18-8522

No:

In the
Supreme Court of the United States

EDWIN FERNANDEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Strickland v. Washington*, 466 U.S. 668, 80 l.ed.2d 674, 104 S.Ct. 2052 (1984) this court explained the standard of review for an ineffective assistance of counsel allegations. The court extended the right to counsel to all "critical stages of the criminal proceedings" in *Montejo v. Louisiana*, 556 us 778, at 786 (2009). In light of the facts of this case, should a writ of certiorari be granted to address the shortcomings of counsel in light of *Strickland* and *Montejo*.

Does this court's decision in *Arizona v. Gant,* 556 U.S. 332, 129 S.Ct. 1710 (2009) apply to a defendant's place of employment when the place of employment is a motorized vehicle.

Did counsel's performance reach a level of ineffective performance when counsel's assertion to objection to the Presentence Investigation Report lacked specificity and clarity.

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 Third Circuit and the United States District Court for the Eastern District of Pennsylvania.

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

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I, Edwin Fernandez, 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 Third Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *United States v. Fernandez, No. 18-2242,* (Reh'g Denied) 12/19/2018 and is reprinted as Appendix A to this petition.

The opinion of the Court of Appeals for the Third Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *United States v. Fernandez*, No. 18-2242, 2018 U.S. App. LEXIS 34805 (3d Cir. Oct. 4, 2018) issued on 10/04/2018 and is reprinted as Appendix B to this petition.

The opinion of the Eastern District of Pennsylvania, whose judgment is herein sought to be reviewed, is an unpublished opinion in *United States v. Fernandez,* No. 13-402-2, 2018 U.S. Dist. LEXIS 56180 (E.D. Pa. Apr. 2, 2018), (2255 Denied) issued on 04/02/2018 and is reprinted as Appendix C to this petition.

STATEMENT OF JURISDICTION

The Third Circuit's denial of Fernandez' Title 28 U.S.C. § 2253 (Reh'g Denied) was entered on 12/19/2018.

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

The statement of the charged offense has been addressed in appellate court's decision in *United States v. Fernandez*, 652 F. App'x 110 (3d Cir. 2016).

However, facts not addressed on appeal relevant hereto, Fernandez provides as follows:

On November 3, 2014, Fernandez addressed a motion to suppress, alleging that the seizure and search of two cellular phones were constitutionally impermissible. The court denied the motion. At the time, trial in was scheduled to commence on January 5, 2015. Prior to trial, the government filed a motion in *limine* to admit, in rebuttal, admissions made by Fernandez during proffer sessions, should he present contradictory evidence or argument at the trial. Fernandez filed a motion opposing the introduction of his proffer statements arguing that his then lawyer, William Cannon, ("Cannon") had improperly advised him on how those statements could be used and that he had been forced to participate in those proffer sessions.

As the trial date approached the government presented the testimony of Cannon who testified that he reviewed the evidence with Fernandez, advised him to meet with the government and cooperate. Fernandez took a separate position. He testified that Cannon had not fully explained the all the consequences related to the proffer session. The district court ruled that Fernandez' proffer statements could be admitted in rebuttal. At that stage, Fernandez entered a plea of guilty, preserving his right to appeal the court's denial of his motion to suppress.

Realizing the extent of ineffectiveness he received, Fernandez filed two separate motions to have Cannon removed and to vacate his plea. The motions for the removal of Cannon were granted and the motion to withdraw the plea was denied. The issue for this Court to consider is whether a Sixth Amendment right to counsel was violated when Cannon, trial counsel at one stage, becomes a *de facto* witness against his client.

All ineffective assistance of counsel claims filed addressing the matter before the District Court and appellate court was denied. This timely petition for writ of certiorari follows.

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

I. IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 80 L.ED.2D 674, 104 S.CT. 2052 (1984) THIS COURT EXPLAINED THE STANDARD OF REVIEW FOR AN INEFFECTIVE ASSISTANCE OF COUNSEL ALLEGATIONS. THE COURT EXTENDED THE RIGHT TO COUNSEL TO ALL "CRITICAL STAGES OF THE CRIMINAL PROCEEDINGS" IN *MONTEJO V. LOUISIANA*, 556 US 778, AT 786 (2009). IN LIGHT OF THE FACTS OF THIS CASE, SHOULD A WRIT OF CERTIORARI BE GRANTED TO ADDRESS THE SHORTCOMINGS OF COUNSEL IN LIGHT OF *STRICKLAND* AND *MONTEJO*.

