No. _____

In the
Supreme Court of the United States

ODILON MARTINEZ-ROJAS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

INES MCGILLION

Ines McGillion Law Offices, PLLC
P.O. Box 212
126 Main Street
Putney, VT 05346
(646) 246-3868
ines@mcgillionlaw.com

Appointed Counsel for Petitioner

October 2, 2021

QUESTION PRESENTED

Whether a plea agreement's appeal waiver can bar a defendant from challenging the unconstitutionality of a sentencing procedure that deprives the defendant of his Sixth Amendment right to counsel and Fifth Amendment due process, where the government was permitted to submit its only proof of a sentence-determinative guidelines enhancement after sentence was imposed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

U.S. Sentencing Guidelines

PETITION FOR A WRIT OF CERTIORARI

Odilon Martinez-Rojas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Second Circuit's Summary Order is reported at United States v. Rojas, No. 19-26640cr (Lead), 853 F. App'x 733 (2d Cir. May 5, 2021). (App. 1a-16a.)

JURISDICTION

The Second Circuit had jurisdiction under 28 U.S.C. § 1291 and entered judgment May 5, 2021. Mr. Martinez-Rojas did not seek rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13 and this Court's July 19, 2021 Order providing that, for lower court judgments issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment provides:

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

STATEMENT OF THE CASE

Mr. Odilon Martinez-Rojas appeals his 293-month sentence and final judgment of conviction entered in the United States District Court for the Eastern District of New York on January 4, 2019, following a guilty plea pursuant to a plea agreement on two counts of conviction -- racketeering in violation of 18 U.S.C. § 1961(1), and sex trafficking in violation of 18 U.S.C. § 1591(a)(1).

Mr. Martinez-Rojas was born and raised in poverty in San Miguel Tenancingo, Mexico, a town known as the epicenter of sex trafficking for Mexico and North America, where the trade has become an "inter-generational way of life." (D. Ct. Doc. 104 at 3.) Mr. Martinez-Rojas was among eight defendants and family members charged, in a 29-count superseding indictment, with offenses stemming from his participation in an international sex-trafficking organization that brought undocumented Mexican women and girls into the United States to work as prostitutes in brothels. (RA1:53.)[1]

Mr. Martinez-Rojas' plea agreement specified that in pleading guilty to Count 1, he would admit as racketeering acts the sex trafficking of Jane Doe #1, as alleged in Racketeering Act 3(a) and Count 7, and the sex trafficking of Jane Doe #9, as alleged in Racketeering Act 11(a) and Count Twenty-Three. (RA1:156; Exhibit 3-Plea Agreement.)

[1] Citations to the record appendix and special record appendix are (RA[Vol#]:[Page#]), (SRA[Vol#]:[Page#]).

The agreement assumed Mr. Martinez-Rojas fell within Criminal History Category I, and estimated a guidelines range of 235-293 months, The agreement's appeal waiver provided "the defendant agrees not to file an appeal or otherwise challenge . . . the conviction or sentence in the event the Court imposes a term of imprisonment of 327 months or below," and did not bar any challenge to the restitution order, and expressly reserved ineffective assistance claims, stating "[n]othing" in the appellate waiver "shall preclude the defendant from raising a claim of ineffective assistance of counsel in an appropriate forum." (RA1:159.) The agreement included an estimated serious bodily injury enhancement for Jane Doe #1 but did not identify it, and that victim was not sentence determinative as two other victims had identical adjusted offense levels. Most importantly, the agreement expressly reserved the defendant's right to contest guideline enhancements at the time of sentencing. (RA1:161 ("defendant reserves the right to contest the above guidelines estimate at the time of sentencing"), RA1:141.) Mr. Martinez-Rojas pleaded guilty on April 6, 2017.

The presentence investigation report ("PSR") issued almost a year later, on April 5, 2018. The PSR resulted in a higher adjusted total offense level of 43, and did not include or recommend a two-point increase for serious bodily injury for Jane Doe #1 under U.S.S.G. § 2A3.1(b)(4)(B). According to the definitions in Application Note 1, serious bodily injury "means conduct other than criminal sexual abuse." Neither the indictment, the plea

agreement, nor the PSR specifically identified any serious bodily injury or conduct involving Jane Doe #1 that could give rise to a serious bodily injury enhancement.

