No. 19-5300

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Fremo Santana — PETITIONER
(Your Name)

FILED
JUL 08 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

From the Third Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Fremo Santana #12541-180
(Your Name)

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QUESTIONS PRESENTED

I. WHETHER DEFENSE COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY INEFFECTIVE FOR ERRONEOUSLY MISCALCULATING PETITIONER'S GUIDELINE RANGE WHICH WAS THE DECIDING FACTOR FOR PETITIONER TO ACCEPT THE GOVERNMENT'S PLEA.

II. WHETHER THE CONFRONTATION CLAUSE PROHIBITS THE ADMISSION OF TESTIMONIAL STATEMENTS THAT ARE NOT SUBJECT TO CROSS-EXAMINATION DURING THE SENTENCING PROCEEDINGS.

LIST OF PARTIES

[x] 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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TABLE OF AUTHORITIES

Federal Statutes

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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

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

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

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[X] is unpublished.

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

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[X] is unpublished.

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

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

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[ ] is unpublished.

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

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[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was April 8, 2019.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

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

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

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions that are involved within the instant petition are: (1) The right to effective representation to counsel in a criminal prosecution; and (2) the Constitutional right to confront all witnesses against the accused [the Confrontation Clause]. Both Rights are protected by the Sixth Amendment to the United States Constitution.

STATEMENT OF CASE

On April 11, 2012, the Petitioner in this case, Fremo Santana, was named as one of multiple defendants in a seven-count indictment issued by a grand jury seated in the United States District Court for the Middle District of Pennsylvania. In the five counts in which Santana was specifically named, he was charged with engaging in a criminal conspiracy to distribute and possess with intent to distribute cocaine hydrochloride in violation of 21 USC §846; engaging in a criminal conspiracy to distribute and possess with intent to distribute heroin in violation of 21 USC §846; distribution and possession with intent to distribute cocaine hydrochloride in violation of 21 USC §§841(a)(1) and (b)(1)(A)(ii), and 18 USC §; distribution and possession with intent to distribute heroin in violation of 21 USC §§841(a)(1) and (b)(1)(A)(i), and 18 USC §2; and use of a communication facility in committing a drug trafficking crime in violation of §843(b).

At the initial arraignment the District Court appointed Counsel John Adom to represent Santana. About a year into the pre-trial proceedings, Santana hired his own Counsel, Jack McMahon, however Adom stayed on for the re-entry case that Santana was charged with. When Adom came to visit Santana about the reentry case he asked Santana about the drug case, which Santana responded that McMahon had stated that he thought he could get Santana a plea deal of

9 years. Abom responded that that would be impossible because Santana was looking at a mandatory minimum sentence of 10 years, and that McMahon was providing him with false information as to the plea that he could receive. Adom then suggested that Santana should fire McMahon and request for the Court to reappoint Abom as Attorney of Record which the Court subsequently did.

After Adom had been reappointed he informed Santana several times that the government was offering a plea deal of 14 years. However, Santana kept stating to Abom that he wanted to proceed to trial. Just prior to picking the jury, Abom once again informed Santana that the government had offered him a plea deal that would only expose him to 14 years imprisonment, and that he advised Santana that he should take the offer because if Santana was found guilty he would receive a substantially higher sentence [30 years or more] at that point Santana accepted the Government plea offer on the belief that he would receive a sentence no greater than 14 years.

The above guideline calculation of 14 years imprisonment made by Defense Counsel Abom was based on an estimation of the alleged drug quantities as provided in the indictment of five kilograms of cocaine and one kilogram of heroin.

Following Santana's guilty plea, the United States Probation Office prepared a Pre-Sentence Report ("PSR"). In this PSR, the Probation Office set Santana's total offense level at 42, Criminal History Category at II, and sentencing guideline range at 360 months to life. PSR 33, 37, 56. Included in the offense level calculation were (a) a conclusion that the offense involved at least 450 kilograms of cocaine hydrochloride and 60 kilograms of heroin; (b) a four-level enhancement for being an organizer or leader in the criminal activity; and (c) a two-level enhancement based on Santana's having maintained a premises for the purpose of manufacturing or distributing controlled substances (a "stash house "). PSR 25, 26, 28.

