No:

In the
Supreme Court of the United States

DEMETRIUS HILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Demetrius Hill
Reg. # 68133-053
FCI Terre Haute
P.O. BOX 33
Terre Haute IN 47808

QUESTIONS PRESENTED FOR REVIEW

Do exculpatory recordings that were purposefully withheld by the government warrant a new trial?

Did the district court err in failing to determine that counsel was ineffective when she failed to object to the government's continual questioning Hill as to if each government witnesses was lying ?

Should a writ of certiorari be granted to determine whether counsel was ineffective for failing to use exculpatory audio tapes in Hill's trial?

Does government vouching for witnesses make them *defacto* witness ?

When the district court resentences a defendant to the statutory maximum for each count of conviction after the defendant is successful at challenging sentencing enhancements present an impression of vindictiveness?

Was this court's decision in *Zzedner v. United states*, 547 U.S. 489 (2006) violated in Hill's case?

Does the failure to call prepared defense witnesses reach the level warranting a new trial?

Does the failure to request downward departures at sentencing warrant a resentencing hearing ?

Should sentence enhancements be presented to the jury as required by the Fifth and Sixth amendment ?

In light of this court's decision in G*all v. United States*, 552 U.S. 38 (2007) was Hill's sentence unreasonable?

PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Second Circuit and the United States District Court for the Eastern District of New York.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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I, Demetrius Hill, the Petitioner herein, respectfully prays that a Writ of Certiorari is issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *Hill v. United States*, Docket No: 17-3543 (Reh'g Denied) entered on October 17, 2018 and is reprinted as Appendix A to this petition.

The opinion of the Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *Hill v. United States*, Docket No: 17-3543 (COA Denied) entered on July 23, 2018 and is reprinted as Appendix B to this petition.

The opinion of the Eastern District of New York, whose judgment is herein sought to be reviewed, is an unpublished opinion in *Hill v. United States*, Docket No: 09cv4499 (2255 Denied) entered on October 5, 2018 and is reprinted as Appendix C to this petition.

STATEMENT OF JURISDICTION

The Second Circuit's denial of Hill's Title 28 U.S.C. § 2253 (Reh'g Denied) was entered on October 17, 2018.

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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 for 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.

Id. Fifth Amendment U.S. Constitution

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and 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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE FACTS

1. Overview of the Offense

On February 16, 2005, Hill was found guilty by a jury verdict of an 11 count third superseding indictment charging violations of Title 18 U.S.C. § 922(g)(1); § 924(a)(2) along Title 18 U.S.C. § 1951(a). Hill was also found guilty of violating Title 18 U.S.C. § 844(h)(2) and § 2. Hill was sentenced to 120 months incarceration as to Count I; 240 months incarceration as to Counts II and III. All Counts were to be served concurrently. (Doc. 245)[1]

On May 27, 2008, the Second Circuit Court of Appeals affirmed the sentence and conviction. *United States v. Hill,* 279 F. App'x 90 (2nd Cir. 2008). The United States Supreme Court denied writ of certiorari. *Hill v. United States*, 555 U.S. 936, 129 S. Ct. 330 (2008).

Hill filed a timely Title 28 U.S.C. § 2255 alleging several instances of ineffective assistance of counsel. Since the U.S. Marshall's were holding his legal

[1] "Doc" refers to the docket in the District Court in 02-CR-0728 (DRH).

documents, exhibits and transcripts since 2006 when he was a pre-trial detainee, Hill filed a motion requesting the court note and grant leave to supplement the Title 28 U.S.C. § 2255 when the U.S. Marshall's return his legal documents. (Cv.Doc. 2)[2] The request was filed to preserve the right to supplement his Title 28 U.S.C. § 2255 once access to his legal documents was provided. Eventually, after the U.S. Attorney's Office assured that Hill's legal documents were released, Hill filed an amended Title 28 U.S.C. § 2255 pursuant to Rule 15(c). (Cv.Doc. 31). After newly recorded phone calls were discovered between Hill and Cynthia Plummer (a cooperating witness who testified against Hill), he filed a second amended Title 28 U.S.C. § 2255. (Cv.Doc. 35). Six-years after his filing, on October 5, 2015, the district court denied Hill's Title 28 U.S.C. § 2255. (Cv.Doc. 43). A motion for reconsideration and supplemental thereto was denied as well. (Cv.Doc. 67). Hill appealed and the Second Circuit Court of Appeals denied the request for a certificate of appealability. This timely request for a writ of certiorari followed.

