IN THE SUPREME COURT OF THE UNITED STATES

Jonathan Randall Curshen Petitioner,	Case No. 128-6996
v.	ON PETITION FOR REHEARING TO THE SUPREME COURT
United States of America Respondent	PETITION FOR REHEARING

QUESTIONS PRESENTED

Where the Eleventh Circuit holds "Absent a stipulation or agreement between the parties, an attorney's factual assertion at a sentencing hearing do not constitute evidence that a District Court can rely on." and "When the government seeks to apply an enhancement under the U.S. Sentencing Guidelines Manual over a defendant's factual objection, it has the burden of introducing "sufficient and reliable" evidence to prove the necessary facts by a preponderance of the evidence."

Why is that despite factual objection by defense counsel to the 250 victim enhancement at sentencing, the Court denied the objection even though the record is devoid of any documents, records, or information except for the prosecutor's factual assertions at sentencing?

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR REHEARING

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion for the United States Court of Appeals appears at Appendix A to the petition.

The judgement of the United States District Court appears at Appendix B to the petition.

JURISDICTION

The date on which the United States Supreme Court denied my Petition for Certiorari was 14 January 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5

Due Process of Law

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

PETITIONER STATEMENT OF THE CASE

Petitioner was convicted after a jury trial of conspiracy to commit mail, wire, and securities fraud (Count One), mail fraud (Counts Six and Eight), and conspiracy to commit money laundering (Count Ten). On 11 May 2012, Petitioner was sentenced to a two hundred and forty month term of imprisonment. On 14 May 2013 a timely notice of appeal followed. However, the judgement and conviction and sentence was affirmed on 28 May 2014. [See, United States v. Curshen, 587 F. Appx. 815 (11th Cir. 2014)]. A Petition for Certiorari was denied on 15 January 2015. On 14 December 2015, Petitioner filed his original Petition seeking an order vacating his sentence under 28 U.S.C. § 2255, raising a number of ineffective assistance of counsel claims, among others. In imposing the sentence, the District Court applied a six level enhancement, pursuant to 2B1.1(b)(2)(C) of the U.S. Sentencing Guidelines, on the ground that the offense involved 250 or more "victims." On 28 July 2017 the District Court denied the Petition. On 7 May 2018 the Eleventh Circuit Court of Appeals denied a Motion for Reconsideration. On 14 January 2019 the U.S. Supreme Court denied a Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

1. PETITIONER HAS ESTABLISHED THAT HE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO APPEAL FROM THE SIX LEVEL ENHANCEMENT FOR 250 OR MORE VICTIMS.

Petitioner has moved to vacate his sentence on the grounds that appellate counsel's failure to appeal from the six level enhancement for for that 250 victims - accorded under U.S.S.G. 2b1.1(b)(2)(C) at sentencing - deprived him of his Sixth Amendment Right to Effective Assistance of Counsel on appeal. Notably, counsel did not object to the Presentence Report's recommendation that the six level enhancement be applied. Indeed, as noted at sentencing, former counsel inquired of the Probation Department as to the basis for their conclusion, but was not provided any response. In overruling defense counsel's objection the District Court stated the following:

> THE COURT: With respect to the objection to the number of victims, the Court overrules the objection. The government has established that the number of victims does, in fact, exceed 250.

[Sentencing Hearing at 11:15-18] This finding may have been based on the Court's mistaken belief that the Probation Department had received approximately 800 responses from potential victims attesting to having sustained an actual loss.

> The COURT: I think there was something like 1,600 letters sent.
>
> PROBATION OFFICER: Approximately
>
> THE DEFENDANT: With about 40 responses, if I understand correctly, so far.
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> PROBATION DEPARTMENT: I think we have received more than 40 responses. My colleague, Ricardo Garcia, has a list of those.
>
> THE COURT: I think it's probably closer to 800. That's what I think I heard. Anyway, that has nothing to do with today anyway.

[Sentencing Hearing 28:21-25 and 29:1-6]. Unbeknownst to the Court at the time of sentencing, there was actually less than 100 responses and victim's impact statement attesting to "actual loss" or "pecuniary harm," a fact the government acquiesces to in their response to Petitioner's Motion filed under 28 U.S.C. § 2255. [See government's Response at 14]. Counsel failed to point out to the Court that there was no where near 800 responses received. The government, who then and there knew the Court was mistaken, failed to correct this critical error.

