19-5738 ORIGINAL

No. _____

SUPREME COURT, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS MANUEL PEREZ-CRISOSTOMO — 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 THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CARLOS MANUFL PFREZ-CRISOSTOMO
(Your Name)

555 GEO Dr. (MVCC / REG. # 12564-036)
(Address)

Philipsburg, PA 16866
(City, State, Zip Code)

(N/A)
(Phone Number)

QUESTIONS PRESENTED

I.- Whether the Sentencing Court erred in founding Petitioner obstructed justice, pursuant to U.S.S.G. § 3C1.1, when Petitioner did not correct the name under he was charged, and maintained that he was born in Puerto Rico?

II.- Whether the Sentencing Court erred in denying Petitioner's acceptance of responsibility credit due an enhancement applied for the obstruction of justice, which should not have applied, and where Petitioner pleaded guilty and interposed no objection to the Government's version of his offense?

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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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[X] is unpublished.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 _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.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[ ] is unpublished.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 August 10, 2018.

[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

Petitioner's Due Process right and Sections 3C1.1 & 3E1.1(a) & (b) of the United States Sentencing Guidelines.

STATEMENT OF THE CASE

On March 5, 2016, Carlos Manuel Perez-Crisostomo, hereinafter Petitioner, was federally arrested under the name "Nelson Calderon."

Petitioner's prosecution stemmed from intercepted calls and two hand-to-hand drug deals with a co-conspirator.

On November 21, 2016, Petitioner pleaded guilty to a one-count information which charged him with Conspiracy to Distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. There was no written plea agreement and Petitioner's admission are memorized in the plea hearing transcript. During the plea allocution, with the assistence of an interpreter, Petitioner informed the Court that he takes medication for "a little bit of mental," and also stated: "I'm very bad at remembering thing, so I'm sorry, but I don't remember what the name of the medication is." The Court found Petitioner to be competent and accepted his guilty plea. At the plea, the District Judge informed Petitioner, who is a citizen of the Dominican Republic, that he could face removal upon conviction.

In preparation for sentencing, the probation office interviewed Petitioner and tendered a Pre-Sentence Investigation Report (PSI) to the District Court. Petitioner did inform the Probation Officer that in 2006 he was mugged and "struck with the butt of a firearm on his head" and is blind in his right eye because of that injury. He further advised that he is unable to read or write, has a history of drug addiction dating back to his teenage years, and has problems remembering key information.

At sentencing, the Judge calculated Petitioner's base offense level to be 30, based upon trafficking the equivalent of 1,159.16 kilograms of marijuana. The Government argued Petitioner should receive a two-level upward adjustment under U.S.S.G. § 3C1.1 for

obstructing of justice because he contended during District Court proceedings the he is Nelson Calderon, a U.S. citizen from Puerto Rico. The Government also contended that Petitioner's obstruction rendered him ineligible for a three-level reduction under U.S.S.G § 3E1.1(a) for acceptance of responsibility, despite Petitioner's waiver of indictment, timely pleaded guilty, and agreed with the Government's version of the offense. Over Petitioner's objection, the Court applied the two-level obstruction enhancement and denied the acceptance of responsibility downward adjust, leading to a dramatic five-level shift in Petitioner's advisory Guidelines range. Therefore, Petitioner's total offense level was 32, which combined with a Criminal History Category I resulted in a recommended guidelines range of 121 to 151 months' imprisonment.

Petitioner filed a timely Notice of Appeals, challenging (1) the District Court's application of the obstruction of justice enhancement and (2) the Court's finding that Petitioner had not accepted responsibility. The First Circuit Court of Appeals, however, denied Petitioner's appeal and agreed that his sentence was appropriated.

Petitioner timely submits the current Petition for a Writ of Certiorati.

REASONS FOR GRANTING THE PETITION

The District Court imposed Petitioner a substantively unreasonable sentence because the Court failed to fully consider the totality of the circumstances in enhancing Petitioner's offense level for obstruction of justice. To the base offense level, the District Court added two levels for obstruction of justice, pursuant to § 3C1.1, because Petitioner did not reveal his real identity at no time during his prosecution. For the very same reason, the District Court denied a reduction for acceptance of responsibility. This left two issues: whether Petitioner had attempted to obstruct justice and whether he should be accorded acceptance of responsibility.

Then, the main reason for granting the current petition for writ of certiorati, is because the Sentencing Court erred its decision to enhance Petitioner's offense level by two levels for obstruction of justice and to deny Petitioner the downward adjustment for acceptance of responsibility.

