18-6855

APPEAL NO_____

IN THE

UNITED STATES SUPREME COURT
WASHINGTON, D.C.

IN RE: ANTONIO PEREZ-MARTINEZ
Petitioner,

-VS-

UNITED STATES OF AMERICA
Respondent

PETITIONER APPLICATION FOR
A WRIT OF PROHIBITION
PURSUANT TO THE ALL WRITS ACT
28 U.S.C. 1651(a) DIRECTED
ASSOCIATE JUSTICE WITH SUPERVISORY
CONTROL OVER THE SIXTH CIRCUIT
UNDER SUPREME COURT RULE 22-1

ANTONIO PEREZ-MARTINEZ
FED. REG. # 11718-082
FEDERAL CORRECTIONAL
INSTITUTION - LA TUNA
P.O. BOX 3000
ANTHONY, NM/TX 88021

FROM: 46810112
TO: Jones, Yekateina
SUBJECT: CONSTITUTIONAL QUESTIONS PRESENTED !!!
DATE: 11/16/2018 02:05:05 PM

CONSTITUTIONAL QUESTIONS PRESENTED

(1) APPELLATE COUNSEL WAS GROSSLY INEFFECTIVE, BY ARGUING A MATERIAL VARIANCE IN THE INDICTMENT, INSTEAD OF THE MORE EGREGIOUS CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

(2) WHETHER BY REASON OF A FATAL CONSTRUCTIVE AMENDMENT OT PEREZ'S INDICTMENT, HIS SENTENCE AND CONVICTION SHOULD BE DISMISSED AB INITIO.

(3) WHETHER THE DISTRICT COURT'S IMPOSITION OF A SUBSTANTIALLY UNREASONABLE SENTENCE, AND THE COURT OF APPEAL'S ENDORSEMENT OF IT, CREATES AN "IMPRIMATUR TO A MISCARRIAGE OF JUSTICE"" IN LIGHT OF THE PROPORTIONALITY OF SENTENCE HOLDINGS OF UNITED STATES V. KIMBROUGH (CITATIONS OMITTED) AND UNITED STATES V. RITA (CITATIONS OMITTED) WHEN ALL OF PEREZ'S CO-DEFENDANTS WERE EXONERATED PURSUANT TO PLEA DEALS.

LIST OF PARTIES

IN RE: ANTONIO PEREZ-MARTINEZ

-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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JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was AUGUST 17, 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).

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.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

LAW RELATED TO STRUCTURAL ERRORS IN PEREZ'S JUDICIAL PROCEEDINGS

In conducting harmless error analysis of constitutional violations, including direct appeals and especially habeas generally, The Supreme Court repeatedly has reaffirmed that "(s)ome constitutional violations ...by their very nature cast so much doubt on the fairness of 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 constitutional errors that defy analysis by "harmless error:" standards.'...Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. 'affect substantial rights') without regard to their effect on the outcome.").

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)("Although most constitutional errors have been held to harmless-error analysis, 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, 283-264 (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").

A JUDICIAL NOTICE/STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 OF THE FEDERAL RULES OF EVIDENCE.

The Right to Effective Assistance of Counsel. See, Kyles v.. Whitley, 514 U.S. at 435-436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 F.2d 832, 839 (8th Cir. 1994)("It is unnecessary to add a separate layer of harmless-error analysis to bar evaluation of whether a petitioner has presented a constitutionally significant claim for ineffective assistance of counsel").

LAW RELATED TO STRUCTURAL ERROR OR MANIPULATION OF EVIDENCE

Included in the rights granted by the U.S. Constitution, is the protection against prosecutorial suppression or manipulation of exculpatory evidence and other prosecutorial and judicial failures that amount to fraud upon the court. Failure to make available to defendant's counsel, information that could well lead to the assertion of an affirmative defense is material, when 'materiality' is defined as at least a "reasonable probability that had the evidence been disclosed tot he defense, the result of the judicial proceedings would have been different. Kyles v. Whitley, 514 U.S. at 435 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)(plurality opinion); id at 685 (White, J,. concurring in judgment)).

