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IN THE
Supreme Court of the United States

SEVERIANO MARTINEZ-ROJAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Second Circuit failed to follow Supreme Court precedent in *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1900 (2018) when it enforced an appellate waiver on the issue of whether Petitioner could challenge the vulnerable victim enhancements?

II. Whether the Second Circuit's failure to remedy the excessive restitution imposed upon Petitioner, which appeared to be sheer speculation, rather than an estimate, conflicts with decisions of other circuits and requires the Supreme Court to resolve the conflict and ensure uniformity across the circuits?

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America
Severiano Martinez-Rojas
Felix Rojas
Odilon Martinez-Rojas
Jovan Rendon-Reyes

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

United States v. Rendon-Reyes (Severiano Martinez-Rojas)., 1:15-cr-00348, is the trial court docket in the Eastern District of New York, from which this case originates.

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In the
Supreme Court of the United States
October Term, 2020

Severiano Martinez-Rojas,
Petitioner,
v.
United States of America,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

To secure and maintain the uniformity of judicial decisions, it is up to this Court, Petitioner's last resort, to remedy the lower courts' decision in conflict with the Constitutional provisions of the United States Constitution and this Court's authority. Such conflicts warrant the grant of the writ.

Opinion Below

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A1).

Jurisdictional Statement

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued a summary order affirming Petitioner's conviction on May 5, 2021.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the protection of the Due Process Clause of the Fifth Amendment.

The statutory provision involved is U.S.S.G. § 3A1.1.

STATEMENT OF THE CASE

Indictment

Petitioner was originally charged with Counts One through Nineteen. Counts One and Two involved racketeering activities. Count One, which included thirteen overt acts, charged that in or about and between December 2004 and November 2015, within the Eastern District of New York, Martinez-Rojas, together with others, knowingly and intentionally participated in the conduct of the Rendon-Reyes Trafficking enterprise through a pattern of racketeering activity in violation of 18 U.S.C. 1961(1) and 1961(5). The acts included sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1), 1591(a)(2) and 2, interstate prostitution in violation of 18 U.S.C. §§ 2422(a) and 2, and alien smuggling in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv), 1324(a)(1)(B)(i) and 1324(a)(1)(A)(v)(II) Jane Does #1-10. Acts five and seven also included a violation of 18 U.S.C. § 2423(a) and 2 for transportation of a minor Jane Does #3 and 5. Acts twelve and thirteen included participating in a money laundering conspiracy in violation of 18 U.S.C. § 1956(h) and distribution of proceeds of a prostitution business in violation of 18 U.S.C. §§ 1952(a)(1)(A), 1952(b)(1) and 2. (A. 69-90).

Count Three charged sex trafficking conspiracy in violation of 18 U.S.C. §§ 1591(a)(1) and 1591(a)(2). Count Four charged alien smuggling conspiracy in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii), 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i). Count Five charged interstate prostitution conspiracy in violation of 18 U.S.C. 2422(a). Count Six involved conspiracy to transport minors in violation of

18 U.S.C. § 2423(a). Counts Six through Twenty-seven involved the above-mentioned sex trafficking, interstate prostitution, transportation of minors and alien smuggling activities involving Jane Does. (A. 90-105).

The Sentencing Proceeding

On January 4, 2019, the Honorable Edward R. Korman sentenced Petitioner to a period of 293 months of incarceration and a supervised release term of five years. During the proceeding, the court ensured that the PSR was translated into Spanish for Petitioner and that it was reviewed by Petitioner (A. 307, 386).

Defense counsel objected to all of the vulnerable victim enhancements. Defense counsel argued that every woman who is sex trafficked is essentially vulnerable and that if the court found the enhancements did apply, they did not apply to Petitioner because it was his co-defendant who enticed and brought the victims to the United States. Rejecting defense counsel's argument, the court held that the vulnerable victim enhancements did apply to Jane Does 1, 4, and 9 (A. 321-326, 329, 333-334, 337, 356).

The government urged the Court to sentence Petitioner at the highest end of the applicable guidelines range on account of Petitioner's conduct over the years, including the rape of Jane Doe #1, trafficking, and verbally abusing his victims. Agreeing with the government's analysis, the Court sentenced defendant to 293 months in prison and a five-year supervised release term.

