No. 21- _____

Supreme Court of the United States

VICTOR REAL-ALOMAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Javier A. Morales-Ramos
CJA Appointed Counsel
412 De Diego Avenue
Puerto Nuevo
San Juan, PR 00920
Tel.: (787) 356-4616
E-Mail: jamprlaw@yahoo.com

Counsel for Petitioner

I. Questions Presented

A. Whether a criminal defendant must raise the issue of non-applicability of a waiver of appeal in his opening brief or whether it falls upon the government to raise the waiver as a defense in its reply brief? If the burden falls on the defense, what elements and standards should apply to a claim that the appeal is not precluded by the waiver of appeal?

B. Whether a federal pretrial detainee's rights to association - under the First and Ninth Amendments, and remedies for violation of said rights, are claims that a defendant can raise on appeal after entering an unconditional guilty plea? Are such constitutional claims deemed waived and precluded from enforcement by a general waiver of appeal clause in a plea agreement?

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IV. Petition for Writ of Certiorari

Victor Real-Alomar, an inmate currently incarcerated at the Federal Correctional Institution Danbury, Connecticut, by and through Javier A. Morales-Ramos, CJA Counsel of Record, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit.

V. Opinions Below

The District Court's Order denying credit for the time Real-Alomar was separated from his family was issued 1/28/2019. Appendix ("App") at 3. The Court of Appeals for the First Circuit granted the government's motion for summary disposition on 1/28/21. App. at 1. It denied panel rehearing on 2/22/21. App. at 5.

VI. Jurisdiction

The Court of Appeals for the First Circuit issued its Order denying panel rehearing on 2/22/21. This Honorable Court has jurisdiction under 28 U.S.C. § 1254, and Rule 13(3) of the Rules of the Supreme Court, insofar that the petition is being filed within 90 days after entry of the order denying rehearing.

VII. Constitutional Provisions Involved

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

VIII. Statement of the Case

1. Lengthy Pretrial Detention, Plea Agreement/Waiver and Request for "Hard-Time" Benefit

Victor Real-Alomar was arrested on 8/16/2012. He was charged under 18 U.S.C. §§ 1962(d), 1959(a)(1), 924(c) and (j), 922(o), 36, and 21 U.S.C. § 846, along with twelve other co-defendants. After a lengthy period of pretrial incarceration of six (6) years, he pled guilty[1] on

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[1] The Plea Agreement, docket entry ("DE") 877, page 4, contains the following waiver of appeal clause:

> Defendant knowingly and voluntarily agrees that, if the imprisonment sentence imposed by the Court is 240 months or less, the defendant waives the right to appeal any aspect of

8/17/2018, to Count One of the Second Superseding Indictment (DE 164) charging a violation under § 1962(d). After entering into the Plea Agreement, but prior to sentencing, he alleged constitutional violations of his First and Ninth Amendment right to family association and sought the benefit of double time for the time he was on pretrial detention separated from his family (referred as "hard time" benefit or credit). (DE 978). The government did not oppose Real-Alomar's request for "hard-time" credit. On 12/11/2018 he was sentenced to 240 months (DE 981). On 1/28/2019 the District Court denied the motion for "hard-time" credit. (DE 998). This appeal follows.

2. Assertion of First and Ninth Amendment Rights

Prior to sentencing, Real-Alomar alleged that his constitutional rights to family association under the First and Ninth Amendments were denied by the BOP; that BOP moved pretrial detainees arbitrarily

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> this case's judgment and sentence, including but not limited to the term of imprisonment or probation, restitution, fines, forfeiture, and the term and conditions of supervised release. The defendant further agrees to waive the right to appeal all matters that were raised or could have been raised before the district court, including but not limited to, all challenges arising from an alleged violation of the Speedy Trial Act or the Sixth Amendment right to a speedy trial.

out of Puerto Rico and also arbitrarily allowed some to stay in Puerto Rico; this without counsel involvement nor any due process to challenge said movements. Real-Alomar was moved out of Puerto Rico during March 2016 to Georgia, where he stayed for a prolonged period of time separated from his family. On 10/14/2016 and 1/8/2018, his lengthy family separation and concerns about his children were brought to the attention of the district court. DE 740[2] and 768[3].