Prior to sentencing, Santana raised a number of objections to the PSR, including objections to the proposed drug weights attributable to him, any leadership enhancement, and to any enhancement for maintaining a premises for the purpose of manufacturing or distributing controlled substances. PSR Addendum; Santana Sentencing Memorandum, Rec.Doc. No. 1269.

In order to resolve the Defense's objection to the PSR, the Court held an evidentiary hearing where Agent Shuffelbottom was the sole government witness who exclusively related to the District Court what he had been told by several co-conspirators and cooperating witnesses during the course of the investigation. However, Agent Shuffelbottom did not produce any tape recording, 302 forms or interviewing notes that he had taken in interviewing these alleged cooperating witnesses that would support the reliability of Agent Shuffelbottom's testimony. Based on Agent Shuffelbottom's uncollaborated testimony alone the count found that Santana was responsible for 276 kilograms of cocaine and 34.2 kilograms of heroin and the 4 level leadership enhancement for Santana's central role in organizing and facilitating the drug activities. Finally the Court found two levels for maintaining a stash house, the district court noted that the Government was relying again upon Shuffelbottom's testimony from the evidentiary hearing. Indeed, the district court credited that testimony (and statements from government's counsel) in support of a finding that the Briggs Street address was a stash house.

With those calculations and the two-level reduction for acceptance of responsibility, this Court found that the total offense level was 40. With Criminal history Category II, the advisory guidelines range for imprisonment was 324 to 405 months, which subsequently increased Santana's sentencing exposure based entirely on Agent Shuffelbottom's hearsay testimony.

The District Court then imposed a sentence of 324 months imprisonment

which was way above what Santana's Counsel had promised him, when persuading him to accept the Government's plea offer.

Santana timely appealed, Case No. 15-3103, which the Third Circuit affirmed Santana's conviction and sentence on June 14, 2016. Santana did not file a writ of certiorari to the Supreme Court.

Petitioner filed a timely post-conviction motion pursuant to 28 USC §2255 which changed his conviction and sentence on two separate grounds (1) that his guilty plea was constitutionally invalid based on his Counsel's ineffectiveness, and (2) that his Counsel was constitutionally ineffective for failure to object to hearsay testimony provided by one of the Case Agents, which substantially increased Santana's sentencing exposure. Santana's §2255 motion in its entirety was denied on November 5, 2018 by the District Court. He then submitted a Request for a Certificate of Appealability, which was subsequently denied by the third Circuit Court of Appeals on April 8, 2019 (Case No. 18-3581). Therefore, Petitioner now respectfully requests this Court to grant his Petition for a writ of Certiorari in order to address the constitutional questions of law presented herewithin the instant motion.

REASONS FOR GRANTING PETITION

The reasons for granting the instant petition is to answer the Constitutional question: Whether an attorney's misadvice regarding a substantial miscalculation to the sentencing guidelines range that a defendant is subject to when accepting a government plea offer, falls under the ambit of the Sixth Amendment guarantee of effective assistance of counsel. Recent decision by this Court would suggest that a defense attorney's misadvice as to the length of sentence defendant faces which was an important factor in the defendant's ability to make an intelligent decision whether to accept a proffer plea offer among alternative choices, clearly falls under the Strickland v. Washington, 466 US 688, (1984)

test for ineffective assistance of counsel. Several Appellate Courts, however, have routinely upheld sentences that were substantially in excess to what the defendant was expecting based on erroneous information that he has received from his counsel based on the sole fact that the District Court had informed the Defendant during the plea colloquy to the maximum penalty that the offense carried as a result of his guilty plea; thus potentially curing any misadvice provided by defense counsel as to the amount of years imprisonment that the defendant would have to serve. Common sense tells us that a defendant who makes the ultimate decision to plead guilty to a criminal offense that would subject him to several years imprisonment does so on what he believed was sound advice from his attorney as to the length of sentence he is facing.

