No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

ANTONIO U. AKEL,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE(S)

I. WHETHER THE ELEVENTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S REFUSAL TO CONDUCT A FULL RESENTENCING WITH THE DEFENDANT PRESENT RENDERS THE PRECEDENTIAL ELEVENTH CIRCUIT BROWN OPINION USELESS AND LIMITED.

II. WHETHER THE ELEVENTH CIRCUIT'S USE OF AN OVERLY HIGH BAR OTHERWISE REQUIRED BY THE FEDERAL RECUSAL STATUTE EFFECTIVELY EVISCERATED THE CONSTITUTIONAL DUE PROCESS PROTECTIONS OF A FAIR TRIAL IN A FAIR TRIBUNAL.

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LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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The Petitioner, **Antonio U. Akel,** respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on September 11, 2019; the Circuit Court denied the Petition for Rehearing and Petition for Rehearing En Banc on August 12, 2020.

OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-11a) is unpublished; the Order denying the Petition for Rehearing and Petition for Rehearing En Banc is enclosed herein.

JURISDICTION

This is a direct appeal of an amended judgment in an underlying criminal case and the sentence imposed by the United States District Court for the Northern District of Florida after resentencing due in large part to District Court's granting in part Mr. Akel's 28 U.S.C. §2255 motion. The District Court had original jurisdiction in Mr. Akel's underlying criminal proceedings under 18U.S.C. §3231, and, jurisdiction in Mr. Akel's civil proceedings under 28 U.S.C. §§1331 and 2255. Accordingly, this Court's jurisdiction over this appeal is predicated upon 18 U.S.C. §3742, 28 U.S.C. §§ 1291, 1294, 2253(c)(1) and 2255.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Fifth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

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STATEMENT OF THE CASE AND FACTS

Course of the Proceedings and Dispositions in the Court Below[1]

Charge(s) and Conviction(s)

Mr. Akel was charged in a Six-Count Indictment, returned on November 27, 2007, with Count One - Conspiracy to possess with intent to distribute Five Hundred (500) grams or more of Cocaine And Methylenedioxymethamphetamine Hydrochloride ("MDMA"); Count Two- Possession with intent to distribute Five Hundred (500) grams or more of Cocaine on a date certain; Count Three - Distribution of Cocaine and MDMA on a date certain; Count Four - Distribution of MDMA on a date certain; Count Five - Possession of a firearm in furtherance of a drug trafficking crime; and, Count Six - Possession of a firearm by a convicted Felon (Doc. No. 1). The charges arose from two controlled sales of MDMA or MDMA and Cocaine to a Confidential Informant ("CI") in May and July of 2007, a trash pull at Mr. Akel's residence during which Law Enforcement discovered evidence of Marijuana distribution, and a subsequent search of Mr. Akel's residence during which Law Enforcement discovered actual Marijuana and were present when FedEx delivered a package containing One Kilogram of Cocaine (*See* Doc. No. 150 at 10-14).

The Government filed a Notice of Enhancement Information (Doc. No. 16). The Notice identified three 1998 burglary convictions, which convictions occurred on the same day, although the underlying burglaries occurred on different occasions (*Id.*).

A Superseding Indictment, returned on January 23, 2008, charged Mr. Akel and in some charges, one co-Defendant) as follows: Count One -Conspiracy to possess with intent to distribute Cocaine, MDMA, and, Marijuana; Count Two - Possession with intent to distribute Cocaine and Marijuana on a date certain; Count Four[2] - Distribution of MDMA on a date certain; Count Five - Distribution of MDMA on a date certain; Count Six - Possession of a firearm in furtherance of a drug trafficking crime; and, Count Seven - Possession of firearms by a convicted Felon. (Doc. No. 34).