In addition to Bagley, which addresses claims of prosecutorial suppression of evidence, the decisions listed below-all arising in "what might be loosely be called the area of constitutionally guaranteed access to evidence," Arizona v. Youngblood, 488 U.S. 51, 55 (1988)(quoting United states v. Valenzuela-Bernal, 458 U.S. 856, 867 (1982) or require proof of "materiality" or prejudice.

The standard of materiality adopted in each case is not always clear, but if that standard requires at least a "reasonable probability" of a different outcome, its satisfaction also automatically satisfies the Brecht harmless error rule. See, e.g. Arizona v. Youngblood, supra at 55 (recognizing the due process violation based on state's loss ort destruction before trial go material evidence); Pennsylvania v. Richie, 480 U.S. 39, 57-58 (1987)(recognizing due process violation based on state agency's refusal to turn over material social services records; "information is Material" if it "probably would have changed the outcome of his trial "citing United States v. Bagley, supra at 685 (White, J,. concurring in judgment)).

Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (denial of access by indigent defendant to expert psychiatrist violates Due Process Clause when defendant's mental condition is "significant factor" at guilt-innocence or capital sentencing phase of trial); California v. Trombetta, 467 U.S. 479, 489-90 (1984)(destruction of blood samples might violate Due Process Clause, if there were more than slim chance that evidence would affect outcome of trail and if there were no alternative means of demonstrating innocence).

United States v. Valenzuela-Bernal, supra at 873-874 ("As in other cases concerning the loss (by state or government of

material evidence, sanctions will be warranted for deportation of alien witness only if there is a reasonable likelihood that the testimony could have affected the judgment of the Trier of fact." Chambers v. Mississippi, 40 U.S. 284, 302 (1973)(evidentiary rulings depriving defendant of access to evidence "critical to (his) defense 'violates traditional and fundamental standards of due process."); Washington v. Texas, 388 U.S. 14, 16 (1967)(violation of Compulsory process Clause when could arbitrarily deprived defendant of "testimony (that) would have been relevant and material, and ...vital to his defense.").

LAW RELATED TO STRUCTURAL ERROR FOR JUDICIAL BIAS

Included in the definition of structural errors, is the right to an impartial judge, i.e. the right to a judge who follows the constitution and Supreme Court precedent and upholds the oath of office. See, e.g. Neder v. United States, supra., 527 U.S. at 8 ("biased trial judge" is "structural error" and thus is subject to automatic reversal"); Edwards v. Balisok, 520 U.S. 461, 469 (1997); Sullivan v. Louisiana, 508 U.S. at 279; Rose v. Clark, 478 U.S. 570, 577-78 (1986); Tunney v. Ohio, 273 U.S. 510, 523 (1927).

STATEMENT OF CASE

Perez was convicted in January 2017 of conspiracy to commit wire fraud, access device fraud and aggravated identify theft in connection with a credit card "skimming" scheme after a fur day jury trail in federal District court for the Western District of Michigan. See 18 U.S.C. Sub-Section 1343, 1349, 1029(a)(3), 1029(a)(3), 1029(c)(1)(A)(1). The prosecution's case rested almost entirely in the testimony of convicted and cooperating co-defendants who said that Perez was the organizer of the scheme. Perez was sentenced to 144 months imprisonment on may 16, 2017. He timely filed an appeal.

THE INDICTMENT AND CO-DEFENDANTS

The original indictment filed in December 1, 2015, charged that Raul Gonzalez Falcon (Falcon), Yunier Carballo-Pupo (Pupo), Juan Estrada-Galvez (Galvez), Manuel Perez-Cabrera (Cabrera) and Michael Velazquez-Gregori (Gregori), all native Cubans living in the United States under various immigration statuses, committed conspiracy to commit wire fraud, access fraud and aggravated identity theft in the Western District of Michigan between July 24, 2015 and September 9, 2015. Indictment, RE#49, PageID##79-82. Falcon, Pupo, Galvez, Cabrera and Gregori had all been arrested in Michigan in August and September 2015. Complaint, RE#1-1, PageID##2-6.