The government opposed Petitioner's challenge arguing that the District Court got it correct when it accorded the six level enhancement based on the so-called 'Blue Sheet Data' which identified the number of "potential victims" in this case. [See government's response at 15]. According to the government, the 'Blue Sheet Data' from which the number of victims was calculated was specifically discussed at Curshen's sentencing hearing, at which time the Court found there were more than 250 victims." [Id. at 16].

It should be noted, however, that by the government's own description of the 'Blue Sheet Data,' the sheet provided only a list of "potential" - not "actual" - victims. [See, e.g. id at 15 (" The United Stated first provided the Court with the number of potential victims based on brokerage trading data when it moved the Court for authorization to notify potential victims through publication, in compliance with the Justice for All Act, 18 U.S.C. § 3771.")] The government also described the dates as identifying "1,600 potential shareholders." [Id.]. The government failed to adduce any definitive data definitely establishing what losses (if any) were sustained by the 1,600 "potential" shareholders. It must be noted that, during the sentencing hearing, the government acknowledged that it has not established what, if any, specific losses had been sustained by the "potential" victims.

> THE GOVERMNENT: In terms of evidence in the record, papers were submitted in connection with the request for victim identification via publication in which we made it clear that, based on the Blue Sheet Data that had been obtained from the largest clearing firms, which covers approximately 65 percent of the market, over 1,600 purchasers of the stock have been identified. We're still receiving information back from a number of investors. I believe Probation is still receiving information back from actual investors, which is one of the reasons we have requested, and today will again request, a 90-day time period for the purposes of restitution.

[Sentencing Hearing at 8:7-18[. On the record at the time of sentencing, it was wholly inappropriate for the District Court to accord the six level enhancement. This, counsel's failure to appeal from the enhancement deprived this Petitioner of his right to effective assistance of counsel on appeal.

In order to establish effective assistance of counsel Petitioner must establish (1) deficient performance - that his counsel's representation fell below the objective standard of reasonableness; and (2) prejudice - but for the deficiency of representation, there is a reasonable probability that the result of the proceeding would have been different. [Strickland v. Washington,

466 U.S. 668 (1984); Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000)(en banc)]. The standard is the same for ineffective assistance of counsel on appeal. (Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987).]

In the case of ineffective assistance of counsel during the penalty phase of a case, prejudice is established "if there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh (Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). A reasonable probability is is a probability sufficient to undermine confidence in the outcome. [Strickland v. Washington, 466 U.S. at 694]. A defendant need only show that the sentence was increased due to counsel's deficient performance [Glover v. United States, 531 U.S. 198, 201-203 (2001)].

Here it is indesputable that the District Court's imposition of the sentence was procedurally and substantially unreasonable where it resulted from a complete misapplication of the Sentencing Guidelines - in this case the substantial likelihood that the Eleventh Circuit would have vacated the sentence and remanded the matter to the District Court for resentencing. Indeed, as the Court has previously observed, in the context of applying the multiple victims enhancement, the Guidelines "define a victim as 'any person who sustained any part of the actual loss determined under subsection (b)(1)'." [Dorvil v. United States, Civil Action No. 09-80745, Criminal No. 07-60119, 2010 U.S. Dist LEXIS 81169 at *5 (S.D. Fla. 2 June 2010) (White, U.S.M.J) (quoting U.S.S.G. Cmt. App. Not 2(A)(i))]. Here, there was not particularized finding by the Court that more than 250 individuals suffered pecuniary harm as a result of the offense. To be sure, at sentencing the government requested a period of 90 days to determine the actual loss to the victims in this case. Thus, there was no evidence - prior to or during the sentencing hearing - indicating how many of the "potential" victims actually sustained pecuniary harm. Without such evidence, or a finding by the Court, it was improper to enhance Petitioner's sentence on the basis that the offense involved 250 or more victims.

The Petitioner, in his original moving papers, argued that the Court should have only counted the number of individuals who actually responded to government inquiries and advised of a specific loss. The government argues

that the use of such information has been denounced by the Eleventh Circuit in United States v. Foley, 508 F.3d 627, 633 (11th Cir. 2007). While we take exception to the government's relience on Foley for the proposition that the Court was not permitted to use the responses to determine which individuals suffered a loss, we submit without the responses from the "potential victims" attesting to a loss, the record was completely devoid of any credible evidence that any potential victims sustained a loss, and they were improperly considered a "victim" for the purpose of the six level enhancement.

