IN THE
SUPREME COURT OF THE UNITED STATES
No. _____

GREGORY JOEL SITZMANN
Petitioner,

19-7525

v.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT
OF COLUMBIA

ORIGINAL

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QUESTION(S) PRESENTED

1) WHETHER THE DISTRICT COURT LACKED "JURISDICTION" OVER EVIDENCE OF FOREIGN DRUG SMUGGLING: AND WHETHER THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA RENDERED A DECISION IN CONFLICT OF THIS COURT AND OTHER COURT OF APPEALS;

2) WHETHER TRIAL COUNSEL'S OBJECTION PRESERVED REVIEW OF THE PROSECUTION'S CLEAR ERROR IN QUESTIONING AGENT BUSS;

3) WHETHER THAT REMAND OF SITZMANN'S IAC CLAIMS IS MERITED?

PARTIES

THE PETITIONER IS GREGORY JOEL SITZMANN, WHICH IS PRESENTING THIS WRIT OF CERTIORARI IN PROPRIA PERSONA (PRO SE), WHO IS CURRENTLY SERVING HIS SENTENCE IN THE FEDERAL BUREAU OF PRISIONS.

THE RESPONDENTS ARE GRIFFITH AND KATSAS, CIRCUIT JUDGES: EDWARDS SENIOR CIRCUIT JUDGE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

TABLE OF CONTENTS

INDEX TO APPENDICES

OPINIONS BELOW

The decision of the United States District Court for the District of Columbia is attached hereto as Appendix (A). The order of the United States Court of Appeals for the District of Columbia is attached hereto as Appendix (B).

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES

CONT;

Cases **Page**

TABLE OF AUTHORITIES

CONT;

Cases **Page**

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Coulumbia Circuit was entered on June 29, 2018. An order denying a petition for rehearing was entered on June 18, 2019, and a copy of that order is attached hereto as Appendix D. On November 08, 2019, this Court extended the time for filing this petition; therefore, Jurisdiction is conferred Title 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 07, 2008, Mr. Sitzmann was indicted on one count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, Title 21 U.S.C. § 846. The indictment charged that "From at least the 1990s, through at least 2004, the exact dates being unknown to the Grand Jury, within the United States, Mexico, Canada, Columbia (sic), the Bahamas,Spain, France, Italy, and elsewhere," Mr. Sitzmann conspired with persons known and unknown to the Grand Jury to unlawfully distribute and possess with the intent to distribute five kilograms or more of cocaine.

A Jury trial commenced on April 17, 2012, before Judge Paul L. Friedman and concluded on May 21, 2012 with a verdict of guilty. A motion for judgment notwithstanding the verdict or a new trial was filed on January 23, 2013. These motions were denied on November 18, 2004. On October 23, 2015, Sitmann was sentenced to 348-months incarceration, to be followed by 120-months of supervised release, and a fime of $500,000. The District Court entered final judgment on November 05, 2015. Petitioner filed his notice of appeal on November 06, 2015.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS:

UNITED STATES CONSTITUTION

STATUTES AND RULES

ARGUMENT(S) IN SUPPORT OF GRANTING CERTIORARI

QUESTION 1: WHETHER THE DISTRICT COURT LACKED JURISDICTION OVER EVIDENCE OF FOREIGN DRUG SMUGGLING; AND WHETHER THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA RENDERED A DECISION IN CONFLICT OF THIS COURT AND OTHER COURT OF APPEALS:

The United States Constitution Article III requires that the trial of all crimes shall be held in the State where the said crimes shall been committed. (U.S. Constitution Article III § 2 Cl. 3). Furthermore, the Sixth Amendment provides that in all criminal prosecutions, an 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.

This guarantee is codified in the **Federal Rules of Criminal Procedures**, which require the Government to prosecute an offense in a District where the offense was committed. Reflecting these safeguards, **Rule 18** of the **Federal Rules of Criminal Procedures** provides; that, unless otherwise permitted by statute or the **Rules**, "the Government must prosecute an offense in a District where the offense was committed.

In the case at bar, Petitioner asserts that the District Court lacked "jurisdiction" over evidence establishing that he smuggled drugs from Columbia to Europe between 2001-2004 (Brief for Appellant(App.Br.) 29). There was jurisdiction to the extent that the indictment charged a violation of the United States Code. See, **United States v. Fahnbulleh, 752 F.3d 470,476(D.C. Cir. 2014).** An issue in this appeal is whether the Disctrict Court has subject matter jurisdiction over the extraterritorial drug possessions occurring outside the United States and whether Petitioner committed an overt act to establish venue in the District of Columbia.