Skimming devices are credit card readers that can be surreptitiously installed on public credit card terminals. The skimming devices in this case were installed in the credit card readers of gas stations pumps. Unsuspecting gas station patrons would swipe their credit cards through the card readers on gas station pumps, and the credit card information would be captured by the skimmer for later use in creating counterfeit credit cards. Falcon, Pupo, Cabrera and Gregori all pled guilty in February 2016, with cooperation, as part of their respective plea agreements. PIR, RE#255, Page1272-1273. Galvez was ultimately dismissed from the Indictment. Order of Dismissal, RE#106, PageID#379.

Based on the cooperation and information provided by Falcon, Pupo, Cabrera and Gregori, a three count First Superseding indictment was filed on March 10, 2016, charging Perez and Pedro Enrique Sanchez-Pupo (Sanchez-Pupo) with the same offenses-conspiracy to commit wire fraud and aggravated identity theft between July 24, 2015 and September 9, 2015. First Superseding, RE#109, PageID##406-409.

The "Object, Means and Methods" section of the First Superseding Indictment stated that the goal of the conspiracy was for the defendants to unlawfully enrich themselves by "obtaining devices that were designated to secretly record account data from credit cards that gas stations customers used to purchase gasoline and diesel fuel, installing those devices on gas station pumps, and then retrieving the devices after they had recorded credit card account data of gas station customers." Id, at PageID407. In other words, the charged conspiracy related to obtaining credit accounts fraudulently by the use of credit cards skimming services installed in gas station pumps.

Sanchez Pupo pled guilty with an agreement to cooperate on September 28, 2016. Plea Agreement, RE#168, PageID##687-695. This left Perez as the only remaining defendant. The First Superseding indictment was filed March 10, 2016. It named Perez as a defendant for the first time and a warrant for Perez's arrest was issued on March 11, 2016. He was arrested in Vermont, as he crossed the border from Canada into the United States. PIR. RE#255, Page1269. He was transferred for he Western District of Michigan and remained in custody pending trial. Counsel was appointed to represent him. Trial was set for January 2017.

RULE 404(b) EVIDENCE

The defense asked in pretrial pleadings to be notified of any evidence the government sought to introduce under Rule 404(b) of the Federal Rules of Evidence. IPTC, RE#174, PageID#702. The government moved prior to trial to admit evidence it characterized as being admissible under Rule 404(b) of the federal Rules of Evidence. Limine Gov't, RE#199, PageID##882-888. Specifically, it asked to admit evidence that Perez was under a deferred adjudication out of the State of Texas for a 2014 credit card fraud charge at the time he allegedly committed the federal offense. Id. It wanted to admit this under Rule 404(b) to prove intent and plan in this case.

The government also wanted to admit evidence that as part of the deferred adjudication, he was sentenced to probation with strict instructions not to leave Texas as a part of the conditions of his probation. Id. It wanted to be able to argue that because he ignored the requirements of probation by leaving the state of Texas to commit fraud in Michigan, and by then moving to Canada after his co-defendants were arrested in 2015 (thus, the arrest at the border in Vermont in 2016), that this was

evidence of flight and consciousness of guilt under Rule 404(b). Id. It said that this was also res gestae evidence because the Texas prosecution was "inextricably intertwined" with federal case.

Prior to trial, the district court heard argument on this. Motion Hearing, RE#265, PageID##1395-1397. It found that the fact of the deferred adjudication, because it involved a guilty plea to credit card fraud by Perez, albeit a plea held in abeyance pending adjudication, was relevant to knowledge and intent in the instant credit card prosecution and would allow the evidence. Id. at PageID##1397-1398.