The Jury Trial took place from March 17-20, 2008, following which the Jury convicted Mr. Akel on Counts One, Two, and, Seven; acquitted him or Counts Four, Five, and Six (Doc. No. 93). The Court entered a Judgment of Acquittal on those Counts (Doc. No. 97). The Jury found that with respect to Count One, the conspiracy involved Five Hundred (500) grams or more of Cocaine as a mixture or

substance containing MDMA and a Mixture or substance containing a detectable amount of Marijuana (Doc. No. 93 at 1-2), [emphasis supplied]

The Presentence Investigation Report ("PSR") was disclosed to the Defense on May 7, 2008 (Doc. No. 107). Using drug equivalency tables, Mr. Akel was held accountable for 1,594.85 kilograms of Marijuana (PSR¶¶ 41-49, 60). Mr. Akel's Base Offense Level was 32 (PSR ¶ 60). A Two-Level adjustment was received, pursuant to USSG § 2D1.1(b)(1), for possessing a dangerous weapon (PSR ¶ 61); a Four-Level adjustment for his leadership role pursuant to USSG § 3B1.1(a), (PSR ¶ 63); and a Two-Level adjustment for Obstruction of Justice pursuant to USSG § 3C1.1 (PSR ¶ 64). Thus Mr. Akel's Total Offense Level was 40 (PSR ¶ 67). Mr. Akel was also designated as an Armed Career Criminal, due to having been convicted of three (3) prior violent Felony offenses (burglaries) (PSR ¶ 68). Mr. Akel had eight (8) criminal history points, but, his criminal history category became VI pursuant to USSG § 4B1.4(c)(2) (PSR ¶ 78. With a Total Offense Level of 40 and a criminal history category of VI, the applicable guidelines range was 360 Months to Life (PSR ¶ 113). However, this range became 360 - 480 Months due to the Statutory Maximum term of imprisonment of 40 years (*Id.*). *[emphasis supplied]*

Mr. Akel objected to the drug weight, each of the adjustments, and, the Criminal History Category being assessed as VI due to his Armed Career Criminal status (PSR Addendum ¶¶ 121-130). [e.s.]. Mr. Akel also asserted that the PSR should have identified factors supporting a downward departure, pursuant to USSG § 4A1.3(b)(1) (PSR Addendum ¶¶ 131-132).

The Government filed a request that the Court impose a term of imprisonment at the high end of the guidelines (Doc. No. 108, 110).

At Sentencing, Mr. Akel withdrew his objections to the Obstruction of Justice enhancement as well as the addition of two points to his criminal history score as a result of having committed the crimes within two years of being released from custody. (*Id.).* Counsel argued that the Armed Career Criminal enhancement should not apply (*Id. at 4-6*) and argued against the application of the Four -Level enhancement for Mr. Akel's role in the offense, maintaining that a Two-Level enhancement would be more accurate, if in fact any role enhancement was appropriate (*Id. at 6-7).* The Government disagreed (*Id. at 10*), and the Court overruled the Objections (*Id. at 12-13*).[3] There was discussion about Mr. Akel's request for a downward departure based on possible psychological disturbances

(Doc. No. 126 at 14-26).

The Court sentenced Mr. Akel to a term of Four Hundred Eighty (480) Months imprisonment on each Count, with the terms to run concurrently with each other, followed by Five (5) Years of supervised release (Doc. No. 117; Doc. No. 126 at 27-28). The Court noted that the Sentence was at the top of the guideline range for Counts One and Two based on "aggravating factors, [and the] history and characteristics exhibited by Mr. Akel" (Doc. No. 126 at 27). The Court further noted that it had considered all of the 18 U.S.C. §3553(a) factors and considered the Sentence imposed to be "reasonable and necessary" (*Id.*). It also, specifically stated that it had not ignored or failed to consider anything Mr. Akel had presented, but, it merely opined that the other §3553(a) factors, and, particularly the need to protect Society from further criminal conduct, outweighed those considerations (*Id. at 28-29).*

Mr. Akel ultimately filed a pro se Brief on Appeal. (Doc. No. 164-1 at 9-10, 61-126, 128-208). The Eleventh Circuit Court of Appeals affirmed Mr. Akel's conviction and Sentence (Doc. No. 150; United States v. Akel, 337 F. App'x 843 (11th Cir. 2009)).

The Supreme Court denied Certiorari, on January 19, 2010 (Doc. No. 152). Mr. Akel filed a §2255, in a timely manner. The Government opposed the §2255 Motion in its entirety. In the end , the magistrate Judge recommended denial (Doc. No. 196) and the District Court agreed. (Doc. 215). Mr. Akel appealed.