Therefore, this Court should grant Petitioner's application for a writ of Certiorari to answer the Constitutional question of law, whether a defense counsel is constitutionally ineffective where counsel substantially misinformed the Defendant to the potential sentence exposure he faced as a result of this plea of guilty, which will be fully argued below.

The second issue that this Court should consider when deciding whether to grant the instant petition is whether the Confrontation Clause that prohibits the admission at trial of testimonial statements that are not subject to cross-examination as held in Crawford v. Washington, 541 US 36 (2004) that applies to hearsay Rule in determining relevant conduct in the sentencing hearing. The majority of Appellant Courts have held that the Crawford Rule to hearsay evidence does not extend to the sentencing phase. However, the lower courts have allowed admissibility of hearsay evidence during a sentencing hearing have enacted that the Supreme Court has not yet ruled whether there are constitutional protections against the admissibility of hearsay evidence that potentially could increase a defendant's sentencing exposure. Therefore, this Court should grant instant petition in order to determine whether the Fifth

Amendment Right to due process is protected against hearsay evidence during the sentencing phase in a criminal proceeding. This issue will be fully argued in the second section to this brief.

I. DEFENSE COUNSEL'S DEFICIENT PERRFORMANCE WAS CONSTITUTIONALLY INEFFECTIVE FOR ERRONEOUSLY MISCALCULATING PETITIONER'S SENTENCING GUIDELINE RANGE

Rule 11 of Federal Rules of Criminal Procedure governs the requirments for a plea allocution and "is designed to ensure that a defendant's plea of guilty is voluntary and intelligent choice among the alternative course of action open to the defendant." A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." Bradshaw v. Stumpf, 545 US 175, 183 (2005).

Additionally, Rule 11 requires the district court to "address the defendant personally in open court" (1) determine that he understands the nature of the charge[s] to which a plea is offered; and (2) make an inquiry to satisfy the court that a factual basis exists for the plea. Fed.R.Crim.P.11(c)(1), (P). United States v. Maher, 108 F3d 1513, 1524 (2d Cir. 1997).

In Hill v. Lockhart, 474 US 52, 54 (1988) the petitioner sought habeas relief to challenge his guilty plea to First Degree Murder. He alleged that his attorney's misadvice about when he would become eligible for parole caused his plea to be involuntary. Id. at 56. In that context, the Court stated that prejudice is shown when "there is a reasonable probability that, but for the Counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" Id. at 59. Because the petitioner there did not allege that he would have insisted on going to trial or that he placed "particular emphasis on his parole eligibility in deciding" to plea the court denied his petition. Id. at 60.

Here, the Instant Case is materially distinguishable from Hill because Santana can demonstrate that if it weren't for his Attorney's misadvice that he would have proceeded to trial.

Specifically on the date that Santana was to pick his jury to proceed to trial is when his Counsel misinformed him that the Government had offered to have Santana plead guilty to superseding information to once charge of conspiring to distribute and possess with intent to distribute one kilogram or more of heroin and five kilograms or more of powder cocaine, and that the Government had agreed to a sentence not to exceed 14 years in exchange for his guilty plea. Furthermore, Counsel explained to Santana that if he proceeded to trial and was convicted that he would be facing a much more severe sentence such as 20 to 30 year sentence. If Santana would have been fully informed by his Counsel that he still could have been subjected to a term of imprisonment of 324 months, which he ultimately received, he would have explicitly elected to continue to select his Jury on that day, thus proceeding to trial if it were not for his Counsel's misadvice in calculation of the maximum sentence that Santana would receive, which clearly constitutes ineffective assistance of counsel under Hill; and further under the two prong test in Strickland, where if it were not for Counsel's deficient performance, the outcome of the proceedings would have been different.