The government's presentence submission, contrary to the PSR, advocated Jane Doe #1's adjusted offense level should include an increase for "serious bodily injury" under U.S.S.G. § 2A3.1(b)(4)(B), and for the first time, in the argument section of its memorandum, the government argued the enhancement should apply because the defendant "physically assaulted her, injected her with unknown substances and he also required her to get a large tattoo, which was very painful to apply and later, after her escape from her trafficking situation, to have removed." (RA2:55.) This argument was the first reference in any court filing to a tattoo, and the government cited no supporting affidavit, or testimonial, or any other court filing, substantiating or evidencing this alleged injury. The only means by which the basis for the injury was presented to the court was in the form of argument in the government's memorandum. The PSR, which had not included an enhancement for serious bodily injury, did not mention a tattoo.

The government's presentence memorandum is also the first mention of any alleged injury by injection – and again the government memo cited to no supporting affidavit or court filing substantiating the alleged injury. The PSR narrative for Jane Doe # 1 did relate that Odilon "instructed another woman to inject her with an unknown substance" but does not relate that any

consequence, pain, or injury--serious or otherwise, resulted from this injection, nor did it identify any purpose for the injection. (SRA:11 at ¶ 13.) The presentence memorandum did not explain or argue that any of these alleged injuries were derived from "conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a)," as Application Note 1 for § 2A3.1 instructs. A post-sentencing document the government later filed under seal in support of its victim restitution arguments attaches a Jane Doe's later-filed Statement in Support of Request for Extradition and refers to injection with an unknown substance but cites no resulting effect, pain or injury. (SRA:113, D. Ct. Doc.152-1 at ¶10.)[2] This document was not submitted either prior to, or at, the sentencing hearing.

On January 4, 2019, Odilon Martinez-Rojas and his brother Severiano were jointly sentenced by Judge Korman in the Eastern District of New York. (RA2:129.)

At sentencing, the government acknowledged that an error in the guideline calculation for Jane Doe #5, noticed and corrected the day prior at a co-defendant's sentencing, signified that victim would no longer be determinative of the ultimate guideline range, because the offense level for that victim was reduced from 40 to 34. See D. Ct. Doc. 147 at 142, 115-142.

[2] A statement in Support of Request for Extradition for Jane Doe #5 refers to an injection administered "with the purpose of preventing pregnancy," and also cites no pain or injury, serious or otherwise, resulting from injection. (SRA:83, Doc. 152-3 at ¶10.)

The government then urged a serious bodily injury enhancement under § 2A3.1(a)(2) for Jane Doe #1, making the argument that Odilon "required her to get a large tattoo against her will," and that "tattooing is itself very painful, and a permanent scar to the body." (RA2:170-171.) It acknowledged the matter did not appear in the presentence report and appeared for the first time in the government sentencing memo. (RA2:171.) The enhancement would raise the adjusted offense level for Doe #1 from 36 to 38, making her victim guideline offense level the highest one and thus determinative for the applicable sentencing range.

The court queried, "So getting a tattoo is a serious physical injury." (RA2:172.) The government responded, "It's a permanent scar, and it's extremely painful." (Id.) The court responded, "I know, but there are many people who would have tattoos all over their body." (Id.) Counsel for the government was not sure where on Doe's body the tattoo had been applied, and she had not personally seen the photographs. (RA2:173.) Asked where serious bodily injury was defined in the guidelines, the government cited "1B1.1." (Id.)

While Judge Korman noted a tattoo may involve "physical pain," he said, "I have no basis for taking judicial notice of the fact that it involves extreme physical pain." (RA2:174.) When the government characterized it as a permanent disfigurement, the judge said, "tell me where it fits in the definition." (Id.) Citing "application note 1M," the government argued "she

had an injury involving extreme pain that later required surgery to have it removed…laser surgery, I believe more than once." (Id.) The court responded it seemed that "what requires the intervention of surgery" is "the impairment of a bodily member organ or mental faculty." The government replied that in the alternative an injury was serious if it was an "injury requiring medical intervention such as surgery." (RA2:175.) Trial counsel argued it was an optional surgery, and not a life-threatening injury that interfered with a bodily function. (Id.) The government pointed out it was not seeking four points for life-threatening injury, just two points for serious bodily injury. (Id.)

Asked if Jane Doe #1 had provided an affidavit or statement about extreme physical pain, the government acknowledged that Doe's extradition affidavit, which to date had not been filed, nor submitted to the court, did not refer to a tattoo. (Id.) Then government counsel, noting agents had just shown her a picture of the tattoo, described it as being located on the shoulder, and ranging from 4 to 6 inches tall. (RA2:179.) The government did not introduce the photograph at the hearing and there is no evidence it was proffered to the judge.

