No. 18-8521

IN THE

SUPREME COURT OF THE UNITED STATES

ANGEL GALAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MR. ANGEL GALAN
(Your Name)

P.O. BOX 6000
(Address)

GLENVILLE, WEST VIRGINIA 26351
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER THE SENTENCING COURT'S UPWARD VARIANCE FROM 71 MONTHS TO 84 MONTHS FOR FELON IN POSSESSION OF A FIREARM WAS SUBSTANTIVELY UNREASONABLE

II. WHETHER THE OBSTRUCTION ENHANCEMENT WAS UNWARRANTED AND EMPHATICALLY OVERLY PUNITIVE

III. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADDRESS TRIAL COUNSEL"S FAILURE TO MANDATE A NON-UNANIMOUS JURY VERDICT

LIST OF PARTIES

[XX] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at October 1, 2018; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[X] reported at Summary Order; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**: N/A

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[X] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the N/A court appears at Appendix _____ to the petition and is

[X] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was October 1, 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: N/A, 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 N/A (date) on N/A (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**: N/A

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, 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 N/A (date) on N/A (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A.) The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to have the assistance of counsel for his/her defense," and the United States Supreme Court has recognized that, "the right to counsel is the right to effective counsel." Petitioner was deprived the right to effective counsel when Appellate Counsel failed to address trial counsel's failure to mandate a jury charge, directed by the court, which deprived Petitioner of his personal liberty that triggered a clear and concise Due Process of Law violation.

B.) The Sixth and Fifth Amendment's to the United States Constitution are Applicable and Involved in this present case.

STATEMENT OF THE CASE

Petitioner, Angel Galan, on June 8, 2014, was arrested by Officer's of the New York Police Department and charged with possession of a weapon and personal quantities of marijuana and cocaine. Following his arraignment in Kings County Criminal Court, Petitioner was out on state bail. Consequently, on June 26, 2014, based on an affidavit and complaint charging Petitioner with felon in possession of a firearm, a federal arrest warrant was issued. On June 26, 2014, Petitioner was arrested by federal authorities and presented before magistrate judge on July 1, 2014, and Petitioner was released on a unsecured bond. Petitioner remained on bond with release conditions becoming less restrictive over time, until October 16, 2016, when the jury returned a verdict of guilty.

The Governments case relied on the testimony of two NYPD Officer's and their Supervising Lieutenant. Subsequently one of the NYPD Officers testified that., "[A]s he approached Petitioner., he saw him place a object on top of a car's tire. The second officer testified that she was present on the scene, but did not see Petitioner place an object on a tire, not did she see the other officer recover the firearm from the tire. As unimaginable as it may sound neither of the officer's recalled their supervising lieutenant's existance or involvement until more then six months after the Petitioner was arrested." Petitioner emphasizes at trial, the Government introduced absolutely no physical evidence, DNA evidence, or forensic evidence

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linking Petitioner to the firearm he was charged with possessing. This Petitioner incurred a Sentence of 84 Months imposed for felon in possession of a firearm. This sentence was an upward variance from the Guideline range and included a two-level enhancement for obstruction of justice. Petitioner's criminal history category was II and has a prior aggravated felony for Hobbs Act Robbery, plus a few miscelaneous arrest approximately 20 years old.

Consequently the indictment charged a single count felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). In addition, the Government charged Petitioner under ACCA, subjecting him to a mandatory minimum sentence of 15 years, whether by guilty plea or jury verdict. Subsequently with no viable option, Petitioner exercised his Constitutional Right to Trial and was convicted on the sole count in the indictment.

At the conclusion of the jury trial the Government pressed for Petitioner to be sentenced under the ACCA. Following a 2 year long litigation on this point, the court rejected the Government's position and did not sentence Petitioner under the ACCA. The guidelien range of imprisonment of 57 to 71 months included a two-level enhancement for obstruction of justice. The enhancement was based on Petitioner's affirmation in response to the Government's opposition to his motion to suppress the weapon in this case. Without prior notice the sentencing judge upwardly departed from the Guidelines and imposed a Sentence of 84 Months.

SUPPRESSION MOTION AND HEARING

Petitioner moved at pretrial for suppression of the weapon and the other items recoved from his person. The Government opposed the

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motion arguing that the Petitioner failed to support his factual allegations with an affidavit based on personal knowledge. In reply, and in support of his motion, Petitioner submitted an affirmation, declaring the following:

> "As I walked, the police officer spoke to me, telling me in effect to "come here", though I do not recall the exact words. The officer then grabbed my belt preventing me from leaving. In the minutes prior to the police officer grabbing me, I had not removed anything from my belt or clothing and I had not placed any object on top of the vehicle's tire."