It is a well-established rule that "a conspiracy prosecution may be brought in any District in which some overt act in furtherance of the conspiracy was committed by any of the co-conspirators." Thusly, a similar standard should not apply to venue because the absence of any act by Sitzmann in the District of Columbia by himself is fatal to the Government's assertion.

Fed. R. Crim. P. 18 the statute proscribing the offense does not contain an express venue provision, "the 'locus delicti' must be determined from the nature of the crime alledged and the location of the act or acts constituting it." Further, the Government must prove that Petitioner must have been acting with the kind of culpability otherwise required for the commission of the crime, which he is charged.

A substantial step must be conduct strongly corroborative of the firmness of Sitzmann's criminal intent, and he must have committed an overt act toward its commission. **See, United States v. Morgan, 593 F.3d 192,195(D.C.Cir.2004); (Citing United States v. Haire, 371 F.3d 833,837 (D.C.Cir.2004); (quoting United States v. Cabrales, 524 U.S. at 6, 118 S.Ct. 1772).**

Under Title 18 U.S.C. § 3237(a)...transportation in interstate or foreign commerce, or the importation of an **object** is prohibited. In the case at bar, the **object** would have been the purported cocaine, which none went into the District of Columbia. "This Court has long held that venue is proper in any District in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense." **See United States v. Watson, 717 F.3d 196,198(D.C.Cir2013)(citing United States v. Brodie, 524 F.3d 259,273(D.C.Cir.2008); and Whitfield v. United States, 543 U.S. 209,218 S.Ct. 687, 160 L.Ed.2d 611(2005)..**

The conspiracy with which Mr. Sitzmann was charged was alleged to have been carried out in numerous states and other nations. But the only connection between this alleged conspiracy and the District of Columbia was a single wire transfer made by one of Mr. Sitzmanns co-conspirators, George Jones, to an individual named Terrance Colligan, who was posing as a fellow con-spirator, but in reality he was a Government informant.

Mr. Colligan, who had agreed to supply 16 kilograms of cocaine to Mr. Jones in Florida, telephoned him there and requested that Jones wire money to Washington, D.C. to facilitate Colligan's travels. However, in reality Colligan was Government informant, and the wire transfer was a ruse orchestrated by law enforcement to establish venue in the District of Columbia.

In the Government's Reply Brief (Page 16), Officer (Agent) Buss testified that "Florida Agents were uninterested in prosecuting Jones, and that he had Jones wire money to DC as a show of "good faith" and to establish venue over Jones." Furthermore, the Government intended to supply Colligan with "fake cocaine" as part of the sting to entrap Jones and arrest Jones when the transaction was completed.

The sole purpose of the Government's sting operation with George Jones was largely to gather evidence on Sitzmann. Jones alleged that he served as a driver for Sitzmann in the 1990s, ferrying cocaine from the United States into Canada. Further, Jones testified under oath during his Grand Jury Testimony the following:

Grand Jury Transcripts:Page 23:

Q. And roughly how much cocaine were you to transport from Texas?

A. I don't really--I was--I think it was 20 Kilos. That's what I got paid for.

Q. Okay, and --

A. I didn't see it.

Q. Okay, you didn't see the, the cocaine?

A. No, sir.

and Page 52 (Grand Jury Transcripts):

MR. ELIOPOULIS. Right. so in other words, what you were doing -- tell me if I'm wrong, but the term that is used in in the business is you were a mule. Am I right?

WITNESS. Yes, yes, that's correct.

Based on the Grand Jury testimony of George Jones, it is clear the Government suborned this witness for the benefit of prosecuting Sitzmann. Sitzmann contends that Jones's wire transfer was not part of the alleged narcotics conspiracy against Sitzmann, or part of any conspiracy since the Governement's only connection to Sitzmann is George Jones false testimony and Goerge Jones alleged conspiratorial agreement with Colligan.

