No. _____

In The

Supreme Court of the United States

TONY CHEVALLIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When are trial judges prohibited from considering as sentencing factors criminal acts that a defendant was neither charged nor convicted of? And in a related question; does the fact that a sentence handed down that is within the statutory range, mean that a court can consider virtually any act or aggravating factor whether it is charged or uncharged, proven or unproven, by a jury?

II. Whether Petitioner's Due Process rights were violated when indictment and jury conviction was for a specific charge and a specific amount of contraband, but at sentencing the petitioner was credited with a much larger amount? This, due to calculation errors of the probation officer as to amounts, as well as inclusion of criminal acts petitioner was neither charged nor convicted of?

(The charge was Conspiracy to Distribute and Possess with the intent to Distribute 500 grams of Methamphetamine and an unknown amount of marijuana. The conviction was for the methamphetamine. At sentencing, petitioner was credited for a much larger amount than 500 grams, 3262 grams of methamphetamine as well as uncharged amounts of Cocaine totaling 4430.55gm and uncharged amounts of Cocaine Base "Crack" totaling 105.0 grams. Neither of the of the last two were part of the charges or conviction, but were only referenced in the Pre-Sentence Investigation Report. Defendant was sentenced to 360 months, almost double of what he would have been facing).

III. Where evidence put forth at trial failed to show a trafficking amount anywhere close to "500 grams or more," did the trial court err by denying petitioner's motion for judgment of acquittal on aggravated drug trafficking of 500 grams of methamphetamine? Evidence that was put forth was of approximately 283 grams, and that amount was also outside of the timeline of the indictment which "began at a date unknown, but no later than 2013." This evidence related to alleged activity in 2016, subsequent to the allegations on the indictment. This evidence came in absent objection by defense counsel.

IV. When is a promise made by a court a promise? Can a promise made by a judge make an unprepared attorney prepared? (Where another appointed defense counsel, who was not trial counsel, appeared for petitioner at sentencing and was admittedly unprepared, seven (7) times asked for a continuance, and where the court made a promise on the record to keep the sentencing points at a specific level (32), thus assuaging defense counsel's concern about her unpreparedness, and then added three points at sentencing, sentencing defendant to 360 months, were defendant's due

process rights violated? Was this sentence procedurally or substantially unreasonable in light of the facts stated? It should be noted, as referenced in a government brief, that the conviction level was actually "30," which would have called for a sentencing range of 168-210 months. Petitioner was sentenced to 360 months. Were the defendant's due process rights violated in light of the numerous irregularities that occurred, at both trial and sentencing)?

LIST OF PARTIES

Tony Chevallier and The United States of America.

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The unpublished decision of the Court Of Appeals For The Fourth Circuit, seventeen (17) pages, is reprinted in Pet. App.A. It affirmed the judgment of the district court.

JURISDICTION

Pursuant to the Rules of the Supreme Court of the United States, Rule 13, and 28 U.S.C. Section 1254(1), Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in United States of America v. Tony Chevallier, Case No. 19-4002.

The Fourth Circuit Court of Appeals issued its decision on October 2, 2020, affirming Petitioner's conviction. The case had been pending for close to two years.

RELEVANT LAW UNDER CONSIDERATION

Under this court's prior decision in Apprendi v. New Jersey, with regard to the necessity of a jury conviction for aggravating factors in crimes, does consideration of both an increased level (6x) of the convicted drug amount as well as referenced crimes not charged or convicted by a jury (but only referenced in the Pre-Sentence Report), violate defendant's Sixth Amendment right to a jury trial. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). Rosales Mireles v. United States, 138 S. Ct 1897 (2018).