The Sixth Amendment guarantees a defendant the right to counsel present at all "critical stages of the criminal proceedings." *Montejo v. Louisiana*, 556 US 778, at 786 (2009) (quoting *United States v. Wade*, 388 US 218 at 227-228 (1967)).

Critical stages include arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea. *Argenrsinger v. Hamlin*, 407 US 25 (1972) (guilty plea). This same reasoning should apply to in situations where a defendant is exposed to proffer statements with the government, either as an attempt to a case resolution or as part of an ongoing investigation.

In *Hill v. Lockhart*, 474 US.52 (1985) this court established that claims of ineffective assistance of counsel *in the plea bargain* (and by inference – proffer statements), are governed by the two (2) prong test set forth in *Strickland. Hill* at 57. In *Hill*, the defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. *Hill* did not allege that even if adequate advice and assistance

had been given he would have elected to plead not guilty and proceed to trial. *Id.* That crucial statement was critical to *Hill's* resolution of his case.

In *Roccisano v. Menifee*, 293 F.3d 51, 59-60 (2d Cir. 2002), the Court held that "the client is entitled to advice of counsel concerning all aspects of the cases including a candid estimate of the probable outcome ... the *probable outcome of alternative choices* ... the maximum and minimum sentences that can be imposed ... and when possible, what sentence is likely. *Roccisano v. Menifee*, 293 F.3d 51, 59-61 (2d Cir. 2002) (recognizing that defendants are entitled to rely on counsel's advice as to the strength of the government's claim and the wisdom of pleading guilty).

In this case, Fernandez alleged in all his proceedings, trial, appeal, Title 28 U.S.C. § 2255 and in his appeal, that Cannon missed the mark of all the above-referenced "entitlements" when he persuaded Fernandez to provide proffer statements without securing any set guarantee from the Government as to what benefits Fernandez would receive based on the information that he possessed. In essence, what occurred to Fernandez is exactly the type of outcome the court expressed should not occur as explained in *Montejo*. In essence, Fernandez suffered a complete lack of representation at a critical stage of the proceeding.

Prior to trial, an accused is entitled to rely on counsel to make an independent examination of the facts, circumstances, pleadings, and laws involved and then

offer his inferred opinion into what plea should be entered. *See Von Moltke v. Gillies*, 332 U.S. 708 (1948); *United States ex rel. Wright v. Myers*, 265 F. Supp. 483 (E.D. Pa. 1967), *United States v. Carmichael*, 216 F.3d 224 (2nd Cir. 2000).

This Court in *Lee v. United States,* 2017 WL 2694701 (2017) drew a distinction between claims of prejudice arising from "attorney-error during the course of a legal proceeding" versus "*deficient performance* [that] arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. *Id.* In the former situation, prejudice is most typically shown through "*a reasonable probability*, that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

> When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain. That is because, while we ordinarily apply a strong presumption of reliability to judicial proceedings, we cannot accord any such presumption to judicial proceedings that never took place. We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right. When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.*
>
> This Court recognized that sometimes a defendant will have to show "that he would have been better off going to trial." But that showing is only required "when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession."

Id. Lee v. United States, 2017 WL 2694701 (2017).

Here, Cannon advised Fernandez that if he cooperated with the Government that he would receive a sentence below the mandatory minimum of 10 years with a sentence somewhere in the range of 8 to 9 years. However, what is disturbing is that Cannon could not have known what sentence that the Government would agree to nor did Cannon have any knowledge of any of the information that Fernandez may have possessed that would benefit or aid in the Government's investigation. In essence, waving the carrot in front of Fernandez [8 to 9-year prison sentence] without first securing any guarantees from the Government as to what terms, would protect the proffer. Not even was the "queen for the day" letter, that would have protected Fernandez rights and subsequent use from this initial proffer was secured. *United States v. Chaparro*, 181 F. Supp. 2d 323, 326 n.2 (S.D.N.Y. 2002) ("The term "proffer session" is generally applied to those interviews in which a defendant submits to questioning by prosecutors in the hope of receiving a benefit from the Government, such as a decision to offer a defendant a cooperation agreement or a representation from the Government that a defendant qualifies for the safety valve provision of the law by having provided truthful information to the Government."); *United States v. Giamo*, 153 F. Supp. 3d 744, 749 n.2 (E.D. Pa. 2015).

