19-7698

No. 18-11654

ORIGINAL

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

-v.-

MARTIN CALDERON-ORTALEJO,

Petitioner.

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

PETITION FOR WRIT OF CERTIORARI

Martin Calderon
Martin Calderon-Ortalejo
Reg. No. 25031-051
Great Plains Correctional
Facility
P.O. Box 400
Hinton, OK 73047

"pro se"

QUESTION(S) PRESENTED

Did the United States District Court for the Northern District of Texas, Lubbock Division, abuse its discretion by imposing two consecutive sentences for Petitioner's case after accepting the calculated Total Offense Level prepared by the United States Probation Officer? Was there sufficient evidenciary facts to justify the enhacements in the total offense level calculation for a "substantial interference with the administration of justice" and the offense being "extensive in scope, planning, or preparation" for the current offense? Did the District Court abuse its discretion by no granting any deductions for Acceptance of Responsibility after Petitioner accepted a plea agreement offered by the government?

Did the Fifth Circuit Court of Appeal violate Petitioner's rights by not carrying a complete review under *Penson v. Ohio*?

LIST OF PARTIES

Supreme Court of the United States
Clerk of the Supreme Court
1 First Street, N.E.
Washington, DC 20543

Petitioner:	Martin Calderon-Ortalejo Reg. No. 25031-051 Great Plains Correctional Facility P.O. Box 400 Hinton, OK 73047
Respondents:	Erin Nealy Cox United States Attorney for the Northern District of Texas
Assistant U.S. Attorneys: for the Northern District of Texas	Wes Hendrix Russell Lorfing Jeffrey R. Haag Sean Long
Assistance Federal Public Defender:	Adam Nicholson David E. Sloan Satah Gunter

Martin Calderon-Ortalejo
Reg. No. 25031-051
Great Plains Correctional
Facility
P.O. Box 400
Hinton, OK 73047
"pro se"

TABLE OF AUTHORITIES CITED

United States v. Cataldo,171 F.3d 1316, 1316 (11th Cir. 1999)

Penson v. Ohio, 513 F.3d 204, 208 (5th Cir. 2008)

United States v. Griego, 837 F.3d 520, 208 (5th Cir. 2016)

United States v. Delgado-Martinez, 564 F.3d 750, 752 (5th Cir. 2009)

United States v. Arturo Garcia, 590 F.3d 308, 312 (5th Cir. 2009)

United States v. Newman, 614 F.3d 1234

United States v. Foster, 889 F.2d 1049, 1056 (11th Cir. 1989)

United States v. Copeland, 520 Fed Appx 822 (11th Cir. 2013)

28 U.S.C. § 1254(1)

18 U.S.C. § 1001(a)(2)

USSG § 3D1.2(b)

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APPENDIX F: Letter from Petitioner to Appellant's Counsel, Mr. Adam Nicholson, dated August 27, 2019 in the matter of USA v. Martin Calderon.

PETITION FOR CERTIORARI

Now comes, MARTIN CALDERON-ORTALEJO, (hereinafter referred to as Petitioner), respectfully prays that a writ of certiorari issue to review the judgmen below for Petitioner's case (No. 18-11654) on the basis of "a decision entered by the Fifth Circuit Court of Appeals in conflict with the decision of others United States court of appeals" and denying Petitioner the right to an independent review of issue(s) under *Penson v. Ohio*.

OPINIONS BELOW

In the unpublished Fifth Circuit's opinion dated November 13, 2019, this Court of Appeals indicates that the appeal represents no nonfrivolous issue for appellate review, excusing counsel from further responsibilities and dismissing the appeal with no further explanation.

JURISDICTION

The Fifth Circuit rendered its decision to dismiss Petitioner's appeal on November 13, 2019. No petition for herearing was timely filed. Instructions were provided by Petititioner's counsel for a writ of certiorari.