OBSTRUCTION OF JUSTICE

The obstruction of justice issue first related to another identity used by Petitioner, which was confirmed by himself, even before had been sentenced.

Although the Sentencing Guidelines empower to enhance a defendant's offense level by two levels if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice," *see* USSG § 3C1.1, such enhancement, however, may be based on a finding that the defendant committed perjury during the course of the case, and that such perjury was deliberately committed by defendant about a material matter.

In the case at bar, Petitioner did never commit perjury nor even denied of guilty. He wasn't put under oath. It should be pointed out that, even though USSG Guidelines Manual § 3C1.1 establishes a two-level increase for obstruction of justice, the application notes provide that a "defendant's denial of guilt (other than a denial of guilt under oath that constitutes

perjury) . . . **is not a basis for application of this provision.**" § 3C1.1, comment., n. 1. (emphasis added).

In *United States v. Aguilar*, 515 U.S. 593, 115 S. Ct. 2357, 132 L. Ed. 2D 520 (1995), this Honorable Court held that a "false statements made to an investigating agent, rather than a grand jury, do not support a conviction for obstruction of justice." Petitioner lied when did not provide the Government with his real name, but did not commit perjury.

There was no written plea agreement pursuant to Rule 11(c)(1)(C) stipulating that the Government will oppose the downward adjustment for acceptance of responsibility in the scenario that the Court had found that Petitioner had obstructed justice under U.S.S.G. § 3C1.1 Nobody explained Petitioner that if the Court will find that he was using another identity rather than his own and legal name, its will be sufficient finding for a two-level enhancement for obstruction of justice. Defense counsel never ever told Petitioner that if the court find that he was using other identity rather than his own identity, Petitioner would have been obstructing justice. Not even the sentencing judge nor the Government explained Petitioner about the obstruction of justice issue.

Petitioner did not "willfully" obstruct the justice and his statement regarding his identity and nationality did not constitute a "significant hindrance" to the Government's arrest and prosecution of him.

Over Petitioner's objection, the Sentencing Judge complied the Government imposing Petitioner a two-level enhancement for obstruction of justice based upon his statements during the investigation for the Presentence Report, in which Petitioner stated that his name was "Nelson Calderon" and that he was of Puerto Rico descent. In fact, it was a lie, an "*a lie is a lie not matter what...*" *see* *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). However, because Petitioner used the false name throughout the case doesn't

mean that was an intentional or willful effort to mislead the Court. The District Court failed to explain what evidence supports its finding that Petitioner acted willfully and with the requisite intent to obstruct justice, as this Honorable Supreme Court has reiterated in *Aguilar, supra.*

Petitioner told these lies far from any suspicious circumstances. Petitioner alleges that he is not guilty of obstruction of justice and should not be doing 121 months in prison when he was not warned, during his Rule 11(c)(1)(C) plea colloquy, that he would receive two-level enhancement in his sentence, because he did not know about the obstruction of justice possibility until the sentencing hearing. Petitioner stresses that at the moment when the Government brought him to the plea guilty hearing, the Government knew or should known about the false identity used by him, because at this hearing the Court informed Petitioner that he could face removal upon conviction. It does mean that the Court, as well as the Government, should known that Petitioner was not a United States citizen from Puerto Rico.

This two-level enhancement for obstruction of justice was only because the court found that Petitioner did not reveal his real identity. How defense counsel did not warn Petitioner, a person *cuasi* illiterate and absolutely ignorant of the law, about this issue? How defense counsel do nothing to avoid that Petitioner ran the risk to lose between 5 levels in his sentencing guidelines? Had defense counsel properly explained and warned Petitioner about such risk, the current writ for certiorati would have never been filed within this Honorable Supreme Court.

In fact, Petitioner did believe that there was not any obstruction of justice because the weight of the law fell on the man who committed the crime; the man who accepted to be the same person involved in the charged conspiracy, not matter what name he had used. Petitioner's statements concerning his identity and nationality did not constitute a "significant hindrance" to the Government's arrest and prosecution of Petitioner.

government does not provide evidence that the investigation was *actually* hindered, the sentence may ordinarily not be enhanced under the guideline for obstruction of justice." *Manning, supra,* n.5 (emphasis in original).