This case involves application of both the Fifth Amendment guarantee of due process, and the Sixth Amendment right of a defendant to have "Assistance of

Counsel for his defense." A novel issue incorporated relates to a sentencing promise made by District Court judge, and whether defense counsel's acceptance of said promise, to the detriment of her client, resulted in Petitioner's due process rights being violated. Strickland v. Washington, 466 U.S. 668 (1984). Lastly, was the resulting sentence reasonable in light of all of the irregularities that occurred. Key Issues include:

1. Whether the court can consider as sentencing factors crimes which a defendant was neither charged nor convicted of? Where the actual conviction was for a specific amount, can the court consider a more than six times increase in this amount as a sentencing factor? Was the sentence of 360 months reasonable where offense at conviction actually called for a sentence of between 168 and 210 months? It should be noted that at trial, actual evidence presented against defendant was for far less than 500 grams of methamphetamine, and there was no evidence or even charges of cocaine or cocaine base. The jury conviction was for five hundred grams or more of methamphetamine. It should also be noted that at best, evidence presented at trial was for 283 grams and the period of the activity was almost three years after the time period listed in the indictment. The indictment listed the time period to be "Beginning at a date unknown, but no later than December of 2013."

2. Whether the Sixth Amendment right of the accused to have "Assistance of Counsel," means that if counsel is unprepared to address issues that affect both the sentencing level as well as sentencing factors that the court is to

consider, and determines to go forward at the expense of a defendant and due to a promise made by a court, are the defendant's due process rights violated?

3. What is the meaning of a promise by a court? What if it appears to be a bargain, and a bad one at that? When a statement that the court is going to take a particular stance, and defense attorney acts on this promise to the detriment of the defendant, are defendants due process rights violated?

RELEVANT CASELAW UNDER CONSIDERATION

Whether there is a limit on the discretion that a lower court can exercise with regard to the sentencing of a defendant? Did United States v. Booker, 543 U.S. 220 (2005), which created an advisory guideline scheme, give the lower courts unlimited authority to consider any evidence that is brought to the court's attention, (including evidence of uncharged criminal acts and a 6x, or more, increase in the amounts of drugs or contraband that the defendant was actually convicted of)? Does this violate the court's ruling in Apprendi v. New Jersey? 530 U.S. 466 (2000). Rosales-Mireles v. United States (prev. cited).

Was the sentence of 360 months substantially unreasonable, specifically where evidence at trial did not show that the defendant was responsible for 500 grams of methamphetamine, much less 3,263.3? (and where there were no charges or evidence presented that he was responsible for 4430.55 grams of cocaine or 105 grams of crack cocaine)?., United States v. Battle, 499 F.3d 315, 323 (4th Cir. 2007), Gall v. United States, 552 U.S. 38 (2007), Rita v. United States, 551 U.S. 127 (2007), United States v. Espinosa-Martinez, 330 Fed. Appx. 49,50 (4th Cir. 2009).

Whether under Strickland v. Washington, 530 U.S. 466 (2000), it constitutes ineffective assistance of counsel for an admittedly unprepared attorney, acting upon a perceived promise by the court, to go forward with a matter that they are utterly unprepared to handle?

STATEMENT OF THE CASE

On October 26th, 2016, a grand jury sitting in the Eastern District of North Carolina returned a Forty-Nine count indictment against twenty-five defendants, in which the petitioner was charged in one general count of conspiracy in violation of Title 21 U.S.C. Section 846. A breakdown of what each defendant was responsible for was part of the indictment, and with regard to the petitioner that breakdown stated "a quantity of Marijuana, in violation of 21 U.S.C. 841(b)(1)(D)" and "500 grams or more of Methamphetamine (mixture and substance), in violation of 21 U.S.C. 841(b)(1)(A)." (21 U.S.C.). The timeline for the indictment was "At a date unknown, but no later than 2013."

Mr. Chevallier was arraigned and pled not guilty on December 11th, 2017. The Government filed a Notice to Seek Enhanced Penalty, pursuant to 18 U.S.C. Section 851.

His original attorney was Leza Driscoll. Driscoll withdrew from the case when she joined the Office of Federal Defender. Attorney Federal Defender Rosemary Godwin represented petitioner at trial. Later, Leza Driscoll again represented petitioner, at sentencing and initially in his appeal to the Fourth Circuit. (Subsequently present counsel was appointed in said Fourth Circuit

matter, which resulted in a seventeen page unpublished opinion affirming the conviction).