On February 4, 2015, the court conducted a suppression hearing. The Government presented three members of the New York Police Department who were present on the scene of the crime and arrest: Officer Andy Cruz., Officer Wilson Verdesoto., and Lieutenant Barbara Fisher. Following an evidentiary hearing, the district court denied the motion to suppress.

JURY TRIAL

Petitioner respectfully and humbly affirms after selection of the jury, the trial commenced on October 13, 2015. The Government on it's case-in-chief called the three New York Police Officers who Petitioner emphasizes all lied. In addtion, the Government called presented three experts: a criminologist who performed DNA testing of recovered firearm yeilding insufficient result for further testing and comparison (See Trial Tr. 323-24), an ATF agent who confirmed that the firearm and ammunition recovered were not manufactured in New York State (See Trial Tr. 359). Petitioner called two eyewitnesses who confirmed the presence of a female officer on the scene before the two male officers appeared on the scene (See Trial Tr.);Hence, "[P]etitioner re-iterates and emphasizes, both Officer Cruz and Officer

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Verdesoto testified under oath that they were the arresting officer's and actually placed Petitioner in cuffs and under arrest. In fact, they testified that they were the only two officer's at the scene and Petitioner's testimony encompassed by his two witnesses who were present at the scene with direct knowledge of the events occurring on the night of Petitioner's arrest, all validated the truth that both Officer Cruz and Officer Verdesoto was not alone and their supervisor, Lieutenant Barbara Fisher, was present at the scene." In fact, Officer Cruz., Officer Verdesoto., and Lieutenant Barbara Fisher, were all together and assigned to the Anticrime Unit of the New York Police Serving Area 3, a housing bureau precinct that covers NYC Housing Developments (See Trail Tr. 45-46, 185-187). Nonetheless around 1:45 a.m. on the morning of June 8, 2014, the officers were patrolling a Bushwick neighborhood in an unmarked vehicle driven by Verdesoto (See Trail Tr. 49-52). Cruz sat in the front passenger seat and Lieutenant Fisher sat in the rear behind Cruz.(See Trial Tr.).

Petitioner respectfully and humbly affirms that Officer Cruz testified he was patrolling with Verdesoto, and his partner for that day was Verdesoto. Cruz further testified he did not recall anyone other than Verdesoto being in the vehicle. (See Trial Tr. 52-53); Hence, "[P]etitioner points out that at the Suppression Hearing, Cruz recalled dropping Lieutenant Barbara Fisher off at the PSA precinct before or right after midnight. 53 and she never got back in the car after she was dropped off (See Supp. Hr. Pg. 12)." Barbara Fisher, the lieutenant overseeing special operations, testified she was supervising and patrolling on that tour with Officer Verdesoto and Officer Cruz (See Trial Tr. 263-264). Petitioner emphasizes all the aforementioned

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inconsistent testimony validates his assertions that Officer Cruz., Officer Verdesoto., and Lieutenant Barbara Fisher blatantly lied committing perjury and false testimony." (emhasis added)

Nonetheless, when the car reached Boriquen Houses, a New York public housing project located at 50 Manhattan Avenue, Cruz observed Petitioner exit the building with a cup in his right hand (See Trial Tr. 54). As unimaginable as it may sound, while driving officer Verdesoto observed clear liquid inside the cup (See Trial Tr. 191). Approximately three to four other individuals exited the building. Officer Cruz further testified he saw Petitioner look over his shoulder as Petitioner turned from Manhattan Avenue onto Siegel Street and lost sight of him. According to the police testimony, the police car got to the intersection, Petitioner alledgedly made eye to eye contact with Officer Verdesoto, dropped the cup and turned on Seigel Street (See Trial Tr. 55).

Officer Verdesoto turned the corner onto Siegel Street and stopped the car. Officer Cruz got out of the car and walked between two parked cars while Petitioner was approximately a car length and a half in front of him (See Trial Tr.). Officer Cruz claims he observed Petitioner bent down, remove a black object, put it on top of a tire of the parked car. He futher testified at that time he held his shield out, Cruz yelled "Police" and then grabbed Petitioner (See Trial Tr. 56).