Restitution Proceeding

The Court held a restitution hearing on July 24, 2019. The proposed restitution calculations were as follows: The Government estimated that the victims earned the defendants about \$4,200 in monthly income and multiplied that by the number of months of forced prostitution to reach the restitution amounts. Jane #3 entered the United States in June 2003 and escaped prostitution in October 2006, providing an amount of \$21,000. Jane #6 was trafficked from mid-January 2008 to February 2010. With a period of 24.5 months of forced prostitution, that yielded a total of \$102,900 in restitution, which the court accepted. (A. 394, 396-397).

While the government noted at the hearing that it did not have the exact date on which Jane #7 entered the United States, the government argued that based on the victim's sworn affidavit that she had been prostituted for "several years," which they believed was "north of 14 months," provided an estimated total of \$ 58,800. The Court accepted and adopted this calculation. (A. 402-404).

Government's Proposed Restitution Letter

The government filed its proposed restitution letter on July 31, 2019. Petitioner was found to be involved in the trafficking of Jane Does #1, 3, 6, 7, 9, FBF, MSJ and SAM (#4). For Jane #4 (SAM), FBF, and MSJ, the government proposed the restitution amounts that were ordered by Judge Totenberg, the United States District Judge for the Northern District of Georgia, prior to the transfer of Petitioner's Northern District of Georgia case to the Eastern District of New York. For Jane #4, the amount ordered was \$25,000 in restitution. Petitioner was ordered

\$15,000 for MSJ and \$150,000 for FBF. The government also contended that while the District Court found that an amount of \$102,900 was proper for Jane Doe # 6, that was a “technical error” where the numbers were transposed, and the intended amount should have been \$109,200. (A. 413-414).

The government also calculated proposed amounts regarding Jane Does 1 and 9. Jane #1 was forced into prostitution over two separate periods: January 2005 to May 2006, providing an amount of \$71,400; and May 2008 to “at minimum” the end of 2008, providing an amount of \$33,600. Jane #9 was forced into prostitution from December 2010 to June 2014, providing an amount of \$180,600 in restitution. In total, the government proposed an amount of \$ 664,600 for Petitioner. (A. 411, 413-414).

Restitution Order

The Court filed its notice to impose restitution on August 9, 2019. To arrive at the restitution amounts, the Court adopted the government’s calculations listed above, which were presented on July 24, 2019, during a court hearing and in the government’s July 31st letter. In its order, the Court decided that each amount would be joint and several, but only as to the specific victims laid out in the government’s July 31, 2019 letter (Dkt. 166). Otherwise, the Court noted that it accepted the calculations made in the government’s letter. (A. 415-416).

In total, Petitioner was ordered to pay \$658,300 in restitution for all victims in the offense for the approximate period of December 2004 to June 2014. (A. 412-416).

REASONS FOR THE GRANTING OF THE WRIT

POINT I

THE SECOND CIRCUIT IGNORED THIS COURT'S PRECEDENT BY ENFORCING AN APPELLATE WAIVER ON THE ISSUE OF WHETHER PETITIONER COULD CHALLENGE THE VULNERABLE VICTIM ENHANCEMENTS.

The Second Circuit held in Petitioner's case that "[w]aivers of the right to appeal a sentence are presumptively enforceable," *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011) and that Petitioner's "knowing and voluntary" appellate waiver included in his plea agreement prevents him from challenging his sentence. However, this Court's precedent requires that Petitioner obtain a correct Guidelines calculation. In *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1900 (2018), this Court recognized that when a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error. In other words, an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than necessary to fulfill the purposes of incarceration. 18 U.S.C.S. § 3553(a). The Second Circuit ignored this precedent in Petitioner's case.