The trial commenced on May 14, 2020 of petitioner and co-defendants Antonio McKoy, Jabarr Rudolph and Greg Bright. At trial the government called a total of two witnesses against Mr. Chevallier, Amanda Burch (J.A. 1040-1098) and Andrekia Parker (J.A. 1124-1242).

On May 22, 2018, the jury found Appellant guilty of the methamphetamine component of Count One, 500 grams, and on December 13th, 2018, the district court sentenced him to a term of imprisonment of 360 months and 10 years of supervised release.

Ms. Burch testified that she began using marijuana and methamphetamine in 2005 while in nursing school. (J.A. 1041-1042). "Sometime after nursing school she met and dated "John John," Mr. Chevallier's brother (J.A. 1042-1043). Ms. Burch confirmed that she was in prison from 2011 through 2013 for possession of methamphetamine precursors and attempted trafficking in heroin.

Ms. Burch asserted on direct examination that Mr. Chevallier provided her with quantities of methamphetamine in 2016 but she did not provide any testimony of such acts prior to 2016. This is important because the indictment's timeline ends in 2013.

Ms. Burch testified about purchasing "five or six ounces at one time" from Petitioner. (J.A. 1046). On redirect she testified she was involved in several other types of narcotics with Petitioner, including cocaine and crack cocaine, but no

quantitative amounts or specific timeline was identified. They had been "friends for a long time" (J.A. 1046).

Witness Burch testified that the first time she purchased five ounces of methamphetamine from Mr. Chevallier, the methamphetamine was of good quality but the second time she purchased "four or five ounces" it was not of good quality.

She was asked to identify Petitioners voice in recorded telephone conversation that she was not a part of. She interpreted the conversation to indicate that Petitioner was trying to buy "stuff" and the "dope" was bad. (J.A. 1054). Again, Ms. Burch was not a party to the conversation and she identified the term ICE but denied it was Petitioner who spoke the term. She did however agree that Mr. Chevallier was speaking about price, though no quantitative amounts were discussed. (J.A. 1055). In fact, any quantitative amounts that even were discussed were outside of the time period of the indictment and at best would have totaled 10 oz., or 283 grams.

The second government witness against Petitioner was Andrekia Parker. Hers was a relationship with co-defendant Antonio McKoy. She testified to witnessing drug activity, but Petitioner was not even mentioned. (J.A. 1149-1150).

The only loose testimony of any activity, which occurred in 2016, was that she had two interactions with the Petitioner relating to an exchange of money. (J.A. 1176).

Finally, Ms. Parker was asked to identity parties and interpret a recorded conversation. Parker identified co-defendant McKoy's voice and Mr. Chevallier. She agreed that Mr. McKoy said "20" and Mr. Chevallier said "18," but she denied having any knowledge of what they were discussing. (J.A. 1219).

At the close of the Government's evidence, Mr. Chevallier moved for a Judgment of Acquittal. The court, after appearing to struggle with the matter, denied the Defendant's motion. (J.A. 1328). The jury returned a verdict of guilty as to the one count charged in the indictment and found he conspired to distribute 500 grams of methamphetamine (J.A. 1596).

A Presentence Investigation Report was filed and Mr. Chevallier was held accountable for a total of 4,430 grams of cocaine, 105 grams of cocaine base "crack" and 3,262.3 grams of methamphetamine. Further, US Probation attributed a three point leadership role adjustment pursuant to U.S.S.G. Section 3B1.1 (J.A. 1739). Defense filed a timely notice of objection to both the leadership enhancement and the drug weights attributed to Mr. Chevallier. (J.A. 1742).