The court ruled, "I will do it under extreme physical pain on the condition that you provide me, before I enter the judgment with evidence of that because I'm not prepared to take judicial notice of it, and it all depends on what pain she suffered." (Id.) The question of whether the tattoo

"required medical intervention, it's a very close question." (RA2:180.) Rather than omit the enhancement until the government produced evidence, the court said, "for the moment, I am going to leave it as serious physical injury." (RA2:181.)

Sentencing, therefore, proceeded with Jane Doe # 1's unsubstantiated enhanced adjusted offense level controlling the resulting relevant guideline range of 235-293 months. The court imposed a 293-month sentence, at "the top of the guidelines range." (RA2:203.) Victim restitution remained to be calculated and imposed at a subsequent hearing, and counsel was informed he had "45 days in which to address restitution." (RA2:205.)

The government filed two post-sentencing letters and a declaration regarding the serious bodily injury enhancement on January 31, 2019 and February 2, 2019. (RA2:222-229.)

The January 31, 2019 declaration by a Homeland Security special agent recounted a telephone interview with Jane Doe #1 on January 9, 2019, five days after Odilon's sentencing hearing and imposition of sentence. It recounted that Doe said Odilon "ordered Jane Doe #1 to get a tattoo of 'Santa Muerte' on her right shoulder." (RA2:225.) Doe said she was advised of the risks associated with the tattoo, including infection, and advised it would be "extremely painful." (Id.) At her first visit the outline was created, and she was instructed to return in forty days after the skin had time to heal. At that time, "Odilon Martinez-Rojas had another individual call Jane Doe #1 and

tell Jane Doe #1 that she had to go to an apartment to have her tattoo finished." At the apartment, she was "forced" by an unidentified party "to take a substance, which caused her to pass out." When she regained consciousness, the tattoo was finished and the site of the tattoo "was in extreme pain." (Id.) The next day, she "woke up in extreme pain with a headache and fever." (Id.) The declaration then recounts she had two "tremendously painful" surgical procedures to have the tattoo removed because she "did not want to be owned by someone." (Id.) After the second procedure there was scarring and some coloring still present, but she did not return for the remainder of the ten treatments because the procedures were too painful. (RA2:226.)

The February 1, 2019 letter attached a Declaration by Dr. Marie Leger, a dermatologist. (RA2:228.) The declaration stated the process of administering a tattoo "is painful for most people" and sometimes causes "scabbing or tenderness." (Id.) Furthermore, it stated tattoo removal is accomplished by "medical intervention" using lasers, and generally "patients often describe the process of removing a tattoo as more painful than the process of receiving the tattoo." (RA2:229.) Doctors use "numbing agents" to "minimize the pain," though even with numbing, the "process can be painful." (Id.) Nowhere did the declaration state that either the administration, or the removal, of a tattoo generally causes "extreme physical pain," nor did the declaration attest to Jane Doe #1 experiencing "extreme physical pain." Nor

did the declaration establish that a tattoo is an injury, or that the tattoo removal process was a surgery. Trial counsel for Mr. Martinez-Rojas did not submit any opposition or objection to the filings. Sentence, after all, had already been imposed.

On February 7, 2019, trial counsel applied for permission to withdraw on grounds his client asserted he was ineffective, there remained the open issue of restitution, and counsel felt "that I cannot remain as counsel for Mr. Martinez-Rojas pending the filing of the Judgment of Conviction." (D. Ct. Doc. 138, RA2:252.) The application was never granted and no new counsel was ever appointed.

At Mr. Martinez-Rojas' September 10, 2019 restitution hearing, the judge imposed $476,700 in restitution. Mr. Martinez-Rojas' counsel made no objection to restitution at the hearing, and no objection to the government's post-sentencing declarations in support of the previously imposed serious bodily injury enhancement. Judgment was entered September 26, 2019. Mr. Martinez-Rojas' timely appeal to the Second Circuit challenged his restitution as excessive and resting on speculation and inadequate proof, and challenged his sentencing with the serious bodily injury enhancement as unconstitutional and in violation of the right to effective assistance of counsel and due process.

The Second Circuit's summary order affirming the convictions issued May 5, 2021. Mr. Martinez-Rojas did not seek rehearing.