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[2] Note:

> 4. Mr. Real-Alomar became the father of a beautiful daughter while incarcerated. During the proceedings he was moved from Puerto Rico and was denied the ability and opportunity to share with his daughter. She continues to grow without her father. Irrespective of the charges that he faces, he does not stop being a father.

DE 740, at 1.

[3] Note:

> 1. Victor Real-Alomar was arrested over five (5) years ago, on August 16, 2012.
> 2. His daughter - who was in uterus at the time of his arrest - will be five (5) years this January 2018.
> 3. His son - who will be thirteen (13) years old in a couple of months - has a constant question for his father: "¿Que te han dicho?" translated to "What have they told you?"
> 4. Mr. Real-Alomar was transferred by the BOP to Atlanta on March 2016.
> 5. Since that date all communications with his daughter and son have been via telephone.

In order to have his rights recognized and preserved, prior to sentencing, Real-Alomar presented to the District Court the request to have his pretrial detention time separated from his family to be counted double as a remedy for the constitutional violations to his family association rights (this double time referred to as "hard-time" credit or benefit). The government did not oppose said request. The "hard-time" credit was ultimately denied by the district court.

On appeal Real-Alomar raised the question of whether the courts are able to offer a remedy under the Constitution for alleged violations of disruption of family association rights by arbitrary removal from Puerto Rico (in particular, the "hard-time" credit remedy requested by him). The questions of whether the district court erred in not granting said remedy, and whether the request for "hard-time" benefit contravened the Plea Agreement were also argued.

> 6. His daughter and his son are growing up without a father, and without any inkling about what is going on with him.
>
> . . .

DE 768, at 1.

3. United States Court of Appeals for the First Circuit

Real-Alomar tendered his Brief for Appellant on 10/1/2019. The government filed a Motion for Summary Disposition on 2/14/2020. The government argued, in general: that the waiver of appeal barred the appeal, that the scope of the appeal was expansive and included Real-Alomar's request for "hard-time" on the basis of the claimed constitutional violations, that the request constituted a departure or a variance; and that a habeas petition or civil rights claim were the proper avenues.

Summary disposition was opposed by Real-Alomar. The opposition clarified that while some constitutional claims were implicitly waved by a guilty plea it did not constitute "a waiver of the privileges which exist beyond the confines of the trial." Class v United States, 138 S.Ct 798, 805 (2018). It clarified that while Speedy Trial claims were specifically waived by Real-Alomar, the claimed violations of family association rights under the First and Ninth Amendments were outside the confines of the trial.

Real-Alomar's Brief for Appellant had advanced that the violation of his family association rights under the First and Ninth Amendments

were actionable. We note the following arguments made:

> The finding of overcrowding without further data, and lack of analysis of the ways BOP designated pretrial detainees to go outside Puerto Rico, makes the Sentencing Order procedurally unsound. The violations of the rights of pretrial detainees are analyzed under the Due Process Clause, Bell v. Wolfish, 441 U.S. 520, 535 (1979)(enduring "genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause" Id. at 542.)

Brief for Appellant at 8; and,

> "It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit." Procunier v. Martinez, 416 U.S. 396, 428 (1974). This is such a case, a case where the pretrial detainee has no remedy aside from requesting the court to uphold his pretrial detainee rights to association and family interaction, ...

Id., at 9.

On 1/28/21, the First Circuit held that "after carefully considering the briefs and record on appeal" the motion for summary disposition was being granted, stating appellant's noncompliance with its tripartite test, to wit: a. that the brief did not address the scope of the appellate waiver nor show that the appeal was permissible or that the waiver should not be enforced; b. that the various reformulations suggested in the brief for appellant failed to explain why the waiver did not cover

the request for credit; and, c. that appellant did not argue or show that enforcing the waiver would engender a miscarriage of justice.