[2] That request has never been addressed by the District Court and is still pending.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

A. DO EXCULPATORY RECORDINGS THAT WERE PURPOSEFULLY WITHHELD BY THE GOVERNMENT WARRANT A NEW TRIAL.

During the trial, Ms. Plummer, (a government cooperator) testified that she had *"no deal"* with the Government other than "use immunity." After the trial, Hill filed a motion for a new trial under Fed. R. Crim. P. Rule 33 averring under oath that he had spoken to Plummer and that she had admitted to having a "deal" with the Government (at the time of Hills' trial), that involved among other things:

a) being allowed to "resign" from her job at the Nassau County Sheriff's Department rather than being fired;

b) the Government agreed to acquiesce to her bail application unopposed in exchange for her testimony and implicating Hill in criminal conduct via written statements;

c) the Government agreed to dismiss Plummer's case for obstruction of justice in exchange for her testimony at trial.

The Government, In direct response to the allegations in the Rule 33 motion, denied Plummer had any deals prior to or during Hill's trial. The Court denied the Rule 33 motion, a request for discovery and evidentiary hearing – instead relying on the unsupported and the unsubstantiated word of AUSA Donoghue that no deal existed. Two phone recordings between Hill and Plummer prove unequivocally that the government was not candid with the court as Cynthia Plummer *did, in fact, have a secret deal with AUSA Donoghue and the Nassau County Sheriff's*

Department at the time she testified for the Government at Hill's trial. The audio CD recordings were provided to the District Court.

The suppression by the Government of evidence favorable to Hill violates due process where that evidence is material to guilt or punishment "irrespective of the good faith or bad faith of the prosecution." See, *Brady v. Maryland*, 373 U.S. 83 at 87 (1963); *United States v. Agurs*, 427 U.S. 97 (1976). In *United States v. Bagley*, 473 U.S. 667 (1985), this court disavowed any difference between "exculpatory and impeachment" evidence. For *Brady* purposes, *Bagley* established that favorable evidence is material and that Constitutional error results from its suppression by the Government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (*Id.* at 682). What makes this significantly more egregious, is the fact that the AUSA Donoghue enlisted the help of Nassau County jail officials in hiding the deal to allow Plummer to resign . . . by keeping her name listed as an employee of the jail months after her resignation. See *Napue v. Illinois*, 360 U.S. 263, 269 (1959). Had the jury known of the deals that existed with the Government and the Nassau County Sheriff's Department, the jury would have had reasonable doubt – the jury asked for a read-back of her entire testimony. *Kyle v. Whitley*, S 14 U.S. 419, 453 (1995), *Ouimette v. Moran*, 942 F.2d 1, 9-11 (1 Cir. 1991) (due process violated because prosecutor failed at trial to disclose extensive

criminal record of state's chief witness and withheld from Pet. existence and nature of deals between state and witness). *Shih Wei Su v. Filion*, 335 F.3d 119, 127-30 (2d Cir. 2003) (Prosecutor's failure to correct Government witness false testimony and subsequent attempt to bolster witness credibility violated deft's due process rights); *United States v. Mason*, 293 F.3d 826, 829-30 (5th Cir. 2002) (Prosecutor failure to correct Gov. witnesses' statements regarding plea agreement was a violation of defendant's due process rights).

B. DID THE DISTRICT COURT ERR IN FAILING TO DETERMINE THAT COUNSEL WAS INEFFECTIVE WHEN SHE FAILED TO OBJECT TO THE GOVERNMENT'S CONTINUAL QUESTIONING HILL AS TO IF EACH GOVERNMENT WITNESSES WAS LYING

Counsel failed to object at least 15 times when the AUSA repeatedly asked was each government witness lying in violation of *United States v. Richter,* 826 F.2d 206 (2nd Cir. 1987). The Court found that *plain error* occurred with regard to this issue at the Rule 29 hearing. See February 27, 2006, Page 76 transcript:

> "To determine whether the error by the government in asking the questions previously referred to and error by the Court in not interjecting itself, even though it was an absence of an objection, here there is plain error."

The Court goes on to state: "in any event, a legal error has occurred and I will assume and believe it to be the fact that it was plain." *Id.* Nonetheless, the Court went on to find that Hill was not "prejudiced" in the sense that the outcome of the District Court proceeding would have been different had the questions not been

asked." *Id.* at 85. Hill posits that the *plain error* and resulting prejudice should be viewed in the context of all the errors committed by counsel.

First, counsel knew that she should have objected, and Hill believed any competent counsel would have objected. Counsel seems to have been surprised she did not object, e.g.:

> "I apologize to the Court, I do not see it in the record and I have to say instinctively the questions are so objectionable I cannot imagine that I did not object but I do not see the objections in the record." *Id.* at 75.