After Cruz exited the car, Verdesoto drove the a car length or two further, stopped the car and exited (See Trial Tr. 191). Both Officer Verdesoto and Lt. Fisher exited the car together and saw Cruz holding Petitioner. Cruz pointed to the parked vehicle and

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Verdesoto heard him say "he put it there, on top of tire" (See Trial Tr. 192). Shinning his flashlight onto the area, Verdesoto recovered a firearm atop the tire of the parked car and made an "X" signaling Cruz to arrest Petitioner (See Trial Tr. 56, 192). Officer Cruz handcuffed Petitioner, Officer Verdesoto removed a bullet from the Gun, and walked over to Officer Cruz (See Trial Tr. 92). At the Police station, Officer Cruz recovered two small ziplock bags, respectively containing personal-use quantity of marijuana and poweder cocaine (See Trial Tr. 56).

DEFENSE CASE AND JURY DELIBERATIONS AND VERDICT

Petitioner respectfully and humbly affirms he called two eye witnesses who were in fact present prior to and at the time of Petitioner's arrest. Each witness testified that a female officer approached and searched Petitioner prior to the arrival of two male officers who exited a car and starting looking around (See Trial Tr. 373-77, 409-15).

Petitioner further respectively and humbly affirms on October 15, 2015, the jury commenced deliberations; hence, "[H]ours later the jury sent a note indicating it was deadlocked. On October 16, 2015, delibarations resumed and the jury found Petitioner guilty of the only count charged in the indictment." Petitioner emphasizes to this Honorable Court, this jury issue is raised greater detail therein his third argument presented before this Court. (emphasis added)

PRESENTENCE INVESTIGATION REPORT

Petitioner asserts the Probation Department determined that

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the following guidelines applied to Petitioner:

Base Offense Level (§ 2K2.1(a)(4)(a)	20
Firearm was Stolen (§ 2K2.1(b)(4)(a)	+2
Obstruction Of Justice (§ 3C1.1)	+2
NOTE: Petitioner contested the obstruction enhancement and raised it on appeal.	
Adjusted Offense Level	24
Criminal History Category	II.

Petitioner asserts based on the Offense Level 24, in Criminal History Category II, the advisory Guidelines range of imprisonment is 57 to 71 months. The Probation Department did recommend that Petitioner to be sentenced thereunder the ACCA. Subsequently, following extensive presentence litigation, the court determined that Petitioner did not qualify for sentencing thereunder the ACCA.

SENTENCING PROCEEDING

Petitioner respectfully asserts that On June 10, 2016, his defense counsel filed the first of several sentencing memoranda's asserting that Petitioner is not an armed career offender. The defense counsel also filed objections to the two-level enhancement for obstruction of justice recommended by the probation department pursuant to § 3C1.1. The Government pressed the court to sentence Petitioner thereunder the ACCA and impose the recommended two-level enhancement for obstruction of justice.

On March 8, 2017, after extensive briefing and numerous oral arguments on these contested issue's, the district court ruled that Petitioner's 1999 conviction for conspiracy to commit Hobbs Act

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Robbery failed to qualify predicate "violent felony" thereunder the ACCA. Consequently, Petitioner no longer faced a mandatory minimum sentence of 15 years.

Petitioner respectfully and humbly affirms the final sentencing was held on May 17, 2017. The parties concurred that Petitioner was in Criminal Category II and based on level 24, the guideline imprisonment range is 57 to 71 months. Defense counsel's only objection to the total offense level of 24 was the two-level enhancment for obstruction of justice (See S. Tr. 10). The Court further stated:

> "[A]nd so I ultimately find that Mr. Galan's prior contact robbery conspiracy convictions increases his base offense level to a level 20, and also gives him three criminal history points for purposes of criminal history. So the only conviction that can be used for purposes of the base offense level in 2K2.1 (a)(4)(a) is the conspiracy to commit Hobbs Act Robery,"

Petitioner respectfully and humbly affirms after extensive discussion regarding whether conspiracy to commit Hobbs Act Robbery is a crime of violence, applicability of the 2014 or 2016 guidelines; pertinent case law, including the Supreme Court's decision in Beckles, defense counsel agreed with the court's statement that at least insofar as Mr. Galan's conviction is concerned, the residual clause can still apply (See S. Tr. 25). The court concluded this discussion be stating, "there was no ex post facto problem because by any measure under both guidelines, Mr. Galan's conspiracy to commit Hobbs Act Robbery is a crime of violence (See S. Tr. 28).

Consequently during sentencing the Judge said: Mr. Galan has a right to put the Government to its proof, to continue to press his innocence, if that's what he believes in. I am in no way basing a sentence--- I am not punishing Mr. Galan in any way, shape or form for continuing to press his innocence. We often talk about expressing

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remorse and acknowledging guilt. People who do that can be rewarded for it, but Mr. Galan is not being punished for not doing that. I want to make that absolutely crystal clear (See S. Tr. 60).