On April 3, 2017, the Supreme Court remanded this Case to the Eleventh Circuit Court "for further consideration in light of Mathis v. United States, 579 U. S. _____, 136 S. Ct. 2243 (2016)." Akel v. United States, 137 S. Ct. 1432 (2017). On July 12, 2017, on remand, this Court vacated "the denial of Mr. Akel's Motion to Vacate, Set Aside, or, correct his Sentences, 28 U.S.C. §2255, and REMAND[ED] for the District Court to reconsider the Sentence on Count Seven (7) in light of Mathis " (Doc. No. 307-1)

On August 9, 2017, the District Court entered an Order amending Mr. Akel's Sentence. (Doc. No. 321) The district Court ruled that in light of Mathis, Mr. Akel no longer qualified as an Armed Career Criminal, and resentenced Mr. Akel to One hundred Twenty (120) Months' imprisonment on Count Seven (7). (Doc. No. 321-3-7) The district Court also ruled that Mr. Akel had been improperly sentenced on Count Two (2). (*Id.*) That is, Mr. Akel was sentenced to 480 Months' imprisonment on Count Two, but Mr. Akel was only found guilty of possessing with the intent to

distribute Marijuana, which is punishable by up to Sixty (60) Months' imprisonment. (*Id.*) The District Court ruled that was "a jurisdictional issue that warranted correction." (Doc. No. 321-4) The district Court resentenced Mr. Akel to 60 Months' imprisonment on Count Two (Doc. No. 321) On August 14, 2017, the district Court entered an Amended Judgment sentencing Mr. Akel to 480 Months' imprisonment on Count One, a 60-Month concurrent term of imprisonment on Count Two, and, a 120 Months' concurrent term of imprisonment on Count Three. (Doc. No. 322-1-2)

On September 11, 2019, this Court affirmed the District Court's decisions in Eleventh Circuit Court of Appeals (ECCA) Case Number 17-14707. (Doc. No. 382) On August 12, 2020, the Circuit Court denied the Petition for Rehearing and Petition for Rehearing En Banc .

REASON(S) FOR GRANTING THE PETITION

THE TRIAL COURT ERRED IN RESENTENCING THE DEFENDANT WITHOUT HOLDING A HEARING AND REQUIRING THE PRESENCE OF THE DEFENDANT.

In its ruling, the District Court inexplicably failed to fully address the issue of whether a Hearing was required and whether Mr. Akel was required to be present. The District Court, relying on no stated precedent, implicitly ruled that Mr. Akel had no right to be present because the Court was merely resentencing Mr. Akel under it's inherent powers, or, 28 U.S.C. §2255, previously, as to Counts 1, 2, and 7, the Court had imposed a total enhanced aggravated Sentence of 480 Months to runs concurrently with each other. With the Supreme Court's [Johnson[4] and] Mathis[5] Case(s) to which the Government conceded [were]/ was controlling and otherwise applicable, the District Court was obligated to resentence Mr. Akel without the ACCA enhancement. (Crim. Doc. No. 313 at 1).

After conducting a de novo review of the Civil and Criminal files, the Court decided to grant the §2255 Motion but denied the Mr. Akel the right ot be present. Though the Court presumably classified its ruling as a "correction", due to the original Sentence imposed as to Counts of 480 Months, the Court had last seen and heard from Mr. Akel nearly a decade ago having imposed the 480 Months Sentence back in 2008. With the §2255 Motion and the Court exercising its discretion (conceded by the Government and required by Supreme Court precedent), and, vacating the "480 Months" Sentence previously imposed upon Mr. Akel, it was imperative for the Court to hear from and have Mr. Akel present in Court in order to determine the appropriate Sentence for him. The Court noted in its Order, the facts of the Case and that Mr. Akel was sentenced in 2008; the Court also noted Mr. Akel's prior contact with the Criminal Justice System, but noticeably cannot

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[4] Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015)

[5] Mathis v. United States, 136 S. Ct. 2243 (2016)

account whether Mr. Akel had changed his path and was now Nine (9) years older, mature, and, rehabilitated.

Having determined his eligibility for resentencing, the Court literally gave Mr. Akel back a chance of having a life outside of Prison. Mr. Akel was no longer resigned to literally spend the rest of his life behind bars. Though the Court found that Mr. Akel was no longer an Armed Career Offender and had an amended guideline rang of 120 Months for Count 7, and 60 Months for Count 2, the Court was faced with a Defendant who had been incarcerated since 2007. Mr. Akel, in the last nine years had literally completed the 120-month concurrent portion of his Sentence and the resentence as to Counts 1, 2, and 7, would determine likely how he would spend the rest of his life.