It did not find, as the government had requested, that it was admissible as res gestae evidence. It also did not find that travel outside of Texas while on probation was a permissible purpose under Rule 404(b). Id. Thus, pre-trial, the district court's Rule 404((b) ruling limited the government to the deferred adjudication in Texas as evidence of intent, not travel outside of Texas in violation of the terms of his supervision as evidence of intent and guilt.

TRIAL

Trial began on January 25, 2017. It should be noted that many of the witnesses, and the defendant, were Spanish speakers so much of the trial testimony was vacillated by interpreters. The parties made their opening statements. The government outlined a story about Perez that started in Austin, Texas area. Trial 1, RE#266, PageID!!1809-1417. It said it would prove Perez started this scheme in Austin by buying credit card numbers off of the internet and trying to re-encode credit cards with those numbers. Id. It said he ended up recruiting a number if other people to help him in that scheme, which proved to be largely unsuccessful, and that ultimately, he spread the scheme out to various other places in the United States, landing in Michigan with he use of credit card skimming devices. Id. it adid it would rely on the testimony of the co-defendants and cell phone records to prove Perez's involvement. Id.

All of the cooperating co-defendants who testified received plea bargains that gave them various benefits in exchange for their cooperation. Trial 2, RE#267, PageID##1483-1485, 82-86, 1602-1603; trial 3, RE#268, PageID#162). Pupo and Falcon, following their arrest in August 2015, were in the same jail cell together and they along with Cabrera and Gregori, would ride to Grand Rapids from the jail to court ion the same van. Id. at Page1D#1616.

In addition, all of the cooperating co-defendants who testified were originally from Cuba and one way or another, met Perez when they arrived in the United States. Pupo arrived from Cuba in march 2015 and lived with Perez's mother and brother in an apartment in Austin, developing a good relationship with Perez and meeting Perez's then-wife, Leydis Laura. Trial 2, RE#267, PageID##1484-1491, Pupo stated that Perez introduced him to fraudulent activity. Id. at PageID#1494. Pupo testified that he had seen Perez re-encoding blank credit card information in Austin, though he did not specify when this happened. Trial 2, RE#267, PageID##1496-1497.

He said that Perez bought a skimmer, reportedly from someone in Miami, and showed Pupo how to install it in gas station pumps in Austin. Id. at PageID#1498. They left the skimmer installed for a few days, retrieved the skimmer, then downloaded the number from the skimmer to the com computer to 'clone the numbers into the cards." Id. at PageID##1499-1500. Generally, the cloned cards used to buy visa gift cards that were sold at a rate of 60% of the value. The proceeds were split "50/50" with Perez and the person that went into the stores to used the cloned cards. Id. at PageID#1501.

Pupo also said the after he was arrested on August 24, 2015 in Michigan, he was in jail with Cabrera, Gregori and Falcon. Trial 2, RE#267, PageID##1518-1519. They talked about the case and Perez while they were in jail and also on rides to and from the courthouse from he jail. Id. at PagteID##1516, 1520.

Falcon on testified that he immigrated tot he United states in December 2014, and went to Miami before moving to Austin at the suggestion of Leydis Laura, a woman he met during his journey from Cuba to the United States. Trial 2, RE#267, PageID##1564-1566. He moved in with Leydis Laura and someone named yaon Mafut (Mafut). He was in a relationship with Leydis Laura. Id. at PageID##1566-1567. Leydis Laura and Falcon eventually broke up because she started dating Perez. Id.

When he and Leydis Laura broke up, he and Mafut moved into an apartment together for just he and Mafut,. Id. at PageID#1567. He said Mafut introduced him to Perez as someone with whom Mafut was doing credit card fraud. Id. at page ID##1568-1569. He said Perez would buy credit card numbers off the internet and send people into stores to buy gift cards, splitting the proceeds fifty-fifty. Id., at PageID#1570. the cards almost always did not work and he said he was doing this with Gregori, Cabrera=era, Pupo and Mafut. Id. He believed he started this activity in March or April of 2015.

