APPEAL NO_____

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: JESUS DENOVA LOPEZ
Petitioner

-VS-

UNITED STATES OF AMERICA
Respondent

ON WRIT OF PROHIBITION UNDER 28 U.S.C. SECTION 1651(A) TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
&
APPLICATION FOR RELEASE PENDING APPEAL ON WRIT OF PROHIBITION UNDER RULE 1651(a) SUPREME COURT RULE.

BRIEF(S) SUBMITTED TO ASSOCIATE JUSTICE WITH SUPERVISORY CONTROL OVER THE FIFTH CIRCUIT CIRCUMSTANCES PURSUANT TO RULE 22-1 OF THE SUPREME COURT RULES

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CONSTITUTIONAL QUESTION

WHETHER THE PANEL OF THE FIFTH CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION BY THE RUBBERSTAMP OF THE ERRONEOUS AND IMPERMISSIBLE CONCLUSION OF ERSTWHILE COUNSEL'S NOTION THAT THE ISSUE OF THE SUBSTANTIAL UNREASONABLENESS OF HIS SENTENCE WAS NOT CERT' WORTHY, UNDER SUPREME COURT RULE 10(a) OF THE SUPREME COURT RULES.

STANDARD OF REVIEW

When courts like the Eight Circuit Court of Appeals, consider the substantive reasonableness of the length of a sentence, it does so under an abuse-of-discretion standard. United States v. Miller, 557 F.3d 910, 916 (8th Cir. 2009)(citing Gall v. United states, 552 U.S. 32, 51 (2007). A district Court does not have to "categorically rehearse the relevant factors" or give "lengthy explanations" of the Section 3553(a) factors. United States v. Burrell, 622 F.3d 961, 964 (8th Cir. 2010). A district court need only provide "enough explanation of the court's reasoning to allow for meaningful appellate review." Id. at 966. A defendant need not object to preserve an attack on the length of the sentence imposed if he alleges only that a district court erred in weighing the section 3553(a) factors. Id. (citing United States v. Wiley, 509 F.3d 474, 477 (8th Cir.. 2007).

"(W)here a district court has sentenced a defendant below the advisory guidelines range, it is nearly inconceivable that the court abused its discretion in not varying downward further. United States v. Moore, 581 F.3d 681, 684 (8th Cir. Cir. 2009)(per curiam)(emphasis added)(internal quotation marks and citations omitted).

DISCUSSION

The Fifth Circuit Court of Appeals in agreeing with Lopez's erstwhile counsel, about the issue of Substantive unreasonableness of a sentence, is not one that the Supreme Court particularly cares for, is refuted by the fact there are numerous examples throughout the federal system, where for instance, Guidelines Sentences and Above Guidelines Sentences that have been reversed on appeal are prevalent and remain relevant.

In United states v. Valdez, 500 F.3d 1291 (11th Cir. 2007), the Eleventh Circuit, for example held that a 108- month sentence was substantively unreasonable - or at a minimum, the judge's reason from imposing such h a high sentence were inadequate- in a case where the-departure guideline maximum was 71 months. The defendant was convicted of counterfeiting. The victim of the offense was the district court clerk's office. the fact that the court was the victim, however, was not a proper basis for such a variance.

In United States v. Plate, 839 F.3d 950 (11th Cir. 2016), the defendant pled guilty to embezzlement. The restitution amount was approximately $152,000.00. At sentencing, the defendant brought her entire net worth to court ($45,000). The trial court said that probation was a reasonable disposition, if full restitution has been paid, but given the failure to pay restitution, the court imposed a guideline sentence of 27 months. The Eleventh Circuit reversed; it is not proper to give dispositive weight, in evaluating the Section 3553(a) factors, to the issue of restitution. In fact, the inability to pay restitution is not one of the factors identified in Section 3553(a). the appellate court held that the guideline sentence, therefore, was substantively unreasonable.

One of the first decisions in the Eleventh Circuit to consider how the appellate court should engage in appellate review of sentence was United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005). The court concluded that though the guidelines are only advisory, the court will still undertake a careful review of the Guideline calculation;

> "...On other words, as wax the case before Booker, the district court must calculate the guidelines range accurately. A misrepresentation of the Guidelines by a district court "effectively means that (the district court) has not properly consulted the Guidelines..." After it has made this calculation, the district court may i impose a more severe or more lenient sentence as long s the sentence is reasonable...

