

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 2020

No. _____

JUAN M. SANTIAGO
PETITIONER

V.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

RAYMOND SÁNCHEZ-MACEIRA, ESQ.
COUNSEL OF RECORD FOR THE PETITIONER
PO BOX 191972
SAN JUA, PUERTO RICO, 00919
TEL. 787-721-3370 / FAX 787-721-4706

I. QUESTION PRESENTED

(A) WHETHER AN ESTABLISHED BOOKER ERROR (MANDATORY APPLICATION OF THE USSG) CAN BE CONSIDERED *PER SE* A MISCARRIAGE OF JUSTICE EXCEPTION THAT IS NOT WAIVED BY A WAIVER OF APPEAL.

II. LIST OF PARTIES

The caption of the case contains the names of all parties in the instant petition.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays, that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit which affirmed a judgment of the District Court for the district of Puerto Rico.

III. CITATIONS OF THE OFFICIAL OPINIONS BELOW

The official citation of the case at the Court of Appeals is, United States v. Juan M. Santiago, 947 F 3d 1 (1st Cir. 2020)

IV. STATEMENT OF BASIS OF JURISDICTION

The district court entered judgment on August 7, 2018. Petitioner appealed to the First Circuit Court of Appeal on August 8, 2018. On January 3, 2020, the First Circuit affirmed the district court judgment. The mandate was issued on January 24, 2020. Therefore, the Supreme

Court's Jurisdiction is invoked under Title 28 U.S.C. § 1254(1), which confers jurisdiction on this Honorable Court to review on Writ of Certiorari the judgment in question.

V. RELEVANT STATUTORY PROVISIONS INVOLVED IN THE CASE

United States Sentencing Guidelines (USSG) §5G1.3 (a)

VI. STATEMENT OF THE CASE

Petitioner, Juan Manuel Santiago, was the subject of a Two Count Indictment rendered by a District of Puerto Rico Grand Jury on April 6, 2017. Count One, charges Possession of a Firearm and Ammunition by a Convicted Felon, in violation of Title 18, U. S. C. § 922(g)(1). Count Two, charges Drug User in Possession of a Firearm and Ammunition, in violation of Title 18, U.S.C. § 922(g)(3).

On April 3, 2017, Puerto Rico Police Department (PRPD) agents of the San Juan Drug Division encountered Petitioner within the common area of the San Martin Public Housing Project in Río Piedras, Puerto Rico. When Petitioner noticed the PRPD officers, he immediately fled on foot. While on pursuit, the officers noticed Petitioner removed a black firearm from his waist. The PRPD officers continued following Petitioner and instructed him to throw his firearm to the ground at which point Petitioner threw his firearm to the floor. The PRPD officers later proceeded to arrest and seize the firearm. The PRPD officers brought Petitioner to their office for further investigation.

Homeland Security Investigations (HSI), agents were contacted and later confirmed that Petitioner was in possession of a Glock 17 (9 mm caliber, Serial Number SEW036), one (1) magazine, and eighteen (18) rounds of 9 mm ammunition and one (1) cellphone. HSI arrested

Petitioner for violation of Title 18, U.S.C. § 922(g)(1); Possession of a Firearm and Ammunition by a Convicted Felon, and (g)(3) Drug User in Possession of a Firearm and Ammunition.

At the time of Petitioner's arrest, he had 7 years absentia state conviction, for possessing drugs with intent to distribute, imposed on January 30, 2017. In June 12, 2017, Petitioner plead pled guilty to Count One of the Indictment pursuant to the terms of the Plea Agreement. Petitioner was held accountable for possessing a semiautomatic firearm that is capable of accepting a large capacity magazine subsequent to sustaining one felony conviction for a controlled substance offense, that is one Pistol, Make: Glock, Model: 17, Caliber 9 mm, Serial Number: SEW036 and 18 rounds of 9 mm caliber ammunition. Accordingly, the parties established a base offense level of twenty-two (22), pursuant to USSG § 2K2.1(a)(3). Pursuant to the plea agreement, the recommended a three (3) level reduction for acceptance of responsibility. USSG §3E1.1(a) and (b). This was conditioned upon the Petitioner clearly demonstrating acceptance of responsibility for the offense. The criminal history was not stipulated.

The parties agreed to recommend a sentence at the lower end of the applicable Guideline Sentencing Range for a total offense level of 19 when combined with defendant's criminal history category as determined by the Court. Petitioner agreed to waive the right to appeal the judgment and sentence in this case, provided that he was sentenced in accordance within or below the guideline range for the total offense level calculated in the plea agreement when combined with the Petitioner's criminal history category as determined by the court.

Also, petitioner waived the right to appeal any aspect of this case's judgment and sentence, including but not limited to the term of imprisonment or probation, restitution, fines,

On April 4, 2019, Petitioner filed an Appeal to the Court of Appeals for the First Circuit. On appeal, Petitioner asserted that the district court violated United States v. Booker See 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), by treating Sentencing Guideline 5G1.3(a), which recommends a consecutive sentence in a case like Santiago's, as mandatory. Petitioner claimed that the district court would have imposed a concurrent sentence had it not felt bound by Guideline §5G1.3(a). Petitioner also claimed that despite the waiver of appeal, the First Circuit should consider his appeal, since a miscarriage of justice would result if the waiver was enforced under United States v. Davis, 923 F.3d 228, 239-40 (1st Cir. 2019).