The Eleventh Circuit has made it clear that an individual may not be considered a "victim" within the meaning of the multiple victims enhancement unless they have sustained a loss to which the defendant is responsible [See Foley, 508 F.3d at 634 (vacating sentence where the evidence "did not establish how many people sustained the loss attributable to [the defendant]."] The holding in Foley applies with equal force here. Like Foley, the District Court here failed to determine "how many people sustained a loss attributable to [the defendant]." Indeed, the Court could make no such finding because the government had not completed its investigation into actual loss - if any - suffered by the purported potential victims. Thus, had counsel appealed from the six level enhancement, the Eleventh Circuit would have vacated the sentence based on the lack of particularized findings concerning the number of people who actually sustained any part of the "actual loss." Indeed, the Eleventh Circuit did just that in Foley and in United States v. Rodriguez, 732 F.3d 1299 (11th Cir. 2013), upon which the Petitioner also relies.

Since the District Court failed to determine whether, and to what extent, any of the "potential" victims in this case sustained part of the "actual loss" and/or suffered "pecuniary harm" based on Petitioner's conduct, and failed to place on the record any particularized findings, the Court should vacate the sentence because, but for appellate counsel's ineffectiveness in failing to raise the issue on appeal, the sentence would have been vacated and the Petitioner would have been resentenced to a lesser term of imprisonment, The government's opposition completely ignores the fact that the Court failed to make any finding regarding what losses (if any) were sustained by the potential "victims" - a prerequisite to applying the multiple victims enhancement as the Court noted in Dorvil, supra. The government's

opposition also fails to take notice that the government was unable to provide the Court - prior to or during the sentencing - with any information concerning what losses were sustained by the potential victims. On the record, Habeas relief is warranted and should be awarded in the interest of justice.

2. PETITIONER ESTABLISHED THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT AND/OR APPEAL FROM THE GOVERNMENT'S FAILURE TO PROVE (AND THE COURT'S FAILURE TO FIND) BY A PREPONDERANCE OF THE EVIDENCE, THAT AT LEAST 250 OF THE INDIVIDUALS WHO ALLEGEDLY PURCHASED SHARES OF "CO2" STOCK ACTUALLY SUFFERED ACTUAL LOSS - A PREREQUISITE TO CLASSIFYING THEM "VICTIMS."

Petitioner moves to vacate his sentence on the ground that counsel's failure to object and/or appeal from the government's failure to prove (and the Court's failure to find) that individuals who allegedly purchased "CO2" securities during the charged scheme to defraud suffered actual pecuniary harm, so as to warrant the six level enhancement he received under U.S.S.G. 2B1.1(b)(2)(C) for 250 or more "victims." It is a fact that the government presented no evidence or information establishing that the shareholders suffered any actual loss. It is also a fact that the Court, in according the six level increase, made no finding that 250 or more shareholders suffered actual loss, or endured any pecuniary harm. However, such evidence, and judicial findings, is a prerequisite to classifying such shareholders "victims" within the meaning of the Guidelines. [See United States v. Washington, 714 F.3d 1358 (11th Cir. 2013) "Absent a stipulation or agreement between the parties, an attorney's factual assertions at a sentencing hearing do not constitute evidence that a District Court can rely on. When the government seeks to apply an enhancement under the U.S. Sentencing Guidelines Manual over a defendant's factual objection, it has the burden on introducing "Sufficient and reliable" evidence to prove the necessary facts by a preponderance of the evidence".] [See U.S. v. Abney, U.S. Appx. LEXIS 18830 (11th Cir. 2017)]. Counsel's failure to raise this precise issue resulted in a substantial sentence increase, the affirmance of the illegal sentence on appeal, and the denial of the counsel guaranteed by the Sixth Amendment. But for the unprofessional performance, Petitioner would have received a substantially lower sentence.

The Honorable Patrick A. White, U.S. Magistrate Judge, recommended - despite the forgoing - that the 28 U.S.C. § 2255 Petition be denied. In the R&R dated 11 April 2017, the Magistrate Judge makes the following relevant

factual findings:

(a) The Presentence Report ("PSI") recommended that, pursuant to U.S.S.G. 2B1.1(b)(2)(C), the offense level be increased by six levels because the offense involved 250 or more victims (See PSI a Para. 60).