In *United States v. Brown*, 879 F.3d 1231 (11th Cir. 2018), this Court changed the landscape and made a precedential, pivotal, decision favorable to Mr. Akel's plight. The *Brown* Panel explored the history of Rule 35 and the interplay of §2255 post sentencing remedies upon resentencing and decided:

> Because both of these Cases were brought under an expansive version of Rule 35 that is no longer available, the Cases do not bind us here. Even so, we find the logic of Jackson persuasive. When an "entire sentencing package" has been vacated, the Sentencing Court must revisit every part of the sentencing package,and, this more expansive remedy may require a Defendant to be present at a Resentencing Hearing to "contribute to the fairness of the procedure." *See* Kentucky v. Stincer, 482 U.S. at 745, 107 S. Ct. at 2667.

> Still, there remains the question of what it means for an entire Sentencing package to be vacated. A purely formalistic test might require Resentencing Hearings for every Sentence modification made pursuant to §2255. That is because, by its terms, §2255 requires a Court to first "vacate and set the Judgment aside," and then apply the appropriate remedy. See 28 U.S.C. §2255(B). However, our precedent takes a more pragmatic approach. Rather than relying solely on a formal analysis of whether the Sentences of all Counts were vacated, we undertake a more fact-intensive inquiry into whether the errors requiring the grant of Habeas Relief undermines the Sentence as a whole.

The *Brown* Panel further stated:

> From our precedent, two inquires emerge to guide our consideration Of whether a Defendant is entitled to a Resentencing Hearing when a change of his Sentence is required as a result of his §2255 Motion. First, did the errors requiring the grant of Habeas relief undermine the Sentence as a whole? Second, will the Sentencing Court exercise significant discretion in modifying the Defendant's Sentence, perhaps on questions the Court was not called upon to consider at the original sentencing? When these factors are present, a District Court's Sentence Modification qualifies as a critical stage in the proceedings, requiring a Hearing with the Defendant present. Stincer, 482 U.S. at 745, 107 S. Ct. at 2667.

Applying this framework to Mr. Akel's Case, Mr. Akel notably filed a Habeas Petition challenging his invalid conviction. The district Court granted Mr. Akel's §2255 Motion and wrote that Mr. Akel's Sentence "is corrected." (Doc. No 321 at 6). The Amended Judgment describes Mr. Akel's previous Sentence as having been "amended as ..." (*Id.*); the term of incarceration ...is "reduced" from 480

to 60 Months on Count Two (2) and reduced [from 480] to 120 Months as to Count Seven (7). (*Id.*) These terms presumably ran concurrently although, although not expressed therein. In effect, the district Court vacated the Sentence on the majority of Counts of Conviction of Mr. Akel and modified his Sentence without conducting a Resentencing Hearing.

The latter supports Mr. Akel's contention that the District Court abused its discretion. Mr. Akel's original Sentence was set by the mandatory minimum under the ACCA, 18 U.S.C. §924(e)(1). When that Sentence was found to be in error, Mr. Akel's new Sentence was imposed under a different Statutory provision, 18 U.S.C. §924(a)(2). As a result, the Statutory basis for Mr. Akel's Firearms Sentence was invalidated, and, the District Court was required to resentence him under a new Statutory provision, with a new Sentencing Guideline Range. Because the Sentence on Mr. Akel's unexpired Counts of Convictions was found to be in error, Mr. Akel's entire Sentence was necessarily undermined, and, the District Court was tasked with crafting an entirely new sentence. As a result, Mr. Akel was entitled to a Resentencing Hearing. *See* United States v. Jackson, 923 F.3d 1494, 1497 (11th Cir. 1991) ; Johnson v. United States, 619 F.2d 366, 368 (5th Cir. 1980)[6].

The need for Mr. Akel to receive a Resentencing Hearing is also supported by the wide discretion exercised by the District Court in imposing Mr. Akel's new

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[6] In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981), this Court adopted as binding precedent all decisions of the former Fifth Circuit issued before the close of business on September 30, 1981.

Sentence, especially when Mr. Akel's first Sentencing hearing is considered. Mr. Akel was fighting an uphill battle.