This court continues to have jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1)

18 U.S.C. § 1001(a)(2)

USSG § 3D1.2(b)

STATEMENT OF THE CASE

Because this Petitioner considered the sentence imposed to be substantially above to what he was indicated by counsel during the arraignment and re-arraignment processes, a Notice of Appeal was filed. After an unexpected change of counsel and review of the record, new counsel submitted an Anders brief, concluding that there was no issues in Petitioner's conviction and sentence. Petitioner attempted to communicate with new counsel by correspondance to discuss his appeal case, but no reply was ever received. Counsel submitted a Motion to withdraw from Petitioner's case in accordance with the requirements of *Anders v. California*, and asked the Court of Appeals to rule in accordance therewith. The Court concurred with counsel's assessment and dismissed the appeal without further review.

In the Appellant's Initial Brief pursuant to *Anders v. California* and filed on April 1, 2019, Appellant's counsel indicates that in the rearraignment hearing on August 31, 2018, Petitioner entered a guilty plea to two counts explained in a superseding indictment. During that hearing, the magistrate judge advised this Petitioner that the sentencing guidelines help judges determine "what an appropriate sentence might be. [But t]hese

guidelines are advisory, not mandatory." The magistrate further admonished Petitioner that, "no one can predict with any certainty" what the sentencing court might decide to be the proper sentence and that "whatever sentence [he may] receive, as long it's within the statutory maximum, is solely within the discretion of the court." There is no indication of a complete review under *Penson v. Ohio*, 488 U.S. 75 (1988) especifically to re-address the issue once argued by Defense Counsel to support the enhancement calculation of Specific Offense Characteristics up to five levels for each count and whether such a claim on this issue survives the appeal waiver. Petitioner maintains there was not sufficient factual basis to support the five level increase and this survives any appeal waiver, but counsel submitted an Anders brief without at least arguing the issue of Petitioner's disproportionate sentence due to the offense enhancements and the consecutive terms Petitioner received. Had counsel argued a review of the evidence for Specific Offense Characteristics, under *Penson v. Ohio*, at least a suplemental briefing on these arguable issues had been raised in the Fifth Circuit of the Court of Appeals.

For this particular case, the Court of Appeals has violated the Petitioner's right to counsel under the Federal Constitution's Fourteenth Amendment, as explicated in *Anders v California* (1967) 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396, by granting counsel's motion for leave to withdraw,

where that motion was not accompanied by a brief drawing attention to anything in the record that might arguably support the appeal. As clearly describe in *Penson v. Ohio*, the Court also failed to examine the record to determine whether counsel's evaluation of the case was sound before it acted on his motion, and to appoint new counsel to represent the accused after it had determined that there were several arguable claims of error, if so the case. Such a complete denial of the assistance of counsel on appeal is presumed to result in prejudice and can never be considered harmless error.

Petitioner presents the following concised summary of the arguable issues that were not considered for his case in the Fifth Circuit Court of Appeals' decision to dismiss it:

(a) The admission of a three-level increase to the Petitioner's offense for arguable Specific Offense Characteristics related to substantial interference with the administration of justice, pursuant to USSG § 2J1.2(b)(2), objected by Petitioner at the sentencing hearing.

(b) The admision of a two-level increase to the Petitioner's offense for arguable Specifc Offense Characteristics related to the offense being extensive in nature or involved the extensive destruction or fabrication of records or documents, pursuant to USSG § 3D1.2(b), also objected by Petitioner at the sentencing hearing.

(c) The denial of a reduction for acceptance of responsibility after Petitioner signed a plea agreement and therefore voided the government the cost and effort to go to jury trial. According to Paragraphs 36-38 of Pre-sentence Investigation Report, Petitioner was considered not eligible to any reductions pursuant to U.S.S.G § 3E1.1 simply because "he signed probation officer's releases under the name of Roy Martinez", put the government to its burden of proof by denying the essential factual elements of guilt.

(d) The abuse of discretion by the District Court for the Northern District of Texas abused by ordering both sentences to run consecutively. Although within the complete discretion of the court, Petitioner was not given the opportunity to respond the Fifth Circuit Court of Appeals after Appellant Counsel filed a motion for leave to withdraw after filing a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967).