Petitioner respectfully and humbly affirms that without giving any prior notice, the district court announced it was departing above the guidelines. The court gave the following reasons for imposing a sentence of 84 months, an upward variance from the guideline range of 57 to 71 months:

> "[I] do credit Mr. Galan's effeorts as leading a law abiding life.... And to me that is key reason why I do not believe Mr. Galan deserves the maximum statutory penalty here as requested by the Government. But I do think that his sentence even above the high guideline range here, is warranted because the guidelines to me does not take into account the defendant's risk of recidivism, the need for incapacitation, the fact that defendant is possessing this gun is continuing to exhibit criminal contact involving guns, very serious criminal conduct in this case (See S. Tr. 66)."

(emphasis added)

In addition to the prison term of **84 months**, the court imposed **three** year term of supervised release with the special condition that Petitioner be subjected to electronic monitoring and curfew for the first six months following release from prison. (emphasis added)

I. ARGUMENT

THE SENTENCING COURT'S UPWARD VARIANCE FROM 71 MONTHS TO 84 MONTHS FOR FELON IN POSSESSION OF A FIREARM WAS SUBSTANTIVELY UNREASONABLE

Petitioner respectfully and humbly affirms without prior notice of its intention to impose an upward variance from the guideline range, the district court judge imposed a sentence of 84 months.

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Petitioner emphasizes to this Honorable Court that there was nothing particularly extrodinary about Petitioner's conduct. He was merely charged as a felon in possession of a firearm based on obversations by New York City Police Department Officer's who alledging Petitioner placed an object on the tire of a parked car. The recovered item was a handgun. Petitioner affirms this was a mere case of simple possession, nothing more., absolutely no violence or other outlining behavior. While firm in belief that Petitioner placed the gun on the tire, the observing officers conveniently failed to recall and/or don't recall their supervisor searching Mr. Galan or detaining this Petitioner for that matter.

Petitioner respectfully affirms the lieutenant, whose presence and identity were revealed some six months after the indictment, testified at trial that she did not make the observations resulting in the charged conduct. Petitioner, now currently over 50 years old, has a criminal history based on conduct he engaged in as a much younger person. His criminal History Category was II, because his record consisted of offenses committed more then ten years ago.

Petitioner asserts the district court judge's upward variance from the guideline range was based in on misunderstanding of the Sentencing Commission's mission in promulgating the guidelines, an apparent, incorrect impression that the Guideline range, which included a two-level enhancement for Petitioner's affirmation in support of standing for his suppression motions, did not adequately contemplate risk of recidivism, the need for incapacitation, the fact the defendant continued to exhibit criminal contact involving guns (See S. Tr.). Nonetheless, the upward variance resulted in a substant-

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ively unreasonable sentence that is greater then neccessary to achieve the goals of sentencing, unsupported by the courts justifications, and in excess of tyical sentencing for this offense and type of offender that it creates unwarranted disparity.

STANDARD OF REVIEW

Asserting that this Court reviews sentences for both procedural error and substantive reasonableness. United States -vs- Cavera, 550 F.3d 180, 189 (2nd Cir. 2008) (en banc); United States -vs- Dorvee, 616 F.3d 174, 179 (2nd Cir. 2010). The court must first determine whether "the district court committed any significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." Gall -vs- United States, 552 U.S. 38, 51 (2007); see United States -vs- Cossey, 632 F.3d 82, 86 (2nd Cir. 2011); United States -vs- Preacely, 628 F.3d 72 (2nd Cir. 2010); United States -vs- Tutty, 612 F.3d 128, 131 (2d Cir. 2010); and Cavera,550 F.3d at 190.

Petitioner asserts this Honorable Court reviews the sentence for substantive reasonableness using"a deferential abuse of discretion standard which does not give district court's a blank check to impose whatever sentences suit their fancy." Cavera,550 F.3d at 191. This court must "patrol the boundaries of reasonableness" in addition to correcting procedural error. Id.

PETITIONER AFFIRMS THE SENTENCE IS SUBTANTIVELY UNREASONABLE

Petitioner respectfully and humbly asserts the upward variance

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from the Guidelines range was based on the district court judge's opinion that "the guidelines do not take into account the defendant's risk of recidivism, the need for incapacitation, the fact that defendant in possessing this gun is continuing to exhibit criminal conduct and/or contact involving guns, a serious criminal conduct in this case." Petitioner asserts at the outset of sentencing, the district judge stated her intention to impose a two-level enhancement for obstruction of justice based on an affirmation submitted by Petitioner to supplement his motion to suppress to establish standing in reply to the Government's opposition.

