No.

In the Supreme Court of the United States

OCTOBER TERM, 2021

JAMES PETER SABATINO, 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S APPEAL AS MOOT, IN THAT THE DISTRICT COURT'S SUBSEQUENT RULING REAUTHORIZING APPELLANT TO COMMUNICATE WITH HIS LAWYERS, DID NOT MAKE IT ABSOLUTELY CLEAR THAT THE DISTRICT COURT HAD TERMINATED THE WRONGFUL CONDUCT OF NOT FOLLOWING THE STATUTORY REQUIREMENTS OF 18 USC 3582 § (e).

PARTIES TO THE PROCEEDING

Petitioner, James Peter Sabatino was the Defendant in the District Court for the Southern District of Florida (District Court), and the Appellant before the Eleventh Circuit Court of Appeals. The United States of America, was the Plaintiff in the District Court for the Southern District of Florida, and the Appellee before the Eleventh Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE

The Petitioner has complied with the requirements set forth in Rule 33 of the Supreme Court. In particular, Petitioner certifies that a 14-point Times Roman font was used in this petition, and pursuant to Supreme Court Rule the petition for certiorari contains 5,082 words or less excluding, the questions presented, list of parties and corporate disclosure statement, the table of content, the table of cited authorities, the listing of counsel at the end of document, or any appendix.

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The opinion of the Eleventh Circuit Court of Appeals was entered on August 17, 2020, on Case No. 19-12916-HH and is attached hereto as Appendix-I. Thereafter, the Petitioner filed timely petitions for rehearing and for rehearing *en banc.* The petitions for rehearing and rehearing *en banc* were denied on November 23, 2020 and is attached hereto as Appendix-J. The judgment of the Court of Appeals was issued on December 1, 2020 and is attached as Appendix-K.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was entered on August 17, 2020.[Appendix-I] This Court has jurisdiction to review this case under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Prisoners such as Mr. Sabatino have a due process right to speak with an attorney under the Fifth Amendment of the United States Constitution and also a right to counsel under the Sixth Amendment of the United States Constitution. A defendant has a First Amendment Right to free speech. In addition, 18 U.S.C. § 3582(e) places no communication restriction on a defendant with an attorney.

STATEMENT OF COURSE AND PROCEEDING

On June 30, 2016, a grand jury in Miami, Florida, returned a fourteen count indictment against James Peter Sabatino and co-defendants Jorge Duquen and Valerie Kay Hunt charging them with a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") in violation of 18 U.S.C. §1962(d), a conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349, and numerous counts of mail fraud. (Appendix-A)[DE: 3]. Thereafter, a Superseding Information was filed charging Mr. Sabatino with 29 offenses including those listed above. (Appendix B) [DE:214].

According to the Stipulated Factual Proffer, the charges arose from Mr. Sabatino, known to law enforcement as a member of the Gambino Organized Crime Family of "La Cosa Nostra" ("LCN") and being the sole organizer and leader of a prison-based enterprise that was associated with LCN. (Appendix C) [DE:231]. The enterprise engaged in acts of wire and mail fraud, interstate trafficking of stolen property, obstruction of justice, introduction of contraband into federal prisons, witness intimidation, bribery, conspiracy to commit murder and other criminal activities in the Southern District of Florida, Southern District of New York, and the Northern District of Georgia. (Appendix C) [DE:231:2-3], [Appendix-D] [DE:286:5-6]. While incarcerated, Mr. Sabatino repeatedly communicated with members of the enterprise including members and associates of the Gambino organized crime family and directed them to murder and threaten violence against those who posed a threat to him or the enterprise or jeopardized its

operations including witnesses to the illegal activities of the enterprise. (Appendix C) [DE:231:3, 6-7, 10-11] From prison, Mr. Sabatino recruited a number of other individuals, including other inmates, federal correctional officers and non-incarcerated co-conspirators to participate and carry out these activities. (Appendix C) [DE:231:3-11]. Despite Mr. Sabatino's incarceration, members and associates of his enterprise were seemingly willing to follow his orders and directives. In addition, Mr. Sabatino orchestrated the theft of over $10 million in jewelry in a two-month period. (Appendix C) [DE:231:3-11].

