No. 19-6146

IN THE

SUPREME COURT OF THE UNITED STATES

Hector Rosario-Rivera
(Your Name)

PETITIONER

ORIGINAL

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Courts of Appeals For The First Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Hector Rosario-Rivera
(Your Name)

Federal Prison Camp,2600 Hwy 301 South,
(Address)

Jesup, GA 31599
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Petitioner's Fifth and Six Amendment Rigths were violated by plain error made in calculating petitioner's sentence, and the numerous ways that Petitioner's counsel was constitutional ineffective assistance of counsel in which the United States Constitution guarantees.

2. Whether the Petitioner's Fifth and Fourteenth Amendment Rights violated and was denied his due process of law.

3. Was Trial counsel ineffective assistance of counsel when hw allowed the government to breach the plea that they knowingly, wilfuling , and volunteeringly entered with the petitioner and petitioner's counsel.

LIST OF PARTIES

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

[X] 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 judgement is the subject of this petition is as follows:

Michael C. Bagge., U.S. Attorney;

Franciso A. Nasosa., U.S. Judge(Sentencing Judge) for Petitioner;

Silvia Carreno-Coll, U.S.Magistrate Judge;

Jason Gonzalez-Delgado, Trial Attorney for Petitioner;

Peter Diaz U.S. Attorney;

James S. Hewes, Appeals Counsel for Petitioner;

Ignacio Fernandez-Lahongrais, U.S. Attorney;

Juan Milanes., U.S. Attorney;

Ernesto Hernandez-Milan., U.S. Attorney;

Olga B. Castellan-Miranda., U.S. Attorney;

Janis Palma., Interpreter;

Joe Reynosa., Court Reporter;

Sandra Velez., U.S. Probation Office;

TABLE OF CONTENTS

JOINT APPENDIX TABLE OF CONTENTS

APPENDIX PAGE

TABLE OF AUTHORITIES

PAGES

STATUTES

TABLE OF AUTHORITIES CONTINUED

PAGES

OTHERS

IN THE

SUPREME COURT OF THE UNITED STATES

PETITIONER FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to revive the judgement below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States Courts of Appeals for the First Circuit(R.27-2) was june 20, 2019. The Appeal number 17-2116 Denying the application of a Certificate of Appealability for the Petitioner's §2255 Motion To Vacate, Set Aside, Or Correct A Sentence Of A Person In Federal Prison and has a secondary case No:3:12-cr-00333-FAB-1. It's reported at Page 1 of this motion.

[X] The Opinion of the United States District Court case No:15-cv-1047(FAB), The district Court ORDERED AND ADJUDGED Petitioner's §2255 Motion and denied Petitioner's Certificate of Appealability at the same time on June 28, 2017 and is on page 1 of this motion.

A timely petition for rehearing was denied by the United States Courts of Appeals on 10/23/2014.

On July 28,2017, the U.S.District Court Judge Francisco A. Besosa Dismissing the case. Appendix A

On June 20,2019, The First Circuit Court of Appeals DENIED Petitioner's Appeal for a C.O.A. Appendix B.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States courts of Appeals decided my case was June 2020, 2019.

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

[x] A timely petition for rehearing was denied by the United States Courts of Appeals on the following date: 10/23/2014 and a copy of the order denying rehearing appears at page 1 appendix.

The jurisdiction of this court is invoked under 28 U.S.C.23 §1254(1).

[] For cases from states courts:

The dates 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._____

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition is promised on the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

1. On April 26,2012, Petitioner was arrested along with 39 others for a six(6) Count Superseeding Indictment for a violation of 21 U.S.C.§846(a)(1),846, and 860, and other crimes.

2. On February 21, 2013 petitioner entered a change of plea from not guilty to guilty to Count one(1) of the indictment,and all other charges were dismissed. Petitioner was sentenced to 262 months and 120 months of supervised release.by the Honorable U.S.District Judge Besosa, on June 20 2013.

3. A timely Notice Of Appeals was filed petitioner's counsel Gonzalez-Delgado on June 24,2013, however, it was denied.

4. Petitioner filed a §2255 Motion To Vacate, Set Aside, Or Correct A Sentence Of A Person In Federal Prison on November 10, 2014, asserting that his Fifth,Sixth, and Fourteenth Amendment Rights were violated.