Petitioner respectfully affirms this issue, briefed in advance of the sentencing proceeding, was contested at sentencing. The grounds for a variance from the Guidelines range are subject to scrutiny on appeal. United States -vs- Aldeen,792 F.3d 247, 252 (2nd Cir 2015).

The reasonableness of a variance and its magnitude depends on the justifications for it.Id.; See Cavera, 550 F.3d at 189. In reviewing a variance from the Guidelines range, this court must consider "the extent of the deviation and ensure that the justification in sufficiently compelling to support the degree of the variance." Aldeen, 792 F.3d at 252 (quoting Cavera).

Asserting, in this current case and siuation, the district court's judge erroneous view of the guideline range does not justify the variance here. The court imposed extra punishment because this Petitioner submitted an affirmation that contradicted testimony at the suppression hearing and its essential repetition at trial; essentially penalizing him for seeking a hearing. Petitioner was fortunate to avoid sentencing under the ACCA. While the court stressed, she was

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not punishing Petitioner for excercising his right to go to trial or maintain his innocence, one wonders whether he was penalized because he was a beneificiary of the Johnson decision, which reduced significantly his sentence exposure.

Petitioner respectfully and humbly affirms the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provided for development of guidelines to further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The U.S. Sentencing Guidelines were promulgated to reduce sentencing disparities and promote transparency and proportionality in sentencing. USSG Statutory Mission. In furtherance of its missions, the Sentencing Commission prescribed guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories.

The Guideline § 2K2.1(a)(4)(a) sets the base offense level at 20 for Petitioner's simple possession of a firearm (a firearm not used in connection with another crime) having previously been convicted of a felony. The guideline penalized Petitioner both for possession of the weapon and his possession based on his status as a prior felon. Section 2K2.1 proscribes lower base levels (ranging from 6 to 18) for possession of firearms for non-felons. See 2K2.1 (a)(5), (a)(6), (a)(7), and (a)(8). Consequently, base offense level contemplates risk of recidivism, need for incapacitation, and continuing criminal conduct in setting the range of incarceration. Further, the two-level enhancement because of the weapon was confirmed, have been stolen (§ 2K2.1 (b)(4)(A)) and the two-level enhancement for obstruction of

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justice ((§ 3C1.1) (discused intra at p.) significantly raises the applicable guidelines range; Hence, whereas Petitioner did not challenge enhancement based on the gun being stolen. He simply pressed his objection to the obstruction enhancement.

Asserting the criminal history score of three placed Petitioner in Criminal History Category II. Based on a Adjusted Offense Level of 24 in Criminal History Category II, the advisory Guidelines range of imprisonment in 57 to 71 months. Subsequently this Petitioner's offense behavior is his possession of a firearm by having previously been convicted by an individual felony punishable by one year or more. Petitioner's offender characteristic category of II derives from having only one prior conviction within the past 10 years.

Further asserting the sentencing court should have begun its sentencing determination based on the applicable guideline range. The primary goal is "to impose a sentence sufficient, but no greater then neccessary, to comply with the purposes set forth in [18 U.S.C. § 3553 (a)(2)]. 18 U.S.C. § 3553(a). Certainly the court is vested with discretion to impose a variance from the guideline range, sentencing courts typically grant variances outside the proscribed range when a particular case presents atypical features that trigger excersize of the court's discretion.

Consequently, if a particular case presents atypical features, the sentencing court may depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify the reasons for departure. 18 U.S.C. § 3553 (b). Petitioner acknowledges if the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742.

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In conclusion, the variance from the Guideline range in this case was based on the court's erroneous view that the guideline sentence did not adequately address the risk of recidivism, the need for incapacitation, and the seriousness of gun possession. Affirming, the court's harsh sentence was unfounded and unreasonable and must be vacated. Re-iterating, the sentence imposed violated statutory mandates to impose a sentence "not greater then necessary" to comply with the purposes of sentencing and "to avoid unwarranted sentence disparities" for similar conduct amoung defendants with similar records. Whereas the imposition of an 84-month prison sentence followed by six months of electronic monitoring and curfew upon release from prison for the kind of case that normally merits no more then 60 months "at the very least stirs the conscience." **See** Aldeen, 792 F.2d at 255.