In an argument for a new trial, counsel even noted just how prejudicial the questions were, *e.g.* "the government really makes attempts to make a fool of the defendant in a completely inappropriate fashion." *Id.* Counsel states that the questions were "rapid fire" and covered some seven witnesses – should lead this Court to believe just what kind of counsel would sit there and allow this type of questioning. Counsel's errors in not objecting over and over to this kind of questioning fell below an objective standard of reasonableness because any lawyer would have objected even if only once.

There is no question that counsel's failure to object subjected Hill to a "much more onerous" standard of review. See *Burns v. Gammon,* 260 F.3d 892, 898 (8th Cir. 2001)("Plain error review is much more onerous for both the direct appeal defendant the habeas corpus petitioner than is a review for a defendant or petitioner pursuing a properly preserved objection."); *United States v. Chavez,* 193 F.3d 375,

379 (5th Cir. 1999)("counsel's failure to object certainly diminished Chavez's possibility of reversal on direct appeal.") The failure to object, then, could rise to ineffective assistance of counsel. *See Burns,* 260 F.3d at 898 (finding ineffective assistance of counsel because counsel's failure to object constituted a deficient performance which prejudiced his client because the result at trial or on appeal likely would have been different)

C. SHOULD A WRIT OF CERTIORARI BE GRANTED TO DETERMINE WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO USE EXCULPATORY AUDIO TAPES IN HILL'S TRIAL

Trial counsel was in possession of crucial evidence that Hill was not in robberies with Guzman. Counsel refused to use it after initially acknowledging that she would. While at the Passaic County Jail, the government in an attempt to obtain incriminating evidence against Hill, sent Guzman to visit Hill on several occasions. The government recorded all the visits. This monitoring and recording were accomplished via the visiting rooms telephones. During a visit on November 15, 2004, Guzman and Hill had a dialog over a visit by federal agents in reference to robberies. Hill empathetically denied any involvement in any robbery which Guzman conceded to. This evidence was no introduced at trial. The jury would have been able to hear Guzman in a genuine conversation when she never stated Hill was involved in robbery's. The significance of November 15, 2004 tapes is that the AUSA did not produce them at Hill's trial because they were exculpatory..

All attempts at having the tapes released were denied. For Hill, this was a win/win situation since he had no way of knowing he was being monitored and recorded during that visit and there was no proof that Guzman knew that either. Yet counsel refused to use the only piece of evidence that could have rendered a not guilty verdict. The Passaic County tape recordings would have planted a reasonable doubt needed for the general conspiracy and give Hill a much needed creditability boost after being made to look like a fool for saying the government witnesses were liars.

D. DOES GOVERNMENT VOUCHING FOR WITNESSES MAKE THEM *DEFACTO* WITNESS

In *Strickland v. Washington*, 466 US 668, 686 (1984), the court laid the foundation for ineffective assistance of counsel claims. During the trial, the government unconstitutionally vouched for the witnesses making themselves a *defacto* witness. The Fifth Circuit has reversed several cases for similar vouching as took place in this case. *United States v. Smith*, 814 F.3d 268 (5th Cir.2016):

> "In considering the impact of what is said the court also must be concerned with the great potential for jury persuasion as a spokesman for the government tend to give to what he says the ring of authenticity. The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty."

This is the epitome of what transpired in this case, where the government asked Hill 15-times was each witness lying, without any objection from trial counsel and the court stayed quite as well, yet interjected itself when Hill began to give agitated responses to these bogus questions. The prosecutor goes even further by making himself a *de facto* witness against Hill *e.g.* the prosecutor says "when we met in that room ..." and other such statements, that directly make himself a witness against Hill, the errors, in this case, are similar to those condemned in *Floyd v. Meachum*, 907 F.2d 347, 353-55 (2nd Cir. 1990)(faulting prosecutor for characterizing non-testifying defendant as "liar" more than 40-times, improperly referencing Fifth Amendment and inviting jury to asses her own credibility personal integrity and professional ethics.), *United State v. Drummond*, 481 F2d 62, 63-64 (2nd Cir. 1973). Prosecutorial vouching "suggest to the jury that there is additional evidence not introduced at trial but known to the prosecutor that supports the witness's credibility, or may induce the jury to trust the government's judgement rather than its own view of the evidence. "*United States v. Young*, 470 U.S.1, 18-19 (1985). What occurred in this case was and is a fundamental denial of due process ... and there were no curative measures taken on Hill's behalf, not by counsel Kellman who repeatedly failed to object. In the context of ineffective assistance of counsel, "it is well settled that a prosecutor in a criminal case has a special obligation to avoid improper suggestions, insinuations, and especially

assertions of personal knowledge" *United State v. Edwards*, 154 F.3d 915, 921(9th Cir. 1998) and there is no excuse for counsel not to have objected. The right to counsel is meaningless if it is not the right to effective assistance of counsel. There is no question that the prosecutor committed misconduct in his statements and questions during the trial, repeatedly asking Hill if each witness was lying. *United State v. Richter*, 826 F.2d 206 (2nd Cir. 1987) and by making himself a *de facto* witness against Hill when he asked (stated) "when we met in that room" and another such comment.