(b) The PSI did not explicitly set forth how the number of victims was determined, although in the victim impact portion of the PSI the probation office noted that it has sent out notice to 1563 victims requesting information about their losses. In the addendum to the PSI the probation office addressed the Petitioner's objections to the calculation of the number of victims. The probation office noted again that it had sent letters to 1563 victims... The government argued that due to the number of shares involved it was clearly foreseeable that the number of victims would exceed 250; and

(c) [T]he government supported its calculation of the number of victims through use of 'Blue Sheets,' or trading data, indicating that approximately 1600 individuals had purchased shares of "CO2" during the scheme.

[Curshen v. United States, 2017 U.S. Dist. LEXIS 57178 at *8-9 (S.D. Fla. 11 April 2017) (R&R)]. These finding counsel in favor of granting Habeas relief.

It is well settled in thr Eleventh Circuit that, before applying a multiple victims enhancement under 2B1.1(b)(2), "the District Court should attempt to connect the number of victims to its loss calculation [United States v. Anderson, 286 F.Appx. 654, 658 (11th Cir. 2011) (citing United States v. Foley, 508 F.3d 627, 633-34 (11th Cir. 2007)]. The failure to make an independent finding on the amount of the loss as it related to each alleged victim renders the sentence illegal. [See e.g. Foley, 508 F.3d at 633 (11th Cir. 2007) (holding that the District Court erred when it based the number of victims upon responses received by the probation department to loss inquiries there "the District Court did not make an independent finding on the amount of loss, and the number of loss, and the number of victims is defined in relation to the loss calculations)]; United States v. Hernandez, 256 F. Appx. 279, 284 (11th Cir. 2009) (government conceded that the District Court had "failed to connect the victims to the actual losses they sustained."); Anderson, 286 F. Appx. at 658 (noting the Guidelines' definition of victim as one whose loss was part of the Court's calculation of actual loss and circuit precedent that "a District Court err[s] in counting as victims, pursuant to U.S.S.G. 2b1.1(b)(2), individuals who did not suffer any part of the actual loss."); United States v. Leach, 417 F.3d 1099, 1107 (10th Cir. 2005) (Finding District Court erred in counting as victims individuals who did not suffer any part of the actual loss); See also United States v. Rodriguez, 732 F.3d. 1299, 1305

(11th Cir. 2013) (vacating sentence where multiple victim enhancement incorrectly applied).

The question of whether a given individual is a "victim" within the meaning of Section 2B1.1(b)(2)(C) - a question of Guidelines interpretation - is an issue of law. [United States v. Skys, 637 F.3d 146, 153 (2nd Cir. 2011)]. "The number of persons or entities who are victims within the meaning of Guidelines [section] 2B1.1(b)(2) is... a question of fact." (Id. at 152-153). it is a fact that not all of the alleged shareholders suffered pecuniary harm. Indeed, nowhere near 250 of them suffered harm. At the very least, and evidentiary hearing is warranted to resolve this material factual dispute.

In this case, as the Magistrate Judge correctly found, "the government supported its calculation of the number of victims through use of 'Blue Sheets,' or trading data, indicating that approximately 1,600 individuals had purchased shares of "CO2" during the scheme. [Curshen, 2017 U.S. Dist. LEXIS 57178 at *9]. The 'Blue Sheets' do not reflect losses at all, and demonstrate little more than actual stock purchases. Thus, the 'Blue Sheets' would not provide factual detail concerning which, if any, purchaser of "CO2" shares actually sustained a loss, or suffered pecuniary harm. Since there was no evidence that there were at least 250 "victims" - as the term "victim" is defined by the Guideline. Moreover, the Court, contrary to binding precedent, made no specific or independent finding that 250 or more "CO2" share purchasers suffered pecuniary harm, and that such harm was part of the "actual loss" as determined by the Court.

Counsel failed to raise the precise legal and factual arguments upon which the Ineffective Assistance of Counsel claims are based, raised in these proceedings that we submit should have been made. Petitioner did not waive his right to counsel and he was entitled to have counsel advance the precise issues raised here, in both the District and Appellate Courts. While counsel did challenge (in the District Court) the six level enhancement for 250 or more victims, counsel did not argue that the government presented no evidence establishing that the individuals were victims within the meaning of the Guidelines, or that the Court failed to make a finding that the individuals were "victims" by virtue of sustaining pecuniary harm or actual loss. The failure to raise such specific challenge, in the face of the record - which is completely devoid of evidence supporting a finding that more than 250 of the

individuals who purchased "CO2" shares actually suffered a loss - deprived Petitioner of the counsel guaranteed by the Sixth Amendment.

