IN THE
SUPREME COURT OF THE UNITED STATES

JUNIEL RIOS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. **Whether Constitutional Due Process requires that *Irizarry v. United States*, 553 U.S. 708 (2008) that limited the Notice requirement in Fed.R.Crim.P. 32(h) to Upward Departures be extended to Upward Variances.**

2. **Whether Procedural and Substantive Due Process were violated when a Sentencing Court applied a factor listed in 18 U.S.C. Section 3553(a) to Enhance a Sentence in Violation of an Express Guideline Provision and *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and that Rendered the Sentence Substantively Unreasonable.**

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES

INTRODUCTION

Petitioner, **JUNIEL RIOS**, through counsel, hereby petitions for a Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit which affirmed the Judgment of the United States District Court for the Southern District of Florida convicting and sentencing him for violations of Federal criminal law.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit issued an Unpublished Opinion Affirming *Per Curiam* his sentence. *United States v. Rios*, 2021 WL 5288923 (11th Cir. 2021) (*Rios II*). A copy of that Opinion is included in the Appendix.

STATEMENT OF JURISDICTION

JUNIEL RIOS invokes the jurisdiction of this Court to hear final judgments or decrees issued by United States Courts of Appeals pursuant to Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS

AMEND. V, - DUE PROCESS OF LAW

. . . nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

STATUTORY PROVISIONS

Title 21, U.S.C. Section 922(g)(1)

(g) It shall be unlawful for any person - -

(1) who has been convicted in any Court of, a crime punishable by imprisonment for a term exceeding one year; ...

To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 21, U.S.C. Section 841(a)(1)

a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Title 18, U.S.C. Section 924(c)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection-

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years;

STATEMENT OF THE CASE

Petitioner was charged by Superseding Indictment with Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. Section 922(g)(1) (Count I), Possession with Intent to Distribute Ethylone a/k/a "Molly", in violation of 21 U.S.C. Section 841(a)(1) (Count II), and Possession of a Firearm in Furtherance of Drug Trafficking, in violation of 18 U.S.C. Section 924(c)(1)(A)

(Count III). He entered a guilty plea pursuant to a written Plea Agreement. He admitted to the facts contained in the Factual Proffer. Both the Plea Agreement and the Factual Proffer are included in the Appendix.

The District Court ordered a Pre-Sentence Investigation Report (hereinafter "PSI"). A copy of that PSI is being provided to the Court under seal.

At the Change of Plea Hearing, Petition acknowledged under oath that he had been previously treated for Bi-Polar Disorder in Cuba and had had problems with drugs. In Miami, he had been medicated for his psychiatric problems and attended a drug program. Prior to sentencing, the District Court entered an order for psychological testing to determine if Petitioner was competent to proceed to sentencing.

The Plea Agreement contained an appeal waiver. It stated, "Defendant hereby waive all rights conferred by Section 3742 and 1291 to appeal any sentence imposed, unless the sentence exceeds the maximum permitted by Statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing."

According to the PSI, Petitioner qualified as a Career Offender pursuant to U.S.S.G. Section 4B1.1. Based on the amount of "Molly", RIOS' Base Offense

Level was 24. However, since the maximum sentence for Count II was twenty (20) years, for purposes of a Career Offender, the Base Offense Level was thirty-two (32).

Based on an accumulation of misdemeanors, simple drug possessions, and two burglaries of unoccupied dwellings, Petitioner's Criminal History was Category V. As a Career Offender, his Criminal History Category was increased to VI.

Without the enhancement as a Career Offender, Petitioner's Base Offense Level of twenty-four (24) would be reduced by three (3) levels for Acceptance of Responsibility, which was recommended in the PSI. The resulting Adjusted Offense Level of twenty-one (21), combined with a Criminal History Category V

would have yielded an Advisory Sentencing Range of 70-87 months. The District Court would be obligated to impose a five-year consecutive sentence for the Section 924(c) offence charged in Count III for a total Advisory Sentencing Range from 130-147 months.