II. ARGUMENT

THE OBSTRUCTION ENHANCEMENT WAS UNWARRATED AND EMPHATICALLY OVERLY PUNITIVE

Petitioner strongly disputed his application of the two-level enhancement for obstruction of justice. The Government alleged that the enhancement applied because Petitioner submitted a "false" affirmation in support of his motion to suppress physical evidence. Claiming this Petitioner's sworn assertion conflicted with the testimony at trial do not make it false. Accordingly, it was error to impose the two-level enhancement. Subsequently, over objection by defense counsel, the district court judge adopted the probation deparment's argument that Petitioner "provided materially false information to a judge" in connection with his motion to suppress and

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and imposed a two-level enhancement for obstruction of justice pursuant to USSG § 3C1.1. The Probation Department's recommedation is based entirely on the government's position and the knee-jerk application of obstruction points when a defendant submits a pretrial affirmation or testifies in his own behalf and the outcome favors the prosecution. The jury chose to credit the Government's proof; a common occurrence especially when the defense not put on a countering case. Whereas in this case the court credited the police officer's account and jury determined the Government met its burden does not render the affirmation false. Without a doubt, by the same token, a not guilty verdict would render the testimony of cooperating witnesses perjurious.

Petitioner respectfully affirms Section 3C1.1 requires a two-level enhancement if "the defendant willfully obstructed or impeded, or attempted to obstruct of impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction....." USSG § 3C1.1. In United States -vs- Dunnigan, 507 U.S. 87, 94 (1993), the Supreme Court rules that an enhancement for obstruction of justice is appropriate when a defendant "gives false testimony concerning a material matter with the willful intent to prove false testimony, rather then the result of confusion, mistake or faulty memory".

Respectively following Dunnigan, the Second Circuit explained that "before applying an onstruction enhancement based on perjury, the sentencing court must fine by a preponderance of evidence 'that the defendant (1) willfully; (2) and materially; (3) committed perjury which is (a) the intentional (b) giving false testimony (c) as to a

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material matter." United States -vs- Angudelo, 414 F.3d 354, 349 (2d Cir. 2005) (quoting United States -vs- Zagari,111 F.3d 307, 329 (2d Cir. 1997)); accord United States -vs- Case, 180 F.3d 464, 467 (2d Cir. 1999).

The Second Circuit Court has repeatedly emphasized that § 3C1.1 contains a clear mens rea requirement that limits its scope to those who willfully obstruct or attempt to obstruct the administration of justice." Nonetheless, "before imposing the adjustment, the district court must find that the defendant consciously acted[ed] with the purpose of obstructing justice." United States -vs- Linceum, 220 F.3d 77, 80 (2d Cir. 2000).

In Arguedo, this court ruled that the district court erred in imposing the two-level obstruction enhancement based solely on a finding that the agents testimony was credible and that the defendants affidavit was false., Arguedo, 414 F.3d at 349. Whereas the probation department's recommendation of the two-level enhancement is based on position that the district court's denial of Petitioner's motion to suppress and the jury's guilty verdict thereby rendering perjurious assertions in Petitioner's affirmation.

Nonetheless, the district court judge's imposition of the enhancement based on that "reasoning is incorrect". As this court found in Agudelo, merely crediting the testimony of police witnesses does not mean that the defendant knowingly made false statement. At sentencing however the district court rejected the suggestion that evidence of pre-arrest alcohol consumption and the possibility of marijuana and cocaine use prevent the government from meeting its burden of proving that any differences between Petitioner's sworn

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statement and the police officers sworn testimony were not the result of confusion, mistake or faulty memory. Whereas in challenging the obstruction enhancement, defense counsel stressed that;

> "[T]the affidavit that we filed in support of our motion to suppression was -- was limited to establish standing and a --and a controversy, I guess, so that the hearing would take place. I think on the record before the court even-- even considered the jury's verdict, that the-- there's not enough evidence for the court to conclude that Mr. Galan had the neccessary mens rea that he intended to obstruct justice to mislead the Court."