In the case at bar, the Government did not provide evidence that the investigation or prosecution of Petitioner was actually hindered. Instead, the record amply supports that Petitioner's conduct did not hinder, delay, or impede the Government's investigation or prosecution of him. Petitioner waived his right to indictment. It does mean that he helped in his own prosecution rather than obstructed, allowing the Government to avoid expending resources to present its case to a grand jury. Petitioner plead guilty, upon an Information, within eight months of his arrest, thereby allowing the Government to avoid expending resources to prepare for trial. Petitioner readily and entirely agreed with the Government's version of the charged offense at the plea and sentencing. Given the efficiency with which Petitioner was arrested, prosecuted and sentenced, it is strong difficult to envision how the Government's case was "significantly hindered."

It should be noted that, in its recent decision in *Marinello, II v. United States*, ___ U.S. ___ 138 S. Ct. 1101; 200 L Ed 2d 3562 (2018), this Honorable Supreme Court stated, regarding the legal interpretation of the word "obstruction," as follows: "As to Congress' intent, the literal language of the statute is neutral. The statutory words ``obstruct or impede" are broad. They can refer to anything that ``block[s]," ``make[s] difficult," or ``hinder[s]." Black's Law Dictionary 1246 (10th ed. 2014) (obstruct); Webster's New International Dictionary (Webster's) 1248 (2d ed. 1954) (impede); id., at 1682 (obstruct); accord, 5 Oxford English Dictionary 80 (1933) (impede); 7 id., at 36 (obstruct).

The verb "obstruct," however, as the Court continues, "suggest an object." *Marinello, II, supra.* In *Marinello, II's* case, the object was the "due administration of [the Tax Code]." In

explaining the obstruction in *Marinello, II's* case, this Honorable Supreme Court bring light to Petitioner's alleged obstruction of justice. This Court concluded: "*The word ``administration'' can be read literally to refer to every ``[a]ct or process of administering'' including every act of ``managing'' or ``conduct[ing]'' any ``office,'' or ``performing the executive duties of'' any ``institution, business, or the like.'' Webster's 34. But the whole phrase-the due administration of the Tax Code-is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business. Cf. Aguilar, supra, at 600-601, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (concluding false statements made to an investigating agent, rather than a grand jury, do not support a conviction for obstruction of justice).*"

ACCEPTANCE OF RESPONSIBILITY

The Government argued that the three-level reduction for acceptance of responsibility should not apply due to the obstruction of justice by Petitioner concealing his real identity. In support of its argument against a reduction for acceptance of responsibility based on the obstruction of justice, the Government does not provide evidence that the investigation was *actually* hindered.

The Court applied the two-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice and denied the three-level reduction for acceptance of responsibility, only because Petitioner was using another identity rather than he own identity.

The Sentencing Guidelines recognize the "legitimate societal interests" in acceptance of responsibility and therefore allow sentencing judges to provide a measure of leniency to those defendants who accept responsibility for their actions, authorizing a two-step decrease in offense level if a defendant "clearly demonstrates acceptance of responsibility." U.S. Sentencing Guidelines Manual § 3E1.1(a). An additional one-step decrease is available,

"upon motion of the government," where the defendant's offense level without any acceptance-of-responsibility credit is at least 16 and his "timely" notification of his intent to plead guilty saves the government from preparing for trial and permits "the government and the court to allocate their resources efficiently." § 3E1.1(b). *See* United States v. Delacruz, 862 F.3d 163, 177 (2d Cir. 2017). "'[T]he paramount factor in determining eligibility for § 3E1.1 credit is whether the defendant **truthfully admits the conduct comprising the offense or offenses of conviction**.'" United States v. Kumar, 617 F.3d 612, 637 (2d Cir. 2010) (emphasis added) (quoting United States v. Teyer, 322 F. Supp.2d 359, 376 (S.D.N.Y. 2004)).

Petitioner was not required, however, "to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction" to qualify for the reduction. *See* United States v. Zapata, 1 F.3d 46, 49-50 (1st Cir. 1993) (conduct underlying an "aggravated felony" for purposes of 8 U.S.C. § 1326(b)(2) is not conduct "part of the instant offense" under § 4A1.2(a)(1) nor relevant conduct). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. *Id.* § 3E1.1 Application Note 1(A) (emphasis added). *See* Delacruz, *supra*. This does mean that Petitioner could have remained in silent respect to the identity issue and that silence does not affect his ability to obtain a reduction under this subsection.

Nevertheless, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." Guidelines § 3E1.1 Application Note 1(A); see, e.g., United States v. Rivera, 96 F.3d 41, 43 (2d Cir. 1996) (upholding denial of § 3E1.1 reduction where defendant had not shown "contrition and candor"). However, in this case, Petitioner have been never questioned regarding the relevant conduct of the use of the identity of other person rather than his own identity.