5. Petitioner attacked his sentence length and the fact that he received a four(4)point enhancement and not the Two(2)point enhancement agreed to in the plea agreement. Petitioner asserts that trial counsel was ineffective assistance of counsel for allowing the government breach the plea agreement. that both parties agreed to and that's why petitioner did a change of plea in the first place.

6. Appeals counsel was constitutionally ineffective for not arguing that on appeal because trial counsel bring the subject up at sentencing.

7. The government claimed that petitioner's §2255 claims were procedurally defaulted because it could have been raised on direct appeal,but was not raised, is now procedurally

defaulted. That supports petitioner's claim that both counsels were ineffective assistance of counsel.

8. The government concluded that petitioner's §2255 Motion should be denied on September 30, 2016.

9. On July 28, 2017, an order dismissing the case was filed by the Honorable U.S. District Court Judge Francisco A. Besosa. The judge asserted that petitioner did not make a substantial showing of a constitutional right.

10. On October 23, 2017, which was entered on November 30, 2017, by the First Circuit Court of Appeals. Petitioner also filed for a C.O.A. because the District Court Judge did not give an opinion on Petitioner's §2255 Motion as is required by the Statute.

11. Petitioner was not vested in law at all and was not aware that he could have filed an objection against the Magistrate Judge's R&R against petitioner's claims. A pro se petitioner as well as any petitioner has a right to be informed that he could file a motion objection to the Magistrate Judge's R&R. However, petitioner was not allowed to. That is a violation of petitioner's due process of law and Fifth Amendment rights.

This decision by trial counsel failed below the standard of effective assistance of counsel and no other counsel would have made this gravee mistake. That choice prejudice petitioner and left him with a sentence greater than the one he should have received and clearly meets both prongs of Strickland v. Washington; and the petitioner should be resentenced.

Petitioner believes that if not for trial counsel's ineffective assistance, he would have received a lower sentence.

REASONS FOR GRANTING THE PETITION

Ground One: Whether the Petitioner's Fifth and Six Amendment Rights were violated by plain error made in calculating petitioner's sentence and was trial counsel constitutional ineffective assistance of counsel in violation of the United States Constitution that is guarantees.

1. The Supreme Court ruled 7-2 on June 18, 2018, that an error in calculating the sentencing guideline is an error that must be addressed by resentencing the defendant,even if no one noticed the error when it occurred. This is exactly like petitioner's case.

The Court must correct the mistake, even if the sentence imposed falls within the correct guideline range.

2. The majority touts that finality is an important principle of vital importance."Without justice, finality is nothing more than a bureaucratic achievement,"Gilbert,640 F.3d. 1292,1337(11th Cir.2011).(en banc)(Hill,J.dissenting), so we should resist the temptation to "prostate[] ourselves at the alter of finality, draped in the sacred shroud of judicial restraint."

3. In the case of Keving Spencer v. United States,Circuit Judge MARTIN,joined by WILSON AND JORDAN, circuit Judges, dissenting: The Majority and dissenting opinions issued by the Court today set out the academic debate over the scope of relief provided by 28 U.S.C.§2255 to prisoners now in Federal Prisons, based on incorrect sentences mistakenly imposed by Federal Judges.

Petitioner believes that this is the same with his sentence and believes that his sentence was miscalculated by the district court when he was sentenced.

4. The sentencing judge's statements suggested that Spencer's sentence would be different in the absence of the career-offender enhancement,"instead of looking at a 32, you have been looking at

a level 23. It's in essence, half the sentence, in essence." Sentencing Tr.at 20(Record No.49). The erroneous enhancement increased SPencer's guideline range from 70 to 87 months to 151-180 months.

This is the same argument as the petitioner's because both parties agreed in the plea agreement that petitioner would receive a two(2) point aggravating role adjustment, adjustment under USSG 3B1.1, which resulted in an offense level calculation of 35 and a guideline range of 210-262 months. Both parties agree to recommend a sentence at the low end.

However, at sentencing the District Court applied a four(4) point enhancement for aggravating role adjustment, which raised the petitioner offense level to 37, and his sentencing guideline range to 262-327 months instead of the 210 months as stated in the plea. Sentencing counsel was ineffective assistance of counsel because he failed to object or to argue this on direct appeal.

