

No. 15-1803

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ANGEL L. ROSARIO-PETITIONER

VS

UNITED STATES OF AMERICA-RESPONDENT  
ON PETITION FOR A WRIT OF CERTIORARI TO  
COURT OF APPEALS FOR THE SECOND CIRCUIT  
PETITION FOR WRIT OF CERTIORARI

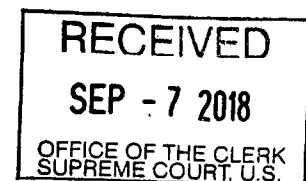
ANGEL L. ROSARIO

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## QUESTIONS PRESENTED

1). Were the Appellant's right to Due Process of Law violated and proceedings unfair considering that the Second Circuit granted both summary affirmance to Government and counsel's permission to withdraw, without formally addressing and revolving any of Appellant's issues outlined in Pro se Anders' Response and Petition for En Banc; encompassing post Beckles uncertainty, the invalidation of U.S.C. 16(b) issues of which counsel never addressed in conflicting Anders Brief; relevant issues pertaining to Amend 709 (2007) and loyalty to Booker, and in particulally, the Ex Post Facto concerns the District Court never resolved and was reserved for Appellate review?

2). Was counsel ineffective for not conducting research on relevant law based on actual innocence of the conviction used to trigger U.S.S.G. Section 4B1(a) and 4B1.2(a) sentencing enhancements. See Colorado v. New Mexico, 467 U.S. 310, 316 (1984) oppose to acquiescing to new arrest rule which counsel clearly understood that Appellant's sequence of arrest history would not meet the exception of the "New Rule" established in Amendment 709 (2007)?

3). Did Amendment 709 limit a District Court's authority over the advisory guidelines in determining if prior convictions was either "single" or "separate" and if so, is the new policy promugated in Amendment 709 unloyal to Booker i.e., U.S.S.G. being "advisory only", but somehow U.S.S.G. sub section 1B1.10(c) being [ex]empt from "advisory" if so what remedy is available for such malfeasance?

4). Could U.S.C. Section 16(b) be void for one purpose of application, but somehow valid to lend authority by reference to U.S.S.G.

4B1 to designate Appellant a career offender for a "violent offense" that does not categorically involve "violent force" as established in 2010 Johnson, 599 U.S. 133, 130 S.Ct. 1265 176 L.Ed?

5). Did the District Court err in not applying the rule of lenity in a case such as this one where the two drug cases were factually related pursuant to U.S.S.G. §1B1.3(a)(1)(b) and U.S.S.G. 4A1.2(a)(1) but the unlawful conviction in question triggered U.S.S.G. 4B1(a)?

6). Its counsel's Alan M. Nelson position in ANDERS BRIEF pg 27 that Appellant's sentence was procedurally reasonable and in accordance with the guidance set forth in Rattoballi, so the question turns on, is Rattoballi even capable of remedying Appellant's Actual Innocence anomaly along with all the interrelated issues at its core?

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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**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals 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 United States district 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.

☐ 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 March 12, 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: June 1, 2018, 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

CASES	PAGE NUMBERS
<u>Anders v. California</u> , 386 U.S. 738 (1967)	1
<u>Beckles</u> , 2017 U.S. LEXIS 1572 *6	3
<u>Booker</u> , 543 U.S. 220, 258, 125 S.Ct. 738, 160 L.Ed 2d 621 (2005)	4
<u>Dimaya</u> , No. 15-1498	4
<u>Johnson</u> , 599 U.S. 130 S.Ct. 1265, 176	2, 3
<u>Rattoballi</u> , 452 F.3d 127, 132 (2d Cir. 2006)	2
<u>Shabazz v. United States</u> , No. 16-CU- 1083 2017 Dist. LEXIS 421, 2017, WL 27394 (D.Conn)	3
<u>Spence v. Superintendent Great Meadows Corr. Fac.</u> , 219 F.3d 162, 171 (3d Cir. 2000)	3
<u>United States v. Mandanici</u> , 205 F.3d 518 (2d Cir) 879, 148 L.Ed 2s 121 S.Ct. 190 (2000)	3
STATUTES AND RULES	
18 U.S.C. Section 16(b)	4
18 U.S.C. Section 3553(a)	2
28 U.S.C. Section 1254	1
Supreme Court Rule 13	1
U.S.S.G. 4B1	2, 4
Amendment 709	3, 4
OTHERS	
New York State CPL 160.(4)	4