Since Colligan is anGovernment agent, there can be no conspiracy and no venue created in the District of Coulumbia for conspiracy. The Government's assertion of venue is misplaced because no drugs were possessed or distributed in the District of Columbia. Moreover, the gravamen of the crime of conspiracy is an agreement to commit an unlawful act, exploratory and inconclusive or preliminary discussions how to violate the law are not sufficient to establish an agreement. **See, United States v. Iennaco, 839 F.2d 394,397 n. 3((D.C.Cir.1990); United States v. Haire, 371 F.3d 833,837(D.C.Cir.2004); United States v. Iennaco, 893 F.2d 394((D.C. Cir.1990).**

The United States Supreme Court has stated more than once that: "Questions of venue in criminal cases...are not merely matters of formal legal procedures, they raise deep issues of Public Policy..." **United States v. Johnson, 323, U.S. 273,276 65 S.Ct. 249,251 89 L.Ed. 236(1944); Travis v. United States, 364 U.S. 631,634, 81 S.Ct. 358,360 5 L.Ed. 2d 340(1961);** Accord, **United States v. Valenti, 207 F.2d 242,245(3d Cir.1953).** This Court has consistantly viewed the venue provisions of the Constitution as important safeguards protecing an accused from unfairness and harsship in defending against prosecution by the Federal Government."

Furthermore, in **United States v. Toomey, 404 F.Supp. 1377(2dCir. 1975),** the court ruled that lack of predisposition to commit the crime is the principal element of entrapment. Sitzmann further asserts that his conviction must be vacated because the Government violated his constitutional rights by manufacturing venue in the District of Columbia. Sitzmann further contends that reversal is warranted because the Government failed to present any evidence the conspiracy with which he was charged and convicted continued after August 07, 2003. **See, United States v. Spriggs, 102 F.3d 1245,1250-51(D.C.Cir.1997); United States v. Slatten, 865 F.3d 767,788-89(d.C.Cir.2017).**

The centrality Sitzmann argument is that his primary defense at trial was that he ceased all drug-trafficking activity within the United States after meeting with Florida prosecutors in 2000. Thusly, a conspiracy to smuggle drugs from one nation to another, without any intent to either possess the drugs in the United States or to distribute them in the United States, would not violate **Title 21 U.S.C. § 846.** Previous precedents established that 'possession outside the United States territory' does apply unless the possessor intends to distribute the contraband within the United States. **See, United States v. Baker, 609 F.2d 134,**

139(5th Cir.1980); United States v.Benbow, 539 F.3d 1327,1330-34(11th Cir.2008).

Finally, under the Rule that an aider and abettor may be tried in the District in which the principal committed the offense; therefore venue could have been established under this Rule if the Government argued that Sitzmann was an aider or abettor. However, the government failed to specify, either in the indictment or at trial,that it was prosecuting Sitzmann on the theory that the he was an aider and abettor as opposed to a principal. Furthermore, the Jury wasn't instructed on the issue, as such reversal is required. **See, United States v. Brantley, 733 F.2d at 1434(11th Cir. COA 1984); United States v. Griffin, 814 F.2d 806(1st.Cir.1987).**

QUESTION 2: WHETHER TRIAL COUNSEL'S OBJECTION PRESERVED REVIEW OF THE PROSECUTION'S CLEAR ERROR IN QUESTIONING AGENT BUSS:

INTRODUCTION and RULE 35(b) STATEMENT

In an overzealous attempt to admit trial testimony colored to convict Petitioner, Gregory Sitzmann, of an alleged drug conspiracy cooked from a Gvoernment sting operation that garnered scant evidence against him, the prosecutor committed clear error. **United States v. Sitzmann, 893 F.3d 811,830(D.C.Cir.2018)**("There can be no doubt that the legal error here was 'plain' and 'clear'''') quoting **United States v. Sullivan, 451 F.3d 884,892(D.C.Cir.2006.** Possibly relying on the Government's response at oral argument, the panel reviewed for plain error. Yet, since full reading of the record reveals an objection by trial counsel to merit harmless error review.

Responding to the panel at oral argument, Government counsel admitted the prosecutor erred by questioning the operation's supervising Agent to state that the non-testifying co-conspirator had pled guilty. **Sitzmann, 893 F.3d at 830,** citing Oral Arg. Recording; Oral Arg. Tran. at USCA Dkt. No. 1768161,pp 18-21. Seemingly to avoid review under a harmlesss beyond a reasonable doubt standard, the Government followed arguing (for the first-time) that trial counsel failed to preserve the error. Id.p.24. The Government, failed to mention trial counsel's "objection" (or the Court's response) redacted from its quote of that questioning in Appellee's brief. Further, it failed to raise preservation in its briefings. Thus, the Panel's finding that "defense counsel neither objected...." and "[t]hus we review only for plain error", was likely the ill-formed result of these failings. **Sitzmann, supra. at 829.**

Consequently, the Panel should have reconsidered rehearing for briefing on the question of preservation, and from it to apply the correct standard of review. See, Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of columbia, Section XIII (B)1., p.58 (2018).