For Cannon to even assume that Fernandez could provide the Government with enough beneficial information to receive substantially reduced sentence clearly proves that Counsel was constitutionally ineffective in advising Fernandez to give up several critical rights as presented in *Strickland* and *Montejo.* Here, irrespective of the proffer statements, the court imposed a 25-year sentence. Hardly, any benefit for Fernandez. Without advising Fernandez that his proffer could be used during this trial, Fernandez had no choice but to plead guilty since the proffer had been already provided.

Plea Bargains have the potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. *See Missouri v. Frye*, 132 S.Ct 1399 (2012). In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations to demonstrate performance under *Strickland* at this stage a petitioner must demonstrate that his attorney failed to provide objectively reasonable advice about the decision to plead guilty. *Boyd v. Warden,* 579 F3 330, 356 (3rd Cir 2007).

In order to show prejudice, defendants must establish both a "reasonable probability they would have accepted the earlier plea offer" and that "there is reasonable probability neither the prosecutor nor the trial court would have provided the offer from being accepted or implemented. *Missouri v. Frye*, 132

S.Ct. at 1410. In this case, the lack of adequate advises, surmounted to the equivalent of no counsel whatsoever as explained in *Montejo.*

The granting of a writ of certiorari will bring Fernandez' case into reason with *Strickland* and *Montejo*

II. DOES THIS COURT'S DECISION IN *ARIZONA V. GANT,* 556 U.S. 332, 129 S. CT. 1710 (2009) APPLY TO A DEFENDANT'S PLACE OF EMPLOYMENT WHEN THE PLACE OF EMPLOYMENT IS A MOTORIZED VEHICLE.

Apart from advising Fernandez to enter into proffer statements blindly, defense counsel also failed to investigate two (2) phones that were discovered by the arresting officers. During the suppression hearing Officer Jose Candelari from the Philadelphia Police Department testified that he observed the target, Foster, meet Fernandez directly outside of Fernandez' Lunch Truck where they had a brief conversation. Fernandez handed Foster an undetermined amount of currency in exchange for what officer Candelaria assumed was drugs. At trial, Candelaria's testimony was as follows:

> Candelaria; myself and Officer Planita then went to stop Mr. Fernandez and recovered the black bag from his person with an additional - a little over $2,700 and two cell phones.

The two (2) cell phones were not discovered on Fernandez' person but were located inside the Lunch Truck after Fernandez was placed under arrest, secured in handcuffs and transported to the back of the police vehicle. Candelaria's deception

during the suppression hearing led the Court to determine there was no *Arizona v. Gant,* 556 U.S. 332, 129 S. Ct. 1710 (2009) violation. *Gant*, at HN1, (Police may search incident to arrest only space within an arrestee's "immediate control," meaning the area from within which he might gain possession of a weapon or destructible evidence.)

The Fourth Amendment prohibits "unreasonable" searches and seizures. *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 109 S. Ct. 1402 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"). Searches conducted absent a warrant are *per se* unreasonable under the Fourth Amendment, subject to certain exceptions. *United States v. Harrison*, 689 F.3d 301, 306 (3rd Cir. 2012). To deter Fourth Amendment violations, when the Government seeks to admit evidence collected pursuant to an illegal search or seizure, the judicially created doctrine known as the exclusionary rule at times suppresses that evidence and makes it unavailable at trial. *See, Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695 (2009); *United States v. Katzin*, 769 F.3d 163, 169 (3rd Cir. 2013).

In *Davis v. United States*, 131 S. Ct. 2419 (2011), this court applied the good faith exception in the context of law enforcement officers' reliance on judicial decisions. *Id.* at 2427. *Davis* held that "searches conducted in objectively

reasonable reliance on *United States v. Katzin*, 769 F.3d 163 (3rd Cir. 2014) binding appellate precedent are not subject to the exclusionary rule." *Id. Davis'* holding implicated two prior Supreme Court decisions, *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 (1981) and *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009). In *Belton*, this Court announced a seemingly broad and permissive standard regarding searches incident to arrest. *Id.* at 460 ("[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* It was widely understood that the Court had issued a bright-line rule, and that *vehicle searches incident to the arrest* of recent occupants were reasonable, regardless of whether the arrestee "was within reaching a distance of the vehicle at the time of the search." *Davis,* 131 S.Ct. at 2424.