Rehearing was requested. In said motion for rehearing, appellant noted and corrected the Court of Appeals' incorrect statement - "After carefully considering the briefs and record on appeal", clarifying to the Court of Appeals that there were no "briefs" since only the Brief for Appellant had been filed (and no Brief for Appellee was filed); and, restated his position as argued in both the Brief for Appellant as well as the Motion in Opposition to the US Motion for Summary Disposition. The Court of Appeals was not moved by said arguments and it re-affirmed its summary disposition. This Petition follows.

IX. Reasons for Granting the Writ

A. The Circuit Split between the D.C. / Third Circuits and the First Circuit should be addressed and solved in favor of the most efficient procedure

The United States Court of Appeals for the Seventh Circuit has acknowledged the existing circuit split on the question of who has the burden of proof regarding waivers of appeals. United States v. Desotell, 929 F.3d 821, 826 (7th Cir. 2019). The United States Court

of Appeals for the Third Circuit held that waivers of appeal may have no bearing on an appeal if the government does not invoke its terms. United States v. Goodson, 544 F.3d 529, 534-35 (3d Cir. 2008). The United States Court of Appeals for the District of Columbia Circuit has taken the position that an appellant does not forfeit his challenges to the appeal waiver's enforceability by waiting to assert them until his reply brief. United States v. Powers, 885 F.3d 728, 732 (D.C. Cir. 2018).

A senso contrario, the position of the United States Court of Appeals for the First Circuit is that failure to make an argument with regarding appeal waiver in the opening brief risks waiving that issue. United States v. Arroyo-Blas, 783 F.3d 361, 367 (1st Cir. 2015). Said Court of Appeals requires an appellant to discuss: 1) whether the written plea agreement clearly delineates the scope of the waiver; 2) whether the district court inquired specifically at the plea hearing about any waiver of appellate rights; and, 3) whether the denial of the right to appeal would not constitute a miscarriage of justice. Failure to address this tripartite test waives the issue on appeal. Id.

Petitioner's position is that the D.C. and Third Circuit's approach is more efficient; that the tripartite test as required by the Court of Appeals for the First Circuit places an unreasonable burden on appellants; and, that in this particular case, said test does not apply.

Real-Alomar claims that the right to family associations under the First and Ninth Amendments are independent of any other criminal case related constitutional provisions that are deemed waived by a plea agreement and its waiver of appeal. Contrary to the "ostrich" approach of Arroyo-Blas, supra, Real-Alomar did present his position regarding the question of enforceability of the waiver of appeal to the Court of Appeals in its opening brief as follows:

> Given that Real-Alomar was sentenced to 240 months, the language of the waiver of appeal provision in the Plea Agreement should be reviewed, in order to find out whether this appeal is proper or banned by said provision. The two separate clauses to be reviewed are as follows:
>
> 1. "... waives the right to appeal any aspect of this case's judgment and sentence, including but not limited to the term of imprisonment or probation, restitution, fines, forfeiture, and the term and conditions of supervised release;" and,
>
> 2. " ... waive the right to appeal all matters that were raised or could have been raised before the district court, including but not limited to, all challenges arising from an alleged violation of the Speedy Trial Act or the Sixth

Amendment right to a speedy trial."

Real-Alomar is not in violation of any of these clauses. His request does not affect the judgment and sentence, nor the term of imprisonment agreed by the parties, it goes to the calculation of the term, a matter that has to be presented to the court prior to sentencing. In U.S. v Huy Trinh, Case No. 10-cr-00385-SI-1 (N.D. Cal. May. 23, 2017), 2017 WL 2242683 (unpublished), an inmate sought "hardship credit for hardtime served." An important point made in the decision issued by Judge Illston, was that any calculation of credit for time served had to be requested prior to being sentenced, because afterwards, only the BOP could calculate it. Note: "Neither the Federal Rules nor the United States Code gives a court the authority to modify a defendant's sentence once that defendant has been committed to the custody of the BOP." U.S. v. Espinoza-Cardenas, Case No. 14-cr-289(1) (SRN/BRT), at *3 (D. Minn. Mar. 13, 2019) (another unpublished case in which the inmate sought hard time). Real-Alomar complied with the requirement of seeking the remedy before sentencing.