Having demonstrated (a) deficient performance by sentencing/appellate counsel in failing to raise the specific legal issue raised in this Petition, and (b) prejudice, in that had counsel raised the specific issues that forms the predicate for the Ineffective Assistance of Counsel claim, Petitioner would have received a much shorter term of imprisonment, he has satisfied the Strickland standard for Ineffective Assistance of Counsel, entitling him to relief.

3. THE DISTRICT COURT FAILED TO RESOLVE EACH OF THE PETITIONER'S SPECIFIC CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND A CERTIFICATE OF APPEALABILITY SHOULD ISSUE IN THE INTEREST OF JUSTICE.

Petitioner filed his original Petition seeking an order vacating his sentence under 28 U.S.C. § 2255, raising a number of ineffective assistance of counsel claims, among others. In imposing the sentence, the District Court applied a six level enhancement, pursuant to section 2B1.1(b)(3)(C) of the U.S. Sentencing Guidelines, on the ground that the offense involved 250 or more "victims."

The enhancement was applied after the U.S. Probation office recommended the enhancement. However, the Probation office "did not explicitly set forth how the number of "victims" was determined." [Curshen v. United States, 2017 U.S. Dist. LEXIS 57178 (S.D. Fla. 11 Apr. 2017) (U.S. Mag. Judge's Report and Recommendation)]. For their part, however, the government supported its calculation of the number of "victims" through the use of 'Blue Sheets' which established only that some 1,600 individuals purchased shares of "CO2" stock. The 'Blue Sheets', however, only established the number of purchasers of "CO2" stock, and revealed nothing about even potential losses to those who purchased stock. Sentencing and appellate counsel failed to object to and/or appeal from, the enhancement on the basis that not all purchasers of "CO2" stock suffered an actual loss - a prerequisite to classifying purchasers "victims" under the Sentencing Guidelines. Neither did counsel object to, or appeal from, the government's failure to prove, or the District Court's failure to make a finding, that 250 or more purchasers of "CO2" stock suffered actual loss as a result of the instant offense.

Petitioner's Motion to vacate his sentence argued, inter alia, that both his sentencing and appellate counsel were ineffective where neither raised the

claim that sentencing was improperly enhanced through the misapplication of Section 2B1.1(b)(2)(C)'s six level enhancement to the facts of this case, the government's failure to adduce evidence establishing that at least 250 individuals suffered an actual loss (a finding esential to classifying them "victims"). and the District Court's failure to make the requisite specific finding that at least 250 individuals suffered actual loss as a result of the instant offense. Petitioner also made the related argument that, but for counsel's failure to raise the claims, he would have received a much shorter prison term or the sentence would have been vacated on appeal. The matter was assigned to U.S. Magistrate Judge Patrick White for Report and Recommendation, and on 11 April 2017, Judge White recommended the Motion be denied. The Report and Recommendation did not, however, resolve or address the specific ineffective assistance of counsel claim raised surrounding the six level multiple victim enhancement. While the Report and Recommendation, at first blush, might appear to resolve the questions asked (as identified heretofore) it clearly does not.

Petitioner timely objected to the Report and Recommendation, reiterating his claims and taking issue with Judge White's failure to expressly resolve the failure of counsel to raise the precise claims presented for Habeas relief. On 28 July 2018, the District Court denied the § 2255 Motion stating that the Petitioner's "objections are already addressed in Magistrate Judge White's Report and Recommendation." [Order Denying § 2255 Motion (28 July 2017)]. A timely Notice of Appeal was filed, and Petitioner now moved this Court for a Certificate of Appealability on the following question: Did the District Court fail to resolve all claims of Ineffective Assistance of Counsel?"

As a preliminary matter, a COA will issue where a District Court fails to resolve all ineffective assistance of counsel claims raised in a Habeas Petition. [See, e.g. Riolo v. United States, No. 13-11603-B, 2013 U.S. Appx. LEXIS 26122 (11th Cir. 21 June 2013) (citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992))].