In the written plea agreement (Appendix E) and a stipulated Letter of Understanding (Appendix F) executed on the same date as his change of plea hearing, Mr. Sabatino agreed to plead guilty to Count 1 of the Superseding Information, the RICO conspiracy. (Appendix E) [DE:230:1; 232:1]. The Petitioner agreed to the Government filing a motion pursuant to 18 U.S.C. § 3582(d) for special conditions of confinement, to wit:

> a. The Defendant be prevented from communicating with anyone other than his step-mother, Carol Fardette, **undersigned counsel, Joseph S. Rosenbaum, and paralegal Kimberly Acevedo during the term of his imprisonment**.
>
> b. The Defendant be prevented from communicating with other inmates during the term of his imprisonment; and
>
> c. **These conditions continue under** such time as the Defendant unequivocally demonstrate he will not threaten or do violence and/or physical harm to other persons. (Appendix F) [DE:232:1].[Emphasis added]

Sabatino agreed to these terms with the understanding that he would be able

to communicate with attorney Rosenbaum, then paralegal (now attorney) Acevedo and his stepmother Carol Fardette throughout his entire term of incarceration.

At his sentencing hearing, the District Court sentenced Mr. Sabatino to a term of 240 months to run consecutively to the sentences imposed in several other federal and state cases. (Appendix G)[DE:287:2]. The District Court orally granted the Government's Agreed Motion Requesting Imposition of Communication Restrictions pursuant to 18 U.S.C. § 3582(d)[1]. (Appendix H)[DE:269]. The District Court entered an Order Granting Government's Agreed-Upon Motion requesting imposition of communication restrictions in which it made specific findings of fact based upon Mr. Sabatino's guilty plea to conspiracy to violate the RICO Act, the Stipulated Factual Proffer and his extensive criminal history wherein many of his crimes were committed while in federal custody. (Appendix-I)[DE:286]. The court also specifically found "that there is probable cause to believe that Defendant's association or communication with persons other than his step- mother, his attorneys, or the attorney's staff would enable Defendant to "control, manage, direct, finance, or otherwise participate in an illegal enterprise." (Appendix-D) [DE:286:5]. In other words, Sabatino's communication with his attorney Rosenbaum and his staff would not pose a threat to the public. The court imposed the following restrictions on Defendant's Communications in that order pursuant to 18 U.S.C. § 3582(d) in pertinent part:

b. Defendant should be limited, within the U.S. Marshals

[1]The same statutory provision is now contained in 18 U.S.C. §3582(e) but in this brief will be referred to as 3582(d).

> Service/BOP/detention facility's reasonable efforts and existing confinement conditions, from having contact (including passing or receiving any oral, written, or recorded communications) with any other inmate, visitor, attorney, or anyone else, that could reasonably foreseeably result in Defendant communicating (sending or receiving) information **that could allow Defendant to circumvent the Court's intent of significantly limiting Defendant's ability to control, manage, direct, finance or otherwise participate in an illegal enterprise**;
>
> c. The restrictions specified above should permit Defendant's contacts and communications with the following persons:
>
> i. Carol Fardette Defendant's step-mother;
>
> ii. **Joseph S. Rosenbaum, Esq**., Counsel for Defendant; and
>
> iii. **Kimberly Acevedo, Esq.**, Co-Counsel for Defendant and
>
> d. The restrictions specified above shall remain in place until Defendant demonstrates his communications no longer pose a threat.
> ...
>
> 3. The Court retains jurisdiction to consider any applications made by Defendant, Defendant's attorneys, or the Government to modify these special conditions of confinement. (Appendix D)DE:286. (**Emphasis added**).

These same restrictions were incorporated into Mr. Sabatino's Judgment and Sentence as Special Conditions of Confinement pursuant to 18 U.S.C. § 3582(d). (Appendix G)[DE:287].[2] Kimberly Acevedo who had been a paralegal in Mr. Rosenbaum's office working on Mr. Sabatino's case, filed a Notice of Appearance

[2]The district court subsequently entered an Amended Judgment which only modified the amount of restitution. DE:306.

as Co-Counsel as a Pro Bono attorney. [DE:270]. Mr. Sabatino's counsel, Joseph Rosenbaum, voluntarily dismissed his direct appeal in Case No. 18-10269.

