PETITION FOR WRIT OF CERTIORARI

No.

In The
Supreme Court of the United States

JUAN PABLO REVELO SALCEDO,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

ISSUE I

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE, OBTAINED BY GOVERNMENT, TITLE III INTERCEPTS. THE ERROR WAS PLAIN AND AFFECTED JUAN PABLO REVELO SALCEDO'S SUBSTANTIAL RIGHTS.

ISSUE II

WHETHER THE DISTRICT COURT REVERSIBLY ERRED BY NOT ENFORCING THE EXCLUSIONARY PROVISION OF 18 U. S. C. § § 2518 (4) (d), (9) and (10), AND §2515 TO EXCLUDE ALL EVIDENCE OBTAINED FROM OR DERIVED FROM THE GOVERNMENT'S TITLE III WIRE INTERCEPTS IN PETITIONER'S CASE, AS THE RECORD IS DEVOID OF ANY EVIDENCE TO SUPPORT COMPLIANCE WITH 18 U.S.C. §§ 2510 - 2520 REGARDING THE USE OF TITLE III WIRE INTERCEPT CONTENTS OR EVIDENCE DERIVED THEREFROM.

ISSUE III

WHETHER THE GOVERNMENT BREACHED ITS OBLIGATION UNDER THE PLEA AGREEMENT BY FAILING TO ADVOCATE FOR JUAN PABLO REVELO SALCEDO REGARDING THE SENTENCING ENHANCEMENTS APPLIED UNDER UNITED STATES SENTENCING GUIDELINES (USSG) § 3Bl.l(a) AND 3Bl.2 (MITIGATING ROLE).

PARTIES TO THE PROCEEDINGS

Petitioner, Juan Pablo Revelo Salcedo, was the defendant in the district court and the Petitioner in the Court of Appeals.

Respondent, the United States of America, was the Plaintiff in the district court and the Appellee in the Court of Appeals.

There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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Supreme Court of the United States Cases

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UNITED STATES STATUTES

1)

PETITION FOR A WRIT OF CERTIORARI

JUAN PABLO REVELO SALCEDO respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals,

The opinion of the Court of Appeals is reported at (5th Cir. 2019) and is found at Appendix, App. A.

The Court of Appeals' order affirming judgment from the United States District Court, Eastern District of Texas; 4:15-CR-155-6,non published,non precedental was entered May 10, 2019.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V OF THE US CONSTITUTION (DUE PROCESS OF LAW)

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 to be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI

AMENDMENT OF CONSTITUTION

AMENDMENT VI OF THE US CONSTITUTION (RIGHT TO COUNSEL)

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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Proceedings Below

On August 13, 2015, the United states Attorney for the Eastern District of Texas, Sherman Division, filed a three-count Indictment against Petitioner charging him with one count of Conspiracy to possess with intent to distribute five kilograms Or more of a controlled substance (cocaine), and two counts (later dismissed) of conspiracy to import cocaine and to Manufacture and distribute cocaine intending and knowing that The cocaine would be unlawfully imported in the United States, in violation of 21 U.S.C. § 846. The offense was alleged to have occurred in or about 2013 and allegedly continued until 2014.

On July 11, 2014, Petitioner entered a plea of guilty to count 1 only (counts 2 and 3 were subsequently dismissed) and the court remanded him to the custody of the U. S. Marshal pending sentencing. (ROA. 538)1 A pre-sentence report (PSR) was prepared and provided to the parties and to the Court. (See PSR).

On December 12, 2015, after a sentencing hearing, the Court sentenced defendant to 168 months imprisonment, 2 years supervised release, $100 special assessment fee, and 1 year denial of federal benefits. (See Appx. 1).

STATEMENT OF THE FACTS

The following facts were elicited from the Factual Statement signed by Petitioner and Counsel of Record:

That the defendant Appellant, Who is changing his plea to guilty, is the same person charged in the First Superseding Indictment; (2) that the events charged in the First Superseding Indictment occurred in the Eastern District of Texas and elsewhere; (3)That Petitioner and one or more persons in some way or manner made an Agreement to commit the crime charged in [the Indictment] to knowingly possess with intent to distribute and dispense 450 kilograms of a mixture or substance containing a detectable amount of cocaine; (4) Petitioner knew the purpose of the agreement and joined in it with the intent to further it; (5) knew the amount involved 450 kilograms or more of a mixture or substance containing a detectable amount of cocaine; and that role in the conspiracy was to supply co-conspirators with kilograms quantities of cocaine from various sources that would then be distributed to other co-conspirators and co-defendants during the term of the conspiracy. (See Appx. 2, Factual Statement and Plea Agreement.)