The way the District Court exercised its discretion in modifying Mr. Akel's Sentence also counsels in favor of having a Hearing. Mr. Akel was originally sentenced to a 480 month term of imprisonment. Mr. Akel's "corrected guideline range under the new rules was 360-480 months of imprisonment under the old non-updated PSR, but the Court sentenced him to 480 months which is a longer prison term permitted by statute for each Count running concurrently. Indeed, the advisory guidelines for each Count concurrently should be 120 month maximum. The maximum for each Count separately is only Offense Level 20, Category VI at 120-150 months. The guide of a consecutive Sentence under USSG 5§G1.2(d) is similarly unavailing since the Court did not allow Mr. Akel in person to address the Court. Upward variances are meant to apply only after "serious consideration" by the Sentencing Court, and only then when accompanied by a "sufficiently compelling" justification . Gall v. United States, 552 U. S. 38, 46, 50, 128, S. Ct. 586, 594, 597 (2007). The fact that the District Court provided little or additional justification for imposing an upward variance to Mr. Akel's Sentence is itself error. See 18 U.S.C. § 3553(c)(2).

Although the Court's written Statement of Reasons dated July 1, 2008 (relied upon by the District Court in 2017) attempted to include an explanation, applying a high end variance in 2017, is a clear act of open-ended discretion, bolstering Mr. Akel's contention that it was error for the Court to modify Mr. Akel's Sentence without a Resentencing Hearing. While it is true that the Court that initially imposed Sentence is not required to provide advance notice that it is considering an upward variance, "[s]ound practice dictates that Judges in all Cases should make sure that the information provided to the Parties in advance of the Hearing itself has given them an adequate opportunity to confront and debate the relevant issues". Irizarry v. United States, 553 U.S. 708, 715, 128 S. Ct. 2198, 2203 (2008). Mr. Akel should have had an opportunity, at a Hearing, to guide the District Court's discretion before it imposed an upward variance. Mr. Akel was given none. Thus, the imposition of the new Sentence based on an upward variance also supports the contention that Mr. Akel's attendance at the Resentencing Hearing is essential to the just administration of his Case.

"Under the Due' Process Clause, a Defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure" United States v. Parrish,

427 F.3d 1345, 1348 (11th Cir 2005). This Court went on to note that "other Circuits have noted that the right to be present under the Due Process Clause is narrower than the right to be present under Rule 43, United States v. Grafton, 321 Fed. Appx. 899,901 (11th Cir. 2009).

The right to be present at Sentencing is based in both the Due Process Clause of the United States Constitution and Federal Rule of Criminal Procedure 43. *See* Fed. R. Crim. P.43(a)(3), (b)(4) stating that a Defendant "must be present at Sentencing, unless "the proceeding involved the correction or reduction of Sentence under Rule 35 or 18 U.S.C. §3582 (c)"); United States v. Parrish, 427 F.3d 1345, 1348 (11th Cir 2005) ("Under the Due Process Clause, a Defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.") (citing United States v. Novaton, 271 F.3d 968, 998 (11th Cir. 2001)).

Although the right to a Resentencing Hearing does not extend to every modification of a Sentence, *See* Fed. R. Crim. P. 43(b), it applies here, where Mr. Akel's entire Sentence was essentially vacated. *See* Adams v. United States, 338 Fed. Appx. 799, 800 (11th Cir. 2009) (The Prisoner's right to a Resentencing Hearing depends on whether his original Sentence package was vacated in its entirety.")

(emphasis added) (cited United States v. Jackson, 923 F.2d 1494, 1496-97 (11th Cir. 1991)); United States v. Stevenson, 162 Fed. Appx. 907, 908 (11th Cir. 2006) (Because Stevenson's original sentence was vacated in its entirety, the District Court erred by not granting him a Hearing..."); Taylor, 11 F.3d at 151-52 ('[t]here is a distinction between modifications of Sentences and proceedings that impose a new Sentence after vacation of the original Sentence. In the former instance, the defendant's presence is not required, but in the latter, the Defendant has a right to be present...") (citing United States v. Moree, 928 F.2d 654, 655-56 (5th Cir. 1991)); *See also* United v. Behrens, 375 U.S. 162 (1963) (holding that it was error for the District Court to impose a Sentence without the Defendant or his Counsel present).