Appellant also requested rehearing of the Panel's decision not to remand Sitzmann's specifically enumerated ineffective assistance of counsel (hereinafter "IAC") claims. As Senior Judge Edwards articulated in his well-penned dissent, the majority's failure to remand is contrary to predence on the treatment of IAC claims first raised on appeal. **Sitzmann, 893 F.3d at 836-39.** Remand for factual findings by the District Court Judge is also consistent with the United States Supreme Court's opinions recognizing the District Court as the superior venue for trying facts on this issue. Id at 838, citing **Massaro v. United States, 538 U.S. 500,504-05(2003).** Consequently, on the issues presented in this petition, certiorari is merited so as to conform with releant precedence. Fed. R. App. P. 35(b)(2018).

NATURE OF THE CASE

A. Trial Proceedings, and Post Conviction Motions.

In 2012, Sitzmann was tried by a Jury, before the Honorable District Court Judge Friedman, on one count of conspiracy to distribute, and possess with the intent to distribute, five kilograms or more of cocaine. **Sitzmann, 893 F.3d at 818.** The conspiracy indictment resulted from a Government sting operation supervised by U.S. Immigration and Customs Enforcement ("ICE") Agent Buss. **United States v. Sitzmann, 74 F.Supp. 3d 96, 127(DD.C.2014.** Sitzmann was the only alleged co-conspirator before the Jury. On April 30, 2012, a week before close of the Government's case, the prosecutor questioned Agent Buss to introduce evidence that Jones--Sitzmann's long-time friend and non-testifying co-conspirator--had pled guilty to conspiracy.

The trial transcript of the prosecutor's line of questioning revealed both that trial counsel had objected, and the Court responded to his objection by inviting the prosecutor to proceed and be "more specific". Trial Tr. 04/30/12 pp. 47-48. Accepting the Court's invitation, the proecutor asked Agent Buss: "[a]nd did Mr. Jones plead guilty?".ID. On May 21, 2012, the Jury convicted Sitzmann of conspiracy, and Sitzmann filed pro se motions for new counsel alleging IAC claims. Trial Dkt. Nos.[1] 175 & 188. On June 14, 2012, the trial Court appointed new counsel ("Counsel 2") for filing post-trial motions and for sentencing. On January 23, 2013, Counsel 2 filed a memorandum in support of motion for judgment notwithstanding the verdict, or a new trial (hereinafter "MJoA"). In its MJoA, he specifically argued the prosecutor's erroneous questioning of Agent Buss.

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1 The abbrevaition "Trial Dkt. No." refers to the number of the document as identified in the U.S. District Court (PACER) Criminal Docket sheet for Case 08-cr-00242 (PLF) related to this matter.

Quoting from the transcript, Counsel 2 underlined trial Counsel's "objection" for emphasis and included the Court's response. Trial Dkt. No. 216, pp. 49-50. Despite this emphasis, the Government's Opposition neither argued, nor addressed, preservation. Trial Dkt. 230, pp.90-92. On April 16, 2014, Sitzmann filed a pro se Motion to Consider Additional Evidence in Deciding Defendant's Rule 29 and 33 Motions and Ineffective Assistance of Counsel...(hereinafter "Pro Se IAC Motion"). Trial Dkt. No. 245. By letter to the court on June 04, 2014, Counsel 2 withdrew Sitzmann's IAC claims "subject to being refiled at a later time...." Trial Dkt. No. 248, n.1. Although Sitzmann filed objections to Counsel 2's withdrawal, on November 18, 2014, the District Court denied the MjoA[2] without adressing Sitzmann's IAC claims. **Sitzmann, 74 F. Supp. 3d 96(D.D.C.2014).**

Not until about a year later, on October 23rd and November 05, 2015, respectively, did the trial Court impose its Sentence and Judgment against Sitzmann. Trial Dkt. 290. On November 06, 2015, Counsel 2 filed notice of direct appeal. In briefings[3] for that appeal, Counsel 2 raised Sitzmann's IAC claims. USCA Dkt. No.[4]1702804.

