provides:

No person who stands convicted of an offense under this part... shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions relied upon.

Title 28 U.S.C. § 2253(c)(1)(B) provides:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(B) the final order in a proceeding under section 2255....

STATEMENT OF THE CASE

In July of 1997 Pappas was found guilty after a jury trial of: (1) conspiring to possess with intent to distribute an unspecified quantity of a substance containing a "detectable" amount of cocaine in violation of 21 U.S.C. § 846 (Count One); (2) conspiring to retaliate against a witness in violation of 18 U.S.C. § 371 (Count Two); and (3) retaliation against a witness in violation of 18 U.S.C. § 1513(b)(2). (Doc. 187). (Cites preceded by "Doc." are to documents in the docket of D.Conn., Case No. 96-cr-185-RNC).

Prior to trial Pappas challenged the government's 21 U.S.C. § 851(a) filing, but the trial court denied Pappas' motion without prejudice to renewal before sentencing if Pappas was found guilty. (Doc. 149).

At Pappas' sentencing on March 31, 1998 Judge Dorsey granted Pappas' renewed motion to strike the section 851 enhancement filing, (Doc. 240), per the holding in United States v. Collado, 106 F.3d 1097 (2d Cir. 1997). Judge Dorsey then sentenced Pappas to 360 months imprisonment and 10 years of supervised release (under 21 U.S.C. § 841(b)(1)(A)), based on Judge Dorsey's

application of an objected to preponderance standard to find that the drug quantity as to Count One was in excess of 50 kilograms of cocaine and 600 grams of crack cocaine. (Doc. 272, at 95-133; Doc. 246/Statement of Reasons, page 5).

While Pappas' direct appeal was pending, a different three-judge panel of this Court, in United States v. Ortiz, 143 F.3d 728 (2d Cir. 1998), overruled the Collado panel's decision that was the basis of Judge Dorsey's decision to strike the section 851 filing.

Nevertheless, the government did not appeal Judge Dorsey's decision striking the section 851 filing and this Court did not disturb that ruling when on direct appeal it affirmed the judgment against Pappas by summary order filed October 19, 1999 in Appeal No. 98-1206. The Supreme Court denied certiorari on October 2, 2000.

Pappas timely moved to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 in October of 2001. After more than five years of briefing and supplemental briefing Judge Dorsey denied Pappas' section 2255 motion. (Doc. 411).

In that ruling Judge Dorsey held that the statutory penalty applicable to Pappas was 21 U.S.C. § 841(b)(1)(C), and further held that the maximum term of imprisonment applicable to Pappas under that provision was 30 years instead of 20 years because the § 851 filing that was stricken, (Doc. 240), would be subject to reinstatement or a new one could be filed since Collado had since been overruled. (App. A, at 38). Judge Dorsey's decision did

not recognize or provide any analysis on the relevance of the government's failure to appeal the decision striking the § 851 filing. Id.

Nor did Judge Dorsey's holding recognize that there is an entire process that must be adhered to prior to an increase under § 851 can take place. Id. Nor did Judge Dorsey make any assessment or ruling on the question of whether Pappas in fact did have a qualifying predicate conviction to enable an increase under § 851. Id. Nor did Judge Dorsey give Pappas notice or an opportunity to be heard as to a § 851 increase imposed for the first time in Pappas' section 2255 litigation. Id. Nor did Judge Dorsey identify any legal authority for the proposition that the government can obtain review during a section 2255 proceeding initiated by Pappas, of an issue it forfeited by failing to appeal after sentencing. Id.

Judge Dorsey's holding was limited to, and based solely on, his conclusion that the government could move to reinstate the stricken § 851 or file a new one. Id.

In denying Pappas reconsideration motion Judge Dorsey did not recognize any argument by Pappas relative to the impropriety of denying him a re-sentencing on the basis of Judge Dorsey's conclusion that the stricken § 851 filing could simply be reinstated or a new one filed. (Doc. 423, at 12 (making no analysis of arguments raised by Pappas on reconsideration and stating that Pappas was simply rehashing rejected arguments and criticizing the court for failing to address certain

arguments.)).