Crawford, 407 F.3d at 1178-79.

Appellate review of a district court's decision as a two-step process that reviews the lower court's decision procedurally ad substantively:

> "We review the reasonableness of a sentence for abuse of discretion using a two-step process." First, we look at whether the district court committed any significant procedural error, such a s a miscalculating the advisory guidelines range, treating the guidelines as mandatory, failing to consider the 18 U.S.C. Section 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. Then, we examine whether the sentence is substantively unreasonable under the totality of the circumstances and in light of the Section 3553(a) factors.

United states v. Cubero, 754 F.3d 888, 893 (11th cir. 2014),(citations omitted); United states v. Dougherty, 754 F.3d 1353, 1358 -1359)(11th Cir. 2014). In United states v. Campbell, 765 F.3d 1291 (11th cir. 2014), the court further elaborate on the lower court's decision-making process;

> "Once the Guideline range is fixed the sentencing court then gives both parties an opportunity to argue for whatever sentence, whether inside or outside the guidelines range, they deem appropriate," using the guidelines range as the benchmark, the court then weighs "all of the 18 U.S.C. Section 3553(a) factors to determine whether they support the sentence rested by a party." "If it decides that an outside-Guidelines sentence is warranted, it must consider the extent of the deviation and ensure that the justification is sufficiently =failing to support the degree of the variance."

Campbell, 765 F.3d at 1298 (citations omitted). Thus, if a trial court miscalculates the guideline range, an appellate court should reverse and remand, even if the sentence . Molina-Martinez v. United States, ___U.S. ___, 136 S.Ct. 1338, 194 L.E.d.2d 444 (2016). See also United States v. Jordi, 418 F.3d 1212 (11th Cir. 2005)(requiring an accurate guideline calculation, including the application of enhancements and encouraged departures, prior to a Booker reasonableness analysis.

LIST OF PARTIES

IN RE: JESUS DENOVA LOPEZ

-VS-

UNITED STATES OF AMERICA

THE NAMES OF ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE. THERE ARE NO ADDITIONAL PARTIES.

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STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." See, Maryland v. Louisiana, 451 U.S. 725, 737 (1981). Second, the Supreme Court also possesses original jurisdiction for "(all)n controversies between the United States and a State." 28 U.S.C. Section 1251 (b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court, for "all) actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970), United States v. Louisiana, 339 U.S. 699 (1951), United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeal" and "certiorari" as vehicles for appellate r review of the decisions of state and lower federal courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari," the Court has complete discretion to hear the matter.

The Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review was virtually entirely eliminated. Now almost all cases come to the Supreme Court by writ of certiorari. Pub. L. No. 100-352, 102 Stat. 662 (1988). The date on which the United States Court of Appeals decided my case July 2018.

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651(a) IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court and all courts established in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule may be issued by a justice (Chief Justice Roberts) to whom an application to a writ of Prohibition is submitted may refer it to the Court for determination.

The date on which the United States court of Appeals decided my case was July 20, 2018.

STATEMENT OF CASE AND PROCEDURAL POSTURE

Denova pleaded guilty to three drug charges, violations of Section 21 U.S.C. Section 841, 8434, and 846. The district court found that Denova's advisory guideline sentence range was 168-3210 months imprisonment. The court sentenced DeNova to 210 months in prison, the top of the range. Denova appealed.

He argued that the 210-month sentence was greater than necessary under the overarching, parsimony command of 18 U.S.C. Section 355(a)(1) that a sentence be sufficient but not greater than necessary to achieve the purpose set out in Section 3553 (a), and thus was unreasonable. The court of Appeals for the Fifth Circuit rejected that argument and affirmed the sentence.

The Court's opinion was entered on July 25, 2018. Counsel reviewed the decision, and wrote to DeNova that same day, explaining to him the right to have a petition for a writ of certiorari filed on his behalf. DeNova had indicated through his family that he would like a petition for certiorari filed if possible. Counsel claims he reviewed the opinion and the Supreme Court Rules, but has been unable to find an issue on which to petition.