However, as *Davis* noted, this Court's subsequent decision in *Gant* upset this interpretation of *Belton*. *Id.* at 2425. After *Gant*, a vehicle search incident to a recent occupant's arrest *was only constitutionally reasonable* where "the arrestee [was] within reaching distance of the vehicle during the search, or (2) ... the police ha[d] reason to believe that the vehicle contain[ed] 'evidence relevant to the crime of arrest.'" *Id.* (quoting *Gant*, 556 U.S. at 343); *United States v. Katzin,* 769 F3d 163, 172 (3rd Cir. 2013).

Here, the search was more intrusive than a normal search of a vehicle because the search was conducted at Fernandez' place of business; though it may not have been a traditional brick and mortar store. Since the Lunch Truck has wheels, it still would have the same equal Fourth Amendment protection against unreasonable search and seizure. Simply put, the search of Fernandez' Lunch Truck would be the equivalent of officers observing an alleged criminal act outside of a brick and mortar store and after arresting the owner of a business in the close proximity of the incident go and search for the business without a warrant *after* the owner had been secured by the police.

The facts of this case will fill the gap that was left in the *Gant* decision (the search of a vehicle) and the search of a residence, a clear Fourth Amendment violation.

III. DID COUNSEL'S PERFORMANCE REACH A LEVEL OF INEFFECTIVE PERFORMANCE WHEN COUNSEL'S ASSERTION TO OBJECTION TO THE PSI REPORT LACKED SPECIFICITY AND CLARITY.

The Government must prove by a preponderance of the evidence the facts necessary to establish a sentencing enhancement. *See United States v. Howard*, 599 F.3d 269, 271-72 (3d Cir. 2010). In weighing the Government's evidence, courts "may accept any undisputed portion of the presentence report as a finding of fact." Fed.R.Crim.P.32(i)(3)(A). Where a defendant fails to object to a presentence report, that report may be relied upon to find, as relevant here, the predicate criminal history necessary for sentencing enhancements. *See United States v. Siegel*, 477 F.3d 87, 93 (3d Cir. 2007) (holding that an unobjected-to presentence report established that a prior conviction was a crime of violence for Guidelines purposes). And if the defendant does object, in order for that objection to put the report in dispute, the defendant must provide "detailed reasons" why the "findings were unreliable." See, *United States v. Campbell*, 295 F.3d 398, 406 (3rd Cir. 2002).

As the Court of Appeals for the Eighth Circuit has noted, "[t]he purpose of the objection [to the presentence report] is to put the Government on notice of the challenged facts," *United States v. Razo-Guerra*, 534 F.3d 970, 976 (8th Cir. 2008), and, accordingly, a "vague, blanket objection" will not suffice, *United*

States v. Davis, 583 F.3d 1081, 1096 (8th Cir. 2009). In *Razo-Guerra*, for example, the court found ineffective due to lack of "specificity and clarity" - an asserted objection that the defendant "should not be assessed a two-point...enhancement as a leader or organizer." *Id.* 534 F.3d at 976. Counsel did submit written objections to the PSI Report finding that Fernandez should be assessed 4 points for his role as leader or organizer and 2 points for obstruction of justice – which further nullified the points for acceptance of responsibility, however, the manner of the objections was deficient.

First, the leader organizer enhancement did not apply to Fernandez. The government identified Canela, who allegedly coordinated the organization from the Dominican Republic, demonstrating that any members of the conspiracy in the Dominican Republic were under the control of Canela and not Fernandez as alleged. Since Fernandez was allegedly part of the United States side of the conspiracy, he could not have control of the Dominican importers. That evidence would have precluded him from asserting any type of leadership role over any of the Dominican Republic members, thus negating the improper enhancement.

Second, counsel could have addressed that the government only identified two individuals, Jose Rodriguez, and Israel Rodriguez, that allegedly Fernandez had control over. Anyone else was speculative and vague at best and could not establish grounds for leader/organizer under the preponderance of evidence test.

What really demonstrates ineffective assistance from the defense counsel standpoint is even though he submitted his written objection to this issue, directly after the Government made its case why Fernandez should receive the 4 point enhancement, Counsel's response was:

> [Mr. Spade] "I have nothing to add to that, your Honor." This Court had no choice but to grant the government's request for the leadership role enhancement after Defense Counsel failed to argue the merits to the objection that he previously submitted.

It is evident that counsel's failure to prepare for the sentencing hearing, caused the errors addressed herein.

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 Third Circuit.

Done this 13, day of March 2019.

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