DETAILED EXPLANATIONS

In relation to the admission of a three-level increase to the Petitioner's offense for arguable Specific Offense Characteristics related to substantial interference with the administration of justice, pursuant to USSG § 2J1.2(b)(2). Petitioner was sentenced for (1) a term of 46 months on one count (count four of a superseding indictment) of false statement and representation to a department or agency of the United States, specifically the Department of Homeland Security in the Lubbock Division of the Northern District of

Texas, in violation to Title 18, United States Code, Section 1001(a)(2), and (2) another consecutive term of 46 months on another count (count five of same superseding indictment) based on the the same felony but carried out on a different time period and a different agency of the United States' Government, in this case the United States Probation Office for the Northern District of Texas. The identity used by the Petitioner in both instances was the same, being that of "Roy Martinez, Jr.", a United States citizen. The District Court ordered both counts to be served consecutively to one another.

The District Court for the Northern District of Texas abused its discretion and incorrectly weighted the 3553(a) factors by ordering both sentences to run consecutively. Additionally, the Fifth Circuit Court of Appeals did not notify Petitioner to allow him proper timing to respond after Appellant Counsel filed a motion for leave to withdraw after filing a brief in accordance with Anders v. California, 386 U.S. 738 (1967). It is therefore noticed that Petitioner's sentence had an enhancement effect of three levels for substantial interference with the administration of justice as Specific Offense Characteristics ("SOC") (Paragraph 41 for one count and paragraph 48 for the other count since they ran consecutively). According to the commentary to USSG. § 2J1.2(b)(2), "substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the

unnecessary expenditure of substantial government or court resources." But in fact, this matter had been previously litigated in connection with a Petitioner's previous conviction for kidnapping in Case No. 2:03-cr-088-J(01) in the Northern District of Texas, in which this District Court found in the petitioner's sentencing that the Petitioner was not "Roy Martinez" or "Roy Martinez, Jr." Even though Petitioner was able to avoid immediate deportation for that particular case, that does not rise to the level of "a premature or improper termination of a felony investigation; an indictment, verdict or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of government resources. For that particular case, this Petitioner was ultimately deported. Therefore, an enhancement of three levels per count, for a total of six levels included in the Petitoner's Offense Level calculation for Specific Offense Characteristics, is a plaint error for this particular case.

In relation to the admision of a two-level increase to the Petitioner's offense for the offense being extensive in nature or involved the extensive destruction or fabrication of records or documents, pursuant to USSG § 3D1.2 (b), Petitioner argues that this is also an abuse of discretion with the only purpose to increase the offense level. Petitioner's sentence suffered this enhancement of four levels for involving the destruction, alteration, or fabrication of a subtantial number of records, documents, or tangible objects;

(B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation of records. Although its true that Petitioner has been using false documents for several years (since 1997), his conduct was simple and not as part of a complicated scheme. Petitioner claimed that he was "Roy Martinez, Jr.", identity that belonged to a person that Petitioner knew for a long time. Other than this, the evidence for this case shows that Petitioner did not engage in fabricating, destroying, or altering any records, except a driver license issued from the Department of Motor Vehicles in Lubbock, Texas on August 23, 2017. The fact that this was done many years ago and continued until the present time does not make it extensive in scope, planning, and preparation. The provisions of USSG § 2J1.2(b)(3) are plainly intended to apply to sophisticated schemes to alter records and the like. This is evidenced by the fact that the commentary on this provision does not more than define what "records, documents, or tangible objects" includes. Therefore, an enhancement of two additional levels for a total of five levels included in the Petitoner's Offense Level calculation for Specific Offense Characteristics is a plaint error for this particular case, and double-weighed by the consecutiveness of Petitioner's imposed term of imprisonment.

Finally, the issue of a reduction for acceptance of responsibility after

an amended plea agreement was submitted about ten days before the sentencing hearing and with time in advance before his jury trial had been scheduled. Despite any investigation efforts up to the point of accepting the plea agreement, Petitioner's actions did vacate the cost and effort of a jury trial and presentation of witnesses. Additionally, there is no record from the United States Probation Office that Petitioner did not respectfully cooperate with his case. If Petitioner demonstrated respect and proper conduct toward law enforcement agents, this alone is sufficient for the government to recommend between one and three level reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility, as it is commonly done for these cases. In *United States v. Copeland*, 520 Fed Appx 822 (11th Cir. 2013), the court of appeals vacated the district court's judgment and remanded for resentencing after concluding that, given a breach of the plea agreement in failing to recommend a two-level reduction under § 3E1.1(a), two remedies were available for Copeland: (1) "specific performance" of the agreement before a different sentencing judge, or (2) withdrawal of the guilty plea. Johnson, 132 F.3d at 631; *United States v. Foster*, 889 F.2d 1049, 1056 (11th Cir. 1989) ("[W]hen the government breaches an agreement, the defendant must either be resentenced by a new judge or allowed to withdraw his plea, regardless of whether the judge was influenced [by the government's breach].").