Needless to say, BOP calculates and applies the time he has been in pretrial detention, and also any applicable good time. Such time calculations are not considered to affect the term of imprisonment imposed; neither would the granting of double time as a remedy for the constitutional violation under the First Amendment/ Ninth Amendment.

Real-Alomar is not objecting to the time imposed. We are not in a case where lesser time for "substandard conditions of his presentence confinement," U.S. v. Sosa, 322 Fed. Appx. 209, 212 (3rd Cir. 2009)[4], nor family

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[4] The District Court used the term "hard time" as follows: "the hard time that he's put in justifies sentencing him at the low end of the

circumstances[5], are at issue. Real-Alomar's case is one where the "hard time" away from family and loved ones defines the constitutional violations under the First and Ninth Amendments for which double counting of said time is being requested. The nature of the claim, based on the Constitution, separates this case from cases where lowering of sentences are sought as a departure, under the Sentencing Guidelines. Real-Alomar's request does not fall under departures nor variances, it is under the Constitution, wholly separated from the Guidelines.

The economic compensation generally issued as remedy for damages arising from constitutional violations is not the remedy being requested.[6] Real-Alomar requests not only that the violation be acknowledged as a constitutional violation, but also, that the remedy of double time be granted for the period said "hard time" imprisonment lasted.

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guidelines" Sosa v. United States, Civil No.: 10-3354 (KSH), at *3 (D.N.J. Mar. 26, 2015)(Unpublished). See also: Neri-Castellanos v. U.S., Civil Action No. 4:10-70146, Criminal Action No. 4:08-863, at *4 (D.S.C. Jul. 22, 2010)(unpublished decision; seeking downward departure due to pretrial confinement conditions).

[5] Neither are we in a case seeking departure based on family circumstances: "The Sentencing Guidelines deem family circumstances a 'discouraged' ground for departure, and a district court may depart on the basis of a discouraged ground only in 'exceptional' case." United States v. Louis, 300 F.3d 78, 81-82 (1st Cir. 2002).

[6] Note: "In Bivens—proceeding on the theory that a right suggests a remedy—this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." Correctional Services Corp. v. Malesko, 534 U.S. 61, 66, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001)." Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

> Real-Alomar submits that his First/ Ninth Amendments claim is actionable. It is akin to a Bivens action against those involved in the constitutional violation; but instead of seeking money, a remedy within the authority of a sentencing court is what we seek as the proper remedy. The remedy, instead of monetary, should be double time for pretrial detention separated from family and friends. Nothing is more precious than time for a father who desires to someday return to his children, family and friends.
>
> We reiterate that neither the judgment nor sentence are being challenged. The term of imprisonment is not the issue, the issue is what remedy should he be granted for the "hard time" served away from his family. Real-Alomar is requesting the court to fashion a remedy consonant with the constitutional violation he has suffered - time away from family, with a remedy that goes to the heart of said suffering - double counting of the time he spent away from his family. Because of the specific remedy being requested, we posit that the request does not violate the waiver of appeal of the plea agreement.

Brief for Appellant, USCA1 Case Number 19-1192, at 13-17.

Real-Alomar did timely oppose summary disposition. He reiterated that the claimed violations of family association rights under the First and Ninth Amendments were outside the confines of the trial and therefore not limited by the Plea Agreement nor its Waiver of Appeal.

The Court of Appeals for the First Circuit found that Real-Alomar had not met the requirements of Arroyo-Blas, supra. Said case

requires an appellant to discuss the tripartite elements regarding waiver of appeal clauses in the original brief, not in a reply brief in response to the government's argument that the waiver of appeal should be enforced.