As a Career Offender, Petitioner's Base Offence Level of thirty-two (32) would be reduced by three points for Acceptance of Responsibility for a total

Offense Level of twenty-nine (29). Combined with a Criminal History Category of VI, his Advisory Sentencing Range would have been 151-188 months. Further enhancements provided for Career Offenders increased the Sentencing Range to 262-327 months. In addition, there would be five (5) years added for the Section 924(c) count raising the total Advisory Sentencing Range from 322-387 months.

Prior to sentencing, Petitioner filed a Motion for Downward Departure from the Guidelines and Request for Reasonable Sentence. The Motion sought a downward departure on the grounds that the Criminal History Category overstated his real criminal history pursuant to U.S.S.G Section 4A1.3(b)(1). Petitioner also requested that the Court consider his psychiatric condition as part of its analysis under 18 U.S.C Section 3553(a) to set a reasonable sentence. A copy of the Motion is in the Appendix.

On June 13, 2016, Petitioner appeared for sentencing. As a preliminary matter, the District Court reported that he had been sent to FMC Butner for a competency evaluation. Nobody requested a competency hearing, and the Court determined he was competent.

The District Court determined the Sentencing Guidelines would be calculated as indicated above. The Court announced the Guideline calculations

with and without Career Offender status. She then considered Petitioner's Motion for Downward Departure. A transcript of the Sentencing Hearing is included in the Appendix.

The Court considered that "what's jacking him up in some respects is some pretty minor stuff." She noted three petit thefts, two possessions of marijuana, and one "really only...serious offence", which were the two burglaries of an unoccupied dwelling.

The Court did express concern over the nature of the firearm that was the subject of Count III. Noting that it was an AR-15, the Court inquired of the Government how Petitioner had obtained possession of it. The prosecutor explained that Petitioner had acquired the firearm by having a straw buyer purchase it for him. He also stated that Petitioner had had two tactical police bullet

proof vests, and a Taser in his home. Petitioner objected to these disclosures because some of the information disclosed by the Government had been obtained during a debriefing under a promise of immunity. The prosecutor promised to limit his disclosures to the items named in the Plea Agreement as subject to forfeiture, but never identified which part of his proffer had been obtained under a

grant of immunity. Defense counsel declined to tell the Court what information had been improperly disclosed.

Petitioner's counsel described the two burglaries for which he had been convicted. Petitioner had broken into two houses on his block and stole electronics for the purpose of selling them. He reported that 90% of the electronics were recovered and returned to the victims. Defense counsel reported that he had represented Petitioner in these cases. He reported that when he was determined ineligible for inpatient drug treatment, he accepted a plea to 364 days in jail.

After hearing from the Petitioner, the Court made the following observation.

> THE COURT: So, I don't disagree with the defense that sentencing Mr. Barrios as a Career Offender is entirely [not] warranted in this situation. Most of his convictions are for offences like petit theft. He does have these two burglary convictions. There is no indication that weapons were used. Of course, burglaries are very serious offenses because they can escalate so easily into violence whether the dwelling is occupied or not occupied because people can come home.

The Court did indicate that it was "very disturbed by the circumstances of this offense" although she noted that although it was a "dangerous neighborhood" where Petitioner lived, she felt that that "fails to explain why that kind of paramilitary equipment was in his residence..."

Consequently, the Court decided that "I'm not going to sentence him as a Career Offender, but what I am going to do is I am going to sentence him to the statutory maximum on the drug charge and follow that with sixty (60) months on Count III to take it to 180 months." Having determined that Petitioner did not qualify as a Career Offender, the Court issued an upward variance from the Advisory Sentencing Range for the drug trafficking count from 130-147 months to 180 months.

Petitioner's attorney never filed a Notice of Appeal. Petitioner filed a timely *pro se* Motion to Vacate, Set Aside or Correct Illegal Sentence pursuant to 28 U.S.C. Section 2255 alleging that his trial counsel had failed to preserve his appellate rights.