For this Petitioner's case, he entered into a plea agreement offered by

the government a month before he signed it as a last opportunity to abstain from the burden to go to jury trial. Even though petitioner had taken a long time to change his plea, there were no rewards considered for finally doing so. This is, to this Petitioner, an arguable and appeable issue.

REASONS FOR GRANTING PETITION

On the issue of:

(a) The admission of a three-level increase to the Petitioner's offense for arguable Specific Offense Characteristics related to substantial interference with the administration of justice, pursuant to USSG § 2J1.2 (b)(2).

The District Court for the Northern District of Texas abused its discretion and incorrectly weighted the 3553(a) factors by ordering both sentences to run consecutively. Additionally, the Fifth Circuit Court of Appeals did not notify Petitioner to allow him proper timing to respond after Appellant Counsel filed a motion for leave to withdraw after filing a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967).

Additionally and according to the commentary to U.S.S.G. § 2J1.2(b)(2), "substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial government or court resources." But in fact, this matter had been previously litigated in connection with a Petitioner's previous conviction for kidnapping in Case No. 2:03-cr-088-J(01) in the Northern District of Texas, in which this

District Court found in the petitioner's sentencing that the Petitioner was not "Roy Martinez" or "Roy Martinez, Jr." Even though Petitioner was able to avoid immediate deportation for that particular case, that does not rise to the level of "a premature or improper termination of a felony investigation; an indictment, verdict or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of government resources. For that particular case, this Petitioner was ultimately deported. Therefore, an enhancement of six levels in total included in the Petitoner's Offense Level calculation for Specific Offense Characteristics is a plaint error for this particular case.

In United States v. Delgado-Martinez, 564 F.3d 750, 752 (5th Cir. 2009). First, we consider whether the district court committed a "significant procedural error," such as miscalculating the advisory guidelines range. Id.If there is no error or the error is harmless, we may proceed to the second step and review the substantive reasonableness of the sentence for an abuse of discretion. Id. at 751-53. We review the{2016 U.S. App. LEXIS 4} district court's factual findings for clear error and its interpretation and application of the guidelines, including any cross-reference provisions, de novo. United States v. Arturo Garcia, 590 F.3d 308, 312 (5th Cir. 2009).

(b) The admision of a two-level increase to the Petitioner's offense for arguable Specifc Offense Characteristics related to the offense being

extensive in nature or involved the extensive destruction or fabrication of records or documents, pursuant to USSG § 3D1.2(b).

Petitioner's sentence was also enhanced by two levels for involving the destruction, alteration, or fabrication of a subtantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation of records. Again, due to the consecutiveness of the sentence, this two-level enhancement has a four-level effect on the Petitioner's term of imprisonment. Although its true that Petitioner has been using false documents for several years (since 1997), his conduct was simple and not as part of a complicated scheme. Petitioner claimed that he was "Roy Martinez, Jr.", only one identity that belonged to a person that Petitioner knew for a long time. Other than this, the evidence for this case shows that Petitioner did not engage in fabricating, destroying, or altering any records, other than a driver license from the Department of Motor Vehicles in Lubbock, Texas on August 23, 2017. The fact that this was done many years ago and continued until the present time does not make it extensive in scope, planning, and preparation. In *United States v. Cataldo*, 171 F.3d 1316, 1321-22 (11th Cir. 1999) (explaining that courts "'must not speculate concerning the existence of a fact which would permit a more severe {614 F.3d 1239} sentence under the

guidelines'" (quoting United States v. Wilson, 993 F.2d 214, 218 (11th Cir. 1993))).