## STATEMENT OF THE CASE

On March 2, 2018, the petitioner timely filed Pro se ANDERS RESPONSE to the Second Circuit Court of Appeals.

On April 4, 2018, petitioner filed a motion for reconsideration en banc.

On June 1, 2018, the Court of Appeals denied petitioner's motion for an en banc.



## REASON FOR GRANTING PETITION

The date on which the United States Court of Appeals for the Second Circuit decided petitioner's petition for Rehearing en Banc was on June 1, 2018. Thus this Court has jurisdiction to hear this matter pursuant to the Supreme Court Rule 13, and 28 U.S.C. §1254(1).

The jurisdiction of the Supreme Court of the United States of America is to review and consider the petition seeking writ of certiorari from the decision and "Order" mandated and issued on June 8, 2018 attached as Exhibit-B by the Second Circuit Justices which granted counsel's Alan M. Nelson for the Appellant Angel Rosario; permission to withdraw as counsel pursuant to Anders v. California, 386 U.S. 738 (1967) and the Government's motion for summary affirmance without giving due consideration to Appellant's pro se supplemental brief in opposition; along with, denying petition seeking en banc review (Exhibit-B); in aid of highlighting that relief for counsel in this case was both:

i). Unwarranted in light of the issues that needed to be resolved and;

ii). Premature, when considering the serious questions of law implicating the (Second Circuit) reputation resolving the question of whether the District Court (EDNY) committed plain error in its qualification of Appellant as a "Career Offender."

In light of this factual oversight, the Honorable Court has juris-

diction to resolve this matter herein; as there is no [clear] indicia on the question presented of exceptional importance that was either ignored or overlooked by both the (EDNY) and the (Second Circuit) Court of Appeals; of which, initially has its foundation in Actual Innocence of a predicate offense used to support a sentencing enhancement as a Career Offender pursuant to 4B1. for an infirm "violent offense", that does not categorically involve "violent force" as established in 2010 Johnson, 599 U.S., 130 S.Ct. 1265 176 L.Ed and in this case, has resulted into, momentous procedural defects along the spectrum of application of statutes and schemes the "Advisory Guidelines" presented District Court with, in complying with the procedural requirement articulated in Rattoballi, 452 F.3d 127, 132 (2nd Cir. 2006) and 18 U.S.C. Section 3553(a). Uncontrovertibly, a complex task when taken in that:

a). Proper representation of the underlying facts were not concisely or intelligently outlined by counsel Alan M. Nelson, for judicial analysis,<sup>[1]</sup> insomuch, in Appellant's case, the infirm conviction triggered the application of 4B1 and Appellant was treated thereafter, as a career offender and this resulted into questionable Ex Post Facto con-

[1] The Rosario violation revolves around (3) New York State arrest as follows, Ind. #1) 4224-98, charging C.S.C Ind. #2) 7449-98 charging conspiracy, and Ind. #3) 3558-98 charging robbery in the 1st (the offense at issue herein) of which appellant has steadfast maintained his innocence of the alledge accusation. (See Exhibit-D ; N.Y.S. sent. tr. of robbery conviction pg. 5 lines 15-25). Now, prior to amend. 709 (2007), the previous criminal history giving rise to the "Rosario Violation" would have been calculated as one previous conviction, as the cases were all sentenced on the same day, in the same court, by the same judge, with consolidation and aggregation clearly being indicted on sent. transcript.

cerns; of which gave birth to a host of meritable issues; ranging from the effects of "New Rules" and "novel application of old rules", United States v. Mandanici, 205 F.3d 518 (2nd Cir. cert. denied), 531 U.S. 879, 148 L.Ed 2d 132 121 S.Ct. 190 (2000) regarding Amendment 709.