B. The Panel's Decision and Senior Judge Edwards' Dissent.

In its Opening Brief on appeal, Counsel 2 repeated it MJoA argument--that the prosecutor committed clear error by questioning Agent Buss to introduce evidence that the co-conspirator had pled guilty. Appellee's Brief did not address preservation in its opposition. USCA Dkt. No. 1716301.

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[2]In a separate decision, issued on the same day, the District court also denied Sitzmann's post-trial motion arguing the Government violated obligations Under Brady v. Maryland, 373 U.S. 83(1983) and Giglio v. United States, 405 U.S. 150(1972) See, United States v. Sitzmann, 74 F.Supp. 3d 128(D.D.Cir.2014).

[3]On February 26, 2018 Counsel 2 filed a Corrected Brief for Appellant (USAC Dkt. No. 1719547) and Corrected Reply (USCA Dkt. No. 1719549). However, neither corrected document contains relevant, substantive, changes from the earlier filings cited.

[4]The abbreviation "USCA Dkt. No." refers to the document number identified in the General Docket for the United States Court of Appeals for the District of Columbia Circuit.

Only in oral argument did Government counsel stated the error was not preserved and so review was for plain error. Oral Arg. at USCA Dkt. No. 1768161, p.24. Without further briefing, the panel ruled that "defense counsel neither objected to this line of questioning...." and [t]herefore, we find that the reference to Jones' guilty plea although serious, does not constitute plain error." **Sitzmann, 893 F.3d at 829.**

Although Sitzmann's Opening Brief identified specific IAC claims, the panel declined to remand for an evidentiary hearing. Dissenting, Judge Edwards cited that well-settled precedence supported remand for additional facts in a manner more consistent with Trial Court, than appellate, practice. **Sitzmann, 893 F.3d at 838, quoting United States v. Fennell, 53 F.3d 1296,1304(D.C.Cir.1995)** rev'd on other grounds on rehg, **77 F.3d 510(D.C.Cir.1996).** Accordingly, certiorari is warranted to bring this decision in line with established precedence.

DISCUSSION(S) ON PETITION FOR CERTIORARI

A. After admitting the Prosecutor's Clear Error in Oral Argument, and Seemingly to Avoid the Heavy Burden of a Harmless Review Standard, Government Counsel Argued (for the First Time) that Trial Counsel Had Failed to Preserve Review

At oral argument's eleventh-hour, the Government conceded that the prosecutor committed clear legal error in questioning Agent Buss on the disposition of co-conspirator Jones' case by introducing testimony that he pled auilty to conspiracy. **Sitzmann, 893 F.3d 830,** citing Oral Arg. Recording at 17:22-18-20;see USCA Dkt. No. 1768161,pp. 18-21. When panel judges then told counsel the Government bore the heavy burden of proving that harmless beyond a reasonable doubt, he responded by arguing anew that:

> ....[i]t was not preserved below, it is before this Court on plain error, and it was, it doesn't meet the standard for plain error. Thank you. If there are no further questions.

Id. pp.23-24. The Government's argument ignored the dialogue of trial counsel's "objection" (and the Court's response), to the prosecutor's line of questioning Agent Buss--dialogue omitted from its quote of that line in Appellee's Brief as follows:

Trans. 4/30/12, pp 47-48

Q. Now, Mr. Jones, he was arrested, you mentioned on the 26th of March, 2004?
A. Correct
Q: And what happened to his case:
MR. ABBENANTE: **Objection**
THE COURT: Why don't you be a little more specific. So he was arrested on the day of the tape we just heard/is that right?
Witness: Yes
BY MR. ELIOPOULOS:
Q: And was there a case in Washington, DC against him for conspiracy?
A: Yes. I had originally obtained an arrest warrant on a criminal complaint.
Q: And did Mr. Jones plead guilty?
A: He pled guilty.
Q: What did he plea?
A: And signed a plea agreement
Q: Okay. And did he plead guilty to conspiracy to distribute and possess with the intent to distribute at least 5 kilograms of cocaine?
A: That's correct.
Q: And did he end up cooperating with the government?
A: He did.
Q: And what happened to Mr. Jones? Is he alive today?
A: He passed away.