1. Petitioner denied and thereby objected to acting as an Organizer/ Leader of an organization with five (5) or more participants. (See Factual Statement-Appx-2).
2. Petitioner denied thereby objecting to the Government's claim that Petitioner was subject to a four (4) level increase under USSG 3B1. (a) organizer/leader. See Appx.2 Plea Agreement.
3. Petitioner denied, thereby objecting to the Government's claim that he did not qualify for a decrease of two (2) offense levels for role adjustment under USSG § 3Bl.l. (See Appx. 2.1)

Petitioner was not advised by his counsel, nor the Court, or in any phase of the District Court proceeding that his waivers in the Plea Agreement attempt to void the Treaty protections under which his extraction was effectuated. Further, Petitioner was not advised by counsel, nor the Court that the Government had not demonstrated compliance with 18 U.S.C. §§ 2510 - 2520 (specifically 18 U.S.C. § 2518 (3), § 2518 (4) (d), § 2518 (9), and § 2518 (10) prior to the use in any proceeding. without such advice or notification Petitioner's plea of guilty cannot be knowing or voluntary, and thereby violates Petitioner 's Sixth Amendment due process protections.

Petitioner 's Presentence Investigation Report (PSR) objections and Responses buy the united States Probation Office (USPO) acknowledges that there was no corroboration of conduct that would warrant an aggravating role adjustment that would preclude a minimal role downward adjustment of two (2) offense levels. (See Appx. 2.1, page 2) This 'failure to advocate for a minimal role constituted a breach of plea Agreement under § 5 (d). (See Appx. 2, page 3 of the Plea Agreement).

Petitioner's role in the offense of conviction lasted from approximately August 2014 until Petitioner's arrest on June 11, 2016, a period of approximately 20 months, in the capacity of a broker, not an owner, supplier or distributor. (PSR).

ARGUMENT AND AUTHORITIES REGARDING ISSUES I & II

ISSUE I

WHETHER THE DISTRICT COURT REVERSIBLY ERRED BY ADMITTING EVIDENCE, OBTAINED BY GOVERNMENT INTERCEPTS. THE ERROR WAS PLAIN AND AFFECTED JUAN PABLO REVELO SALCEDO'S SUBSTANTIAL RIGHTS.

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Standard of Review

This Court reviews issues of statutory interpretation de novo. See Texas v United States, 487 F.3d 491, 495 (5th Cir. 2017). In light of the Supreme Court's long standing rule with regard to statutory interpretation, that is:

> "We interpret criminal statutes like other statutes, in a manner consistent with ordinary English usage."

See: Flores-Figueroa v United States, 556 U.S. 646, 650-652,129 S.Ct 1886, 173 L.Ed.2d 853 (2009) Jones v United States,529 U.S. 848, 855, 120 S.Ct. 1904,146 L.Ed.2d 902 (2000); Bailey v United States, 516 U.S. 137,144-145,116 S.Ct. 501,133 L. Ed . 2d 47 2 (1995). It becomes a question of paramount importance as to what this Court's interpretation requires of the Government regarding language and English usage 18 U.S.C. § 2515, 18 U.S.C. §§ 2518 (4)(d), 2518 (9), and 2518 (10)

require the Government to demonstrate, before the offering into evidence, the content of wire intercepts or evidence obtained from wire intercepts,compliance with 18 U.S.C. § 2510 et seq. United States v Scurry, 821 F.3d 1 (DC Cir. 2016) recently opined:

> "Title III of the Omnibus Crime Control and Safe streets Act of 1968, 18 U.S.C. § 2510 et seq., includes its own mandate. 18U.S.C.§ 2515 provides: 'Whenever any wire or oral communication has been intercepted, no part of the contents of such and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the united States, or State, or political subdivision thereof if the disclosure of that information would be in violation of Title III'. 18 U.S.C.S. § 2518. A person seeking to enforce § 2515 must have Title III "standing," which Title III defines as any aggrieved person in any trial, hearing, or proceeding, 18 U.S.C.S. § 2518 (10) (a), who was a target of the wiretap, § 2510(11). A person with standing may move to suppress wiretap evidence and its fruits on any of three grounds:
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the wiretap order is insufficient is insufficient its face;
>
> (iii) the interception was made in conformity with the wire tap order;18 USCS 2518 (10) (a) (i).

(see also: US v Dahada, affirmed, 5/14/18, challenging a violation of 18 USC 2518) (3).

The Government's failure to comply with the provisions of 18 USC 2510 et seq, before it's offer into evidence the contents of intercepts in Petitioner's case is a violation of Petitioner's Constitutional rights as well as, violation of the Petitioner's Constitutional right to Due Process as well as a violation of the statutory mandate under 18 U.S.C . 2510 et seq., to establish by proof of admissible facts of the entirety of the Government's burden of proof of the elements of the

charged offenses It was error for Counsel of record to fail to object to the District Court's adoption consideration and adoption of the Pre Sentence Report in Petitioner's case to the extent evidence of the Petitioner's involvement in the charged conspiracy was identified by an unlawful wire intercept in Columbia and to use such evidence in a proceeding in a United States District Court or Grand Jury without first complying with the mandates of 18 U.S.C. 2515, 2518 (4) (d), 2518 (9) and 2519 (10).