E. WHEN THE DISTRICT COURT RESENTENCES A DEFENDANT TO THE STATUTORY MAXIMUM FOR EACH COUNT AFTER HE IS SUCCESSFUL AT CHALLENGING SENTENCING ENHANCEMENTS PRESENT AN IMPRESSION OF VINDICTIVENESS.

Hill was found guilty of 11 counts after trial. The first Pre-Sentence Investigation Report ("PSI") was formulated prior to counsel filing the "Rule 29" motion although the request to file such a motion had been preserved. The first PSI report was based on all 11 counts of conviction and calculated Hill's sentence as follows:

> "Advisory guideline provisions: Counts 1 through 5 based on the total offense level of 29 in a criminal history category of II, the guideline imprisonment range is 97 to 121 months.
>
> Count 6: per guideline 2K2.4(b) the sentence is the minimum term required by statute (seven years). Counts 7 and 8: per guideline 2K2.4(b) the sentence is the minimum required by statute (25 years on each count).

Counts 9 through 11: per guideline 2K2.4(a) sentence is determined required by statute (10 years on Count 9 and 20 years on count 10 and 11)."

On February 27, 2006, the Court granted Hill's Rule 29 motion for judgment of acquittal on eight of the 11 counts. Specifically, counts 4 through 11 were dismissed on jurisdictional grounds. The Court requested a new PSI report reflecting the dismissal of the counts. The first five counts had a guideline range of 97 to 121 months so that once the Court dismissed the eight counts including two of the first five counts the new guideline calculation should have been below the 97 to 121 month previously determined. The only objection the government had was requesting a two-point enhancement for obstruction of justice, relative to the first PSI report.

Yet, after the Court's ruling of the Rule 29 motion, the government along with the Probation Officer added at least "ten" new enhancements recalculating Hill's sentence under the remaining three counts until Hill faced 50 years. It was only after the success of the Rule 29 motion that the enhancements and the recalculations began and were calculated into the sentence, this was clearly vindictive. *United States v. King,* 126 F.3d 394, 397 (2nd Cir. 1997)(a "presumption of vindictiveness arises when the circumstances of the case create a 'realistic likelihood' of prosecutorial vindictiveness"); *United States v. Johnson,* 171 F.3d 139, 140 (2nd Cir. 1999) (actual vindictiveness must play no part in a

prosecutorial or sentencing decision and since the propriety of such vindictiveness may unconstitutionally deter a defendant's exercise of his rights the appearance of the vindictiveness must also be avoided.) Facts are facts; the AUSA would not have sought over ten new enhancements had the court not dismissed eight counts creating the possibility that Hill would get less than ten years incarceration. *See United States v. Pearce,* 395 U.S. 711 (1969).

Counsel should have argued (and may have been successful) the vindictiveness of all the new enhancements, of which there was more than ten during the request for the new PSI Report. This could have significantly altered the outcome of Hill's sentence since the court very well may have refused to entertain the questionable enhancement or the Court of Appeals may have reversed because of the improper enhancements. *See Johnson,* supra at 96:

> "A criminal defendant must have a right to contest the recommendations of the PSI report agreed to by the government without fear that, if he or she has success, the government will respond with a new and substantially different position with regard to guideline calculations and be able to force courts to entertain the new arguments."

The Court also went to state "we believe in such circumstances it is within our power to decline to entertain the cross appeal and that it would be appropriate to do so." *Id.* Counsel failed to do some investigation into Hill's background, e.g., when Hill's family called Ms. Kellman's office several times requesting to meet with her, she never returned the calls and refused to be present during the meeting with

the PSR probation officer. The court even commented that "now much of this is very hard to verify because much of the information is provided by him." *Id.* (June 13, 2006, transcript at 365).

Because counsel failed to argue the violation of Fed.R.Crim.P. 32(b)(6)(d) since there was "no good cause shown" for the new enhancements; and not set forth facts of proof of vindictiveness in the new guideline calculations, Hill's sentence may have been exceptionally lower. See *Glover v. United States,* 531 U.S. 198, 202-204 (2001) ("the Court does not suggest that a minimum amount of additional time in prison cannot constitute prejudice. Quite to the contrary, we suggest that any amount of actual jail time has a Sixth Amendment significance.")