A COA was granted on all issues, (Doc. 423, at 12), and in response to Pappas' arguments this Court did not provide any analysis or discussion and held only that as "to Pappas' claims ... [it] affirm[ed] the order of the District Court ... substantially for the reasons stated in the District Court's thorough and careful ruling..." of December 13, 2006. Pappas v. United States, 362 Fed. Appx. 175, 177 (2d Cir. 2010). The Supreme Court denied certiorari on April 4, 2011 (563 U.S. 930).

Pappas sought other forms of relief in the district court and appeals court in pursuit of justice, from April of 2011 through November of 2015. (Docs. 455, 457, 460, 470, 473, 478, 480, 485, 486, 487, 489, 494, 495, 502, 506, 507, 510, 513, 514, 523, 525, 534, 552; and Second Circuit Nos. 13-2186, 13-4760, 14-6, and 14-773,¹ the last of which this Supreme Court denied certiorari on June 29, 2015).

In November of 2015 Pappas moved for relief under Fed.R.Civ.P. 60(b)(4) and (6), from that part of the December 13, 2006 ruling relative to the § 851 increase on the basis that the ruling was void on due process grounds and otherwise defective. (Doc. 557).

1. Prior to becoming a federal judge, Circuit Judge Christopher Droney of the United States Court of Appeals for the Second Circuit, was the U.S. Attorney for the District of Connecticut and he prosecuted Pappas in this case from the very start in September of 1996 through trial and sentencing. Nevertheless, he was the only repeat Circuit Judge on the panels in 13-4760, 14-6, and 14-773. A footnote in each decision in those appeals says he did not participate, thus meaning Pappas did not get the three-judge panel review he was entitled to in those appeals when those two-judge panels granted motions for summary affirmance filed by an AUSA who served under former U.S. Attorney, now Circuit Judge, Droney.

That motion remained pending for 20 months without any opposition by the government. On July 7, 2017 the U.S. District Court for the District of Connecticut denied the motion based on its own arguments invoking two procedural barriers not invoked by the government and thus fairly deemed as waived by the government: (a) that the Second Circuit's decision affirming Judge Dorsey's December 13, 2006 ruling at issue in Pappas' Rule 60(b) motion foreclosed "Pappas's [Rule 60(b)] due process claim" (App. B, at 1); and (b) that the motion was untimely. (App. B, at 1-2).

Pappas moved for reconsideration, (Doc. 607), and in that filing Pappas challenged the court's ruling in all respects, including that it violated the party-presentation principle and was otherwise clearly erroneous and gave rise to a manifest injustice since the lawful 20 year maximum term of imprisonment Pappas can be subject to has already expired as of September 24, 2016, day-for-day without consideration of all the good conduct time Pappas has earned. (Doc. 607, at 4-15).

The court ordered the government to file a response, (Doc. 608), and it did so on August 18, 2017. (Doc. 611). In its response it did not contest the merits of Pappas' claim that a § 851 increase cannot be applied to him as he does not have a qualifying predicate conviction, and it agreed that Pappas' Rule 60(4) motion was at least arguably timely. *Id.* Pappas submitted a reply on September 14, 2017, (Doc. 613). He then moved for release on bail on October 16, 2017, (Doc. 616), and that motion

was denied on November 30, 2017. (Doc. 622).

On December 27, 2017, the court denied Pappas' motion for reconsideration, (App. C), and in that ruling the court did not re-affirm its previous position on untimeliness and instead focused the basis of its denial of relief on its own argument that Pappas waived the due process issue he raised in his Rule 60(b)(4) motion by not raising it on appeal from the denial of his section 2255 motion. (App. C, at 6). Even though the court found that the standard for a COA was fully satisfied, (App. C, at 7 ("The propriety of enhancing Pappas's sentence without holding a hearing under § 851(c) may be debatable.")), it still refused to grant a COA. Id.

On February 1, 2018, the district court granted Pappas' motion to proceed in forma pauperis in this appeal. In its ruling the district court noted its denial of a COA, "even though the issue [Pappas] asks [the court] to address may be debatable on the merits." (Doc. 629). The district court went on to add that Pappas "seeks to appeal on the ground that the Second Circuit can and should address that issue [the court said was debatable] on the merits. [The court does] not think [Pappas'] appeal would be objectively frivolous." Id.

Despite the COA standard being satisfied per what the district court said, the U.S. Court of Appeals for the Second Circuit denied a COA on June 7, 2018 per a boiler-plate, one paragraph summary order. (Appendix D).

Because a COA or GVR is appropriate per recent decisions of this Court, Pappas submits the instant petition.