In *United States v. Newman,* the district court's reliance on the eight-year duration of the offense to find that it was "extensive in scope" was also error. *Newman's* states that although they have found no case directly on point, they hold that the duration of the offense is not equivalent to its "scope" for purposes of § 2J1.2(b)(3)(C). Both, Newman's case law and {2010 U.S. App. LEXIS 16}other provisions of the sentencing guidelines distinguish between the duration and scope of criminal offenses. For example, § 2B1.1, which applies to theft, fraud, and property offenses, directs the district court to "make a reasonable estimate of the loss" caused by the offense. U.S.S.G. § 2B1.1 cmt. n.3(C). In making this estimate, the guidelines instruct the district court to consider "available information . . . as appropriate and practicable under the circumstances" including "general factors, such as the scope and duration of the offense." Id. (emphasis added). The Commission's decision to include consideration of both the "scope" and "duration" of the offense under § 2B1.1, while at the same time omitting any consideration of the "duration" of the offense from § 2J1.2(b)(3)(C), is significant. This is so because identical terms in different guidelines are generally presumed to have the same meaning in both provisions, and the disparate inclusion or exclusion of language is presumed to be intentional and purposeful. See

United States v. Perez, 366 F.3d 1178, 1182-83 (11th Cir. 2004) (collecting cases). We therefore presume that the Commission said what it meant and meant what {2010 U.S. App. LEXIS 17}it said when it omitted the duration of the offense from consideration under § 2J1.2(b)(3)(C).The provisions of USSG § 2J1.2(b)(3) are plainly intended to apply to sophisticated schemes to alter records and the like. This is evidenced by the fact that the commentary on this provision does not more than define what "records, documents, or tangible objects" includes.

Therefore, both enhancements as explained above merit revision according to the right implementation of law.

(c) The denial of a reduction for acceptance of responsibility after Petitioner signed a plea agreement and therefore voided the government the cost and effort to go to jury trial.

Petitioner did not receive any deductions to his sentence for Acceptance of Responsibility and for voiding the Court the additional cost and time had Petitioner's case gone to jury trial.

In relation to a prior federal case, this Petitioner was sentenced for (1) a term of 188 months on conspiracy to commit kidnapping, in violation to 18 U.S.C. §1201(d), (2) and another term of 188 months on kidnapping and aiding and abetting, in violation to 18 U.S.C. §§1201(a) and 2 (*USA v. Martin*

A Calderon, Docket # 2:03-cr-088-T(01)). The court ordered both counts to run concurrently with each other, together with a victim's compesation restitution for the amount of $5,782.00, payable to the Clerk of the United States District Court in Austin, Texas. Petitioner excercised his right to a jury trial for this case, and after being found guilty, he accepted the Court's imprisonment order and complied with the monetary restitution. Petitioner did not receive any reductions for acceptance of responsibility for not reaching a plea agreement with the government and going to a jury trial instead. This is not the same for this current case. Comparing both federal cases, Petitioner questions the abuse of discretion in his current case by imposing consecutive sentences and thus, doubling the effect of any additional levels that to this Petitioner's view, and not granting any reductions for not going to a jury trial and signing a plea agreement which is also a clear evidence of accepting responsibility.

(d) The District Court abused its discretion by imposing two consecutive terms for each count, when both counts construe a single pattern or conduct by Petitioner.

Due to the doubling consecutiveness effect of the sentence imposed, Petitioner's sentence suffered an enhancement effect of six levels as Specific Offense Characteristics ("SOC") for substantial interference with the administration of justice and involving the destruction, alteration, or

fabrication of a subtantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation of records on two counts accepted by Petitioner as part of the plea agreement. All other counts were dismissed. Record clearly shows that the action that led Petitioner to these two counts was the same in nature. If court properly weighs out all other 3553 factors, a sentence with concurrent terms for both counts serves in this case the end of justice.

CONCLUSION

For the reasons presented in this Petition, Petitioner respectfully requests that certiorari be granted. The scarcity of evidence and the Constitutional guarantees of "due process" require that Petitioner's convictions be reversed.

Respectfully submitted,

Martin Calderon

Martin Calderon-Ortalejo
Reg. No.
Great Plains Correctional Facility
P.O. Box 400
Hinton, OK 73047

"pro se"