Although this Court established in Beckles, 2017 U.S. LEXIS 1572\*6 amongst other things that... the Guidelines are not subject to a vagueness challenge under the Due Process Clause, as this Court may be aware, "Beckles does not address the issue of whether robbery under New York CPL can be committed without"... "2010 Johnson- level force". As observed, in Shabazz v. United States, No# 16-CU-1083 2017 Dist LEXIS 421, 2017, WL 27394 (D.Conn) on Jan. 3rd 2017. Here, the Court expressed interalia:

..."Beckles, only established the more general issue of the continued constitutionality of guidelines "residual clause"... Shabazz Supra. In Appellant's case, nor does Beckles, give any guidance to what procedural method District Courts are to employ when Actual Innocence of a predicate offense used to support a sentencing enhancements as a career offender for an infirm conviction of which Appellant's harsher sentence was based on. See Spence v. Superintendent Great Meadows Corr. Fac., 219 F.3d 162, 171 (3rd Cir. 2000)(Emphasis added)and

B).. The assignment of counsel in aid of coherently briefing the complexity of issues this anomaly in Appellant's case presents in a non-conflicting manner to protect and preserve all Appellant's rights

### CONCLUSION

Therefore, because as a matter of law, Beckles didn't resolve the issue of whether or not New York State robbery could be committed without the violent force inherent in a crime of violence; further, New York State CPL 160.(4) does not qualify as a violent offense as defined in U.S.C. 16(b) in light of the landmark ruling this Court recently announced in Dimaya No. 15-1498.

WHEREFORE, ALL PREMISES CONSIDERED, this Honorable Court should vacate and remand this case for all unsettled reasons enumerated thus far and because the reference U.S.S.G. 4B1 relies on violates Due Process of law, and further to address the Amend. 709 (2007) loyalty question regarding Booker. And finally, so the Ex Post Facto issue could be addressed or whatever relief this Court deems appropriate.

Respectfully Submitted, -

  
Angel L. Rosario, pro se

Date: 8-22-18

SWORN AFFIDAVIT OF ANGEL L. ROSARIO

I, Angel L. Rosario, pursuant to Title 28, United States Code, Section 1746, hereby declare under the penalty of perjury:

1). I am the above captioned Appellant in this matter and I am submitting this affidavit in aid of petition seeking certiorari.

2). On December 5th 2014 Appellant was sentenced in the United States District Court for the Eastern District of New York, by the Honorable Eric V. Vitaliano for conspiracy to possess with intent to distribute a controlled substance, to wit: heroin and cocaine violation of Title 21 U.S.C. §841(b)(1)(B) and 846. The Court imposed a sentence of 132 months imprisonment.

3). Appellant timely filed a Notice of Appeal by letter dated December 11th 2014 (Dkt# 250).

4). On June 3rd 2015 the District Court filed Judgment and Statement of Reasons.

5). By letter dated March 18, 2016 counsel Alan M. Nelson pursuant to Anders v. California, 386 U.S. 738 (1967) requesting to be relieved from representation, and further, for the appointment of new counsel pursuant to the Criminal Justice Act of which was filed contemporaneous thereto.

6). Counsel served upon Appellant a copy of brief and attached papers with cover letter dated June 5th, 2016.

7). By letter dated June 22, 2016, Appellant filed Pro se Motion

in opposition seeking permission to exceed the page limit and attach exhibits to appendix.

8). Appellant's motion was never fully acknowledged by the Second Circuit Court of Appeals nor a response either granting or denying request in application dated June 22, 2016 was ever issued. Therefore, because the Second Circuit Court never communicated with Appellant as a Pro se litigant of record, Appellant did not know how to respond.