5. Petitioner asserts that the court did not consider any factors of §3553(a) for the reasonableness of the sentence he received In United Stes v. Williams, at 1363,pg 7 of No.06-13584-FF, the U.S. Courts of Appeals stated "When reviewing the lenght of a sentence for reasonableness, we will remand for resentencing if we are left the definite and firm conviction that the district court committed a clear error of judgement in weighing the §3553(a) factors in arriving at a sentence that lies outside the range of a reasonable sentence dictated by the facts of the case."

Petitioner believes that his case is the same as this one because petitioner's sentence is unreasonable when looking at the facts of the case.

In addition, the court held: "we note that the district court did not expressly indicate that it considered the §3553(a0 factors and did not provide any comment regarding the sentence other than that he was sentenced at the low end of the guideline range, that is the same as petitioner's case. The Government, the District Court and the First Circuit said about petitioner's sentence. However, petitioner's sentence range was 210 months prior to the additional Four(4) point enhancement instead of the Two(2) point enhancement that both parties agreed to. Counsel was ineffective assistance by not holding the government to the terms of the agreement and by not filing a direct appeal to raise the issue.

Petitioner also asserts that counsel was ineffective assistance when counsel advised petitioner that he would receive a sentence of 210 months, and not the 262 months he received.

6. See Tse v. United States,290 F.3d. 462(1st Cir.2002), misadvise that defendant could not received more than a ten year sentence or be prosecuted on more than one count without violating extradition order stated claim of ineffective assistance remanding for a hearing). This is like like petitioner's case counsel advised petitioner what his sentence would be.

7. On June 18,2018, the Supreme Court ruled sentencing calculation errors be fixed SCOUTS says (1) A mistake calculation under federal sentencing guideline that is plain and effects a defendant's right should be corrected. They also stated"such a mistake will"in the ordinary case, as here, seriously affect the fairness, integrety, or public reputation of judicial proceedings." The court said in an opinion by Justice Sonia

Sotomayore.

8. To help ensure certainty and fairness in sentences, federal courts are required to consider the advisory USSG, prior to sentencing, the United States Probation Office prepares a presentence report to help the court determine the applicable sentencing guideline range goes unnoticed by the court and the parties. However, in this case the probation office and the court mad a plain error in calculating petitioner's sentencing guideline according to the plea agreement.

9. In United States v. Olano, 507 U.S. 725(1) the error was not "intentionally relinguished or abandoned,"(2) the error, and (3) the error"affected the defendant's substantial rights. Petitioner believes that this illegal enhancement should be corrected and petitioner's sentence should be lowered to the term of 210 months agreed upon by both parties.

GROUND TWO: Whether Petitioner's Fifth and Fourteenth Amendment **Rights Violated** When He Was Denied His Due Process Of Law?

1. Petitioner asserts that those rights were violated when he never received the benefit of responding to the Magistrate Judges recommendation to the Sentencing Judge Besosa regarding Petitioner's pro se §2255Motion To Vacate, Set Aside or Correct A Sentence Of A Person IN Federal Prison.

That issue prejudice the petitioner, and the fact that he was indeed a pro se litigant there should have been some notification to allow petitioner to offer an objection to the opinion of the magistrate's judges ruling. However, that was not the case, and it is the law.

2. This certainly was a violation of Petitioners's due

process law right, and the Magistrate judge are required to make a R&R on each issue that the defendant raised in his §2255 Motion, but the petitioner was never given that option. Petitioner should be allowed to due so or resentenced to the agreed upon sentence.

3. The District Court did not make its own findings in petitioner's §2255 Motion and only affirmed what the Magistrate judge stated. The petitioner believes that the court should have notified him by mail that he had a certain time to file a motion in opposition of the Magistrate judge recommendation, and this is a violation of petitioner's Fifth and Fourteenth Amendment Rights guaranteed by the U.S. Constitution.

A response dialogue/opinion is required by law of each issue raised by the Appellant/Petitioner, and not just simply a conceding to the Government's unopposed motion to dismiss Appellant motion.((Exhibit A-Docket).

No Formal Order of the court with opinion was provided to Petitioner, only a simple judgement saying," in accordance with the Order entered today (Docket No.15), this case is dismissed with prejudice."(Exhibit B. Judgement). Petitioner's Sixth Amendment Rights were violated again by the district court not providing its own judgement on petitioner's §2255 Motion.

GROUND THREE: Was counsel ineffective assistance of counsel when he allowed the Government to breach the plea that they knowingly, willfully, and volunteeringly entered with the petitioner and petitioner's counsel?