On December 21, 2017, the district court appointed Mr. Rosenbaum "to continue further representation of the Defendant" and requir[ed] that "[a]ll motions or requests shall be filed by counsel for the Defendant." [DE:314].

Thereafter, in 2018, Mr. Sabatino was having difficulty communicating with his counsel, Mr. Rosenbaum, due to his busy trial schedule, and filed a number of pro se pleadings and letters to the district court. [DE:395, 396]. On July 10, 2018, the court ordered Mr. Rosenbaum to respond to the allegations regarding the communication issues. [DE:416].

Three days later, the court appointed Ivy Ginsburg to represent Mr. Sabatino on appeal in Case No. 18-12846.[3] [DE:420]. On November 2, 2018, the District Court granted Petitioner's Motion for Modification of the Communication Restrictions, and added appellate attorney Ivy Ginsberg to the list of persons with whom Petitioner may communicate. [DE:508].

On November 26, 2018, attorney Ginsberg filed a Motion requesting that She be added as CJA counsel in the district court proceedings because of the difficulty that Mr. Sabatino had communicating with Mr. Rosenbaum. [DE: 525]. The Court entered an Order to Show Cause why attorney Ginsberg should not be substituted for Mr. Rosenbaum in the District Court proceedings. [DE:534]. The

[3]One of the issues in that appeal concerned the district court's restriction on his ability to submit pro se filings to modify his communication restrictions despite the court's prior order which authorized Sabatino to file motions. DE:286 ¶3.

lack of communication was simply because his trial schedule was very busy. Mr. Rosenbaum responded to the Order to Show Cause stating that Mr. Sabatino did not wish for Ms. Ginsberg to replace undersigned counsel and that the defendant did not want to lose him as an attorney. [DE:539]. Rosenbaum added, "the defendant believed Ms. Ginsberg could correspond more frequently with him, but he does not want this at the expense of replacing [Rosenbaum.]. [DE: 539]. Rosenbaum wrote that he was "cognizant of the limited resources available to fund [the CJA] program" and that "[i]f Ms. Ginsberg were appointed in addition to undersigned counsel, neither one of us would double bill for services rendered." [DE:539].

Sabatino filed a response requesting that both Rosenbaum and Ginsberg represent him in the District Court. [DE:541]. The Court denied Petitioner's motion to appoint attorney Ginsberg as a second CJA counsel the District Court proceedings, finding that Petitioner did not need two court-appointed attorneys to represent him in said Court. [DE:542].

Mr. Sabatino filed a *pro se* Motion to Reconsider and Substitute Ivy Ginsberg as District Court counsel. [DE:546]. On February 12, 2019, the Court granted the Motion for Reconsideration, substituted Ms. Ginsberg for Mr. Rosenbaum as District Court counsel, and **terminated Mr. Rosenbaum as counsel of record** in this action. [DE:547]. Despite the §3582(d) Order which authorized the Petitioner to file *pro se* motions, the District Court also stated: "Now that the Court has granted Defendant's request to appoint Ivy Ginsberg as counsel in the district

court, all motions, requests, and correspondence with the Court shall be filed by Ms. Ginsberg. [DE:547].

On April 23, 2019, Defendant filed a *pro se* Motion to Allow Communication with Attorney Rosenbaum. [DE: 549]. In that motion, Mr. Sabatino apprised the District Court that he attempted to write a letter to Rosenbaum and Acevedo concerning the Scola cases and found out that the prison officials were interpreting the Court's orders as prohibiting communication with Mr. Rosenbaum because he was terminated as counsel in the 2016 case. Petitioner argued that he is still permitted to communicate with Mr. Rosenbaum because he is named in the Court's November 20, 2017 Order imposing restrictions onPetitioner's Communications (Appendix D) (DE: 286, 287), and also because Mr. Rosenbaum is still his attorney in three other cases before Judge Scola. [DE:549]. On April 25, 2019, the District Court denied the *pro se* motion and stated: "The Court finds that the Court's Order of February 12, 2019 terminating Mr. Rosenbaum as counsel in this case speaks for itself- because Mr. Rosenbaum has been terminated as counsel of record, [Petitioner] was no longer permitted to communicate with him. If [Petitioner] needs to communicate with Mr. Rosenbaum regarding one of his other cases, he may file a motion through Ms. Ginsberg." [DE:550].