Appellee's Brief, p.54

Q. Now, Mr. Jones, he was arrested, you mentioned on the 26th of March, 2004?
A. Correct....
Q: And was there a case in Washington, D.C. against him for conspiracy?
A: Yes. I had originally obtained an arrest warrant on a criminal complaint.
Q: And did Mr. Jones plead guilty?
A. He pled guilty.
Q: What did he plea?
A: And signed a plea agreement.
Q: Okay. And did he plead guilty to conspiracy to distribute and possess with the intent to distribute at least 5 kilograms of cocaine?
A: That's correct.
Q: And did he end up cooperating with the government?
A: He did.
Q: And what happened to Mr. Jones? Is he alive today?
A: He passed away.

Trial Trans. 04/30/12, pp 44-47 (emphasis added), cf USCA Dkt. No. 1716301, 54.

In addition to omitting this objection-response dialogue, the Government failed to properly cite the omission. Rule 5.1 of the Bluebook: A uniform System of Citation (20th ed.) required counsel to note the dialogue's absence "by inserting and indenting four periods ("....") on

a new line" where the language would have been. Tr. Dkt. No. 216, p. 54. Yet, by only inserting four periods at the end of the sentence "Correct". the Government implied it had only omitted the end of that sentence, and not entire paragraphs. See, Id. Rule 5.3(b)(iii); Appellee Br. p. 54. The Government's omission, combined with its improper citation, likely served to obfuscate this objection-response dialogue on appellate review.

Sitzmann's MJoA highlighted that dialogue for appeal. **See, United States v. Olano, 507 U.S. 725,731(1993); Yakus v. United States, 321 U.S. 414,444(1944).** In addition to quoting the prosecutor's complete line of questioning, the MJoA also underlined trial counsel's objection:

> Q. Now, Mr. Jones, he was arrested, you mentioned on the 26th of March, 2004?
> A. Correct.
>
> Q: And what happened to his case?
> MR. ABBENANTE: Objection.
> THE COURT: Why don't you be a little more specific. So he was arrested on the day of the tape we just heard/is that right?
>
> Q: And was there a case in washington, D.C. against him for conspiracy?
> A: Yes, I had originally obtained an arrest warrant on a criminal complaint.
>
> Q: And did Mr. Jones plead guilty?

Trial Dkt. No. 216, pp. 49, quoting, Tr. 04/30/12 pp. 47-48 (underlining in MJoA).

This cited dialogue evidences counsel voiced objection to the prosecutor's question[5] regarding what "[a]nd happened to his [co-conspirator Jones'] case?" Id. Because that question could only have answered by stating Jones pled guilty, trial counsel timely objected. Id. Further, responding to counsel's objection, the trial court invited the prosecutor to proceed with his questioning and even be

5 This questioning followed after Buss had testified:

"more specific." Id. Accepting that invitation, the prosecutor proceeded to ask Agent Buss "[a] was there a case in Washington, D.C. against him [Jones] for conspiracy?" Id. (Underlining emphasis in MJoA). When Buss answered "yes" the prosecutor specifically asked "[a]nd did Mr. Jones plead guilty?" Id. Given the Court's response, inviting the resulting specific/erroneous questioning (i.e., did Jones plead guilty to conspiracy) further objection on that line was not necessary to preserve review. **See, Deloach v. United States, 307 F.2d 653,654(D.C.Cir.1962); In re M.C., 8 A.3d 1215,1223(DC.2010) (Quoting Hunter v. United States, 606 A.2d 139,144(D.C.1992)** ("The determining factor for purposes of preservation for appellate review is...whether the trial Judge was 'fairly apprised as to the question on which [she] was] being asked to rule."). Consistent with this argument, the Government did not argue lack of preservation in its briefs. Thus, the record does not support its eleventh-hour that objection was not preserved. **See, Empagran S.A. v. F. Hoffman-Laroche, Ltd., 388 F.3d 337,343-44(D.C.C. Cir. 2004), citing United States v. Layeni, 90 F.3d 514,522(D.C.Cir.1996).**

As the panel stated in oral argument, the correct review for such clear error is harmlessness beyond a reasonable doubt. Oral Arg. USCA Dkt. No. 1768161; **United States v. McGill, 815 F.3d 846(D.C.cir.2016).** Application of this high review standard comports with the panel's comment that it was "very troubled by the prosecutor's conduct in this case."[6]

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5 cont; he supervised the government's sting operation, his recorded conversations with Jones, and his subsequent arrest of Mr. Jones in this conspiracy. Sitzmann, 74 F. Supp. at 127.