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* to decide the important federal question presented in this case. The Second Circuit's affirmance calls for an exercise of this Court's supervisory powers because it sanctions a total abdication of the Fifth and Sixth Amendment protections afforded a defendant during sentencing. Appeal waivers appear in almost every federal defendant's plea agreement, but they should not be construed to preclude appellate review of unconstitutional sentencing procedures. The patently illegal sentencing in this case, where the government both created and submitted proof in support of sentencing *after* sentence was imposed, effectively deprived Mr. Martinez-Rojas of his Sixth Amendment right to counsel and his right to Fifth Amendment due process, and his claim on direct appeal was both reviewable and could not constitutionally be barred by his plea agreement's appeal waiver. Even if the appeal waiver could be construed broadly enough to bar a challenge to an unconstitutional sentencing, it should be unenforceable or invalid.

Not only did the illegal sentencing procedure deprive the defendant of effective counsel and due process, it also amounted to a total abdication of judicial responsibility to impose sentence based on sufficient proof introduced at the sentencing hearing, and not after imposition of sentence when it could not be subjected to adversarial testing. The sentence imposed in this case

was fundamentally unfair. This Court should reverse the Second Circuit, hold the appeal waiver cannot constitutionally waive the defendant's right to a constitutional sentencing procedure, and remand for resentencing without the serious bodily injury enhancement.

The illegal sentence here was grounded entirely on an enhancement that the district court expressly found was not grounded in proof produced at sentencing, and based instead on proof to be produced after sentence was imposed.

The Second Circuit's holding that the "error did not constitute 'an abdication of judicial responsibility' sufficient to render [Mr. Martinez-Rojas'] appeal waiver unenforceable," (App. 13a), is such a departure from this Court's decisions affirming a defendant's right to constitutional sentencing procedures and right to counsel at sentencing that it should be reversed.

This Court has held defendants have "a right to counsel during sentencing in both noncapital and capital cases." Lafler v. Cooper, 566 U.S. 156, 165 (2012) (citing Glover v. United States, 531 U.S. 198 (2001), and Mempa v. Rhay, 389 U.S. 128 (1967)). Due process requires both a fundamentally fair sentencing procedure and sentencing based on evidence meeting minimum standards of reliability. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Tucker, 404 U.S. 443 (1972).

Federal Rule of Criminal Procedure 32 does not permit court determinations of controverted facts to occur after sentencing, nor does it

permit submission of substantive proof long after a sentence has been imposed. The rule provides that, "At sentencing, the court (B) "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B) governing "Court Determinations."

Rule 35 permits "correcting clear error" in a sentence "[w]ithin 14 days after sentencing," if the error "resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). Rule 35 also provides that "'sentencing' means the oral announcement of the sentence." Rule 35(c). Rule 35 does not permit evidence to be submitted after sentencing, nor is undersigned counsel aware of any rule that does.

Imposing sentence based on an enhancement totally unsubstantiated by proof at sentencing renders the appeal waiver unenforceable, because Mr. Martinez-Rojas did not anticipate or agree to a sentencing procedure permitting an enhanced sentence imposed without proof, or permitting post-sentencing evidence that his attorney could not possibly test or defend against. Courts "will not enforce an appeal waiver" where "the sentencing decision . . . was reached in a manner that the plea agreement did not anticipate," "or where 'the sentencing court failed to enunciate any rationale for the defendant's sentence, thus amounting to an abdication of judicial

responsibility subject to mandamus.'" United States v. Woltmann, 610 F.3d 37, 40 (2d Cir. 2010). The sentencing judge here not only failed to enunciate any rationale for the enhanced sentencing range, but it totally lacked proof for it upon imposition of sentence, and permitted an unconstitutional post-sentencing submission not subject to adversarial testing, and even then failed to enunciate whether that post-sentencing submission would have been satisfactory, had it been introduced at sentencing.

The PSR omitted the serious bodily injury enhancement, and the government objected to the omission, making the matter a controversy for the judge to decide. The sentencing judge acknowledged the absence of any proof establishing extreme physical pain needed to demonstrate serious bodily injury, and never made an actual determination or ruling on the matter either during sentencing, or after sentencing. "The purpose of Rule 32 is to ensure that a record is made regarding the resolution of the controverted matter and that the record comes to the attention of the Parole Commission or the Bureau of Prisons," and "adherence to the rule eliminates the uncertainty in determining what the trial court relied upon when making its sentencing decision, thereby facilitating appellate review." United States v. Fernandez-Angulo, 863 F.2d 1449, 1456 (9th Cir. 1988) (remanding to ensure compliance with the rule).