On May 6, 2019, undersigned counsel filed Petitioner's Motion to Authorize Communication with attorneys Joe Rosenbaum and Kimberly Acevedo. [DE: 551]. As grounds, Mr. Sabatino urged that Mr. Rosenbaum remained his attorney of record in the three cases cases before Judge Scola and needed to consult with Mr.

Rosenbaum regarding the sentence in order to determine whether he had grounds to challenge the legality of his sentence in a 28 U.S.C. § 2255 motion, his still yet to serve post- revocation sentences, RRC placement and supervised release. [DE:551:3]. He also wished to consult with him regarding the substantial restitution order in Case No. 13- 60040-TP-Scola. DE:551:3. Further, Mr. Rosenbaum possessed the factual and legal knowledge pertaining to any issues in those cases as well as the files. Mr. Rosenbaum and his associate Ms. Acevedo were willing to speak with Sabatino regarding those cases at no charge and without any compensation from the Criminal Justice Act. [DE:551:3-4 ¶¶7-8].

The government responded that "there is no legitimate need to consult his 11 former court-appointed attorneys; they no longer represent him in that case or any other." [DE:554:1].

Mr. Sabatino replied that: (1) attorney Rosenbaum remains Mr. Sabatino's attorney of record in the Scola supervised release cases; (2) the District Court did not have the statutory authority to add a communication restriction without a motion from the Director of the BOP or the United States Attorney pursuant to 18 U.S.C. § 3582(d); and (3) interference with Mr. Sabatino's communication with his attorney implicates his right to access to the courts and free speech as guaranteed by the First, Sixth, and Fourteenth Amendments to the United States Constitution. [DE:557:2].

On July 10, 2019, the district court in a paperless order denied the motion to authorize communication with the attorneys on the basis that the three Scola cases

were closed and Judge Scola denied motions to appoint counsel in all three cases. [DE:559]. The Paperless Order stated in its entirety:

> Paperless Order denying [551] Motion to Authorize Communication with attorneys Joseph Rosenbaum and Kimberly Acevedo as to James Sabatino (1). All three cases cited in Defendant's motion are closed. Judge Scola has denied motions to appoint counsel in all three cases. In two of the cases, 98-06147-CR-Scola, and 99-00114-CR- Scola, the Defendant's appeal of Judge Scola's orders denying appointment of counsel have been dismissed by the 11th Circuit. In 13-60040-TP-Scola the last entry by Judge Scola was in 2018. No appeal was filed. This entry constitutes the PAPERLESS ORDER in its entirety. DE:559.

The district court failed to address any of the statutory, procedural and constitutional arguments made by the defendant. [DE:559]. Mr. Sabatino timely filed a Notice of Appeal. [DE:560].

On September 26, 2019, Sabatino filed an Expedited Motion to Stay Order Denying Communication with attorneys Rosenbaum and Acevedo. [DE:566]. In a footnote, Appellant indicated that if the Court would like to reconsider its order, then the Petitioner would move to relinquish jurisdiction to the District Court. [DE:566]. The government filed a Response opposing the motion to stay. [DE:568]. Petitioner filed a Reply. [DE:569]. The District Court indicated in part that it would be willing to reconsider its Order denying Defendant's Motion to Authorize Communication if the Eleventh Circuit relinquished jurisdiction to this Court. [DE:570].

On October 3, 2019, Appellant moved to stay the briefing schedule pending an

indicative ruling by the District Court. On October 15, 2019, this Court granted the motion to stay the briefing schedule pending a ruling on the motion for reconsideration.

Appellant filed a Motion for Reconsideration on November 5, 2019. [DE:571]. Simultaneously, Ivy Ginsburg moved to withdraw as CJA counsel and to appoint Joseph Rosenbaum as CJA counsel because she was closing her law practice and accepted a position with the Florida Attorney General's office. [DE:572]. On November 6, 2019, in a paperless order, the District Court granted counsel's motion to withdraw as CJA counsel, appointed Joseph Rosenbaum as CJA counsel, denied as moot the motion for reconsideration and the motion to stay order denying communication. [DE:572].