By denying Mr. Akel the right to be present at Resentencing, the District Court also denied Mr. Akel an opportunity to address the Court personally and through Counsel in violation of Federal Rule of Criminal Procedure 32(i)(4)(A). See Fed. R. Crim. P. 32(i)(4)(A)(i) & (ii) (stating that before imposing a Sentence, the District Court must: (1) provide the Defendant's Attorney an opportunity to speak on the Defendant's behalf, and, (2) address the Defendant personally in order to permit the Defendant to speak or present any information to mitigate the Sentence); *See also* Green v. United States, 365 U.S. 301, 304 (1961) ("[A]s early as 1689, it was

recognized that the Court's failure to ask the Defendant if he had anything to say before Sentence was imposed required reversal."); *See also* Taylor, 11 F.3d at 152 ('as this was a Resentencing after vacation of the original Sentence, Taylor had a right to be present and allocute."); United States v. Prouty, 303 F.3d 1249, 1252-53 (11th Cir. 2002) (holding that it is plain error if a Defendant is denied an opportunity to allocute and does "not receive the lowest possible Sentence within the applicable guideline range.")

By denying Mr. Akel's request for a Resentencing Hearing, the District Court violated the Due Process Clause of the Constitution as well as Federal Rules of Criminal Procedure 32 (i)(4)(A) and 43(a). Accordingly, Mr. Akel respectfully requests that this Court vacate his Judgment and remand this Case with instructions that the District Court schedule a Resentencing Hearing.

In the instant Case there clearly were factual disputes. The Government though conceding that Mr. Akel was eligible recommended the Mr. Akel remain incarcerated for the rest of his life. Mr. Akel requested that the Court grant the new Sentence as to the affected Counts due to the progress, rehabilitation, and, metamorphosis that Mr. Akel had undergone in the past 9-10 years in prison. Due Process demanded that Mr. Akel have a Hearing, the opportunity to be present, and,

the opportunity to be beard.

In United States v. Hernandez, F.3d, 2018 U.S. App. LEXIS 14563, 2018 WL 2427573, at *1-3 (11th Cir. May, 2018), the Eleventh Circuit concluded that where a Defendant is sentenced on multiple counts of conviction, and, where removal of the §924(c) Sentence, which runs consecutive to any other sentence imposed, then the ACCA error has no effect on Movant's guideline range and the error does not undermine the Sentence as a whole. *Id.* Consequently, unless the Movant were entitled to vacatur of the §924(c) or §3559(c) enhancements, it would not appear that the Court would be required to conduct a complete Resentencing Hearing.

Hernandez is inapposite to the Movant herein. Unlike the Hernandez Defendant, the removal of the ACCA enhancement has removed the Statutory basis for the total Sentence imposed and it does affect the §922 Sentence statutorily.

After vacating Mr. Akel's Sentence, the District Court, without a Resentencing Hearing, applied an upward variance and resentenced Mr. Akel utilizing the guidelines, an option not previously envisioned at the original Sentencing. In doing so, the District Court denied Mr. Akel an opportunity to directly address the Court and to provide evidence of his post incarceration

rehabilitation. This is error.

"The Law of the Case Doctrine, self imposed by the Courts, operates to create efficiency, finality[,] and, obedience within the Judicial System" so that "[a]n Appellate decision binds all subsequent proceedings in the same Case." *Id. at 1520* (citation omitted). "The Mandate Rule is simply as application of the Law of the Case Doctrine to a specific set of facts." *Id.* (citations omitted). Accordingly, when acting under an Appellate Court's Mandate, a District Court "cannot vary it, or, examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on Appeal; or intermeddie with it, further than to settle so much as has been remanded." *Id.* (Quoting Litman v. Mass. Mut. Life Ins. Co.,825 F.2d 1506, 1510-11 (11th Cir. 1987) 9internal quotation marks omitted). The Law of the Case Doctrine (and, by implication, the Mandate Rule) applies to findings made under the Sentencing Guidelines. See, e.g., United States v. Bordon, 421 F.3d 1202, 1207-08 (11th Cir. 2005) (declining to consider a challenge to a Guidelines calculation that was previously reviewed and affirmed by this Court).

This Court has recognized three exceptions to the Mandate Rule:"(1) a subsequent Trial produces substantially different evidence, (2) controlling authority

has since made a contrary decision of the Law applicable to that issue, or, (3) the prior [Appellate] Decision was clearly erroneous and would manifest injustice." United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996).