F.WAS THIS COURT'S DECISION IN *ZEDNER V. UNITED STATES*, 547 U.S. 489 (2006) VIOLATED IN HILL'S CASE.

Hill's Speed Trial rights were violated when the Court allowed Hill to sign a perspective waiver of his speedy trial rights. Counsel had an obligation to advise the court that Hill's case should have been dismissed pursuant to the Speedy Trial Act, Title 18 U.S.C. § 3161-3174. Section 3161(c)(1) of the Act states in relevant part:

> "In any case in which a plea of not guilty is entered, the trial of the defendant charged with the information or indictment with the commission of an offense shall commence within 70 days of the filing date (and making public) of the information or indictment or from the date the defendant has appeared before a judicial officer of the Court in which such charge is pending, whichever date last occurs."

Section 3162(a)(2) of the Act states in turn that "if a defendant is not brought to trial within the time limit required by Section 3161(c) as extended by section 3161(h) the information on them should be dismissed on motion of the defendant." In Hill's case, the District Court totaled 157 days "chargeable time" under the Act that had elapsed since the case began, well in excess of the 70 day requirement. Hill included times of 21 days from May 12th through June 2, 2003; 28 days from June 23rd through July 21, 2003; 28 days from November 25th through December 23, 2003, and 17 days from January 5th through January 22, 2004.

The government and the District Court took the position that since Hill *appealed* his denial of the release on bail on April 24, 2003, which was pending until May 5, 2004, that all that time should be excluded from the considerations of a speed trial violation. *United States v. Rivera,* 844 F.2d 916 (2nd Cir. 1988); *United States v. Tunnessen*, 763 F.2d 74, 76 (2nd Cir. 1985) (an interrogatory appeal automatically tolls speed trial clock) In short, the Court took the position that since 94 of the 157 days Hill alleged on his Speedy Trial Act fell within the period that the interlocutory appeal was pending, Hill was left with only 63 days that counted toward his Speed Trial clock. Thus Hill was short seven days from the speed trial violation he requested. That decision is in error.

First, the Act says "delay caused by the interlocutory appeal," here no delay ever occurred from the *pro-se* appeal. The prospective Speedy Trail waivers were invalid, so that the time from June 27, 2002, to September 13, 2002, should have been counted against the Speedy Trial clock since *Zedner v. United States*, 547 U.S. 489 (2006) was decided in 2006, while Hill's case was pending.

The Court relied on *United States v. Oberroi,* 547 F.3d. 436 (2nd Cir. 2008). *Oberroi* is inapplicable because of to the prospective waiver. The Court could not allow a prospective waiver for setting a scheduling order for motions. The Court excluded time prospectively based on a waiver and not pursuant to any section of the Speedy Trial Act. It would be a miscarriage of justice to retrospectively attribute the scheduling order to some section of the Speedy Trial Act, since (a) counsel had no intention of filing any motions during that period, (b) no motions were discussed in court, (c) the Court never expressly stopped the Speedy Trial Act on the record or in a written order, other than Hill's prospective waiver, which is invalid. *See, Oberroi.* Moreover, the Government response time to the motion must be calculated since once counsel made no motion the government had an affirmative obligation to move the case along as did the court. From August 1, 2002, through September 3, 2002, no motions were filed. In other words, once there were no motions filed by Hill, the Government and the court were required to call Hill back into court to address the status of said motions and not simply allow

the time to run out. The same is true for the court, which would have had the case under advisement on September 3, 2002. Further *United States v. Oberroi,* 547 F.3d. 436 (2nd Cir. 2008), cannot apply since it represents the "creation of a new legal principle." Cf, *Policano v. Herbert,* 2005 WL 3046798 (2nd Cir. 2005). The same is true for September 13, 2002. thru October 11, 2002, as there was a prospective waiver not covered by the statute.

This court's decision in *Alabama v. Bozeman*, 533 U.S. 146 (2001) in instructive. In *Bozeman*, the Court concluded that a return of an individual who has been transferred to another State for trial to the sending State before his trial is complete requires dismissal of the charges brought in the receiving State if the requirement of the IAD is violated. In essence, since the federal authorities chose to transfer Hill to the State authorities in order to see if a conviction would be obtained, it was the government who caused the perspective waiver of the speedy trial violations. Hill did not openly and knowingly waive any speed trial acts in court by requesting to be transferred to State authorities for prosecution. It was the government's doing that caused the transfer of Hill to the State authorities for prosecution and thus causing the speedy trial violation to occur.