Title 18 U.S.C. 2515 provides:

§ 2515. Prohibition of use as evidence of intercepted wire or oral Communications

> "Whenever any wire of oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, of other authority of the united States, a State, or a political subdivision thereof it the disclosure of that information would be in violation of this chapter". [18 USCS §§ 2510 et seq.]."

The District Court is the arbiter of what is, or is not admitted into evidence in Petitioner case. The District Court, plainly erred by allowing admission of the Government evidence derived from Title III intercepts, without proof that such evidence was not unlawfully obtained. Plain error is an error that affects substantial rights, and may be considered even though its was not brought to the court's attention either in the District Court or the Court of Appeals.

In Petitioner's case the two (2) plainly reversible errors complained of are:

(i) the District Court's admission (by adopting the PSR) of wire intercept contents, or evidence derived from intercepted telephone conversations with Petitioner , and/or regarding Petitioner was error and without a basis in law to be used against Petitioner ; and

(ii) the Trial Courts failure to provide Petitioner copies of the Affidavit/Application for wire intercept authority, and of the Order authorizing the wire intercept , in compliance with the statutory mandates contained in 18 U.S.C. 2518 (3). 18 U.S.C. 2518 (4) (d) and regarding the use of contents and evidence derived therefrom. 18 U.S.C. 2519 (9).

The Government, nor the District Court, nor the lawyers in Petitioners case have provided Petitioner copies of the wire intercept Affidavit/Application, nor the order(s) authorizing the wire intercept , in violation of 18 U.S.C. 2518(9) .

Upon information and belief the Petitioner avers Affidavit/Application and Order authorizing wire intercept of telephone conversations, to which Petitioner was a party, or which regarded Petitioner , do not comply with the mandate of 18 U.S.C. § 2516 (l) and 18 U.S.C. §

2518 (4) (d) regarding the identity of the high level Department of Justice (DOJ) official who pre- approved the Affidavit/Application for wire intercept.

The DC Circuit Court of Appeals recently held:

> "A wiretap order is "insufficient on its face," 18 USCS § 2518 (10) (a) (ii), where it fails to identify the Justice Department official who approved the underlying application, as required by Title III id. 2518 (10 (a)(4) (ii), where it falls to identify the Justice Department official who approved the underlying application As required by Title III of the Omnibus Crime Control And Safe Street Act of 1968. 188 U 2510 et seq.,18 USCS 2518 (4) (d).

Further, Scurry, holds:

> "We hold that a wiretap Order is "insufficient on its face, where it fails to identify the Justice Department Official who approved the underlying application as is required by Title III Id. § 2518 (4) (d) ... "

With regards to an Affidavit /Application and order for wire intercept, that are factually insufficient, suppression is mandatory. (18 USCS 2510 (ii), Scurry, id.).

The Supreme Court holds that, the starting point for interpreting and applying paragraph (b) of FED.R.CRIM.P. Rule 52, is the Court's decision in United States v Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Olano instructs that a court of appeals has discretion to remedy a forfeited error provided certain conditions are met.

First, there must be an error that has not been intentionally relinquished or abandoned. Olano, Id., at 723-733, 113 S.Ct. 123 L.Ed.2d 508. Second, the error must be plain, that is to say, clear and obvious. Third, the error must have affected the defendant's substantial rights, which in the ordinary case means he or she must "show a reasonable probability that but for the error, II the outcome of the proceeding would have been different, Dominguez Benitez, 542 U.S. 74, 76, 82, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004).

Once these three conditions have been met, the court of appeals should exercise its discretion to correct the forfeited error if the error "'seriously affects the proceedings. III Olano, supra,at 736, 113 S.Ct. 1770, 123 L.Ed.2d 508. Because 18 U.S.C. s 2515 and 18 U.S.C.s 2518 et seq. mandates certain requirements before evidence obtained by wire intercepts may be introduced into any hearing or proceeding which statutory mandates were disregarded by the District Court. The error committed is plain as it affects Petitioner substantial rights, that is,

without the introduction of the tainted wire intercept evidence, the outcome of Petitioner's case, and sentencing, would have, in all likelihood, been different.

ARGUMENT AND AUTHORITIES REGARDING

ISSUE III

WHETHER THE GOVERNMENT BREACHED ITS OBLIGATION UNDER THE PLEA AGREEMENT BY FAILING TO ADVOCATE FOR JUAN PABLO REVELO SALCEDO REGARDING SENTENCING WITHOUT ENHANCEMENTS UNDER UNITED STATES SENTENCING GUIDELINES (USSG) § 3Bl.l (a) AND 3Bl.2 (MITIGATING ROLE).