9). Combined with the Court not giving any notice regarding the status of appointment of new counsel and setting a time frame to submit papers in opposition, only added to the malfeasance. As a direct result, Appellant violated the Second Circuits' instructions in how to submit papers in opposition.

10). On the 14th day of November 2016, the Second Circuit denied counsel's Alan M. Nelson application seeking permission to withdraw as counsel pursuant to Anders v. California, 386 U.S. 738 (1967) and the Government's motion for summary affirmance; without prejudice to re-filing and held the appeal in ABEYANCE pending the Supreme Court's in Beckles v. United States, No. 15-8544, 2016 WL 1029080 (U.S. June 27, 2016)(order granting writ of certiorari).

11). On March 6, 2017, the United States Supreme Court decided Beckles v. United States. The Beckles court held "[u]nlike the ACCA... the advisory Guidelines do not fix the permissible range of a sentence"... The Court further announced in this landmark decision that..."the Guidelines are not subject to a vagueness challenge under the Due Process

Clause"...amongst other things. See Beckles v. United States, 2017 U.S. LEXIS 1572 86.

12). As a consequence of the Supreme Court's decision in Beckles, Supra, counsel Alan M. Nelson refiled a "second motion" to be relieved and a "second Anders' Brief dated September 4, 2017.

13). Upon Appellant being served with counsel's "second" affidavit and Anders' Brief on September 29, 2017, Appellant acting pro se submitted an application in aid of appointment of new counsel to assist Appellant in articulating the issues in a non-conflicted manner to best preserve and protect all of Appellant's rights.

14). For some unexplained reason, the Second Circuit never acknowledged "second" application requesting appointment of counsel adding more confusion on how to proceed in submitting Plus Size brief in opposition to counsel's Anders' Brief.

15). On November 15, 2017, Appellant was put on administrative transfer from F.C.I. Raybrook and arrived at F.C.I. Schuylkill on November 19th, 2017.

16). In light of transfer procedure, Appellant received personal property from F.C.I. Raybrook on December 22, 2017, containing material relevant to this appeal.

17). On February 22, 2018, Appellant perfected brief despite 21 days of institutional security/lock downs and irony the task presented in pleasing the Court, highlighting the issues that ought to be reviewed and the conclusion Appellant prays for.

18). The Second Circuit received package containing pro se brief in opposition to counsel's Anders' Brief on the 1st day of March 2018 at 1:47pm according to U.S.P.S. Tracking Number 70150640000103755473, (11 days) before the Court granted both counsels motions.

19). As a result of submission supra, the Court issued an order on the 12th day of March granting both counsels motion to:

a). Withdraw as counsel pursuant to Anders v. California, 386 U.S. 738 (1967);

b). Granted the Government's request for summary affirmance, without giving due consideration to the issues Appellant presented in "Over-sized Pro se Motion" to determine if such relief at this stage for counsel was premature in light of Pro se Supplemental brief file by Appellant and received by the Courts prior to affirmance; which raised serious questions of law implicating this Court's reputation resolving the question of whether the District Court committed plain error in its qualification of Appellant as a career offender.

20). On April 4, 2018, petitioner timely filed motion for reconsideration en banc.

21). On April 13, 2018, the Second Circuit Court of Appeals gave petitioner notice of defective filing for not including T-1080 with Order to cure the defect no later than May 11, 2018.

22). By service date of April 18, 2018, petitioner resubmitted motion for reconsideration Dkt#124.

23). On June 1st, 2018, the Second Circuit issued Order denying



motion for reconsideration en banc. Dkt.#128.

24). On July 4th, 2018, petitioner initiated petition of writ of certiorari to the United States Supreme Court of America to intervene and review Appellant's claim of plain error qualification as a career offender and interrelated issues the designation has created.

Dated: 8-22-18



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