This Court has long standing precedent employing some type of limited remand and instructing that the Resentencing Hearing on remand resumes at the point of allocution. *See, e.g.*, United States v. Doyle, 857 F.3d at 1121; United States v. Perez, 661 F.3d 568, 586 (11th Cir. 2011); United States v. Rogers, 848 F.2d 166, 169 (11th Cir. 1988). That is to say that, after the Defendant's allocution, Counsel for the Parties may make arguments to the District Court for the appropriate Sentence in light of the 18 U.S.C. § 3553(a) factors and the record, including any information the Defendant has provided during his allocution, and the District Court must consider § 3553(a) factors and the record, including the Defendant's allocution, in selecting the Sentence imposed. The information a Defendant provides during his allocution may indeed have an effect on his Sentence, and the allocution should not be "an empty formality." See United States v. Tamavo, 80 F.3d 1514, 1518 (11th Cir. 1996) ("The purpose underlying the right of allocution is to permit a convicted Defendant an opportunity to plead personally to the Court for leniency in his Sentencing by stating mitigating factors and to have that plea considered by the Court in determining the

appropriate Sentence.")

In this Case, the District Court did not even bother to ask for nor entertain any rehabilitative or § 3553 documents.

II. THE PANEL'S USE OF AN OVERLY HIGH BAR OTHERWISE REQUIRED BY THE FEDERAL RECUSAL STATUTE EFFECTIVELY EVISCERATED THE CONSTITUTIONAL DUE PROCESS PROTECTIONS OF A FAIR TRIAL IN A FAIR TRIBUNAL.

The District Court and the Panel also erred when it ruled that a Petitioner must be able to point to specific instances of actual bias during the Court proceedings at issue in order to prove a Due Process Violation. Supreme Court precedent, as demonstrated in cases such as Bracy v. Gramley, 520 U.S. 899 (1997), Tumey v. Ohio, 273 U.S. 510 (1927), and, Caperton v. A. T. Massey Coal Co. Inc., 129 S. Ct. 2252 (2009), establishes that no such showing of actual bias is necessary. Rather, Petitioner must merely show that there was "such a risk of actual bias or prejudgment that the practice must be forbidden if the the guarantee of Due Process is to be adequately implemented." Caperton at 884. Mr. Akel has alleged that, at the very least, the presiding Judge's personal bias posed such a risk of actual bias that it violated his due process guarantee. The district Court therefore erred when it denied

Mr. Akel's Petition for relief.

As the Supreme Court noted years ago it is axiomatic that "... a fair Trial in a fair Tribunal is a basic requirement of Due Process." In re Murchison, 349 U.S. 133, 136 (1955). Although the Court noted that most matters related to Judicial disqualification do not rise to a Constitutional Level, there are circumstances "...in which experience teaches that the probability of actual bias on the part of the Judge or decision maker is too high to be Constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975). The High Court has acknowledged the difficulty of inquiring into actual bias, noting that the Due Process Clause "...has been implemented by objective standards that do not require proof of actual bias." Caperton v. A. T. Massey Coal Co. Inc., 129 S. Ct. 2252 (2009). In an attempt to define these objective standards, the Court has asked "... 'whether under a realistic appraisal of psychological tendencies and human weakness', the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of Due Process is to be adequately implemented. '"Caperton, quoting Withrow, 421 U.S. 35, 47, concluded (after citing Tumey that, "[h]armless-error analysis thus presupposes a trial.

A similar argument to that made by the District Court herein was rejected by this Court in *United States v. Holland*, 655 F.2d 44 (5th Cir., August 31, 1981). In[7] that case, the bias complained of consisted of remarks made on the record by the Presiding Judge to the Defendant and Counsel after the Jury had retired to deliberate. "The Judge commented on his belief that Holland had 'broken faith' with the Court at his First trial by consenting to the Judge visiting the Jury Room but then raising the issue on Appeal.... The judge then stated for the record that he intended to increase Holland's Sentence because of the incident which he had described." *Id.* at 45.

CONCLUSION

Mr. Akel's Sentence should be vacated and the cause remanded for Resentencing with instructions to apply the guidelines Constitutionally and with due regards for the precedent set by the United States Supreme Court . Accordingly, Mr. Akel respectfully requests the Court grant a Writ of Certiorari.

Respectfully Submitted,

/s/ Noel G. Lawrence

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