1. On February 21, 2013, petitioner agreed to plead guilty to COUNT ONE of the Superseding Indictment with the government

and Petitioner's counsel. In the Plea Agreement both parties agreed that petitioner's Base Offense Level would be thirty(32), pursuant to 2D1.1(c)(4) for at least 5 Kilograms but less than 15 Kilograms of cocaine.

2. Petitioner was given a two(2)point enhancement for his role as the leader pursuant to §3B1.1(a). And another two(2) point enhancement for a Protected Location pursuant to U.S.S.G.§2D1.2(2)(1). Petitioner was also given a two(2) point enhancement for a Dangerous Weapon pursuant to §2D1.1(b)(1). Then petitioner was also given a two(2) point reduction pursuant to 3E1.1, for a **total Base Offense Level of 35.**

4. However, at sentencing petitioner's counsel did advised the Court that we filed a sentencing memorandum where we made some requests to this Honorable Court regarding the sentencing guideline calculations that were made. We believe that there is an enhancement that was made by the Probation that we would like to the Court to disregard. It's regarding the four points, on page 14 of the pre-sentence report, item 38. Section 3B1.1(a), probation says that he warrants a four point increase in sentence.

5. This is clearly a breach of the plea agreement because the petitioner was given a four point enhancement instead of the two point agreed upon, this is certainly a miscarriage of justice and is evident in the appeals response by the Government when the Government advocated for a higher sentence during the appeal that was against the terms they agreed to in the plea.

However, at the sentencing colloquy, the government justly and correctly advocated for the sentence to concur with the plea agreement. The Government asked for the U.S.S.G.§3B1.1(c),

two level for a leadership enhancement but the court applied a 4 level section 3B1.1)a)(1) leadership enhancement in opposition to the terms of the plea agreement. See government's document 826 plea agreement P.5 of 15 and Sentencing Transcripts, Page 5, Lines 1-7.

6. The government and counsel agreed that petitioner should be sentenced to One Hundred and Sixty-Eight months if petitioner's Criminal Category History was one,and Two Hundred Ten(210) months if higher, or at the low end of the sentencing range in either case.210-262 months and the low end is 210 months not the 262 months and Ten years of Supervised Release he received. Counsel was constitutionally ineffective for not holding the government to abide by the plea agreement that they entered. This prejudice petitioner leaving him with an unjust term of imprisonment.

7. The Prosecutor Mr. Baggs stated in the sentencing colloquy P.8: "Mr. Bagge: Yes, your honor, Your honor, as the court well aware, the United States made, along with brother counsel and the Defendant, a Plea Agreement. And we have to recommend and stand by the plea agreement, and we are bound by the terms of the plea agreement. So the United States makes that recommendation to the court to uphold the plea agreement." Quoting the Sentencing Transcripts Page 8 Lines 1-7. However, in its Response Brief to the First Circuit, the Government once again breached its own brief by advocating against the terms of its plea agreement.

That should have voided the plea agreement and violated petitioner's rights of due process of law guaranteed by the

U.S Constitution. The Government breached the plea agreement and the government knew that the plea agreement is a contract that must upheld by them. These actions by the government and the facts of the plea agreement exemplifies a constitutional ineffective assistance of counsel that's guaranteed by the SIxth Amendment Rights.

8. In Santobelloe v. New York, 404 U.S.257,262(1971(, the Supreme Court held that,"...When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Petitioner believes that this case is exactly like petitioner's case, the government induced him take the plea of no more than 210 months in prison, and then breached the plea and opposed the sentence in the Circuit Court.

9. Citing Atwood, 963 F.3d at 479. Because defendants must ultimately waive fundamental rights as a result of entering into any plea agreement,"We hold prosecutors engaging in plea bargaining to "the most meticulous standards' of both promise and performance." United States v. Rivera-Rodriquez, 489 F.3d 48,57(1st Cir.2007)(citations omitted). Petitioner believes that the District Court and the First Circuit did not hold prosecutors to that standard because they breached the plea agreement and should remand the case back for resentencing to the 210 months both parties agreed to.