This Court in *Zedner v. United States*, 547 U.S. 489 (2006) addressed the same situation like the one that Hill now faces. The *Zedner* court held that defendant may not prospectively waive the application of the speedy trial act. In fact, during

the request for a speedy trial violation that was before this court during the trial, the Court took the position that Hill's continual *pro-se* motions pending before the court filed by Hill or counsel were, in fact, a perspective waiver of Hill's right to request a speedy trial. Ironically, the District Court in denying the motion for speedy trial reached a determination that Hill had prospectively signed and consented to five waivers of his speedy trial rights totaling a duration from several days to several months on June 27, 2002; September 13, 2002; November 21, 2003; December 24, 2003; and January 23, 2004. This Court has clearly established that these perspective waivers, do not constitute a waiver of a speedy trial act. During the motions calendar scheduled for June 27, 2002 (D.E. 10) Hill was forced to sign a waiver of the speedy trial act (D.E. 11) on that same day a prospective waiver for the motions that were due back on September 13, 2002. That type of prospective waiver cannot be included as per the Supreme Court's decision in *Zedner.*

In sum, according to this Court's decision in *Zedner,* numerous dates that were prospective waivers either because of the government presenting Hill for State prosecution or Hill's own prospective waiver of the Speedy Trial Act as signed before this Court were not included in this Court's calculations of the 63 days in which the Court determined that could be attributable to the Speedy Trial Act violation. Respectfully so, Hill presents that in calculating the added days the

government surpassed the 70 day requirement by multiple weeks if not months in violations of Hill's speed trial act protection.

1. The IADA Violation

Hill was being held on a State indictment of possession of a weapon, robbery and promoting prison contraband and Suffolk County Jail from March until September 2002. On May 8, 2002, a complaint was filed in the E.D. New York and an arrest warrant was issued. (D.E. 1 and 2). Hill was taken from State custody and arraigned on May 21, 2002. (D.E. 4, 5, 6, 7) He was then taken back to State custody. Hill was indicted federally on June 20, 2002, and arraigned on the indictment on June 27, 2002, then sent back to State custody. On September 13, 2002, Hill was taken into Federal Custody for a Status Conference and returned to State custody. From September 30, 2002, until December 2003 (where Hill was acquitted of the final State charges), the Government repeated transferred Hill back to State custody then brought him back to federal custody. Kevin Keating was ineffective counsel for no immediately filing a motion to dismiss the federal charges since they were the "receiving State." See, *Knight* supra, and took Hill into custody and returned him to State custody prior to any trial taking place in violation of IAD 4(e). See *Alabama v. Bozeman.* Second, the IAD was violated when the trial was not had within 120 days of Hill being taken into federal custody. Robin Smith was required to raise this issue on direct appeal as the dismissal is

mandatory in with or without prejudice, would have been the only issue which may have been decided in Hill's favor since the "anti-shuttling" provision was violated continuously in Hill's case. See *United States v. Mauro,* 436 U.S. 340 (1978).

G. DOES THE FAILURES TO CALL PREPARED DEFENSE WITNESSES REACH THE LEVEL WARRANTING A NEW TRIAL.

Hill suffered ineffective assistance when counsel during the trial counsel rendered ineffective assistance when she failed to present several defense witnesses, specifically, Pastor Skillings. Skillings, a witness who had no vested interested in Hill's liberation or conviction, would have corroborated Hill's testimony that could have resulted in an acquittal of Count I. *Pavel v. Hollands,* 261 F.3d 217-18 (2nd Cir. 2001) (counsel's failure to call important fact witness and a medical expert at trial was ineffective assistance because testimony of those witnesses would have rebutted prosecution's already weak case); *Williams v. Washington,* 59 F.3d 673 at 682 (7th Cir. 1995)(in a credibility contest the testimony of a neutral dis-interested witness is exceedingly important). Pastor Skillings' testimony would have highlighted other testimony and should have been used during closing arguments.

H. DOES THE FAILURE TO REQUEST DOWNWARD DEPARTURES AT SENTENCING WARRANT A RESENTENCING HEARING.

In many circuits, the courts had begun to grant downward departures due to harsh conditions of pre-sentence confinement. See *United States v. Brinton*, 139 F.3d 718, 725 (1998)(30 month downward departure); *United States v. Hernandez-Sant*, 92 F.2d 97, 101, n.2 (2nd Cir. 1996)(departed three levels); *United States v. Elvin Francis,* (reported in the New York Law Journal February 2, 2001)(departed one level).

Hill had endured a nightmare during his time in pre-trial confinement. Hill was sadistically beaten by the Suffolk County Jail Guards, he was then sexually assaulted when a nurse pulled his pants down and injected him with "Haldol." The beatings and side effects were so bad a judge ordered that he immediately receive medical attention.