At sentencing much of the evidence regarding increased amounts came from Sampson County Task Force Officer Kevin Sampson. It was based on his being "familiar with various drug trafficking organizations in Sampson County." (J.A. 1613 lines 22-24). What it came down to was his interpretation of telephone calls, and that was where the increased amounts came from that were used against the petitioner at sentencing. No trial evidence nor jury conviction, just testimony from an officer at sentencing.

At the very beginning of the original case, Leza Driscoll was Petitioner's attorney. Ms. Driscoll left the case, and was replaced by Rosemary Godwin who was Petitioner's trial attorney. Subsequently, Attorney Leza Driscoll was appointed to represent the Petitioner between the time of conviction and

sentencing. She was admittedly unprepared for said sentencing hearing, and the following transpired:

> THE COURT: Are you and Mr. Chevallier ready to proceed?"
>
> MS. DRISCOLL: You're Honor, we're asking at this time if you would consider granting an extension. I was not the original trial counsel in this case, and I have been trying to prepare for this sentencing. There is a tremendous amount of discovery, and there's been a tremendous amount of stuff. I've spent a lot of time talking to Rosemary Godwin, the trial counsel in this. And every time that I think I'm prepared, something else is popping up. And so just because of the enormity of the case, if I could have a little bit more time for preparation?"
>
> THE COURT: What is the specific issue? I mean, I've read the objections about drug weight and leadership.
>
> MS DRISCOLL: Well, I mean, drug weight. I thought I understood where the drug weight was coming from, at least I had an idea. And then after speaking to the prosecutor, I've discovered that there's other things out there I didn't take into consideration and haven't really looked at.
>
> So, I'm very concerned about that because in my preparation for this---Judge, originally I was the original counsel in this case. And back then I met with the Government and met with the case agents and thought I understood where all the drug weight was coming from based upon these conversations and what my original notes were, it seemed to correspond somewhat with what Probation had---you know I understood the basis for it.
>
> But after speaking to the Government I think there's other statements out there that I was not really aware of, and the case has evolved considerably since when I was originally involved in the case. It's been two years. And during that time period, I believe there's been other statements, other cooperators, other things that I wasn't really aware of, and I don't believe that they were part of the trial either. I think there are things that probation has taken into account, and I believe that that's---it's just other stuff that I just didn't take into consideration.
>
> That might be my fault. I have tried diligently to be prepared. And I---I---I am fearful that I'm not as prepared as I thought. There was---

THE COURT: This has been on for sentencing. I spend a lot of time preparing. I have----I think at last count, I think I may have gone over 900 cases on my own docket. I just got over that. We've been one judge short here for almost 14 years. And I prepare a lot, and I tried this case. This case has been on for sentencing. And to hear a motion like this on the day of sentencing - - what is the Government's position? Appendix Volume IV, Sentencing, p.1600-1602, Lines 9-7/

The Government objected, here is the continuation of the discussion:

THE COURT: Ms. Driscoll, what do you need that you haven't done?

DRISCOLL: I just---this is very frustrating that we're here, that I have prepared. Appx., Volume IV, page 1602, Lines 19-21.

THE COURT: I'm confident that you're prepared. I don't understand. What do you want to do, reread witness statements from Thacker and Burch? I'm trying to understand If I give you this time, what are you going to do and where are we going to be, because then I have to put this file down. I have another sentencing after this. Got sentencings tomorrow. I've got a trial next week. I've got four trials scheduled in January, right? And I get it. That's what I do. That's fine.

But it's extremely frustrating for a lawyer to make an oral motion on the day of the sentencing hearing. And I need to know specifically. "Judge, I need to read this or---"I need"--- what do you need, to reread it? I'm trying to understand because I'm ready to go."

MS DRISCOLL: I walked in today believing I was ready to go. And I have been communicating back and forth with the prosecutor about the case and about the discovery and what's going on. I have spent a considerable amount of time on it. I don't want the court to believe that I have taken this in any way frivolously.