The Court of Appeals for the First Circuit's Judgment reads (in part): "Appellant fails to adequately address the scope of his appellate waiver. He does not show that his appeal is permissible or that the waiver should not be enforced. See United States v. Arroyo-Blas, 783 F.3d 361, 365-67 (1st Cir. 2015) (developed argumentation required)." Judgment, January 28, 2021.[7]

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[7] The pertinent section reads:

> . . . Indeed, his opening brief did not even acknowledge our key case dealing with an appeal waiver's enforceability, United States v. Teeter, 257 F.3d 14 (1st Cir.2001), nor did it address any of the factors we take into account when deciding whether or not we should enforce the waiver, see United States v. Edelen, 539 F.3d 83, 85 (1st Cir.2008) ("[A]ppellate waivers are binding so long as: (1) the written plea agreement clearly delineates the scope of the waiver; (2) the district court inquired specifically at the plea hearing about any waiver of appellate rights; and (3) the denial of the right to appeal would not constitute a miscarriage of justice." (citing Teeter, 257 F.3d at 25)).

United States v. Arroyo-Blas, 783 F.3d 361, 366 (1st Cir. 2015); and note

The Judgment (reaffirmed in the denial of rehearing) not only places the burden on a defendant-appellant - as per Teeter and Arroyo-Blas, supra; but also defines certain standards that are not shared by other circuits. The controversies of where the burden lies and what elements/ standards should be address by the party, are ripe and proper for a decision by this Honorable Court. Entertaining said issues will clarify an area of criminal law which is currently obscure.

This Honorable Court should decide whether a defendant in a criminal appeal where there is a plea agreement with a waiver of appeal clause must prove his right to appeal, notwithstanding the waiver of appeal clause, in his opening brief as per First Circuit standards, or wait to respond to the government's claim that it does if raised in the reply brief, as per the D.C. and Third Circuits.

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also:

> Let today's decision remove any lingering doubts. We expect and require counsel to address a waiver of appeal head-on and explain why we should entertain the appeal. An appellant who fails to do this buries his head in the sand and expects that harm will pass him by. "The ostrich is a noble animal, but not a proper model for an appellate advocate." Gonzalez–Servin v. Ford Motor Co., 662 F.3d 931, 934 (7th Cir.2011).

Arroyo-Blas, 783 F.3d at 367.

Furthermore, in order to bring order and define national policy, if it is decided that the burden is on the appellant, what would be the elements and standard of proof that must be satisfied by a defendant-appellant in such cases.[8] Should the First Circuit's tripartite inquiry be the proper national standard?

B. Federal pretrial detainee's rights to association, and remedies for violation of said rights, should be specifically recognized by this Honorable Court as claims that a defendant can raise on appeal even after entering an unconditional guilty plea

"This case marks the fourth time in recent years that the Court has turned a deaf ear to inmates' claims that the conditions of their confinement violate the Federal Constitution." - so began Justice Marshall's dissenting opinion in Block v. Rutherford, 468 U.S. 576, 596

[8] If the burden is placed on the government, to raise said waiver in the brief in opposition, we understand that matters would be simpler. In said case the appellant would be filing a reply brief addressing only the arguments raised by the government. The First Circuit's caselaw fails to take into consideration that there may be particular issues not covered by its tripartite analysis of appellate waiver; and, that in such cases, the government is in the best position to present and argue to the court its position regarding said issues.

(1984). The caselaw on pretrial detainees' rights is even more scant. His dissent is also pertinent to this case, among others, by the distinction of Wolfish to the effect that "... the plaintiffs' claims did not implicate any "fundamental liberty interests" such as those "delineated in . . . Roe v. Wade, 410 U.S. 113 (1973); . . ." Rutherford, 468 U.S. at 597. Contrary to the circumstances in Bell v. Wolfish, 441 U.S. 520 (1979), petitioner Real-Alomar's case does implicate present fundamental liberty interests. We follow his dissenting line of thought and propose that the issues presented should be decided by this Honorable Court.