While at the Metropolitan Detention Center ("MDC") Hill was being brutalized no one believed him. The same officers who had been writing the incident reports and the Captain who claimed Hill had started a "riot" in the Special Housing Unit (where all prisoners are locked in their cells 24 hours a day) were all prosecuted by the U.S. Attorney's Office, reprimanded or fired by the Office of the Inspector General (OIG), including the Captain. Hill was housed at MDC Brooklyn, (five times); Suffolk County Jail (two times); Nassau County Jail (three times); MCC

(Manhattan) (two times); USP Lewisburg (one time); Passaic County Jail (one time); and the Queens Detention Center (one time). The Passaic County Jail was closed down due to its horrible conditions. The matter was so publicized that many pretrial inmates received downward departures due to the conditions at that prison. Yet counsel never made any specific requests for any departures despite Hill even having been housed in Ten South – the Terrorist Unit at MCC. He was housed in an "AD Max" section of MDC otherwise known as a Terrorist Unit of Brooklyn MDC. Counsel claimed to have "never heard" of the downward departure due to harsh pre-trial conditions of confinement. These pre-trial, that reached due process violations, warranted sentence reductions.

I. SHOULD SENTENCE ENHANCEMENTS BE PRESENTED TO THE JURY AS REQUIRED BY THE FIFTH AND SIXTH AMENDMENT

"Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence. *Cf. In re Winship*, 397 U.S. 358 (1970), *United States v. Bell*, 808 F .3d 926 (DC Cir. 2015).

That is the essence of what occurred to Hill *e.g.* it is a fact that his original PSI Report calculated his sentence at less than 10-years, then the district court vacated 8-counts, which should have lowered the sentence further, instead the probation office added numerous new enhancements, and recalculate Hill's sentence up to 50-years! The actual guideline range exceeded the statutory maximum, and the court saw fit to apply the new enhancements and sentence Hill to the statutory maximum of 20-years! A sentence Hill could not have received in the absence of those enhancements, and which is extremely rare in Hobbs act cases. Accordingly, Hill's requests that counsel's actions be viewed as ineffective for requiring the granting of an evidentiary hearing in the District Court.

1. Sentencing decisions that increased Hill's sentence that were made by the District Judge beyond a reasonable doubt violated Hill's Sixth Amendment rights.

At Hill's sentencing, the Court conducted a *Fatico* hearing, after it found that the government had proved certain facts, including whether the defendant had committed various robberies that were relevant to whether an aggravating role adjustment under United States Sentencing Guidelines § 3B1.1 was appropriate, "beyond a reasonable doubt." *See* June 13, 2006, Tr. at 316-318. This standard was in error and a due process violation and has been criticized by numerous court's nationwide.

A year after this Court decided *Rita* v. *United States*, 551 U.S. 338, 371-372 (2007), a deeply fractured Sixth Circuit *en banc* panel held that so long as the defendant's sentence "does not exceed the * * * United States Code maximums," the defendant categorically has no cognizable jury trial right claim. *White*, 551 F.3d at 382. However, writing for six dissenters, Judge Merritt questioned how that possibly can be correct, reasoning that where "the reasonableness - and thus legality - of [the defendant's] sentence depends entirely on the presence of facts that were found by a judge, not a jury," *the sentence logically is "in contravention of the Sixth Amendment*" rule set forth in *Apprendi* and *Blakely*. *Id.* at 386-387.

In *United States* v. *Broxmeyer*, 699 F.3d 265, 298 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013), then-Chief Judge Jacobs of the Second Circuit, echoing Justice Breyer's due process approach, urged that "the offense of federal conviction [should not] become just a peg on which to hang a comprehensive moral accounting," with the defendant's sentence being "upheld as reasonable" based solely on the district judge's finding that the defendant committed additional, more serious crimes. 699 F.3d 265, 298 (2012) (Jacobs, C.J., dissenting), *cert. denied*, 133 S. Ct. 2786 (2013). More recently, Judge Kavanaugh of the D.C. Circuit observed that finding a lengthy sentence substantively reasonable solely on the basis of a judge's finding of "uncharged conduct * * * *seems a dubious infringement of the rights to due process and to a jury trial.*"

United States v. *Bell*, 808 F.3d 926, 928 (2015) (Kavanaugh, J., concurring in denial of reh'g en banc), petition for *cert. denied,* October 3, 2016. Judge Millett has asked for the Supreme Court's urgent intervention, recognizing that "only the Supreme Court can resolve the contradictions in the current state of the law." *Id.* at 932 (Millett, J., concurring in denial of reh'g en banc).