Gregori knew Perez because they were neighbors in Cuba but when he immigrated to the United states, he moved to Austin to live with other Cubans that he knew. Id at PageID#1605. He made the trip to the United States with Cabrera. Id. at

PageID#1604. He moved in with someone named Alexi Roman who was making money doing credit card fraud by buying numbers off the internet. Id. at PageID#1605. He and Cabrera did credit card fraud for Alexi Roman and traveled to Colorado in the spring of 2015. Id. It was unsuccessful but Alexi Roman felt that Gregori and Cabrera were stealing money from him and cut off his relationship with them. Id. Gregori said he then started doing fraud for for Perez. Id. He said he moved to Miami, Florida in August 2015, and that Cabrera, Sanchez-Pupo and two other people moved there with him. Id. at PageID1612. He claimed to know the person who sent the skimmers to Texas from Florida.

Cabrera also said that he immigrated to the United States with Gregori and started doing credit card fraud in Austin with Alexi Roman. trial 3, RE#268, PageID##1631-1632. This included making trips to do fraud in and around Austin, and also in Colorado. Id. at PageID#1632. He descried the break he and Gregori had with Alexi Roman and then they started working with Perez. He said Perez had five guys "from Miami" doing fraud with him, "Lenio" and Juan Carlos, as well as Mafut, Pupo, Falcon and Sanchez Pupo. Id. at PageID##1635-1636. Pupo installed the skimmers and Perez downloaded the information. Id. at PageID##1636-1637. He heard through the group that the skimmers came from Florida. Id.

Rather than walking the court through the evidence in the same order, it was presented to the jury, we were organizing the trial testimony and evidence by topic. Because of the way the government organized the proofs, it was confusing and overlapping. It did not help that the important witnesses spoke through interpreters and had hyphenated last names that were used inconsistently.

REASONS FOR GRANTING

This case is unique, and a case of first impression, which is not likely to open the floodgates for other inmates in this circuit, and as a matter of fact, anywhere else. The chances are zero to none, that now or the foreseeable future, there would be a case that involves a situation where counsel of record contends that petitioner's Antonio Perez-Martinez 's sentence is too long, by reason of the sentence being substantially unreasonable. Even more egregious is the fact that, perez's indictment was constructively amended, violating his Fifth Amendment right to the Grand Jury.

Congress has bestowed "the courts broad remedial powers to grant relief." Boumediene v. Bush, 553 U.S. 723, 776, 128 S.Ct. 2229, 171 L.Ed.2d 21 (2008). It is uncontroversial ...that this privilege entitles the prisoner to a meaningful opportunity to demonstrate that, he is being held pursuant to "the erroneous application or interpretation of the law."Id at 779 quoting INS v. St. Cyr, 533 U.S. 289, 302, 121 S.Ct 2271, 150 L.Ed.2d 347 (2001))).

It is "above all, an adaptable remedy, "and its precise application and scope change, depending upon the circumstances."Id. Thus, Antonio Perez-Martinez, contends he is entitled to being given a meaningful opportunity to demonstrate that he deserves relief from his allegedly erroneous guilty plea, sentence and conviction. After all, the Supreme Court has held that any judicial proceeding involving a biased judge is structural error.

Antonio Perez-Martinez truly extraordinary conundrum is further aggravated by the fact that, the totality of the errors in this case makes it a strong candidate for a remand or GVR to the Sixth Circuit Court of Appeals with instructions for dismissl of the cae or in the alternative, a reduction of his sentence.

APPELLATE COUNSEL WAS GROSSLY INEFFECTIVE BY ARGUING A MATERIAL VARIANCE IN THE INDICTMENT INSTEAD OF THE MORE EGREGIOUS CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

STANDARD OF REVIEW

The Sixth Amendment right to counsel is the right to effective assistance of counsel. McMann v . Richardson, 397 U.S. 759, 771` n.14 (1970). The benchmark for judging any claim of ineffective assistance of counsel, however, is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relief on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 688 (1984); see also Boykin v., Wainwright, 737 F.2d 1539, 1542 (11th Cir. 1984).