More importantly, this Court held in Padilla v. Kentucky, 599 US 356 (2010) that an attorney's failure to advise regarding deportation consequences of a guilty plea, or the rendering of misadvice about those consequences of a guilty plea, may constitute deficient performance under Strickland standards 559 US at 373-74. See also Strickland v. Washington, 466 US 668, 687-88 (1984) (articulating the two-prong inquiry for ineffective assistance of counsel claims). As the High Court later clarified, in Chaidez v. United States, 133

S.Ct. 1103 (2013) however Padilla also made a threshold determination that an attorney's misadvice or non-advice regarding such matters is within the ambit of Sixth Amendment guarantee of effective counsel, even though deportation matters are collateral, not direct, consequences of the criminal proceeding 133 S.Ct. at 1108; see Padilla 599 US at 366 holding that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.") Indeed Padilla determined that deportation consequences are ill-suited to the then-prevalent collateral-direct framework because deportation is an integral part...of the penalty that may be imposed on aliens [or naturalized citizens] who plead guilty to specific crimes 559 US at 366, 364. According to Chaidez and Padilla's answer to the threshold question "breach[ed] the previously chink-free wall between direct and collateral consequences "133 S.Ct. at 1110, a statement which suggests that the Chaidez Court wrote that it was Padilla that first rejected that categorical approach--and so made Strickland operative...when a criminal lawyer gives false advice.

Here, Santana's counsel's misadvice as to the maximum sentence exposure he faced [14 years] was a direct consequence to the criminal proceeding as to whether he would accept the government's last plea offer before proceeding to trial.

As this Court held in Padilla at 365, 368 further reiterated in Lafler v.Cooper, 132 S.Ct. 1376 (2012) that the Strickland framework for evaluating claims of ineffective assistance of counsel applies to advice regarding plea negotiations, which is regarded as a separate and distinct critical stage in court proceedings.

In Roccisano v. Manifee, 293 F.3d 51, 59-60 (2d Cir. 2001), 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." Clearly, Petitioner's

counsel failed to investigate the appropriate guideline range that he would face by accepting the Government's plea. The Roccisano Court stated that the principle articulated in the proceeding quotation dated back fifty plus years to the case of Von Moltke v. Gillies, 332 US 708 (1948), which held:

> Prior to trial an accused is entitled to rely upon his 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.

More recently, the Second Circuit confirmed in United States v. Carmichael, 216 F3d 224 (2d Cir. 2000):

> We do not suggest that to comply with the Sixth Amendment, counsel must give each defendant anything approaching a detailed exegesis of the myriad arguable relevant nuance of the Guidelines, nevertheless, a defendant has the right to make a reasonably informed decision whether to accept a plea offer. Hill v. Lockhart 474 US at 56-57.

In United States v. Booth, 432 F3d 542 (3d Cir. 2005), the Third Circuit exposits on the Second Circuit opinion in Carmichael by holding:

> We have stated that a defendant has the right to make a reasonably informed decision whether to accept a plea offer because "knowledge of the comparitive sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plea guilty." Id. at 549 (quoting Hill v. Lockhart 474 US at 56-57.

The Third Circuit further held that, if a defendant raises sufficient allegations that his counsel's advice in helping to make that decision was "so insufficient that it undermined [the defendant's] ability to make an intelligent decision about whether to accept the [plea] offer," the defendant is entitled to an evidentiary hearing on the merits of his habeas petition. ID. at 43-44.

Indeed, if Santana had fully understood that he could have received a substantially higher sentence that he did [324 months], he would have surely went to trial since he was in the process of selecting the jury when his Counsel misadvised him to the Government plea offer. After all, a plea bargain

is supposed to benefit both parties, not just the government as it expressly did in the Instant Case.

More recently, the Supreme Court handed down its decision in Lee v. United States, 177 S.Ct. 1958 (2017) where Justice Roberts began by drawing 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 error, the result of the proceeding would have been different." Id.

Justice Roberts further held;

> "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 judical 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.