Counsel also claimed that the issues he raided in the Fifth Circuit Court of Appeals, the reasonableness of the sentence and the applicable standard of review, abuse-of-discretion or plain error, reasonableness review - were arguable and counsel pursued them in the Fifth Circuit Court of Appeals. The argument that abuse of discretion, not plain error, was the proper standard of review was declared out of this case. In its opinion, the Fifth circuit court of Appeals held that DeNova's sentence was reasonable without reference to plain error and with reference to Gall v. United States, 552 U.S. 38 (2007), which held that abuse of discretion is the proper standard. Slip. Op. at 2.

REASONS FOR GRANTING

Erstwhile counsel for Petitioner Jesus Denova Lopez, Philip Lynch made he bold assertion to the Fifth Circuit Court of Appeals essentially that the issue owe whether a sentence was substantially unreasonable, was inconsequential tot the Supreme Court and invokes Rule 10 of the Supreme Court Rule to back up his impermissible assertion. Unfortunately, the Fifth Circuit agreed with him ad relieved him from appointment as petitioner's representative, foreclosing petitioners Unreasonable Sentence argument. Herewith, Counsel Philip Lynch's argument, memorialized n paragraph in of four of his petition to the fifth Circuit Court of Appeals frames as "MOTION SUGGESTING FUTILITY OF PETITION FOR WRIT OF CERTIORARI."

> "The Supreme Court grants review in cases that present issues of broad applicability or post legal conflicts between the Circuit Court of Appeals. See, Supreme Court Rule 10(a). No such issue exists in Denova's case."

Serious constitutional questions would arise, if this really were the case and the only insstances when the Supreme Cour intervenes. This intevention is apparent in the fac that the Supeme Court oftn rules in dicta, withut all of it rulings being to resolve a circuit spits. For this very reason, Jesus Denova Lopez takes issue with erstwhile counsel's characterization of the Supreme Court's Cert' Worthiness standards under Rule 10(a) of the Supreme Court Rules. With respect to the issue of substantive unreasonableness of his Jesus Denova Lopez's sentence, the Supreme Court has not only being vocal about Appellate Review Advisory Guidelines, it has further articulated in no uncertain terms, the role of the Guidelines.

The Supreme Court has in fact bequeathed to trial judges the ability to fashion a sentence that considers factors other than those spelled out into the Guidelines. The weight to be given to various factors (including the Guideline calculation), and the method by which the appellate judges will review the trial judges' decisions are matters that are still being litigated.

Petitioner avers, this whole effort by the Supreme Court is hardly an exercise in futility. Ultimately, the appellate court will review a sentence for reasonableness. The review for reasonableness is deferential, and the party challenging the sentence has the burden of establishing unreasonableness, and Petitioner has done in this case. See United States v. Clay, 483 F.3d 739, 743 (11th Cir. 2007). But deferential does not mean, a simple rubberstamp in their decision, as United States v. Pugh. 515 F.3d 1179 (11th Cir. 2008), demonstrates.

The Pugh court began with a thorough review of the development of the Booker/Rita/Gall cases and then reversed the lower court's decision that reduced a child pornography sentence from a Guideline range of eight years to a sentence of probation; "Even though we afford 'due deference to the district court's decision that the Section 3553(a) factors, on a whole, justify the extent of the variance'...we may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably lies an unreasonable sentence." Id at 1191.

At the end of the 2006 Term of the Supreme Court the court decided the case of United states v. Rita, 127 S.Ct. 2456 (2007). Rita addressed the standard of review that appellate courts must use when either a defendant or the government appeals a sentence. The Supreme Court held that the appellate court may, but is not required to presume that a sentence that is within the appropriately calculated Sentencing Guideline is reasonable. The court emphasized that such a presumption (which, is should be stressed an appellate court is not required to invoke) is not a presumption that shifts the burden of proof and, more importantly, is not a presumption that is available to the sentencing court.

Again, however, trial courts are not permitted to presume that a Guideline sentence is reasonable. United States v. Aqbal, 497 F.3d 1226 (11th Cir. 2007)(if trial court determines that the case is "cookie-cutter" then imposing a sentence within the Guidelines is reasonable); United States v. Campbell, 491 F.3d 1306, 1313-1314 (11th Cir. 2007); United States v. Hill, 643 F.3d 807, 880-882 (11th Cir. 2011).