Because a lawyer is presumed to be competent to assist a defendant, the burden is not he accused to demonstrate the denial of the effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 658 (1984). Ineffectiveness of counsel may be grounds for vacating conviction of;

(1) counsel's performance fell below an objective standard of reasonable professional assistance and;

(2) the defendant was prejudiced by the deficient performance. Strickland, 466 U.S. at 687, 694. "There is no reason for a court deciding an ineffective assistance claim ...to address both components oft he inquiry of the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697.

Thus, if the defendant fails to show that he is prejudiced by the alleged error of counsel, this court may reject the defendant's claim without determining whether the counsel's performance was deficient. see Coulter v. Herring, 60 F.3d 1499, 1504 n.8 (11th Cir. 1995). For performance to be deficient, it must be established that , in light of all the circumstances, counsel's performance was outside the wide range of professional competence. see Strickland, 466 U.S. at 690.

In other words, when reviewing counsel's decisions, "the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." Chandler v., United states, 218 F.3d 1305, 131 (11th cir. 2000)(en banc)(quoting Burger v. Kemp, 483 U.S. 776 (1987)), cert. denied, 531 U.S. 1204 (2001).

Furthermore, "(t)he burden of persuasion is on a petitioner to prove, by a preponderance of the evidence, that counsel's performance was unreasonable." Id.. (citing Strickland, 466 U.S. at 688). This burden of persuasion, though not insurmountable, is a heavy one. see, id. at 1314 (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)).

"Judicial scrutiny of counsel's performance must be highly deferential." and courts "must avoid second-guessing counsel's performance." Id. at 1314 (quoting Strickland, 466 U.S. at 689). "Courts must 'indulge (the) strong presumption ' that counsel's performance was reasonable and the counsel ;'made all significant decisions in the exercise of reasonable professional judgment." Id. (quoting Strickland, 466 U.S. at 689-90). Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy." Id. (quoting Darden v. Wainwright, 477 U.S. 168 (1986)).

If the record in incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgment. See Id. at 1314-15 n.15. Thus, the presumption afforded counsel's performance "in no ...that the particular defense lawyer in reality focused on and, then deliberately decided to do or not to do a specific act." Id. Rather, the presumption is "that what the particular defense lawyer did at trial..,.were acts that some reasonable lawyer might do." Id.

Moreover, "(t)he reasonableness of a counsel's performance is an objective inquiry." Id. at 1315. For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take." Id. To uphold a lawyer's strategy, a court "need not attempt to divine the lawyer's mental processes underlying the strategy." Id. at 1315 n. 16. Finally, "(n)o absolute rules dictate what is reasonable performance for lawyers." Id. at 1317.

Further, counsel does not provide ineffective assistance when frivolous arguments are not raised on appeal. Jones v. Barnes, 463 U.S. 745 (1983); see also United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 18992)(attorney not ineffective for failing to argue a meritless issue).

WHETHER BY REASON OF A FATAL CONSTRUCTIVE AMENDMENT TO PEREZ'S INDICTMENT, HIS SENTENCE AND CONVICTION SHOULD BE DISMISSED AB INITIO.

Petitioner seeks a grant of the writ of prohibition for two primary reasons, and directs his application utilizing Supreme court rule 22-1 to the Associate Justice with Supervisory Control over the Sixth Circuit Court of Appeals. The first reason fir the application and the reason it should be granted, has to do with the denial of his direct appeal, where appellate counsel, argued a nuanced version of variance of the indictment, instead of a constructive amendment of the indictment.