Asserting the defense counsel reiterated that discussions the case with Petitioner and other witnesses confirmed there were three officers involved at the scene, not two as represented by the Government, and "[O]ne actually turned out to be a Lieutenant." (emphasis added)

Nevertheless until in connection with seeking a suppression hearing, the issue of the thrid officer was brought to the attention of the Government (obviously the officer's sworn statement's and testimony was misleading), "the Government was apparently operating on fact that--- that <u>was not accurate</u> for whatever reason.... And up to the point that we approached the hearing, the facts simply weren't accurate." (Tr. 30) Wherefore on the issue of whether or not Petitioner's statement in the affirmation established willful intent to provide false tesimony, defense counsel confirmed that the challenge goes to whether Petitioner made the affirmation as a result of confusion, mistake, or faulty memory; Hence, "[T]hat's the facts as he recalled them from that night. I believe he made statements on both sides, and Petitioner wanted to clear that record and he did at the time." (emphasis added)

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Petitioner respectfully and humbly affirms he did not testify at the suppression hearing or at trial. The affirmation, based on his honest belief of what had occurred, was submitted for the limited purposes of standing for the granting of a suppression hearing. There was no willfulness or intent to obstruct justice period. This Petitioner's position forced resolution of the issue regarding the number of officers on the scene. And the granting of the suppression hearing compelled the government to prepare its witnesses and in doing so became aware that it received misinformation from Officers Cruz and Verdesoto, whom neither confirmed that their supervising lieutenant, Barbara Fisher was in the vehicle with them, at the scene of the crime and arrest. Petitioner emphasizes, regardless of what officers Diaz and Verdesoto thinking., or what mayhave been motivating them., "[T]he officers failure to confirm the existence and identity of the third officer., their supervising lieutenant., emphatically served to obstruct justice by withholding a significant fact that was confirmed by two defense witnesses whom testified at trial." (emphasis added)

Consequently the district courts conclusion that Petitioner's affirmation was false and perjurious was crediting the testimony of the officers over other witnesses;

> "[W]ith respect to the falsity of the affidavit, I credited the Police Officer's testimony at the suppression hearing, and the jury credited the police officer's testimony at the trial. And the story here is very simple, the officer's indicated they believed that Mr. Galan took actions consistent with crouching down next to this car, removing something from his waistband and putting it on the tire of a parked car....So the falsity of the testimony is proven by the preponderance of evidence by my own findings, I don't even have to resort to the jury's findings in this case."

(S. 35).

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> "[I] will note parenthetically that at the time that Mr. Galan made his affidavit, had I considered the substance of it in deciding the motion to suppress, it could have influence the ultimate outcome of the decision. I specifically decided not to reply on Mr. Galan's affidavit in deciding the suppression motion because it was not the subject of cross-examination, and I explicity sat that in my ruling on the motion to suppress."

(S. 36).

Subsequently the district court judge's view of Petitioner's affirmation was false., and was incorrect. In the alternative or rather then addressing the purpose of the affirmation., "to satisfy a standing requirement for a motion to suppress"., the court merely focused on testimony by government witnesses and the jury's veridct. Whereas increasing the sentence because a defendant affirms facts that conflict with testimony undermines the defendant's right to satisfy requirements to obtain a pretrial evidentiary hearing. (emphasis added)

Petitioner respectfully and humbly affirms., "[T]he affirmation merely put the government to its burden of proof, and in doing so the truth was revealed: there was emphatically three., not two, NYPD offciers at the scene during the commission of the crime and at the time of arrest. Without, or absent the affirmation, no hearing would have been held and the presence and identity of the third officer would have never been revealed. Petitioner did nothing beyond submission of the affirmation. Petitioner did not testify at the hearing. He did not testify at trial."(emphasis added)

GROUND THREE

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADDRESS TRIAL COUNSEL'S FAILURE TO MANDATE A NON-UNANIMOUS JURY VERDICT

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APPLICABLE CASE LAW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to have the assistance of counsel for his/her defense," and the United States Supreme Court has recognized that, "the right to counsel is the right to the effective assistance of counsel." McMann -vs- Richardson, 397 U.S. 759, 771 n.14 (1970); and Matthews -vs- Parker, 651 F.3d 489, 507-08 (6th Cir. 2011). In Strickland -vs- Washington, 466 U.S. 668 (1984), THE Supreme Court held that criminal defendants have a Sixth Amendment Right to "reasonably effective" legal assistance, id.,at 687, and announced a now-familiar test: A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation "fell below an objective standard of reasonableness," id., at 688, and (2) that counsel's deficient performance prejudiced the defendant, id., at 694.

Consequently, in showing that counsel's performance was deficient requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. In showing the counsel's deficient performance prejudiced the defense requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Petitioner respectfully and humbly affirms in this present case, when asking whether this Court believes that the evidence at trial established guilt beyond a reasonable doubt; hence, "[d]eferance to the way the jury reached its findings is especially important." (emphasis added)

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Petitioner respectfully and humbly affirms, this case before this Honorable Court is riddled with a plethoria of inconsistent testimony enshrining false and untruthful statement's supporting Petitioner's assertions that all three (3) New York City Police Department Officer's gave inconsistent and untruthful testimony.