THE COURT: I know you haven't. Again---

MS. DRISCOLL: I'm nervous that I missed something, and I was worried because of a conversation that we just had in which I understand there's---the Government intends on putting on drug weight that's in excess of what's even in the PSR. So that wasn't something I took into consideration when I was looking at everything, and that scared me. And I don't want to be unprepared. I've been trying very hard to be prepared.

THE COURT: So my question then is: What is it that you want to read, some statements that Mr. Knott (an AUSA)---I mean, I just don't understand.

MS DRISCOLL: I can be ready tomorrow, Your Honor. How about that?

THE COURT: Well, I can't be---I have Federal Court in Winston.

MS DRISCOLL: I was just upset when I heard that there was so much more weight than I had anticipated or seen, Appendix, Volume IV pages 1603-1604, lines 12-21.

THE COURT: Is it beyond the 32? Is the Government going to try and say that the drug weight should go up beyond what's in the PSR?

(The base level was actually 30, or lower. The Government has even admitted that it was "30" on page 15 of their Reply to the Supplemental Brief in this matter).

MR KNOTT (THE AUSA): Your Honor, we will not be moving to increase the offense level. We will be putting on evidence that exceeds the calculations of the probation officer, arguing that out of risk of double counting and so forth, we do accept the calculation; however, there is evidence that exceeds what the probation officer calculated. Appx. Volume IV., pages 1604-1605, lines 22-5.

THE COURT: Are you telling me you haven't had time to read---to prepare for that or what, Ms. Driscoll?

MS. DRISCOLL: I have, Your Honor, It was my---I mean, I also thought there was several other---I mean, I didn't think that that was the only thing that they were looking at.

I've come in today prepared for all of the intercepted phone calls, where there's any drug accountability going through the intercepted phone calls. I have gone through that.

But then when I was just talking to them, they seemed to indicate that the drug weight could go in excess of 32, and that concerned me because I hadn't taken that into account, and that was where I got concerned.

THE COURT: He just (said) they're not going to ask me to go above 32.

> MS DRISCOLL: Well, I just heard that but I hadn't heard that outside the courtroom, I'm sorry. In light of that, I believe we can go forward. Appx. Volume IV., page 1606, lines 7-25

When pronouncing sentence, here is what the court stated:

> THE COURT: "I do think that he---I find by a preponderance that he did recruit these accomplices; that he claimed a right to a larger share of the fruits of the crime." Appx Volume IV., LINES 12-14. "I do think Chevallier was the one that had the largest role in connection with that based on the evidence presented both at trial and here at the sentencing hearing." Appx., lines 20-23. "The nature and scope of the illegal activity was extensive, and that he did exercise control and authority over the others," Appx., Volume IV., pages 1690-1691, lines 24-1. "So the total offense level is 35, The Criminal History Category is VI. The advisory guideline range is 292-365 months." Appx. Volume IV., page 1691, lines 10-12.

The court sentenced the Petitioner to 360 months of incarceration followed by 10 years of supervised released.

In another statement at sentencing where defense counsel requested that Petitioner be placed in a medical facility, the court stated:

> "I'm going to leave it up to the BOP. I think it's critical that the BOP keep the entire McKoy DTO separate from each other for all the years. And this organization is going to have many, many, many, many, many, years in prison, and it's my recommendation that they never inhabit the same federal prison." Appx Volume IV, Sentencing Hearing, pages 1705-1706, lines 22-2.

REASONS FOR GRANTING THE PETITION

This case presents a novel and extremely important question before this court, important questions of due process that affect cases across the country and include but are not limited to:

1. Where a defendant is charged and convicted of one specific offense with a specific amount of contraband attached, can this morph into a six times (6x)

increase and related criminal responsibility, not as a jury finding but as a finding in a pre-sentence report? Were his due process rights violated? Where a defendant was neither charged nor convicted for a specific offense, can mere allegations of guilt for said offense be used against him at sentencing?

2. Where evidence presented at trial was for a specific amount, but conviction was for a greater amount, should the court have granted defendant's motion for Judgment of Acquittal?