The government claimed that that Santiago's appeal was barred because, as part of his guilty plea, he expressly waived his right to appeal "any aspect" of his sentence if the sentence was within or below the guideline range for a total offense level of nineteen when combined with his criminal history category ("CHC") as determined by the district court. At sentencing, the district court ruled that Santiago had a CHC of III. After concluding that the resulting guideline range for a total offense level of nineteen was thirty-seven to forty-six months, the judge imposed a thirty-seven-month sentence, thus satisfying the condition on which the appeal waiver rested.

On January 3, 2020, the Court of Appeal affirmed Mr. Santiago's consecutive sentence. (See United States v. Juan M. Santiago 947 F.3d 1 (1st Cir. 2020). The First Circuit reasoned that, Although Santiago says that the district court applied the guidelines in a mandatory fashion, United States v. Cardona-Díaz, 524 F.3d 20, 23 n.1 (1st Cir. 2008), described such a claim as "too trivial to warrant discussion in light of [his] waiver of appeal." (Id)

forfeiture and the term and conditions of supervised release. There was no agreement that the federal sentence run consecutive, with the State sentence.

Petitioner accepted, that at the time of his conviction, he had previously sustained a felony conviction of controlled substance, which subjected him to a term of imprisonment of more than one year. After the discovery was provided to Mr. Santiago entered into a plea agreement with the government. On June 12, 2017 a change of plea hearing was held in which the Petitioner was advised of his constitutional rights and detailed all matters implicit and explicit to the change of plea entered into. Also, during the Change of Plea hearing, Petitioner informed the court that he was serving a State Court Sentence. The District court explained to the Petitioner, that the sentence to be imposed in the federal case could run concurrently *or* consecutively to the state court sentence that Petitioner was serving.

On August 7, 2018, the district court held the Sentencing Hearing. At the Sentencing hearing Counsel requested that the federal sentence run concurrently “in the court’s discretion” to the state sentence. Counsel also, argued to the court, that state sentence was already taken into consideration in establishing criminal history point and a two-point enhancement.

The district court understood that the state sentence was from a “Separate Incident”. Although the district court did not mention the specific the guideline, it seems it relied on U.S.S.G. § 5G1.3 (a). The Prosecutor also requested a consecutive sentence, because the prior state sentence was not “relevant conduct” to the instant federal offense. Therefore, both the Court and the government understood that USSG §5G1.3 (a) was mandatory and that the court should imposed the sentence to run consecutive.

Mr. Santiago is therefore respectfully requesting from this Court to grant his Writ of Certiorari, since he understands the First Circuit decision is contrary to this court's opinion in Gall v. United States, 552 U.S. 38 (2018). This Honorable Court held that regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must first ensure that the district court committed no significant procedural error, such treating the Guidelines as mandatory. (See Gall 552 US at p. 51) Mr. Santiago is presenting an issue of fairness and justice in sentencing, and the matter goes directly to the district court power, to administer justice.

VII. REASONS FOR GRANTING THE PETITION

Appellant very respectfully understands that the First Circuit erred in concluding that a Booker error is a "garden variety error" that cannot be reviewed in light of Petitioner's waiver of appeal. There is no doubt that the district court imposed a consecutive sentence, *because it treated the USSG §5G1.3 (a) as mandatory*. Therefore, Mr. Santiago has demonstrated that his sentence is procedurally incorrect, therefore a Booker error exist that cannot be considered "garden-variety" that automatically is waived by a waiver of appeal. The first Circuit reviews unpreserved Booker claims for plain error. See United States v. Antonakopoulos, 399 F.3d 68, 75(1st Cir. 2005). Under the plain error standard this Honorable Supreme Court has required defendants to meet a four-prong test: (1) that there was an error, (2) that it was plain, (3) that it affected substantial rights, and (4) that the error seriously impaired the fairness, integrity, or public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).

PREJUDICE & MISCARRIAGE OF JUSTICE

There is no doubt that the district the district Court, by imposing the Federal sentence consecutive to the state sentence, the district court raised the instant offense from 37 to 121 months, this is one month more than the statutory maximum for violations to 18 USC §922(g). (See 18 USC §924(a)(2)). Even if the Sentencing Guidelines mandated a consecutive sentence, under § 5G1.3 (a), the district court had the authority to depart from the guidelines and impose a concurrent sentence. See United States v. Parks, 698 F.3d 1, 8 (1st Cir. 2012).

Mr. Santiago respectfully states that a huge miscarriage of justice will result if the waiver of appeal is enforced. The district court would have imposed a concurrent sentence, had it not considered the guidelines mandatory. Even the government, was under the impression that the guidelines were mandatory. There is little doubt that the alleged error, (treating the guidelines as mandatory) occurred. Second, the error was grave since Mr. Santiago's federal sentence is equal to 121 months, instead of the 84 months he would have served if the district court had imposed the sentence concurrent, with the state sentence. Also, there was no prejudice to the government, and the appellant did consent to the result.

Petitioner respectfully states that enforcing the waiver would be a miscarriage of justice. If it were not because the district court felt obligated and treated the guidelines mandatory in imposing the sentence consecutively, it would have considered counsel's argument to use the court's discretion. The fact that Mr. Santiago had a prior conviction was considered already by the guidelines by adding criminal history points and his sentence enhanced by two levels. No good will come from imprison this young individual to 121 months considering both sentences consecutively.