10. In United States v. Marin-Echeverri,846 F.3d 473, 476(1st Cir.2017)(internal quotation marks omitted)(quoting United State v.Almontee-Nunez,771 F.3d 84,89(1st Cir.2014)). These strick standards"require more than lip service to, or

technical compliance with, the terms of the plea agreement." Id. (quoting Almonte-Nunez,771 F.3d at 89):see also id. "We frown on technical compliance that undercuts the substance of the deal"): United States v. Quinons-Melendez,791F.3d 201,204(1st Cir.2015) (The government us barred not only from 'explicit repudiation of the government's assurance' contained in a plea agreement but also' in the interest of fairness'-from undertaking end-runs around them."(quoting United States v. Rivera-Rodriquez,489 F.3d 48,57(1st Cir.2007). Instead, a"defendant is entitled not only to the government's technical compliance; with its stipulations to the 'benefit or the bargan' struck in the plea deal and to the food faith of the prosecutor." United States v. Mates-Quiones, 456 F.3d 14,24 (1st Cir.2013)(as in all contracts, plea agreements are accompanied by an implied obligation of good faith and fair dealing" (quoting United States v. Ahn, 231 F.3d 26,35-36, 343 U.S. App. D.C. 392(D.C.Cir.2000)).

Petitioner asserts that none of the above references were taken into consideration at sentencing regarding the breach of the plea by the government. Petitioner and counsel planned on the government to uphold its part of the plea, however, trial counsel was ineffective assistance by not trying to hold prosecution from fulfilling its contractual obligations, and that prejudice petitioner and should be corrected.

11. There is no course,"no magic formula" for assessing whether a prosecutor has complied with a sentencing recommendation in a plea agreement," United States v. Gonezy,357 F.3d 50,54 (1st Cir.2004) In the end, we examine the totality of the circumstances, Marin-Echeveri,846 F.3d at 478, to

determine whether "the prosecutor's oeverall conduct (is)...reasonably consistent with making such a recommendation, rather than the reverse." Petitioner believes that the prosecutor's overall conduct was not reasonable because in prosecutor's response to petitioner's §2255 motion To A Vacate, Set Aside Or Correct A Sentence By A Person In Federal Prison and Petitioner's appeal prosecutor claim the sentence was right, and clearly it was not because the plea agreement was for 210 months.

At sentencing Prosecutor Bagge agreed with petitioner's counsel when he stated "Your honor, and the court is well aware, the United states made, along with brother counsel and Defendant, a Plea Agreement, And we have to recommend and stand by the plea agreement, and we are bound by the terms of the plea agreement. So the United States makes that recommendation to the court to uphold the plea agreement." Petitioner asserts prosecutors overall conduct was not reasonable and it prejudice petitoner, leaving him with a longer sentence than the plea agreement stated.

12. (Quoting United States v. Canada,960 F.3d 263,268(1st Cir.1992) As for the Appellant, clear breach of the plea agreement occurred by examining the record in violation of the Due Process Clause of the Fifth/Fourteenth Amendments of the U.S. Constitution. Whether the government breached the terms of a plea agreement is usually a question of law, which an appellate court reviews denovo. But, where the defendant fails to object to the purported breach before the district court, review is only for plain error. Here, the issue was raised at

at sentencing via a Memorandum and on the records of transcript, denovo review is the appropriate review for this issue.

13. Petitioner believes that appeals counsel was ineffective assistance when he failed to argue that the Prosecutor Mr. Bagge's overall conduct was very unprofessional and was prosecutorrial misconduct when he filed his opposition to petitioner's §2255 Motion, and to petitioner's appeals when he said that the sentence was right, however, at sentencing he said that the government entered a plea agreement with brother counsel and the defendant, and that the government and were bound by the plea agreement.

14. The United States Supreme Court substantially changed the landscape of criminal sentences in the federal system by the case of Booker v. United States,543 U.S.220.125 S.Ct. 738,160 L.Ed.2d 621[2005]. The Court held that the sentencing guidelines of the U.S.Sentencing Commission were"effectively advisory" and not mandatory. Petitioner believes that the 262 months were not mandatory and that he should have received the 210 months according to the plea agreement.

15. The Court also said in sentencing an individual "the court should "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate,sometimes magnify, the crime and the punishment to ensue." Gall v. United States,128 S.Ct.586,598(2007).

With that in mind Petitioner's counsel pointed out several factors that the court should should consider in his Sentencing Memorandum. 1. Petitioner was a father of four, he was 35 years old and only had a 10th grade education, and that he was sentenced to 2 years in prison when he was 23 years old and again in2007.