As presented in *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015):

> "before depriving a defendant of liberty, the government must obtain permission from the defendant's fellow citizens, who must be persuaded themselves that the defendant committed each element of the charged crime beyond a reasonable doubt. That jury-trial right is "no mere procedural formality," but rather a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Id. Bell at 930.

In this case, Hill was found guilty of one offense, however, the Court at sentencing, made several "beyond a reasonable doubt" determination that robberies were committed and that "drugs" were stolen to elevate his sentence to the statutory maximum. *See* June 13, 2006, Tr. at 316-318. "The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' " Cf. *Alleyne* v. *United States*, 133 S. Ct. 2151, 2156 (2013) (plurality opinion). At a minimum, the "answer to [the] implicit question in *Apprendi* - what, exactly, does the 'right to trial by jury' guarantee? - is that it guarantees a jury's determination of facts that constitute the elements of a crime." *Id.* at 2167 (Breyer,

J., concurring). Hill was convicted of possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1), conspiring to commit robberies of narcotics traffickers in violation of 18 U.S.C. § 1951(a), and one count of robbery of narcotics traffickers in violation of 18 U.S.C. § 1951(a).

Yet, on the basis of facts found only the court at the sentencing hearing, the court determined that Hill had committed various robberies that were never charged by the grand jury, nor were presented to the jury for a verdict. Hill chose to have a jury trial, not a judge based trial.

That judicial finding was then the express driving force behind both the district judge's de-termination that Hill deserved a 20-year sentence. If the constitutional right to a jury is to have *any substance of Hill's sentence* found by his peers, the jury not the court at sentencing.

J. IN LIGHT OF THIS COURT'S DECISION IN *GALL v. UNITED STATES*, 552 U.S. 38 (2007) WAS HILL'S SENTENCE UNREASONABLE.

Hill's sentence is unwarranted. Twenty years denies rehabilitation as it removes the person from society so that he no longer knows how to function in a normal society and most defendants do not receive the statutory maximum as a first offense as adults. The District Court was of the belief that Plummer somehow became a "felon" due to Hill. (See June 13, 2006, Trial Tr. at 366) In fact, as

stated in Hill's Rule 33 motion, Plummer's criminal case was dismissed nearly 3 months after Hill's conviction. She was also allowed to resign and was not fired.

Hill's sentence was unreasonable in light of the Supreme Court's decision in *Gall v. United States,* 552 U.S. 38 (2007). This Court decided in reviewing the reasonableness of a sentence outside of the advisory guideline range, that the Court may take into account that there is no rule that requires "extraordinary" circumstances to justify a sentence outside the guideline range.

The appellate counsel in Hill's case had an obligation to present to the court the multiple cases of abuse that Hill had encountered while in pre-trial detention. The Court failed to consider not only the consequences of Hill's incarceration during the pre-trial detention where he was maintained in a special housing 23 hour lock down situation during most if not all of his incarceration, but the Court failed to consider the government's inappropriate actions in enhancing Hill's sentence by multiple levels after the Rule 29 motion had been granted. The government's vindictiveness in light of Hill's success during the Rule 29 motion causes the District Court to consider whether a sentence outside of the advisory guideline range is appropriate in light of the government's actions.

In reviewing a reasonable sentence outside the guideline range, appellate courts were granted and therefore may take a degree in variance into account to consider the extent of deviation from the guidelines permitted by the District Court. The

Supreme Court took the position that it rejected an Appellate Court's rule that requiring "only extraordinary" circumstances to justify a sentence outside of the guideline range. Counsel had a requirement to present in light of the Supreme Court's decision in *Gall* that in light of Hill's substantial suffering at the hands of the government, that the Court had the authority to consider a sentence outside of the advisory guideline sentence that it was within its power to grant one. In fact, the Supreme Court went further into considering that after giving both parties the opportunity to argue for whatever sentence they deem appropriate, the District Court should then consider all of the factors enumerated in Section 3553(a) in order to determine whether they support the sentence requested by one of the parties.

It is evident, that in this case counsel failed to advise the Court of the District Court's failure to consider Section 3553(a) in factoring a sentence appropriate in light of the Rule 29 decision in this case and in light of the abuses caused by the government authorities while in custody by the Federal Bureau Prisons.[3]

As such, this court must agree that the granting of a writ of certiorari is required to develop the record as to what strategy if any was being followed by sentencing counsel.

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[3] This Court should note that a majority of the correctional officers that Hillalleged were beating and abusing him while in custody of the Federal Bureau Prisons have since been indicted and prosecuted for their actions and are currently serving time at other federal institutions.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Second Circuit.

Done this 10, day of January 2019.

Respectfully submitted,

Demetrius Hill
Reg. # 68133-053
FCI Terre Haute
P.O. BOX 33
Terre Haute IN 47808