REASONS FOR GRANTING THE PETITION

There are three reasons why this Court should grant this petition and either issue a COA or GVR to the U.S. Court of Appeals for the Second Circuit.

1. Petitioner respectfully submits that this Court should decide whether or not the COA requirement of 28 U.S.C. § 2253(c) that explicitly applies to motions under 28 U.S.C. § 2255 also applies to motions under Federal Rule of Civil Procedure 60(b) that relate to a section 2255 proceeding even though there is no language in section 2253(c) indicating the COA requirement applies to anything other than the denial of a section 2255 motion

Petitioner argued in the Second Circuit that a COA is not required to appeal the denial of a Rule 60(b) motion that relates to a section 2255 proceeding. (Pappas Motion For Clarification..., dated February 5, 2018, filed in Second Circuit No. 18-232, pages 8-9). However, the Second Circuit did not acknowledge or address that argument in its summary order now in issue. (Appendix D). Petitioner respectfully submits that the issue is worthy of this Court's attention at this time.

In 2005 this Court expressly left open the question of whether a COA is required to appeal the denial of a Rule 60(b) motion. See, Gonzalez v. Crosby, 545 U.S. 524, 535 n. 7 (2005) ("Although we do not decide in this case whether this construction [i.e., requiring of COA] of [28 U.S.C.] § 2253 is correct...").

More recently, this Court again noted the open nature of the question, and further observed that there is now conflict among federal appeals courts on the question. See, Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759, 772 n. * (Feb. 22, 2017)(noting that

there is a disagreement among the Federal Courts of Appeal as to whether or not a COA is needed to appeal the denial of a Rule 60(b) motion that relates to a habeas judgment, and expressly leaving that question open by assuming without deciding that one was required in this case).

This Court's enduring commitment to strict adherence to the plain language of a statute, coupled with this Court's guidance as to the limited nature in which a "true" Rule 60(b) motion attacking a habeas judgement can be entertained, supports the propriety of addressing this issue at this juncture.

Indeed, an assessment of that nature reveals that the plain and unambiguous language of 28 U.S.C. § 2253(c)(1)(B) is directed at nothing more than a "final order in a proceeding under section 2255...." And, a "true" Rule 60(b) motion is one that attacks the manner in which a decision was made in a habeas (or section 2255) proceeding, not the actual decision on the merits.

Gonzalez v. Crosby, 545 U.S., at 538. In other words, a true Rule 60(b) cannot attack a "final order in a proceeding under section 2255[,]" and is limited solely to the process or manner or decision.

There was no dispute or holding that Pappas' motion was anything other than a "true" Rule 60(b) motion. As such, the circumstances here render the issue and timing ripe for consideration by this Court as to whether or not a COA is required to appeal the denial of a "true" Rule 60(b) motion.

2. Because in denying Petitioner's Rule 60(b)(4) motion (wherein Petitioner raised a due process issue based on the court's application of a 21 U.S.C. § 851 enhancement for the first time in Petitioner's 28 U.S.C. § 2255 proceeding), the district court decided it was debatable that a hearing should have been held as to whether a section 851 enhancement was applicable at all, Petitioner respectfully submits it is appropriate for this Court to issue a COA or GVR to the Second Circuit for further consideration in light of this Court's clarification of the standard for issuance of a COA in Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759 (Feb. 22, 2017)

In Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759 (Feb. 22, 2017), this Court clarified the standard applicable to the assessment of whether a COA should be granted:

The COA inquiry ... is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

137 S.Ct., at 773. (Internal quotation marks and citation omitted).

As noted supra, Judge Dorsey found all of the issues in this case "debatable" in 2007 when he granted a COA permitting an appeal of his denial of relief on the merits of Petitioner's claims advanced in his § 2255 motion. If a COA is required to enable Petitioner to appeal the denial of his Rule 60(b) motion, the COA Judge Dorsey previously granted should be continued for purposes of this appeal.

If a new COA is required then one should issue as a matter of formality since, as noted supra at 9, the district court found in two separate orders that the issue Petitioner raised in his Rule 60(b) motion is in fact "debatable" thus fully satisfying the standard clarified in Buck, set forth above.