In the Instant Case, there is no question that Santana would have elected to proceed to trial if it were not for Counsel's deficient performance in misadvising him to the maximum penalty that he faced upon accepting the government plea offer.

Further, in Lee, according to the Chief Justice, "the error was instead one that affected Lee's understanding of the consequences of pleading guilty." The Government argued for "a pro se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial."

However, the Chief Justice Roberts articulated;

> The adaption of a categorical rule would be inappropriate because (1) claims of ineffective assistance require a "case by case examination" of the "totality of the evidence"; and (2) the relevant inquiry "focuses on a defendant's decision-making, which may not turn solely on the likelihood of conviction after trial." Id.

Essentially, the Court recognized that defendants with little to no chance of success at trial will often have a hard time proving that they would have gone to trial instead of pleading guilty. But this is not because of the possible outcome of the trial, but because of how the prospect of success would have affected the defendant's decision to plead.

Nevertheless, the Court recognized that sometimes the potential consequences of going to trial versus pleading guilty can both be bad. According to the Court, "when those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20 year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Id.

The instant case provides the same scenario as Justice Roberts described above, whereby Petitioner, accepting the Government's plea offer has still faced the same potential sentence that he would have received if he was convicted during a Jury trial.

After all, common sense tells us that after fighting the alleged charges for approximately two years on the day that the trial was scheduled to start, why would Santana agree to the Government's plea deal if someone had not offered him a significant sentence reduction as part of the plea agreement -- and that someone had to be none other than his Defense Counsel.

In accordance with this reprehensible constitutional error, this Court should grant Petitioner's request for a Writ of Certiorari to answer the Constitutional question: "Does the protection of ineffective assistance of counsel found

in Padilla, Laffer v. Cooper, and Lee v. United States, extend to counsel's erroneous advice as to the length of sentence that a defendant should expect when contemplating whether to accept a government's plea offer.

This issue affects literally hundreds of defendants on a yearly basis, which burdens every circuit court under the premise of "reasonableness of sentence" arguments. Therefore, this Court should grant Certiorari in order to decide the above Constitutional question, thus giving helpful insight to the District and Circuit Court.

II. PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONT ALL WITNESSES AGAINST HIM WAS VIOLATED DURING HIS SENTENCING PROCEEDINGS

Petitioner Santana submits a good faith challenge to the Hearsay Rule that this Court has not previously had a chance to resolve. Specifically, Petitioner asserts whether the prohibition to the admission at trial of testimonial statements that are not subjected to cross-examination as held by this Court in Crawford v. Washington, 541 US 36 (2004) would extend to the sentencing phase where the sentencing court reliance on hearsay evidence substantially increased the defendant's sentence under relevant conduct.

It is Santana's position that the District Court's admission of Drug Enforcement Agent Eric Shaffelbottom's hearsay evidence at the sentencing hearing which solely established all sentencing enhancements expressively violated his Sixth Amendment Right to the Confrontation Clause.

A. The Supreme Court's Prior Confrontation Clause Precedents

In the Supreme Court case of Ohio v. Roberts 448 US 56 (1980) provided that hearsay can be admitted into evidence without violating the Confrontation Clause when the statement (1) falls within a firmly-rooted exception to the hearsay rule, or (2) contains particularized guarantees of trustworthiness

such that adversarial testing would be expected to add little, if anything, to the statement's reliability. See also Lilly v. Virginia, 527 US 116, 124-25 (1999). In 2004 however, the Supreme Court overruled nearly twenty-five years of Ohio v. Roberts precedent, finding out-of-court statements which are testimonial in nature to be barred by the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the Court. Crawford, 541 US at 59.

According to the Court, the Confrontation Clause's ultimate goal of ensuring reliability of evidence commands reliability in the criminal setting to be assessed in a particular manner, i.e., "by testing in the crucible of cross-examination." Id. at 61.