This Court has held that activities related to marriage and family relations are included in the right of personal privacy, or zones of privacy, that exist under the Constitution. Roe v. Wade, 410 U.S. 113, 152-153 (1973)(citing cases). The right to live together [or as in this case, to continue functioning] as a family belongs to both the child . . . and the father . . . Fiallo v. Bell, 430 U.S. 787, 810 (1977)(Marshall, J., dissenting). "We protect the family because it contributes so powerfully to the happiness of individuals, ... we all depend on the [']emotional enrichment from close ties with others.[']" Bowers v. Hardwick, 478

U.S. 186, 205 (1986)(Blackmun, J., dissenting; citations omitted). See also: Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987) (recognizing, inter alia, marriage, child begetting, child rearing, and child education among the "intimate relationships" having constitutional protection).

The question of family relationship presented herein pertains to a very defined person, Real-Alomar, a pretrial detainee waiting for the resolution of his case; and his rights, if any, to continued family relationships during said time (in his case, several years of pretrial detention). If these rights exists for Real-Alomar, does a general waiver of appeal in a plea agreement preclude judicial remedies for violations of said constitutional rights?

The exploration, or definition, of the asserted right of association by Real-Alomar - a federal pretrial detainee - is proper given that BOP's actions in his case are arbitrary - this being shown by BOP's decisions of leaving some detainees in Puerto Rico and sending others away (even convicted inmates may be left in Puerto Rico) without notice to the detainee nor counsel. There is no method of challenging these practices of separating detainees from their families. "We have

found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion" Turner v. Safley, 482 U.S. 78, 90 (1987)(not dealing with pretrial detainees).

Unlike inmates serving their sentence, whose interstate prison transfers are not covered by the Due Process Clause, Olim v. Wakinekona, 461 U.S. 238, 248 (1983), herein petitioner Real-Alomar's pretrial detention transfer is protected by the Due Process Clause. The dissent recognized the issue of due process as follows: "[W]e cannot assume that a State's initial placement of an individual in a prison far removed from his family and residence would raise no due process questions. " Wakinekona, 461 U.S. at 253 (J. Marshall, dissenting). This doubt regarding inmates' rights gains more strength when dealing with pretrial detainess. While this Court has resolved the issue against "duly convicted prisoners" it has not addressed what is the standard regarding pretrial detainees. Note: "Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system." Meachum v. Fano, 427 U.S. 215, 225 (1976).

There are differences between the limitations imposed on an inmate and those imposed on a pretrial detainee's constitutional rights. "The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123 (1889)." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Real-Alomar's due process claims have substance. Said claims require this Court to recognize and define pretrial detainees' rights to association vis-a-vis inmates serving a sentence, i.e. Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977)(dealing with prisoners and considering the First Amendment rights "barely implicated").

Real-Alomar's claims fall under the constitutional rights recognized in Bell v. Wolfish, 441 U.S. 520, 545 (1979)(" A fortiori, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."). While the Court has recognized First Amendment rights in the prison context, it has done so regarding prisoners serving sentences without clearly differentiating said prisoners from pretrial detainees. A definition of pretrial detainees

rights of association under the First and Ninth[9] Amendments is necessary in order to validate pretrial detainees' family visitation privileges.

In this case in particular, with a separation from family spanning years, the issue is ripe. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." Overton v. Bazzetta, 539 U.S. 126, 137 (2003)(prisoner's case; emphasis ours). Years of separation from his family as a pretrial detainee, in an arbitrary manner, require that this Honorable Court grant the writ.[10]

Due to the nature of Real-Alomar's constitutional claims outside of the realm of the trial, the plea agreement and its waiver of appeal

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[9] "[E]very power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution." Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 Tex. L. Rev. 1, 70 (2006)(citing Tucker, Blackstone's Commentaries).