The government in this case relied solely on its bare arguments that a tattoo existed for the enhancement, and there were no other facts in the PSR

establishing serious bodily injury causing extreme physical pain, there was no evidence that the tattoo was forcibly administered or involuntary, and all conduct described constituted part of criminal sexual abuse already accounted for by the base offense level and the four-level enhancement for the criminal sexual abuse conduct.

The time between imposition of sentence and judgment is not a window of time during which the government can bolster its non-existent or inadequate proof. In United States v. Abreau-Cabrera, the Second Circuit vacated a sentence that the district court "corrected" with a downward departure four days after sentence was imposed, but before judgment was pronounced, on grounds Rule 35, as then written, did not permit the newly imposed departure, and only permitted correction of arithmetical or technical or other clear error. United States v. Abreau-Cabrera, 64 F.3d 67 (2d Cir. 1995) (noting rule was not intended to afford opportunity to reconsider application or interpretation of the guidelines or to reopen issues previously resolved). Under Rule 35 and Second Circuit precedent, the sentence is final when it is orally imposed and cannot be corrected or reduced later absent timely discovered clerical, arithmetic, or clear error. Abreau-Cabrera, 64 F.3d at 71-74.

The procedure used in this case totally deprived the defendant of the ability to object to the proof in a public forum at the hearing, relieved the government of its burden of proof at sentencing, and (even if post-sentencing

evidence could be permissible, which it is not) seriously prejudiced and precluded the defendant's ability to have the sentence modified if the government's proof failed. It deprived Mr. Martinez-Rojas of counsel, and left him without a defense to the enhancement at sentencing, in violation of the Sixth Amendment and due process.

The court's procedure invites application of United States v. Cronic, 466 U.S. 659 (1984), where the Supreme Court held that in some circumstances deprivation of counsel requires no showing of prejudice: (1) where there is a "complete denial of counsel" at "a critical stage of his trial," (2) where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) regardless of counsel's performance, where "surrounding circumstances make it so unlikely that any lawyer could provide effective assistance that ineffectiveness" is "properly presumed." Cronic, 466 U.S. at 659-60. "[E]ven the broadest appeal waiver does not deprive a defendant of all appellate claims." Garza v. Idaho, 139 S. Ct. 738, 744 (2019) (Sixth Amendment prejudice presumed "if the accused is denied counsel at a critical stage of his trial" or if prosecution's case not subject to "meaningful adversarial testing"). Here, sentence imposed in the absence of proof an enhancement applied, and a procedure relieving the government of a burden at sentencing, and permitting the government to submit the proof after sentence was imposed, amounted to a complete denial of counsel. Mr. Martinez-Rojas was deprived of the right to subject the evidence to

adversarial testing before he was sentenced, in violation of the Sixth Amendment and due process. Prejudice by the court's procedure must be presumed under Cronic. Mr. Martinez-Rojas should be resentenced without the enhancement, because the government failed to meet its constitutional burden at the first sentencing and should not enjoy a second opportunity. United States v. Archer, 671 F.3d 149, 168 (2d Cir. 2011) (circuit consensus that where "government knew of its obligation to present evidence and failed to do so, it may not enter new evidence on remand"); United States v. Rowe, 919 F.3d 752 (3d Cir. 2019) (government only "afforded one opportunity to carry its burden").

Mr. Martinez-Rojas' plea agreement appeal waiver cannot constitutionally absolve the government from meeting its burden of proof at sentencing, it cannot constitutionally absolve the court from requiring that evidence for material sentencing enhancements be produced at the adversarial sentencing hearing, and not after sentence has been imposed, and it cannot bar the defendant from challenging on direct appeal a sentencing procedure that deprives him both of due process at sentencing and the right to have counsel subject the evidence against him to adversarial testing. These errors are so grave, and so contrary to this Court's precedents and to the Constitution, that this Court should invoke its supervisory powers to vacate the order affirming the convictions and sentence and remand for resentencing without the enhancement.

CONCLUSION

This Court should grant the petition for a writ of certiorari and set the case for argument.

Respectfully submitted,

/s/ Ines McGillion

Ines de C. McGillion
Appointed Counsel of Record for Petitioner
Ines McGillion Law Offices, PLLC
P.O. Box 212
126 Main Street
Putney, VT 05346
(646) 246-3868
ines@mcgillionlaw.com

October 2, 2021