This was emphasized in the Supreme Court decision United States v. Nelson, 129 S.Ct.. 890 (2009)(The Guidelines are not only not mandatory on sentencing courts, they are also not to be presumed reasonable). See also United States v. Velasquez, 524 F.3d 1248 (11th Cir. 2008)(n a sentence within the correct Guidelines range that is based on an impermissible factor(such as the trial court's disagreement with an immigration decision in the defendant's case is not a reasonable sentence and will be reversed).

Thus the assertion by the Fifth Court of Appeals, in agreeing with erstwhile counsel Philip Lunch, that the Supreme Court is not interested in the correction of error per se, but only in cases with wide applicability, that assertion is not categorical and not borne out, by virtue of the profundity of cases addressing this very issue in appellate review, as United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005) attests to. In Clay, the court concluded that though the Guidelines are only advisory, the court will still undertake careful review of the Guideline calculation.

CONCLUSION

Trial judges perform vital constitutional duties during criminal trials. Appellate Courts must explain those duties and remind trial judges of their importance. The rule of automatic reversal, which should be applied to Jesus Lopez's case by reason of numereous structural errors, enumerated in this opening brief, namely, Kyles v. Whitley, supra, quoting United States v. Bagley, Arizona v. Youngblood, quoting United States v. Valenzuela-Bernal, etc, for concealment of evidence, creates a conflict between that prospective appellate function of evaluating the fairness of the particular trial in Jesus Lopez's case. For this Honorable Court to affirm a verdict that was fairly obstained, the rule of automatic reversal forces an appellate court to find no error occurred.

To wit, to avoid this doctrinal consequence, this Honorable Court should reject the Fulminante, framework for determining when the rule of automatic reversal applies. In its place, this Honorable Court should apply the rule of automatic reversal only to the pedigree of errors that occurred in Ken Ezeah's judicial proceedings, i.e. the errors that never contributed to the verdict.

To be valid, a guilty plea must represent 'a voluntary and intelligent' choice among the alternative courses of action open to the defendant, and the defendant must possess an understanding of the law in relation to the facts. Wilkins v. Bowersox, 145 F.3d 1006, 1015 (8th Cir. 1998)(quoting North Carolina v. Alford,

400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). "A defendant must enter into a plea agreement and waiver knowingly and voluntarily for these agreements to be valid." United States v. Andis, 333 F.3d 886, 890 (8th Cir. 2003). "There are many ways in which a --- (plea agreement, or aspects of an agreement, could be entered into without the requisite knowledge or voluntariness." Id. Jesus Lopez's Guilty Plea proceedings was the result of his counsel(s) hoodwinking him into regurgitating prepared questions and answers with the proviso that, anything outside those answers would lead to the judge rejecting the Plea Agreement, especially considering the knowledge of the co-operation agreement which was set to begin the next day (February 2nd).

The Federal Rules of Criminal Procedure permit a defendant to withdraw a plea of guilty after the court accepts the plea but before sentencing if the defendant can show "a fair and just reason for requesting the withdrawal." Fed.R.Crim.P. 11(d)(2)(B). Ken Ezeah contends, he made such a showing by the letter he sent to the District Court Judge DeGiusti at sentencing. The contents of the letter was accorded little deference, except for a few remarks during the sentencing proceedings.

Evidence of a guilty plea which is subsequently withdrawn and any statement made in the course of the plea proceedings are not generally admissible against the defendant who made the plea. See, Fed.R.Evid. 410(a)(1). One exception to this general rule permits a defendant's statement to be admissible "in a criminal proceeding for perjury or false statement, if

the defendant made the statement under oath, on the record, and with counsel present." Rule 410(b)(2).

In conducting harmless error analysis of constitutional violations in direct appeal, the Court repeatedly has reaffirmed that "(s)ome constitutional violations --- by the trial process that, as a matter of law, they can never be considered harmless," Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States 527 U.S. 1, 7 (1999)("W)e have recognized a limited class of fundamental errors that defy analysis by "harmless error" standards, some will always invalidate the conviction." (citations omitted); id at 283 (Rehnquist, C.J., concurring); United States v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 570, 577-78 (1986)("some constitutional errors require reversal without regard to the evidence in the particular case --- (because they) render a trial fundamentally unfair"); Vasquez v. Hillary, 474 U.S. 254, 263-264 (1986); Chapman v. California, 386 U.S. 18, 23 (1967)("There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error").

Dated: October 18, 2018.

Respectfully Submitted,

Jesus Dehova Lopez

Jesus Lopez #68694-380