6 By way of example, Judge Edwards commented during oral argument:"[i]t really is perplexing the prosecutor would pull a stunt like this three times, we both caught it, clear error in a case in which you think there's overwhelming evidence. You know we have rules, why don't we follow them?" USCA Dkt. No. 1768161, pp. 23:1-7.

Certiorari is warranted then to review under a harmless standard, and/or for briefing on the question of preservation raised at oral argument.

QUESTION: WHETHER THAT REMAND OF SITZMANN'S IAC CLAIMS IS MERITED?

B. The Panel Departed from Precedence in Declining to Remand Sitzmann'S Specific Ineffective Assistance of Counsel Claims.

Petitioner Sitzmann's appeal identifies specific claims that support review of trial counsel's ineffectiveness. USCA Dkt. No. 1702804, pp. 57-62. The Panel's failure to remand for an evidentiary hearing on those claims is contrary to Circuit precedence.

1. Remand is Warranted Under Controlling Precedence.

In declining to remand Sitzmann's IAC claims, the Panel's majority relies upon statements it reads out of context (and for the first time) in appellant's Reply Brief. **Sitzmann, 893 F.3d at 831-32.** So reading, the majority states Sitzmann "affirmatively argues that 'a remand is not necessary' because his particular claims 'are based on events in the trial record.' Appellant's Reply Br. 24. We agree with Sitzmann that a remand is unncessary."Id. at 831. Read in context, Sitzmann's statements are to the contrary. Notably, they appear under the argument heading "A Remand is Not Precluded." Reply at USDA Dkt. 1718967, p. 23 (emphasis added).

Further, Sitzmann's statements are in reply to the Government's argument that remand is precluded under the (distinguishable) case of **United States v. Debango, 780 F.2d 81(D.C.Cir.1986).** Sitzmann does not argue against remand in his Opening Brief. Even if Sitzmann had argued against remand in his Reply, that argument should be disregarded.

As the Panel reasoned in ruling to disregard Sitzmann's "seventh venue-related allegation of ineffective assistance" that was "raised only in his reply brief"--'[i]t is generally understood that arguments first raised in a reply brief are untimely.'" **Sitzmann, 893 F.3d at 833, citing United States v. Hunter, 786 F.3d 1006,1011(D.C.Cir. 2015).** Consistently, Sitzmann's reply should not form the basis for the panel's finding that "[b]ecause each of his claims turns on 'events in the trial record,' Appellant's Reply Br. 24, there is no need for further factual development." **Sitzmann supra. at 832.** Other than these statements in reply, the majority relies on but the slim reed of a footnote from **United States v. Poston, 902 F.2d 90,99 n.(D.C.Cir.1990)** in deciding not "to remand because Sitzmann 'has not raised any substantial issues that require a determination of facts.'" **Sitzmann, supra. at 832, citing Poston, Id.** That slim reliance is misplaced.

As Judge Edwards' dissent articulates, the greater weight of precedence compels remand of Sitzmann's specific IAC claims for evidentiary hearing. **Sitzmann, 893 F.3d at 838.** For example, quoting D.C. Cir in **United States v. Cyprus, 890 F.2d 1245,1247(D.C.Cir. 1989)** Judge Edwards reminds us:

> Our precedent should be clear. Where a party fails to create a record on the issue of ineffectiveness of counsel, this Court must remand the case for such proceedings.

Id., also citing, **United States v. Fennell, 53 F.3d 1296,1304(D.C. Cir. 1995)** rev'd on other grounds on reh'g, **77 F.3d 510(D.C.Cir. 1996).**

The majority's argument that Sitzmann presents no allegations that show "'his 'counsel's performance was deficient" and that "that deficient performance prejudiced the defense" is defeated by the panel's own finding of clear error by the prosecutor. **Sitzmann, 893 F.3d at 837, quoting Strickland v. Washington, 466 U.S. 668,687(1984).**

If the Court persists in finding that trial counsel failed to preserve review of the prosecutor's clear error in his questioning Buss, that specific error would merit remand for evidentiary hearing on facts surrounding trial counsel's deficient performance in failing to object to Sitzmann's prejudice. **See, Sitzmann, supra. at 831.** An ineffectiveness claim on this error should be found to have been preserved on appeal through counsel's third IAC allegation--that "[t]rial counsel deliberately or with gross negligence opened the door for the Government to introduce otherwise inadmissable evidence harmful to his client's defense." Id. at 832, citing Appellant's Br. p. 60. These IAC allegations in Appellant's Brief, and the many more in the record, demonstrate specific factual claims on ineffectiveness for remand.