A noted above, Petitioner raised a claim that both his sentencing and appellate attorneys failed to object to, or appeal from, the six level multiple victims enhancement on the ground that (a) the government's failure to adduce any evidence that each of the "CO2" stock purchasers suffered actual

losses, and (b) the District Court's failure to make specific findings that "CO2" stock purchasers suffered actual losses, and (c) not every purchaser of "CO2" stock suffered actual loss. Rather the Magistrate Judge addressed a closely related issue (i.e. whether sentencing and appellate counsel was ineffective for failing to simply object to the six level enhancement). Indeed, sentencing counsel objected to the enhancement. That objection, however, was not premised upon the failure to prove that the purchasers of "CO2" stock suffered actual loss, essential to classifying such purchasers as victims under the Guidelines. Thus, the specific ineffective assistance of counsel claims raised in the Habeas proceedings were not resolved.

The denial of a § 2255 Motion to vacate or correct a sentence presents a mixed question of law and fact, and the Appellate Court must review the District Court's factual conclusions for clear error and questions of law de novo [Rhode v. United States, 583 F.3d 1289, 1290 (11th Cir. 2009) (per curiam)]. Pro se pleadings, such as the ones made here and in the District Court, are held to a less stringent standard that pleadings drafted by attorney's and, thus, must be construed liberally. [Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam)].

It is well settled in the Eleventh Circuit that District Judges must resolve all claims for relief raised in a Habeas proceeding, regardless of whether relief is granted or denied [Clisby, 960 F.2d at 935-36]. The Clisby holding applies to § 2255 proceedings [Rhode, 583 F.3d at 1291]. The Eleventh Circuit has held that when the District Court fails to either consider or resolve each of the claims raised in a Habeas proceeding, the Court "will vacate the... judgement without prejudice and remand the case for consideration of all remaining claims." [Riolo v. United States, 567 F. Appx. 684, 687-88 (11th Cir. 2015) (vacating judgement denying § 2255 Motion and remanding for consideration of each claim not resolved) (quoting Clisby, 960 F.2d at 928))]. The failure to resolve the specific claims of ineffective assistance of both sentencing and appellate counsel in this case requires remand. Accordingly, consistent with the Eleventh Circuit's practice, the judgement of the District Court should be vacated, and the matter remanded with specific instructions that the District Court consider and resolve the specific ineffective assistance of counsel claims raised in the District Court and on this Petition.

It must be noted that had the District Court considered and resolved Petitioner's specific Ineffective assistance of counsel claims, it would have granted the § 2255 Motion. Judge White's Report and Recommendation, as noted above, although the Probation Department recommended the six level victim enhancement, it "did not explicitly set forth how the number of victims was determined." More importantly, neither the government nor the District Court (prior to or during sentencing) articulated that the purchasers of "CO2" stock suffered any pecuniary harm. Before according an enhancement for multiple victims "the District Court should attempt to connect the number of victims to its loss calculation." [United States v. Anderson, 286 F. Appx. 654, 658 (11th Cir. 2011); United States v. Foley, 508 F.3d 627, 633-34 (11th Cir. 2007)]. Where "the District Court did not make an independent finding on the amount of loss, and the number of victims is defined in relation to the loss calculations," error has occurred. [Foley, 508 F.3d at 633; United States v. Hernandez, 356 F. Appx. 279, 284 (11th Cir. 2009) (Government conceded that the Court "failed to connect the victims to the actual losses they sustained" resulting in improper multiple victims enhancement); see also Anderson, 286 F. Appx. at 658 (holding that "a District Court err[s] in counting victims, pursuant to U.S.S.G. 2B1.1(b)(2), individuals who did not suffer any part of actual loss" determined by the District Court); United States v. Leach, 417 F.3d 1099, 1107 (10th Cir. 2005) (same); United States v Rodriguez, 732 F.3d 1299, 1305 (11th Cir. 2013) (vacating multiple victim enhancement, which had been incorrectly applied.)

Since the misapplication of the multiple victims enhancement resulted in a far greater sentence than the one that would have been imposed had either sentencing or appellate counsel raised the specific claim surrounding the victim/actual loss related proof/finding. Petitioner was clearly denied his Sixth Amendment right to the effective assistance of counsel, entitling him to Habeas relief.