The district court made it clear that its basis for denying a COA was its belief that its denial of Rule 60(b) relief itself was correct. However, the above quote from Buck, as-applied to the district court's finding (twice) that Petitioner's issue was "debatable" (which finding is enhanced by the additional recognition by the district court in granting Petitioner in forma pauperis status for appeal that any appeal would not be frivolous) warrants issuance of a COA (if one is required) per this Court's holding in Buck v. Davis quoted above.

If this Court does not grant a COA outright, it should at a minimum GVR to the Second Circuit for further consideration on whether a COA should be granted in light of this Court's holding in Buck v. Davis which the Second Circuit did not even allude to in denying a COA.

3. Petitioner respectfully submits that a COA or GVR to the Second Circuit is appropriate in light of this Court's recent holding in Rosales-Mireles v. United States, 585 U.S. ___, 138 S.Ct. 1897 (June 18, 2018)

In this Court's recent decision in Rosales-Mireles v. United States, 585 U.S. ___, 138 S.Ct. 1897 (June 18, 2018), this Court clarified the standard applicable when a court must determine whether a sentencing error should be corrected. This Court explained that the "risk of unnecessary deprivation of liberty" gives rise to all factors needed to satisfy the plain error standard that governs un-objected to errors. 138 S.Ct., at 1908.

Here, there is far beyond a "risk" that Petitioner's sentence has been miscalculated under the Sentencing Guidelines as was the case in Rosales-Mireles. Here, it is undisputed that Petitioner's sentence has been subject to a statutory enhancement

that increased the applicable maximum by 10 years, and that the enhancement is inapplicable. Specifically, for the first time in Petitioner's section 2255 litigation the district court applied a previously objected to 21 U.S.C. § 851 increase and held that Petitioner's 30 year sentence was within the enhanced 21 U.S.C. § 841(b)(1)(C) 30 year maximum and left the sentence intact.

Absent the section 851 ten year increase, the undisputed maximum as to Count One is 20 years imprisonment and 3 years supervised release. Petitioner's enhanced (again, enhanced for the first time during Petitioner's section 2255 litigation despite a prior objection to the enhancement being sustained and not appealed by the government) 30 year term of imprisonment exceeds the maximum term applicable by a decade (full 10 years) and the supervised release term of 10 years exceeds the 3 years that actually applies by 7 years. Add to that the fact that Petitioner has amassed 729 days of good conduct time credit and the math shows Petitioner has as of the filing of this petition spent approximately 17 days short of 4 full years longer in prison than what is permitted by law (i.e., the applicable statutory maximum).

It is undisputed by the government and the district court that the government's section 851 filing stricken at sentencing in 1998 (which decision was not appealed and which filing has never been refiled or otherwise reinstated), identifies a single prior conviction which does not qualify as a proper section 851 predicate.

In other words, there is no factual or legal basis for the section 851 increase the district court applied for the first

time during Petitioner's section 2255 litigation in order to leave intact a 30 year sentence that is 10 years longer than the 20 year maximum that same court found applicable to Petitioner if the section 851 ten year increase (that factually and legally does not apply) was not applied.

Thus, the "risk of unnecessary deprivation of liberty" this Court found in Rosales-Mireles to be the proper standard in assessing whether a sentencing error should be corrected is far exceeded here as the deprivation of liberty is real and present. The sentencing error here is resulting in Petitioner actually, right now, being confined longer than the law permits.

The additional finding of this Court in Rosales-Mireles that "the public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for correction[,]" is fully applicable here. In Rosales-Mireles the amount of time in issue was 8 months per a Sentencing Guidelines calculation that could have ultimately yielded the same sentence found subject to correction per the improper calculation of the applicable sentencing range. Here, Petitioner's sentence exceeds the undisputed statutory maximum by 10 years based on an enhancement that the government does not, and cannot, dispute is inapplicable to Petitioner.

From that perspective, "what reasonable citizen would not bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to [but here as to Petitioner Pappas

actually] require[s] [Petitioner Pappas] to linger longer in federal prison than the law demands?" Rosales-Mireles, 138 S.Ct., at 1908.

Accordingly, Petitioner respectfully asks this Court to either issue a COA on this point or GVR to the Second Circuit for further consideration in light of the clarification provided by this Court's recent decision in Rosales-Mireles as to how the question of whether a sentence should be corrected should be assessed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Markos Pappas, pro se

Date: September 6, 2018*

*Mailbox Rule invoked to ensure timely filing as of this date.