To all intents and purposes, a fatal constructive amendment is intrinsically prejudicial, because it violates the fifth Amendment Grand Jury Clause, which guarantees an accused like Perez-Martinez the right to be tried on the indictment returned by the grand jury. Williamson, supra, United states v. Koen, 31 F.3d 722 (8th Cir. 1994); Fisher, supra at 462; United States v. Roshko, 969 F.2d 1, 5 (2d. Cir 1992)(prosecutor's trial presentation constructively amended the conspiracy count by expanding the object).

Perez was convicted in January 2017 of conspiracy to commit wire fraud, access device fraud and aggravated identity theft in connection with a credit card 'skimming' scheme after a four day jury trial in Federal District court for the Western District of Michigan. See 18 U.S.C. Sub-Section 1343, 1349, 1029(a)(3), 1029(c)(1)(A)(1), 1028A(a)(1). The prosecution's case rested almost entirely on the testimony of convicted, but cooperating co-defendants who said that Perez was the organizer of the scheme.

In point of fact, although the indictment charged only one conspiracy[, the proof at trial outlines three separate conspiracies. One led by Alexi Roman. One led by Perez, and the one pled by Sanchez-Pupo. There was also an additional conspiracy that involved the use of credit card numbers obtained from the "dark web," not skimmed credit card number as charged by the indictment. The proof at trail was that Sanchez-Pupo organized and led a group that came to the Grand rapids, Michigan area on September 9, 2015. Perez was not involved directly or indirectly and there was no proof he knew anything about this trip. The group consisted of Sanchez-Pupo, Cabrera

The proof at trial was the Sanchez-Pupo organized and led a group that came to the grand Rapids, Michigan area on September 9, 2015. Perez was not involved directly or indirectly and there was no proof he knew anything about this trip. the group consisted of Sanchez-Pupo, Cabrera and Gregori, but also of p[people who had not been previously associated with any of the groups allegedly organized by Perez- Juan Estrada-Galvez (or perhaps Manuel Estrada-Galvez according to Gregori) and Yunier Del Toro. No one saw Sanchez-Pupo with any equipment other than a laptop and there was no evidence about what type of scheme Sanchez-Pupo was operating on this trip. Sanchez's group originated in Miami, Florida, not Austin, Texas.

Of critical importance is the fact that, without any evidence that Sanchez-Pupo's group was doing anything similar to the alleged fraud activities of Perez, and with evidence that Perez neither participated in nor knew of the trip by Sanchez-Pupo's group coming out of Miami, the evidence was of multiple conspiracies. There was no evidence of a common scheme to gosl each Sanchez-Pupo's group. Indeed, it is illogical that Perez would no have been involved in the September 9 Sanchez-Pupo conspiracy -Pupo and falcon had just been arrested nearly on August 24. Furthermore, the proofs at trail included testimony about a different conspiracy than the one charged in the indictment; a conspiracy before July 24, 2015 to sue credit card numbers that were bought off the "dark web."

There was testimony of a June 2015 trip from Denver to Ohio (or Ohio to Denver depending on the version relied on, Cabrera's or Pupos') where credit card numbers purchased from the internet were used. There was also testimony about a pre-July 24, 2015 trip to grand rapids, Michigan (June or early July 2015) where the group attempted top use credit numbers that were purchased online. There was testimony about a Wisconsin trip pre-July 24, 2015 that did not involve skimming devices, it is clear that the testimony about these trips was about separate conspiracies.

Thus, Perez avers that an indictment is constructively amended, as here, when a prosecutor or judge broadens the possible grounds for conviction beyond what the indictment specified. For example, one court found a constructive amendment when a defendant was charged with possession of cocaine and methamphetamine for the government presented evidence about possession of marijuana and the judge instructed the jury that it could convict on the basis that the defendant possessed any controlled substance., the charges themselves did not include marijuana. United states v. Wosniak, Id. at 109-10. The marijuana evidence and judge's instructions thus broadened the basis for conviction what the indictment stated.