Standard of Review

"This court reviews a claim of breach of plea agreement de novo, accepting the district court's factual findings unless clearly erroneous." United States v Elashyi, 554 F.3d 480, 501 (5th Cir. 200S) (quoting United States v Lewis, 476 F.3d 369, 387 (5th Cir. 20D7}) (internal quotation omitted). Although Petitioner's Plea Agreement contained an appeal waiver, the waiver does not preclude the argument that the government breached the Plea Agreement. See United States v Purser, 747 F.3d 284,289 n.l1 (5th Cir. 2014).

The Fifth Circuit reviews under general principles of contract law, which apply to the interpretation of a plea agreement. ld. at 413. Ambiguities are construed against the government as the drafter. United States v Elashyi, 554 F.3d 480, 501 (5th Cir. 2008);

United States v Farias, 469 F.3d 393, 397 & n.4 (5th Cir. 2006). In determining whether the government breached the agreement, we consider whether it conduct was "consistent with the defendant r s reasonable understanding of the agreement. (See also, United States v Hinojosa, 749 F. 3d 407 413 (5th Cir. 2014).

Further the Fifth Circuit holds, in regard to a claim of breach of plea agreement, that:

"To determine whether a plea agreement has been violated, this Court considers whether the Government's conduct is consistent with the defendant's reasonable understanding." See United States v Valencia,985 F.2d 758, 761 (5 th Cir,1993); see also, United States v Roberts, 624 F.3d 241, 2010 U.S. App. LEXIS 21453 (5 th Cir. 2010).

Jurist of reason could reasonably debate the existence of the ambiguous sections of the Plea Agreement regarding the Government's obligations to advocate for Petitioner minor role adjustment. To Petitioner, and to most people, the reasonable interpretation would be that the "quid pro quo" was Petitioner plea of guilty in exchange for the Govrnment not seeking certain enhancements against the Petitioner, in as much the stipulated quantity guaranteed a mandatory minimum sentence of ten (10) years The Supreme Court has long held that the

Government breaching a plea agreement when a promise is made to induce a plea agreement goes unfulfilled".

See: Santobello v New York, 404 U.S. 257, 262, 92 S.Ct. 485 L.Ed. 427 (1971).

Further, Petitioner believed that his sentence would be left to the sole discretion of the District Court Judge, because that is what the Government's Plea Agreement stated multiple times. The Petitioner is not trained in the law, does not have a college education and did not have a lawyer who explained, in detail, what to expect at sentencing.

Petitioner's Plea Agreement (Appx. 2) provides to the section, "Guidelines Stipulation", that the Government and Petitioner agreed to four stipulations :

Stipulation "a"and "b" are clearly agreed to, however, stipulation "c" and "d" were clearly not accepted by the Petitioner. The language of the Plea Agreement clearly states that the court is not bound by the stipulations.

Because the Government did not object, it tacitly agreed to the Petitioner's redaction of stipulations "c" and "d" (Plea Agreement), page 31. The Petitioner reasonably believed that the Government accepted Petitioner' redactions.

Prior to sentencing , the Government breached it's obligations under the Plea Agreement by not joining the Petitioner's objections to the USPO's position to not decrease Petitioner's USSG offense level by two (2) levels, under USSG 3B1.2 (a), (See: Appx.2.1).

Reducing Petitioner's offense level by two (2) levels is warranted as there is no credible evidence to support Petitioner in any role in the conspiracy other than that of a minimal participant. (See Appx. 2.1, page (ii).

Based on the language of the Plea Agreement and Counsel of Record at the District Court level of proceedings and on Appeal (Anders Brief).

Petitioner reasonably expected to have a USSG calculation of offense level 31, and a Criminal History of I, which under the Plea Agreement translates into a guideline sentencing range of 108 to 135 imprisonment, which under the Plea Agreement, would be a mandatory minimum sentence of 120 months imprisonment.

CONCLUSION

Based on the foregoing arguments and Authorities, Petitioner prays that the Court will grant review of his issues and upon due consideration reverse and remand for resentencing.

REASONS FOR GRANTING THE PETITION

Petitioner submits that Writ should issue in Salcedo because the proceeding involves a question of exceptional importance.

The decision is reflective of a Fundamental error ... [is] "error which goes to the foundation of the case or goes to the merits of the cause of action." The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error "very guardedly." [T]he doctrine of fundamental error should be applied in this cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.

Fundamental error is that which undermines the trial's legality such that the guilty verdict could not have been obtained without the error. Such an error must "so permeate the proceeding as to convert it into a 'mere pretense of a trial' [or] in the case of conviction by plea ... strike at the fundamental legality of the proceedings themselves.

Therefore, petition for a writ of certiorari should be granted.

Respectfully Submitted,

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