The Section 2255 Motion was referred to a U.S. Magistrate Judge for an evidentiary hearing. After hearing testimony, he issued a Report and

Recommendation that Petitioner's claims be denied. *Rios v. United States*, 2018 WL 10667636 (S.D.Fla. Jan. 24, 2018). The District Court adopted the Report and Recommendation of the Magistrate Judge. *Rios v. United States*, 2018 WL 10667613 (S.D.Fla. May 7, 2018).

Petitioner took an appeal to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit vacated his sentence and remanded his case to the District Court "to consider whether Rios was prejudiced by counsel's failure to consult with him about an appeal". *Rios v. United States*, 783 Fed.Appx. 886, 892 (11th Cir. 2019) (*Rios I)*.

At a subsequent hearing, the U.S. Magistrate Judge issued a Report and Recommendation that recommended that trial counsel's failure to have consulted with Petitioner within the 14-day window for filing a Notice of Appeal prejudiced him. If he had consulted with his client, the Magistrate Judge found that Petitioner would have insisted on pursuing his right to appeal. *Rios v. United States*, 2020 WL 19006900 (S.D.Fla. Jan. 16, 2020). The District Court adopted the Report and Recommendation of the Magistrate Judge and found further that the existence of the appeal waiver did not excuse trial counsel from consulting with Petitioner and

filing a Notice of Appeal if he demanded. *Rios v. United States,* 2020 WL 947340 (S.D.Fla. Feb. 27, 2020). Petitioner was permitted to file an out-of-time appeal. The Court subsequently ordered the judgement of conviction to be vacated and reimposed. That judgment was later amended to correct an error. The correct Judgment and Commitment Order is in the Appendix.

A district court must impose a procedurally and substantively reasonable sentence. *Gall v. United States*, 552 U.S. 38 (2007). A sentence may be procedurally unreasonable if the District Court improperly calculates the Guidelines range, treats the Guidelines as mandatory, or fails to consider the Section 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. *Id.* at 51. Assuming the sentencing courts decision is procedurally sound, an appellate court will consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. *Id.*

A district court has "considerable discretion" in deciding whether the - factors justify a variance and the extent of one that is appropriate. *Id.* An

appellate court may vacate a sentence only if left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case. *Id.*

Petitioner complained on appeal to the Eleventh Circuit that he had been provided with no notice that the nature and characteristics of the firearm that was the subject of the Section 924(c) conviction would be used by the District Court to justify an upward variance from the Guideline range for the drug trafficking count. Consequently, he failed to argue that by so doing, the District Court had violated U.S.S.G. Section 2K2.4. Section 2K2.4 prohibits the underlying drug trafficking or violent felony Guidelines to be enhanced for possession, use or brandishing of a firearm that was the subject of a Section 924 (c) prosecution. Since the upward variance was based on the characteristics of the same firearm that was the subject of the Section 924(c) count, the District Court's sentence was procedurally unreasonable. The remedy was a remand for resentencing.

Petitioner also argued to the Eleventh Circuit that his sentence was substantively unreasonable. Notwithstanding the considerable discretion that district courts have in applying the Section 3553 factors and imposing sentence, a

"[a] district court abuses its discretion when it (1) fails to afford consideration to the relevant factors that were due significant weight, (2) *gives significant weight to an improper or irrelevant factor*, or (3) commits a clear error of judgment in considering the proper factors." See e.g., *United States v. Irey*, 612 F.3d 1160,

1189 (11th Cir. 2010) (en banc) (emphasis added) (quotation omitted). "A sentence that is based entirely upon an impermissible factor is unreasonable because such a sentence does not achieve the purposes of Section 3553(a)." *United States v. Velasquez Velasquez*, 524 F.3d 1248, 1252 (11th Cir. 2008); *United States v. Plate*, 839 F.3d 950, 957-58 (11th Cir. 2016) ("district judge clearly gave significant weight to Plate's inability to pay as a factor in the sentence that he imposed, and he ended up imposing a prison term based solely on that factor, which is not a permissible consideration under Section 3553(a)"). The District Court erred and imposed a substantively unreasonable sentence by applying the characteristics of the firearm that was the subject of the Section 924(c) count as an impermissible factor for issuing an upward variance for the drug trafficking count.