[10] Needless to say, the separation of a pretrial detainee from his family goes against the penological interest of reducing recidivism. Emma Kaufman, The Prisoner Trade, 133 Harv.L.R. 1817, 1859 (2020)(citations omitted). And "the cost of protecting a constitutional right cannot justify its total denial." Bounds v. Smith, 430 U.S. 817, 825 (1977).

are inapplicable to his case. The nature of guilty pleas has been summarized as follows:

> "The plea of guilty is, of course, a confession of all the facts charged in the indictment, and also of the evil intent imputed to the defendant. It is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion. ..."

Class v. United States, 138 S. Ct. 798, 804 (2018)(citation omitted).

As can be ascertained from the above arguments and consonant with Class, Real-Alomar's claims do not contradict his acceptance of guilt nor attack the court's jurisdiction. Neither does he attack case-related constitutional defects such as improper grand jury proceedings, Fourth Amendment issues, or the like. As stated in Class, the relinquishing of rights does not include "a waiver of the privileges which exist beyond the confines of the trial." Class, 138 S. Ct. at 45 (citing Mitchell v. United States, 526 U.S. 324 (1999) - re preservation of Fifth Amendment right against self-incrimination). Real-Alomar's reliance on Class shows not only that the tripartite standards promulgated by the First Circuit are not applicable in this case, but also, that the waiver of appeal does not preclude Real-Alomar's constitutional claims.

Moving along this line of thought, we should add that the power of the courts to design and provide remedies when constitutionally protected rights have been violated is firmly established. Note:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S., at 684 (footnote omitted); see Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 36 (1933) (Cardozo, J.); The Western Maid, 257 U.S. 419, 433 (1922) (Holmes, J.).

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392-91 (1971).

The violation of Real-Alomar's constitutional rights of association and family life are implicated here. These rights are of a personal nature, independent and separated from any case-related rights. Instead of a monetary remedy - which would not account for the lost time separated from his family - a request that the time he was separated from his family be considered "hard or hardship time" was made. Such sentencing remedies are within the court's purview. This Honorable Court should grant the writ and adjust the remedy to the necessary relief being requested.

X. CONCLUSION

This case presents two questions that are intertwined. First we have addressed the procedural question of who and when the question of enforceability of a plea agreement's waiver of appeal should be addressed. The circuit split, on one side placing the burden on the government (D.C. and 3rd Circuits), and the other placing it on appellant (1st Circuit), has been briefly discussed. Second, we have discussed the substantive question of pretrial detainees' rights of association under the First and Ninth Amendments, remedies thereof, and our position that seeking said remedies does not contravene a general waiver of appeal.

The circuit split regarding the burden on waiver of appeals is an issue that will repeat itself. As argued, we view the position of the D.C. Circuit and the Third Circuit as more practical. There will be cases where the waiver of appeal may not have applicability and that the government may concede said inapplicability by not raising the issue in its reply brief. Such approach simplifies the appeal process by eliminating unnecessary argumentation of issues that are not in dispute. If, however, the government does raise the issue in its reply

brief, then the appellant would have to address the specific matters raised by the government and not address a universe of arguments or set of elements as required by the First Circuit. Simplicity in procedure and the elimination of unjustifiable expense and delay, Rule 2 Fed. Crim. Proc., suggests this approach as the most efficient. The writ should be granted to allow such determination to be made, and to simplify the appeal process regarding the enforceability or not of waivers of appeal.

The question of whether pretrial detainees' rights of association are to be deemed waived by a general waiver of appeal clause is also ripe for determination. While a wide berth has been given to administrators of detention facilities, this Honorable Court has recognized that there are limits in the implementation of family separation policies. A pretrial detainee's long period of separation - in this case years - from his family should be unacceptable. Whatever administrative purpose may be claimed, these types of restrictions violate detainees' rights under the First and Ninth Amendments. Given that said violations are separable from those rights referred to in Class as "case-related", a general waiver of appeal should not apply to

them. The writ should be granted to recognized these constitutional pretrial detainees' rights and to define the remedies for their violation.

Respectfully submitted,

In San Juan, Puerto Rico, this 18th day of March 2021.