3. Where evidence came in at trial, without objection, as to criminal activity subsequent to the period for charges stated in the indictment, was there ineffective assistance of counsel and a violation of defendant's due process rights?

4. Where defense counsel was utterly unprepared to proceed with the sentencing, and where the court made a promise to limit the sentencing points in said matter, were the defendant's due process rights violated when the court added points (as a role adjustment) and then sentenced him to an amount of time that was almost double of what his guideline score would have called for?

ANALYSIS

From trial to conviction to sentencing, this particular case is rife with irregularities amounting to plain error, error that was clear and obvious, that affected substantial rights of the petitioner and which seriously affected the

fairness, integrity or public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725 (1993).

Starting with the fact that evidence came in, without objection by trial counsel Rosemary Godwin, of alleged drug activity outside of the period of the indictment (which had it's beginning "at a date unknown, but not later than in or about December of 2013), this alone had a prejudicial affect upon the petitioner. Only two witnesses testified against him, and only the first witness, Amanda Burch testified about any specific drug activity, and this was in 2016, approximately three years after the period that the indictment ends. The second witness, Andrekia Parker, merely testified about transfers of money between petitioner and co-defendant McKoy, without remembering dates and with no knowledge or amounts or what the purpose of the transfer was. The vast majority of her testimony was about co-defendant McKoy.

Further, the first witness, Ms. Burch, testified about intercepted communications between petitioner and McKoy, communications which she was never a part of and merely guessed what the conversations were about. Further, Ms. Burch never discussed drug quantities sufficient to substantiate 500 grams or more of methamphetamine.

Testimony relating to activity in 2016 should have been both objected to and excluded under Federal Rule of Evidence 403, and failure to do so constituted plain error, error that was plain, deprived defendant of substantial rights, and affected the fairness, integrity or public reputations of the judicial proceedings,

Federal Rule of Evidence 403 stands for the premise that a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

What occurred at trial was a guessing game where the jury was presented with general evidence of drug activity, no specific time period, a conspiracy involving twenty-five individuals, and then asked to accord by insinuation the culpability of a specific defendant, similar to throwing paint on a wall and hoping that it sticks.

This Court, in Strickland v. Washington established the standard for determining when a criminal defendant's Sixth Amendment right to counsel is violated by that counsel's inadequate performance. The two-prong standard first being that Counsel's performance fell below an objective standard of reasonableness. The second being that Counsel's performance gives rise to a reasonable probability that if counsel performed adequately, the result would have been different.

Defense counsel should have objected to all of this general evidence outside of the period of the indictment, and it should have been excluded.

Additionally, what did come in did not in any way, shape or form, address drug amounts constituting 500 grams or more of methamphetamine (or a later jump in the Pre-Sentence Report to 3262.3 gm). Even more serious is the fact that

the indictment does not charge defendant with involvement in cocaine or cocaine base. All of this came into existence in the Pre-Sentence Report. There has to be a time when enough is enough and the guessing and speculation of a probation officer must be weighed against what the defendant was actually charged and convicted of. This bears direct relation to this court's ruling in Apprendi v. New Jersey, 530 U.S. 466, which stands for the premise that judges are prohibited from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by a jury beyond a reasonable doubt.

It begs the question: When are trial judges prohibited from considering as sentencing factors criminal acts that a defendant was neither charged nor convicted of? Does the fact that a sentence handed down is within the statutory range, mean that a court can consider virtually any act or aggravating factor whether it is charged or uncharged, proven or unproven, by a jury?

The trial judge erred by denying Petitioners Motion For Judgment of Acquittal on the aggravated drug offense of a quantity of 500 grams or more of methamphetamine. Court's review de novo a district court's denial of a motion, made pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for judgment of acquittal to succeed, the trial court must determine whether the evidence was sufficient to support a conviction. "In determining whether the evidence was sufficient to support a conviction, a reviewing court must determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The court reviews sufficiency of the evidence to support a conviction by determining whether there is substantial evidence in the record, when viewed in the light most favorable to the Government, to support the conviction.