The opinion of the Eleventh Circuit Court of Appeals was entered on August 17, 2020, on Case No. 19-12916-HH and is attached hereto as Appendix-I. Thereafter, the Petitioner filed timely petitions for rehearing and for rehearing *en banc.* The petitions for rehearing and rehearing *en banc* were denied on November 23, 2020 and is attached hereto as Appendix-J. The judgment of the Court of Appeals was issued on December 1, 2020 and is attached as Appendix-K.

STATEMENT OF THE CASE

The course of proceedings adequately sets forth the facts for purposes of this appeal.

REASONS FOR GRANTING THE PETITION

I

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S APPEAL AS MOOT, IN THAT THE DISTRICT COURT'S SUBSEQUENT RULING REAUTHORIZING APPELLANT TO COMMUNICATE WITH HIS LAWYERS, DID NOT MAKE IT ABSOLUTELY CLEAR THAT THE DISTRICT COURT HAD TERMINATED THE WRONGFUL CONDUCT OF NOT FOLLOWING THE STATUTORY REQUIREMENTS OF 18 USC 3582 § (e).

This is a case that presents a highly compelling reason for granting a Writ of Certiorari because it involves perhaps the only time in our nation's history were the Court has not allowed a prisoner to communicate with his attorney. Thus, having "so far departed from the accepted and usual course of judicial proceeding." Supreme Court Rule 10 (a). On appeal, the Eleventh Circuit Court of Appeals decided not to enter a ruling on the issues presented. Instead the Circuit Court opted to denied Petitioner's appeal as "moot'. This Court should note that the Government never presented the issue of "moot" before the District Court. The first time the Government presented this issue was in its answer brief. Contrary to the Government's argument regarding the issue of "mootness", Petitioner did not get the relief he sought before the District Court. [Gov's Brief, at 24] While it is true that the District Court did re-authorize Sabatino to communicate with his

former attorneys Rosenbaum and Acevedo by re-appointing Mr. Rosenbaum pursuant to the CJA Act, the District Court ignored the requirements of 18 USC **§** 3582(e) in its ruling. Clearly, the Government's argument that this action is "moot" because the District Court was correct in restricting Sabatino's communications with his lawyers Rosenbaum and Acevedo, is the perfect example as to why this illegal communication restriction is very likely to "recur" in the future. Sabatino had not simply requested that he be allowed to communicate with his lawyers. To be precise, Sabatino has repeatedly and consistently requested that he be allowed to communicate with his lawyers as mandated by 18 USC § 3582 (e). Thus, by failing to follow the statutory requirements of § 3582 (e), the District Court has failed to unambiguously terminate its wrongful conduct of having denied Sabatino access to attorneys Rosenbaum and Acevedo for a period of nine months. Accordingly, if the Court continues **to not follow** the requirements of § 3582 (e), this same issue is certain to recur in the future and therefor this issue is not "moot". Title 18 USC § 3582 (e) states as follows:

> **(e) Inclusion of an Order To Limit Criminal Association of Organized Crime and Drug Offenders.—**
>
> …**upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney,**

> **upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise. [emphasis added]**

As an example, in Sabatino's motion to reconsider the illegal denial of communication with the aforementioned lawyers, the District Court was not just asked to re-authorize communication with attorneys Rosenbaum and Acevedo, but rather to do so based primarily on the the requirements of 18 USC § 3582 (e) statutory "probable cause" factors as well as other factors. [DE-571:15] Rather than basing her decision in the factors of § 3582 (e), the District Court Judge simply stated that that the **only reason** that she was re-authorizing communication between Sabatino and Rosenbaum and Acevedo was "**because"** she reappointed them as CJA counsels in **this** case. (DE-573) Based on Judge Lenard's wording in reauthorizing communication between Sabatino and his lawyers, it stands to reason that if Rosenbaum or Acevedo were again substituted in "this case", Sabatino would be once again restricted from communicating with them regarding their role as his private attorneys in the Scola cases, or any other legal matter. In fact this prediction is now true. On **January 29, 2021** (DE:615) the District Court entered a paperless order granting defense attorney Rosenbaum's motion to withdraw as attorney of records. In the same order the District Court

appointed the undersigned attorney to represent Sabatino before the District Court. Furthermore, the District Court ordered as follows:

> Defendant James Sabatino is permitted contact and communications with Israel Encinosa, **and is no longer permitted contact and communications with his former attorneys Joseph S. Rosenbaum, Esq. and Kimberly Acevedo, Esq**. **Mr. Rosenbaum and Ms. Acevedo are hereby stricken** from the list on page 9 of the Court's November 20, 2017 Order [DE:] 286 **of persons with whom Defendant is permitted to have contacts and communications**. This entry constitutes the PAPERLESS ORDER in its entirety.[Emphasis added]

Clearly, the District Court ignored Sabatino's arguments that the Court was without any statutory authority to restrict Appellant's communication with his attorneys Rosenbaum and Acevedo without having followed the strict and specific requirements of 18 USC § 3582(e). It is important to point out that the District Court has not even once addressed any of the arguments made by Sabatino concerning the illegality of the modification. Furthermore, to prohibit Sabatino from communicating with his attorneys for a period of nine months, without considering the factors of § 3582(e), also tantamount to a violation of Appellant's Sixth Amendment Constitutional Right to

Counsel. This argument is even stronger today, as reflected by the District Court's **January 29, 2021** paperless order mentioned above. This is a clear example that the District Court continues to fails to disregard the requirements of 18 USC § 3582(e).

More disturbing is the fact that the District Court order was *sua sponte.* Clearly, § 3582 (e) requires that before the District Court can enter an order restricting the Appellant from communicating with an individual, a motion must first be filed by either the **United States Attorneys or the Director of the Bureau of Prison** (BOP). This motion requirement applies to whether the Court is issuing a restriction for the first time or modifying an already existing restriction. (*United States v. Allmon*, 702 F.3d 1034 (8th Cir. 2012). In the case at bar, no motion was ever filed by either the Director of the BOP or the United States Attorney.

It is well settled, that when an opposing party chooses to end a challenged practice, this choice does not always deprive the courts the power, under the "mootness" theory, to continue to decide the legality of the practice. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc*., *et al*., 528 U.S. 167, 189, 120 S.Ct. 693, 708, 145 L.Ed 2nd 610 (2000). In Friends of the Earth, Inc., (*Supra*), the Supreme Court held that a the party claiming that its voluntary compliance moots

an issue, bears the formidable burden of showing that is absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur. *Id* at 190, 120 S. Ct. at 709. The Supreme Court has applied the same standard to governmental actors. See, *Parents Involved in Community School v. Seattle School District, No.1,* 551 U.S. 701, 719, 127 S.Ct2738, 2751, 168 L.Ed. 2d 508 (2007); *Adarand Constructions, Inc. v. Slater, Secretary of Transportation, et al*.528 U.S. 216, at 224, 120 S.Ct 772, 726, 145 L.Ed. 2d650, (2000) (*Per Curium*). The Eleventh Circuit has also followed this Supreme Court standard. See, *Harrel v. Fla. Bar.*, 608 F.3d 1241, 1268 (11th Cir. 2010) (reaffirming the principle that the initial heavy burden remains with the government actor to show that is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.)

Another case worth noting is that of *Doe v. Wooten,* 747 F.3d 1317 (11th Cir. 2014). In Doe, the petitioner was an in-mate housed in a high security facility, who was coerced by BOP guards into sexual relations. While at the prison, the defendant entered into a cooperation agreement with the government. As part of the agreement the government agreed to keep the petitioner safe and to place the petitioner in a low security facility for his cooperation. After the investigation had concluded the petitioner was moved to a low security facility. However, some time

later he was returned to a high security facility again. While at the high security facility, petitioner's mail was not kept confidential and soon his cooperation became known. The petitioner was then placed in a a cell with two sex offenders where he was severely beaten and assaulted. He was then moved to a restricted housing unit where he spent up to 23.5 hours in isolation each day. Mr. Doe then filed a lawsuit against the BOP. The day before trial, the BOP asked the court to declare petitioner's claim moot because he had been moved to a lower security facility. Mr. Doe continued to opposed the BOP's motion to dismiss on the ground of "mootness". The District Court dismissed Mr. Doe's lawsuit as moot. On appeal the Eleventh Circuit court of appeal reversed the District Court dismissal find that:

> **Neither is there evidence of any substantial deliberation. The BOP does not explain why it decided to make the transfer now, when it had failed to do so earlier.** We are mindful that Mr. Doe had been recommended for transfer to medium-security BOP facilities by BOP wardens going as far back as 2006. See id. at 1312 (finding reasonable basis to conclude infringement might continue where counsel did not provide any reasoned basis for the voluntary cessation). "As a result, we have no idea whether the [BOP's] decision was `well-reasoned' and therefore likely to endure." Harrell, 608 F.3d at 1266-67 ("[I]f a governmental entity decides in a clandestine or irregular manner to cease a challenged behavior, it can hardly be said that its `termination' of the behavior is unambiguous."). Throughout Mr. Doe's incarceration, the BOP has taken inconsistent positions about whether his conviction renders him ineligible, regardless of his good conduct or safety concerns, to be placed in anything but a high-security BOP facility. In sum, the BOP's record on the placement of Mr. Doe shows more confusion and inconsistency than substantial deliberation. Considering all the circumstances of Mr. Doe's case and applying the

> proper standard for evaluating voluntary cessation by a government actor, we conclude that the BOP failed to carry its burden to demonstrate **unambiguous termination of the challenged conduct**. Mr. Doe's lawsuit is therefore not moot. [Emphasis added]

The case at bar is very similar to *Doe v. Wooten* (*supra).* In this case, Mr. Sabatino filed a motion for reconsideration of the order denying communication with attorneys Rosenbaum and Acevedo, (DE-571) which the Court dismissed as moot after having reappointed Mr. Rosenbaum and Ms. Acevedo to represent Sabatino pursuant to the CJA Act. (DE-573) The Government asserts that the District Court "could not provide relief more meaningful than the relief already provided by the district court." (See Go's brief, at 25). This is incorrect. Rosenbaum and Acevedo were only appointed by the Court in **this** case. The District Court has indicated that if not for the reappointment, that the restriction would still exist. It's very clear, that the District Court ignored the requirements of § 3582 (e). This Court should note that 18 USC § 3582 (e), does not allow restrictions of communication between a defendant and his/her attorney. The statute is clear. There is **no** mention in § 3582 (e) that it applies only to attorneys representing a defendant in a particular case. Rather, § 3582 (e) prohibits the court from restricting communication with a defendant and any attorney who represents him regardless of the basis for the underline representation. This is very clear because § 3582 (e) reads in part as follows:

> …or at any time thereafter **upon motion by the Director of the Bureau of Prisons or a United States attorney**, **may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney**, **upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.** [emphasis added]

The "meaningful relief" this Court could and should find is a remand to the District Court with instructions on the proper way of evaluating this and future Modifications to the communication restrictions pursuant to 18 USC § 3582 (e). The Court should also order specific performance with respect to the Government's continued opposition to Appellant's communication with Rosenbaum and Acevedo in violation of the plea agreement. The fact remains that this is still a live controversy as Mr. Sabatino continues to be subject to § 3582 (e) restrictions and the likelihood of future modifications is not just substantial but certain, especially since § 3582 (e) does not prohibit restriction in communication between a defendant and his attorney. The District Court made clear that the reauthorization of communication was not made due to any of the legal arguments submitted by the Appellant, but rather because Sabatino previous counsel in this case had to withdraw and Rosenbaum was reappointed. It is also important to note that the District Court's restriction of Mr. Sabatino's communication with his lawyers, was not based on "probable cause" as required by § 3582 (e).

CONCLUSION

Based upon the foregoing arguments and citations of authority, this Court should vacate the judgment of the Eleventh Circuit Court of Appeals denying Petitioner's appeal as "moot" (Appendix I) and remand this case back to the Eleventh Circuit Court of Appeals to decide this appeal on the merits.

Respectfully submitted,

By: /s/ *Israel Jose Encinosa*
Israel J. Encinosa, Esq.