2. Because the District Court Ruled on Sitzmann's MJoA Before Issuing Either Sentence or Judgment, the District Court Would Not Have Contemporaneously Considered His IAC Claim.

Both the majority's Opinion, and Judge Katsas in concurring, identify that Sitzmann failed to first bring his IAC Claims with his MJoA/New Trial in District Court. **Sitzmann, 893 F.3d at 831 & 834.** However, as appellate counsel explained to the trial Court in his June 04, 2014 letter withdrawing Sitzmann's pro se IAC claims, they should not be brought "at that time." Trial Dkt. No. 248. IAC claims are generally brought in District Court pursuant to 28 U.S.C. § 2255 (hereinafter "section 2255"). **See, United States v. Hayman, 342 U.S. 205,219(1952).** Section 2255, as amended in 1996, permits collateral attacks only after sentence is imposed. 28 U.S.C. § 2255 ¶ 1. In 1996 section 2255 was amended to create a one-year limit for filing claims that tolled from entry of a final judgment.[7]

7 Section 2255 was amended in 1996 under the Antiterrorism and Effective Death

Here, neither sentence nor judgment was imposed on Sitzmann until a year after the District Court denied MJoA--i.e., on October 23 and November 05, 2015 respectively. Trial Dkt. No. 290. Because Sitzmann's appeal was filed the day after his Judgment entered (on November 05, 2015), there was not[8] the "reasonable opportunity to challenge a conviction [i.e., by an IAC claim] in District Court" in the manner Judge Katsas argues in concurrence. **Sitzmann, 893 F.3d at 834, citing United States v. Debango, 780 F.2d 81,86(D.C.Cir.1986).** The case of United States v. Debango, as relied upon by the Government and concurring Judge, is distinguishable. Id. That **Debango** predates Section 2255's amendment by over a decade, provides further distinction here. Id.

Despite these distinctions under **Debango,** even assuming Sitzmann was required to first bring his IAC claims in District court, Sitzmann did so. The record is heavy with filings by Sitzmann requesting the trial Court hear his IAC claims with his MJoA. Trial Dkt. Nos. 175, 188, 245, 246, and 247. On April 16, 2014 Sitmann filed a pro se "Motion to Consider Additional Evidence in Deciding Defendant's Rule 29-Rule 33 Ineffective Assistance of Counsel and the MotionnRequesting the Grand Jury Transcripts Pending Before the Court" (hereinafter "pro se IAC Motion"). It was the Court's appointed Counsel who withdrew these claims over Sitzmann's objection. Trial Dkt. Nos. 246 & 247.

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7 cont; Penalty Act to create a one-year time limit for filing claims. Pub. L. No. 104-132, 110 Stat, 1214 (1996). That one-year limit sets the "date on which the judgment becomes final" as tolling the time to file a motion. 28 U.S.C. § 2255(f)(1).

8 Although "there is no jurisdictional barrier to a district court entertaining a § 2255 motion while a direct appeal is pending," this general rule when a contemptuous § 2255 motion filed in district court, it is often dismissed without prejudice while his direct appeal was pending. See Rules Governing § 2255 Proceedings, Advisory Committee Note to Rule 5.

That Counsel's letter to the Court withdrawing Sitzmann's claims did so conditionally "subject to being refiled at a later time." Trial Dkt. No. 248. That conditional withdrawal should be suffcient to find claims perserved now.

Consequently, and in order to bring the panel's decision in line with controlling precedence, certiorari is warranted on the foregoing issues.

CONCLUSION

Appellant respectfully requests that certiorari is GRANTED by the United States Supreme Court, so that the ends of Justice is served.

Respectfully submitted,

Date: November 05, 2019
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CERTIFICATE OF SERVICE

I certify that on 1/10/20 I served a copy of Brief on all parties, addressed below:

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AFFIDAVIT OF MAILING

I certify under penalty of perjury and pursuant to Rule 29.2 this Brief was originally mailed on November 05, 2019.

Gregory Sitzmann