S/ Javier A. Morales-Ramos
Javier A. Morales-Ramos
Law Offices of Javier A. Morales Ramos
P.O. Box 362677
San Juan, PR 00936-2677
Tel. (787) 356-4616
E-mail: jamprlaw@yahoo.com
Counsel For Victor Real-Alomar

XI. APPENDIX

United States Court of Appeals
For the First Circuit

No. 19-1192

UNITED STATES,

Appellee,

v.

VICTOR REAL-ALOMAR, a/k/a Toston,

Defendant - Appellant.

Before

Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

JUDGMENT

Entered: January 28, 2021

After carefully considering the briefs and record on appeal, we grant the government's motion for summary disposition and affirm the judgment below.

Appellant fails to adequately address the scope of his appellate waiver. He does not show that his appeal is permissible or that the waiver should not be enforced. See United States v. Arroyo-Blas, 783 F.3d 361, 365-67 (1st Cir. 2015) (developed argumentation required). Although Appellant acknowledges that his waiver covers "any aspect of this case's judgment and sentence" and "all matters that were raised … before the district court," he fails to explain why the waiver provisions do not cover his request for credit, including under the various reformulations that he suggests in his brief. Moreover, Appellant does not argue or show that enforcing the waiver would engender a miscarriage of justice. Even if the court had erred in denying his motion for credit, which Appellant does not establish, routine error does not suffice to avoid a waiver. See United States v. Calderon-Pacheco, 564 F.3d 55, 59 (1st Cir. 2009).

Affirmed. See 1st Cir. Loc. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:
Max J. Perez-Bouret
Julia Meconiates
Victor O. Acevedo-Hernandez
Mariana E. Bauza Almonte
Alexander Louis Alum
Javier A. Morales-Ramos
Raymond Rivera-Esteves
Victor Real-Alomar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA Plaintiff vs 4) VICTOR REAL ALOMAR, a/k/a "Toston" (Counts 1-6) Defendant	CRIMINAL 12-0488-04CCC

ORDER

Defendant [4] Víctor Real Alomar filed a Motion on December 10, 2018 (**d.e. 978**) asking the Court to "hold that the time he was separated from his family while in pretrial detention in Atlanta be considered 'hard-time served' and to grant him double credit for all that time he spent in Atlanta since March 2016 until he was returned to Puerto Rico." Motion, at p. 4. In support, defendant avers that as a pretrial detainee he had the right to be visited by his family and cites from First Circuit cases holding that it would be unconstitutional to arbitrarily refuse detainees any visitation privilege. See e.g. Feeley v. Sampson, 570 F.2d 364 (1st Cir., 1978).

Defendant has failed to establish that as a pretrial detainee he was arbitrarily denied any visitation privilege. Rather, his argument is that, by being transferred to a correctional institution in the mainland, he was effectively prevented from being visited by relatives that lived in Puerto Rico. While it is undeniable that the transfer of a pretrial detainee to an out-of-state facility would make visitation more burdensome, we cannot find that such transfer was arbitrarily made when the clear objective and consequence was to significantly improve the inmate's basic living conditions given the well-known overcrowding

conditions existing at MDC-Guaynabo. Accordingly, movant having failed to establish that he was arbitrarily denied the privilege to be visited by his relatives living in Puerto Rico, his Motion for "hard-time" credit is DENIED.

SO ORDERED.

At San Juan, Puerto Rico, on January 28, 2019.

S/CARMEN CONSUELO CEREZO
United States District Judge

United States Court of Appeals
For the First Circuit

No. 19-1192

UNITED STATES,

Appellee,

v.

VICTOR REAL-ALOMAR, a/k/a Toston,

Defendant - Appellant.

Before

Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

ORDER OF COURT

Entered: February 22, 2021

The motion for "reconsideration" is construed as a petition for panel rehearing, and it is denied. Petitioner does not show that this court overlooked or misapprehended any material point of fact or law. See Fed. R. App. P. 40(a)(2).

By the Court:

Maria R. Hamilton, Clerk

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