In this particular case, the government attempted to splice together various conversations (which the witnesses were not a part of), to substantiate amounts. Much of the testimony related to activity that was outside of the time period of the indictment and which arguably should never have come in. The trial court erred in not granting defenses Motion for Judgment of Acquittal.

Plain Error and the Making of a Promise.

When is a promise a promise, and what does that even mean? Does the mere making of such a promise bind the court? When a court makes a promise and then apparently goes back on that promise, is there a remedy? Can a promise make an unprepared attorney prepared?

When the court promised to limit the sentencing points to 32, which would have given a guideline range of 210-262 months, and then went back on this apparent promise and added an additional three points (as manager/leader/organizer), and sentenced petitioner to 360 months, did this seriously affect the fairness, integrity or public reputation of the proceedings.

In order to understand the context of the court's promise, it was made in order to assuage the concerns of newly court appointed defense counsel who stated over and over that she was not prepared for the proceedings. The idea that the

sentence would be limited to a specific guideline category is what made her grudgingly agree to go forward.

There are four prongs in the Plain Error Rule as this court has stated in United States v. Olano. They are: That there was error, That the error was plain, That the error affected substantial rights, and That the error affected the integrity or public reputation of the judicial proceedings.

First, calculation of the guideline amount by the probation officer, which gave a base level of 32 for "Conspiracy to Distribute with Intent to Distribute 500 Grams of Methamphetamine and a Quantity of Marijuana were incorrect on their face. The proper guideline amount at conviction was 30.

Petitioner was not convicted of distributing a "Quantity of Marijuana." Secondly, section 2D1.1 U.S.S.G. calls for a base offense level of 30, not 32. And when the court agreed to limit the guidelines to 32, even there it arguably opened defendant to a sentence in excess of the guidelines. What is more is an open question, was this statement by the court a recognition of the fact that a sentence above that range (210-262) would have been unfair and improper?

The improper calculation of the probation officer should have resulted in the case being returned to the lower court for re-sentencing., Rosales-Mireles v. United States, 138 S. Ct 1897 (2018).

The apparent promise made by the court to limit the sentencing to a specific category, which the court then disregarded, constituted Plain Error. Clearly there was error, the error was plain., the error affected substantial rights, and it

seriously affected the integrity or public reputation of the proceedings. Further, when the court went against this promise, the resulting sentence of 360 months was clearly unreasonable. It was unreasonable on many levels, not the least being the miscalculated guidelines but also the fact that the petitioner was credited for amounts as well as criminal acts he was never tried nor convicted of.

The failure of later defense counsel Driscoll to prepare for sentencing, and then her acceptance of an offer by the judge induced her to go forward, arguably constitutes ineffective assistance of counsel. Perhaps she should have known that the court was going to add three points to the guideline score? It almost boggles the mind trying understand what considerations were being made that made an "unprepared" attorney now prepared?

There are two main prongs to Ineffective Assistance of Counsel: First, that counsel's performance fell below an objective standard of reasonableness. Secondly, that counsel's performance gives rise to a reasonable probability that if counsel had performed adequately, the result would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

In the instant case it is not so much the counsel's failure to prepare for the final hearing, asking for a continuance 7x, but her acceptance of the court's offer to go forward when the court stated that he would limit the sentencing points to 32. Perhaps she should have known that this wasn't going to happen?

Once again Plain Error is called into play, as there was error, the error was plain or obvious, and the error affected the substantial rights of the petitioner as

well as the public reputation of the court or the proceedings. United States v. Olano (prev. cited).

Petitioner asks that his conviction in this matter be reversed and that this matter be remanded for a new trial. Further, in the absence of a new trial, that the sentencing in this matter be vacated and that this matter be remanded for re-sentencing.

CONCLUSION

For all of the above stated reasons this Petition for Writ of Certiorari should be granted by this honorable court.

RESPECTFULLY SUBMITTED

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