It is true that the sentencing judge "is in a unique position to evaluate a defendant's acceptance of responsibility." The Sentencing Judge's determination whether or not to grant the reduction is "entitled to great deference on review" [in appeal proceeding] Guidelines § 3E1.1 Application Note 5, but the Judge's determination should be review because the District Court denied Petitioner's acceptance of responsibility credit on basis of an obstruction of justice which was neither mention at the plea hearing nor explained to Petitioner before sentence.

The District Court further erred when it found that, concomitant to its obstruction of justice finding, Petitioner was not entitled to a two-level reduction in his offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). Whether a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility" is a fact-dominate issue, and the District Court's decision to withhold a reduction in the offense level will be overturned when it is clearly erroneous. *See* United States v. Mata-Grullon, 887 F.2d 23, 24 (1st Cir. 1989) (per curiam); United States v. Zayas, 876 F.2d 1057, 1060 (1st Cir. 1989); cf. United States v. Diaz-Villafañe, 874 F.2d 43, 48 (1st Cir.), cert. Denied, 493 U.S. 862 (1989).

To prove acceptance of responsibility, a defendant must truthfully admit or not falsely deny the conduct comprising the conviction, as well as any additional relevant conduct for which he is accountable. *See* United States v. Glaum, 356 F.3d 169, 180 (1st Cir. 2004) (*citing* U.S.S.G. § 3E1.1, cmt. n.1(a)).

Petitioner's lament with respect to acceptance of responsibility is two-fold. First, Petitioner asseverates that the sentencing court's obstruction-of-justice enhancement was unwarranted and that, therefore, the court's epibolic refusal to credit him for acceptance of responsibility was erroneous. The second branch of the Petitioner's challenge starts with the

valid premise that even if his sentence is enhanced for obstruction of justice, he still may receive a downward adjustment for acceptance of responsibility. Despite that practice has proven such largesse to be hen's-teeth rare, Petitioner, however, insists that he qualifies for it. The baseline rule, of course, is that "[c]onduct resulting in an enhancement [for obstruction of justice] ordinarily indicates that the defendant has not accepted responsibility." USSG § 3E1.1, comment. (n.4). Yet the sentencing guidelines explicitly confirm that there may be "extraordinary cases" in which adjustments for both obstruction of justice and acceptance of responsibility can coexist. *Id.* In such instances, the defendant has the burden of proving that an adjustment for acceptance of responsibility is warranted. *See* United States v. Gonzales, 12 F.3d 298, 300 (1st Cir. 1993).

Petitioner points to a host of factors that, undoubtedly, make his case extraordinary. These include that he demonstrated acceptance of responsibility early, clearly, and consistently. A very important issue is that Petitioner waived formal indictment and pleaded guilty to the Government's Information without the benefit of a plea agreement. Petitioner interposed no objection during the presentence investigation to the Government's version of his drug offense. Essentially, Petitioner mounted no material defense of the Government's substantive charge and he "d[id] so candidly and with genuine contrition." *See* United States v. Franky-Ortiz, 230 F.3d 405, 408 (1st Cir. 2000). These factors, Petitioner exhorts, merit a reduction for acceptance of responsibility.

These factors, taken in cumulation, should have been more than sufficient to make the Petitioner's case extraordinary and, thus, to overcome the secondary effect of the warrantable finding that he had obstructed justice. "Whether a defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility is a fact-dominated issue, and . . . will not be overturned unless clearly erroneous." *See Cf.* United States v. Royer, 895

F.2d 28, 29 (1st Cir. 1990) (internal quotation marks omitted).

Petitioner's drug offense corresponded with a base offense level of 30. By pleading guilty early in the proceedings, Petitioner anticipated a three-level reduction to that offense level, for a total offense level of 27, which combined with his Criminal History Category I would have resulted in an advise Guideline range of 70 to 87 months imprisonment. However, the application of the obstruction of justice enhancement and the denial of acceptance of responsibility dramatically affected Petitioner's Guideline range, adding a net five (5) levels to his Total Offense Level and nearly doubling his Guideline range to 121 to 151 months.

Because the obstruction of justice should not have applied, and because that was the only reason Petitioner did not get credit for his acceptance of responsibility, the District Court rule should be reversed, and Petitioner should be resentenced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARLOS MANUEL PEREZ CRISOSTOMO

Date: 11/7/18