WHETHER THE DISTRICT COURT'S IMPOSITION OF A SUBSTANTIALLY UNREASONABLE SENTENCE, AND THE COURT OF APPEALS ENDORSE MENT OF IT, CREATES AN "INPRIMATUREFOR A MISCARRIAGE OF JUSTICE" IN LIGHT OF THE PROPORTIONALITY OF SENTENCE HOLDINGS OF UNITED STATES V. KIMBROUGH (CITATIONS OMITTED) AND UNITED STATES V. RITA (CITATIONS OMITTED) WHEN ALL OF PEREZ'S CO-DEFENDANTS WERE EXONERATED PURSUANT TO PLEA DEALS.

STANDARD OF REVIEW

When Court of Appeals, consider the substantive reasonableness of the length of a sentence, it does so under an abuse-of-discretion standard. See, e.g. 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

Appellate counsel's reasoning that there are no non-frivolous issue on this appeal, totally ignores the facts of this case, given the fact Perez's indictment was constructively amended. The government charged one conspiracy in his indictment, while proof at trail revealed in excess of four different conspiracies. In fact, there are numerous examples in the federal system, where for instance, Guideline Sentences and Above Guidelines Sentences have been reversed on appeal. These cases are prevalent and remain relevant. In light of which Valentin contends his sentence is substantially unreasonable.

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 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;

> "...In other words, as was 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 impose a more severe or more lenient sentence as long as 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 and 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 elaborated 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.

CONCLUSION

Traditionally, efficiency and finality have carried less with than fairness in the criminal context, because criminal sanctions may result in imprisonment and greater social stigma than civil sanctions. see, Stacy & Dalton, supra note 2, at 137 ("As our ...commitment to the availability of habeas corpus, finality and efficiency concerns carry relatively less sway in criminal cases than in civil cases -a product of criminal defendant's countervailing liberty interest." (footnote omitted).

The category of errors known as trial errors can be harmless if the government can show beyond a reasonable doubt that they did not contribute to the verdict. See id at 24, see also, Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)(stressing that the test for harmlessness "is not whether, in a trial that occurred without the error, a guilty verdict would have surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.").

The Supreme Court has recognized a narrow set of rights that, if denied are structural errors; the rights to counsel, see Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) and to counsel of choice, see, United States v. Gonzalez- Lopez, 548 U.S. 140, 150 (2006)(deeming deprivation of counsel of choice a structural error.); the right of self representation, see,, Mckaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)(finding harmless error analysis inapplicable to deprivations of the right to self-representation, because exercising the right increases the chance of a guilty verdict); the right to an impartial judge, see, Tunney v. Ohio, 273 U.S. 510, 534 (1927)(holding that trial before a biased judge "necessarily involves a lack of due process").

Also denominated in the narrow set of rights deemed structural error, is the freedom from racial discrimination, in grand jury selection. This denial of have been found to undermine "the objectivity of those charged with bringing a defendant to judgment"); the right to a public trail, see, Waller v. Georgia 467 U.S. 30, 49 (1984)("the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee"), and the right to accurate reasonable-doubt instruction, see, Sullivan v. Louisiana, 508 U.S. 275, 280 (1993)(finding that because of an inadequate reasonable doubt instruction, no actual jury verdict could thus not apply harmless error analysis to determine whether error affected the verdict.).

By contrast, the list of trial errors is extensive. See, Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991) (declaring that "almost constitutional errors can be harmless," and naming sixteen examples of trial error. While the list of structural errors have remained consistent t, the Supreme Court's m ethos of distinguishing between trial and structural= errors have fluctuated. The prejudicial impact of these constitutional errors is assessed by asking whether the error hard " a substantial and injurious effect or influence in determining the jury's verdict." Bretch v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), See also, Fry . Pliler, 551 U.S. 112, 119-120, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (holding that the Bretch standard applies whether or not the state court recognized the error and reviewed it for harmlessness.).

11/16/2018

/s/ Martinez

ANTONIO PEREZ MARTINEZ

APPENDIX 1