4.BOTH CLISBY v. JONES, 960 F.2d 925 (11th Cir.) AND CARVER v. UNITED STATES, No. 14-15679. ___ F. Appx. (11th Cir. 12 Jan 2018) COMPEL RECONSIDERATION OF THE 7 MAY 2018 ORDER DENYING PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY INASMUCH AS THE COURT CLEARLY OVERLOOKED CONTROLLING AUTHORITY, FACTS AND LEGAL ARGUMENTS PRESENTED IN THE MOTION FOR COA.

As noted, the specific ineffective assistance of counsel claim raised by this Petitioner - i.e. that counsel failed to object to the government's

failure to adduce evidence that at least 250 individuals suffered pecuniary harm - was never addressed by the District Court. The Eleventh Circuit requires such proof before a multiple victims enhancement (such as the one applied in this case) may be applied to a sentence. [See e.g. United States v. Rodriguez, 732 F.3d 1299, 1305 (11th Cir. 20130 (vacating multiple victims enhancement as improperly applied); United States v. Anderson, 286 F. Appx. 654, 658 (11th Cir. 2011) ("a District Court err[s] in counting victims pursuant to U.S.S.G 2B1.1(b)(2), individuals who did not suffer any part of the actual loss"); United States v. Hernandez, 356 F. Appx. 279, 284 (11th Cir. 2009) (the Court "failed to connect the victims to the actual losses they sustained" resulting in improper victims enhancement).

United States v. Foley, 508 F.3d 627, 633-34 (11th Cir. 2007)]. Here, there was no such proof, and counsel failed to object and/or appeal from the substantive and procedural due process error that resulted in a sentence substantially greater that the sentence that would have been imposed had counsel either objected to the error, or appealed from the error.

It bears noting that, in considering the § 2255 Motion, the Magistrate Judge to which it was assigned, duly noted that the multiple victims enhancement was recommended by the Probation Department and the Presentence Report "did not explicitly set forth how the number of victims was determined." [Curshen v. United States, 2017 U.S. Dist. LEXIS 57178 (S.D. Fla. 11 Apr. 2017) (U.S. Magistrate Judge's Report and Recommendation)].

Clearly the District Court did not consider the ineffective assistance of counsel claims raised in the Petitioner's pro se § 2255 Motion. Clisby v. Jones, the Eleventh Circuit held that if a District Court fails to address each claim advanced in a Habeas Petition, "we will vacate the District Court's judgement without prejudice and remand the case for consideration of all remaining claims." [960 F.2d at 938; see also Rhode v. United States, 583 F.3d. 1289, 1291 (11th Cir. 2009) (per curiam) (applying Clisby to § 2255 proceedings)]. Under Clisby, the Courts only role is to determine whether a District Court failed to address a claim - not whether the underlying claim is meritorious. [Dupree v. Warden, 715 F.3d 1295, 1299 (11th Cir. 2013)]. To qualify for relief under Clisby, "[a] Habeas Petitioner must present a claim in clean and simple language such that the District Court may not misunderstand it." [Id.]. Such a clear and unequivocal claim was presented

here, but the District Court failed to address it.

The Eleventh Circuit recently vacated an order denying Habeas relief by the same District Judge assigned in this case, on the ground that he failed to consider each of the claims raised by a Habeas Petitioner. In Carver v. United States, 2018 U.S. Dist. LEXIS 86 (11th Cir. 12 Jan. 2018), the Eleventh Circuit vacated the order denying Habeas relief and remanded the case for further proceeding under Clisby v. Jones. The District Judge in Carver is the same District Judge in Petitioner's case.
The same relief is warranted here.

CONCLUSION

Petitioner prays for an order setting aside the sentence under Indictment 11-CR-20131 and granting such other and further relief as this Court finds just and proper.

Dated: 20 FEBRUARY 2019

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Dated: 19 February, 2019

Clerk of the Court
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Curshen v. United States
Docket No.: 18-6996

Dear Clerk of the Court,

This is in response to your correspondence dated February 6. 2019.

Enclosed is a Petition for rehearing, to be entered in the Court docket referenced above. I request that you forward proof of these documents being docketed to the address below and the petition is presented in good faith and not for delay.

On 19 February, 2019, I placed this Petition for Rehearing in the prison mail box and I certify that a true and correct copy of these documents have been furnished upon the Office of the United States Attorney for Washington, D.C., Neve Dimock, AUSA, by my having placed the same in the United Stated mail, postage prepaid.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Executed on; 20 February, 2019
Joint Base MDL, NJ

Respectfully submitted,

Jonathan Curshen

Jonathan Randall Curshen
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