The court record is crystal clear, appointed counsel Mr. Schneider during closing arguments made it crystal clear to the district court and jury that all Three (3) new York City Police Department Officer's could not be trusted. Whereas appointed counsel Mr. Schneider pulls one (one of many) contradictions out of their testimony, one that the Government missed or conveniently forgot, is that Officer Cruz and Officer Verdesoto took the witness stand., swore to tell the truth., looked the judge and jury in their face and said there was only two of us there on the scene. Lieutenant Fischer was not there; hence, "[T]hen Lieutenant Fischer takes the stand and said., oh., yeah., I was there. I was in the back seat."; (See Trial Transcripts Pg. 470). (emphasis added)

In this present case the record is crystal clear, there is absolutely no physical evidence., no scientific evidence., there is no video evidence period. They dusted the gun for prints and yet there was no testimony about getting prints off the gun. They called the "DNA" expert, and they swabbed the gun for DNA and yet absolutely no DNA was mustered from the gun. Petitioner emphasizes even Officer Verdesoto testified he fiddled with the gun a lot; hence, so if Petitioner was allegedly seen placing the gun on top a car tire without wearing gloves and Officer Verdesoto fiddled with the gun a great deal without wearing gloves; hence, "[T]hen why didn't the

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gun produce a single finger print or any DNA period." (emphasis added)

More importantly, "there are (3) Three Different Versions of the arrest and the facts which subtantiate the event without direction by the court to be unanimous as to one version emphatically rendered a non-unanimous jury verdict utilized to deprive Petitioner of his persoanl liberty encompassing a clear and concise violation of Due Process Of Law." (emphasis added)

In addition to the above referenced record, the jury was obviously confused by all the inconsistent testimony because it sent out notes to the court seeking clarification. The note labelled exhibit #5, read, the jury is deadlocked; See Trial Transcripts page 555.. Nonetheless the trial court allowed continuous inconsistent testimony never once stopping the proceedings to address testimony that possibly encompassed perjury. Even after several notes from the jury, the trial courtinstructed the jury to once again continue their deliberations. Subsequently was the last district court direction to the jury to continue their deliberations a "dynamite charge";hence, "[t]he detonating charge which exploded a verdict from the deadlocked jury." (emphasis added)

Asserting the district court should have charged the jury in a manner directing unanimity in the jury verdict to the event which really happened. More importantly, appointed counsel failed to address trial counsels failure to request the court to charge the jury with unanimity to the event which really happened.

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SUMMARY CONCLUSION

Petitioner respectfully and humbly affirms he acknowledges there are cases when a general unanimity instruction is sufficient. The second circuit courts have held that "[a] general unanimity is sufficient to insure that..... a unanimous verdict is reached, except in cases where the complexity of the evidence or other factors creates a genuine danger of jury confusion." (emphasis added)

Thus in this present case, a simple read of Petitioner's trial transcripts (especially Mr. Schneider's closing arguments) will reveal a substantial amount of inconsistent testimony; hence, "you'll even find a juror sleeping during the trial proceedings.": See trial transcripts page 257.

Petitioner respectfully and humbly affirms, all the aforementioned subject matter therein ground three deprived Petitioner of a fair trial which subsequently violates Petitioner's Sixth Amendment Constitutional Right to a Fair Trial. Furthermore the aforementioned validates Petitioner's Due Process Right's thereunder both the Sixth and Fifth Amendment's of the United States Constitution were violated because the District Court erred depriving Petitioner of a jury verdict that was consistant with the law.

WHERFORE, based on all the aforementioned genuien facts, Petitioner respectfully and humbly urges this Honorable Court to GRANT Petitioner his **Writ Of Certiorari to the United States Supreme Court.**

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REASONS FOR GRANTING THE PETITION

The District Court allowed the testimony of (3) New York City Police Department officer's which coincidentally all three Officer's provided inconsistant testimony, testimony of three different verisions of events which took place. Petitioner's trial counsel should have mandated the court during jury instructions to charge the jury to a unanimous verdict to which event happened.

This Petitioner emphasizes this Honorable Court should grant Petitioner a Writ Of Certiorari based on the genuine issue's raised therein (ground Three) of Petitioner's Statement Of Case.

CONCLUSION

Petitioner respectfully urges that this petition for writ of Certiorari should be granted.

Respectfully Submitted,

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Date: 12/30/18