In *Peugh v. United States*, 569 U.S. 530, 537 (2013), this Court stated that the district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct, and the "[f]ailure to calculate the correct Guidelines range constitutes procedural error." Given the complexity of the calculation,

however, district courts sometimes make mistakes. It is unsurprising, then, that “there will be instances when a district court’s sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed” by the parties as well, which may result in a defendant raising the error for the first time on appeal. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). Those defendants are not entirely without recourse as this Court has stated that in such circumstances, appellate review of the error is governed by Federal Rule of Criminal Procedure 52(b). *Id.* As such, the Court of Appeals’ decision to hold that Petitioner could not challenge his sentence because of his appellate waiver, directly conflicts with this Court’s decision in *Molina-Martinez*, 136 S. Ct. at 1343, so as to call for an exercise of this Court’s supervisory powers.

In sum, the Court of Appeals’ determination that Petitioner could not challenge the vulnerable victim enhancement because of his appellate waiver, directly conflicts with this Court’s decision in *Molina-Martinez*, 136 S. Ct. at 1343. This Court should exercise its supervisory power and grant the writ of certiorari.

POINT II

THE COURT OF APPEALS FAILURE TO REMEDY THE DISTRICT COURT’S EXCESSIVE RESTITUTION AMOUNTS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, AS TO CALL FOR AN EXERCISE OF THIS COURT’S SUPERVISORY POWER TO RESOLVE THE CONFLICT AND ENSURE UNIFORMITY ACROSS THE CIRCUITS.

The restitution amounts imposed against Petitioner were grossly excessive. The government submitted its restitution submission to the Court on July 31, 2019

in which it proposed a total restitution amount of \$664,600 for Petitioner for the offenses against eight victims which took place between December 2004 and June 2014. The government's proposed total restitution was based entirely upon estimates. There was not a single item of evidence documenting the alleged amounts proffered by the government. The Court adopted the government's calculations and imposed restitution of \$658,300.

The fact that the government noted at the July 24, 2019 hearing that it did not have the date of which Jane #7 entered the United States and argued that based on the victim's sworn affidavit that she had been prostituted for "several years," which they believed was "north of 14 months," should have alerted the court to reject such a sizeable and speculative restitution total of \$58,800. The Court accepted the government's arbitrary selection of a 14-month period of prostitution without any evidence of a start and end date for that victim. While Jane #7 provided an affidavit describing "several years," the government's guess of "north of 14 months" seemed like mere speculation. Restitution "may not be based entirely upon speculation." *United States v. Adetiloye*, 716 F.3d 1030, 1039 (8th Cir. 2013)(quoting *United States v. Chalupnik*, 514 F.3d 748, 755 (8th Cir. 2008)). Thus, the District Court's, and ultimately the Second Circuit's acceptance of the speculative restitution amounts directly conflict with the decision of other circuits, which hold that restitution may not be based entirely upon speculation, so as to call for this Court to exercise its supervisory powers to resolve the conflict so as to ensure uniformity throughout the Circuits.

All of the Jane Doe restitution amounts were based on unsubstantiated estimates, “for which there were no affidavits or supporting evidence,” *United States v. Brown*, 709 Fed. Appx. 103, 104 (2d Cir. 2018) (remanding restitution for recalculation and forbidding supplementing record unless government could demonstrate exceptions, where government failed in its burden of proof). They all should have been rejected as being unsubstantiated by sufficient proof. While the Second Circuit cited *United States v. Gushlak*, to state that “[s]o long as the basis for reasonable approximation is at hand, difficulties in achieving exact measurements will not preclude a trial court from ordering restitution.” 728 F.3d 1518, 196 (2d Cir. 2013), the government did not provide any basis for its estimate of “14 months.” Without any basis for an estimate, the estimate is not reasonably approximated and should be determined to be sheer speculation. While the price and number of acts were estimated, the number of months should have therefore been accurate and not based on speculation, especially if the government explained that it took a “conservative approach” for the calculation relating to each Jane Doe.

The restitution amounts attributed to Petitioner were sheer speculation rather than reasonable estimates. The Court of Appeals failure to remedy this error directly conflicts with decisions of the Eighth Circuits, which hold that restitution may not be based entirely upon speculation. *Adetiloye*, 716 F.3d at 1039; *Chalupnik*, 514 F.3d at 755. This conflict among the Circuits calls for this Court to exercise its supervisory powers to resolve the conflict and grant the writ of certiorari.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: May 26, 2021
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