The Sixth Amendment Right in Crawford concerned testimonial hearsay that was introduced at trial. An issue unaddressed by Crawford is whether the Sixth Amendment Right to confront witnesses applies similarly at sentencing. It is Santana's position that it does because it relates to whether the District Court finds a defendant guilty [as opposed to innocent] to certain criminal conduct based solely on hearsay evidence that substantially increased his sentencing exposure.

The answer to the above question was well settled pre-Crawford, testimonial hearsay was admissible at sentencing if it bore some minimum indicia of reliability. In short, prior to Crawford, confrontation rights do not apply in sentencing hearings as at a trial on the question of guilt or innocence.

However, in light of the dramatic shift in the legal landscape in which over 20 years of precedent has beeen reversed, Santana makes a good faith argument that the Court should re-examine the Confronation Clause as it applies to the Sentencing phase under the lens that reflects Crawford's ruling and intent.

Furthermore, courts have questioned the continuing validity of allowing testimonial hearsay at sentencing post-Crawford and post Booker. See United States v. Katzopoulos, 437 F3d 569, 575 (6th Cir. 2005). Additionally, the Eleventh Circuit noted "while [the Crawford Rule] may eventually be extended to the sentencing context, that has not happened yet." United States v. Chase 426 F3d 1318, 1323 (11th Cir. 2005). In ruling that Crawford did not apply at the sentencing in the particular case, a West Virginia District Court stated "for hotly contested issues, however, the truth-seeking function of the Confrontation Clause deserves attention at sentencing." United States v. Gray, 362 F.Supp.2d 714, 725 (2005). The Sixth Circuit has recently stated that it is still an open question in that circuit whether our rule that confrontation rights apply in sentencing hearing after Crawford. United States v. Stone, 432 F3d 651, 654 (6th Cir. 2005).

B. Hearsay Testimony Affecting the Instant Case

In the instant case the District Court, when determining the drug quantities that Santana was culpable of and whether to apply all other sentencing enhancements as cited in the PSR the Court exclusively relied on the hearsay testimony of Agent Shuffelbottom who admitted that he had no firsthand knowledge of the actual events that he was testifying to, but that he had received the information that he was testifying to during the course of the investigation by interviewing several co-conspirators and cooperating witnesses. More importantly, the Government failed to allow any of the so-called co-conspirators or cooperating witnesses to testify during the sentencing hearing that would collaborate Agent Shuffelbottom's testimony, which would have further allowed Santana to confront any of these witnesses in open court. Thus avoiding any Confrontation Clause concerns.

Essentially, it is Petitioner Santana's position that the District Court's

exclusive reliance on Agent Shuffelbottom's hearsay testimony that significantly increased the penalty that the Court imposed which certainly deprived Santana of his liberty and was a clear and explicit violation to the Confrontation Clause, against admission of testimonial statements that are not-subjected to cross-examination. Therefore, this Court should grant Petitioner's application for a writ of Certiorari in order to clarify whether the protections against hearsay evidence that is not subjected to cross examination as this Court held in Crawford v. Washington, 541 US at 50-51, would extend to the Sentencing Hearing where a defendant faces a significant risk of a substantial increase in his sentence based on hearsay testimony. More importantly the majority of circuit courts are undecided whether the Confrontation Clause prohibits the admission of trial testimony extends to the Sentencing phase after this Court had decided Crawford, therfore clarifying this important constitutional question once and for all.

CONCLUSION

Petitioner has presented two valid Constitutional claims (1) Whether a defense counsel's miscalculation as to the amount of prison time that he will be subject to upon accepting a government's plea offer; and (2) whether the Confrontation Clause prohibits hearsay testimonial statements during a sentencing proceeding. Whether this Court elects to hear one or both of these issues which is certainly the Court's choice; either way both claims are ripe to be adjudicated by this Court in order to bring clarity to the Circuit and District Court which has long-struggled with issues presented in this motion. Therefore, for the above given reasons, this Court should GRANT Petitioner's application for a writ of Certiorari and Order further briefing by all parties.

Respectfully Submitted,

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