The Eleventh Circuit disagreed and affirmed. As to any notice requirement, the Panel was convinced that this Court's decision in *Irizarry v. United States*, 553 U.S. 708 (2008) was controlling. *United States v. Rios*, 2021 WL 5288923, *2

(11th Cir. 2021) (*Rios II)*. *Irizarry* held that a defendant is not entitled to notice that a district court contemplates an upward variance. As to the Section 2K2.4 issue, the Panel found that the nature and characteristics of the subject firearm could be considered as a factor under Section 3553(a). *Rios* II, at *3-*4.

The Panel that decided this case reviewed the issues based on the plain error standard. This was done because Petitioner's trial counsel had interposed no objections to the sentence imposed during the hearing. At the evidentiary hearings that followed, he testified that he did not understand that the District Court had issued an upward variance. He used that opinion to decide to not even consult with Petitioner about taking an appeal despite Petitioner's efforts to get the lawyer to come see him after the sentencing.

After considerable litigation that took the case to the Eleventh Circuit, trial counsel was determined to have been ineffective for failing to pursue the appeal that Petitioner clearly wanted. However, now having been granted his appeal, the failure of those same trial counsel to preserve any issues appears to have prevented any relief from being granted. Petitioner requests this Court consider the merits of the arguments he is making in this Petition notwithstanding the failure of trial counsel to properly preserve what would have been meritorious objections.

The portion of Section 3553(a) relied upon by the District Court was that portion that permitted consideration of the "circumstances of the offense." But the Guidelines are guided by this same consideration when determining "relevant conduct." In this case, the District Court essentially increased the "relevant

conduct" of the offense by taking into consideration the nature and characteristics of the firearm – a factor that is defined by the Guidelines and Section 924 itself.

During both appeals taken in this case, the issue was raised whether the District Court had issued a downward variance from the Career Offender Guideline or an upward variance from the sentencing range without the Career Offender Guidelines. This matter was settled by the Eleventh Circuit in the first appeal.

The Eleventh Circuit analyzed the issue follows:

> The record is ambiguous as to the District Court's sentencing guideline calculations. Two possibilities emerged. It could be said, first, that the Court implicitly accepted the PSI's uncontested guideline calculations, including the Career-Offender guideline range, and then varied downward from that range based on the Section 3553(a) factors. Alternatively, the Court may have decided that RIOS was not a Career Offender under the guidelines, calculated the guideline range without the enhancement 70-87 months, plus 60 months consecutive, and then varied upward based on the Section 3553(a) factors. **This latter theory is reflected in the Court's "Statement of Reasons" for the sentence.** (emphasis added)

Rios v. United States, 783 Fed.App'x 886, 888 (11th Cir. 2019) (*Rios I*).

When deciding the instant appeal on the merits, the Eleventh Circuit decided that it did not matter whether the variance was up or down. The Court reasoned that either guideline level was inadequate because the variance was based on an analysis of the factors in 18 U.S.C. Section 3553(a). *Rios II,* at *2-*3.

A district court cannot substitute its own judgment for that of the Sentencing Commission under the guise of weighing the "circumstances of the offense" under Section 3553(a). By so doing, the Court in this case produced a sentence that was procedurally and substantively unreasonable.

As an attorney who has practiced Federal criminal law since 1983, and litigated sentencing guideline issues since their inception, undersigned counsel would observe that strictly applying *Irizarry* to the case at bar and others similarly situated will cause endemic violations of due process at sentencing. There are thousands of prosecutions every year in Federal district courts throughout the United States where a defendant is charged with a crime of violence of drug trafficking offense and a violation of Section 924(c). The instant case is a run-of-the-mill type case seen every day. Most of them result in a Guideline sentence for the underlying felony followed by the applicable minimum mandatory sentence for Section 924(c). Absent any other aggravating or extenuating circumstances, most

defendants believe that they will be sentenced under the Guidelines or will be able to request a downward variance. The Government almost never asks for an upward variance. Unless warned, any defendant would have been completely surprised if his drug trafficking count was enhanced because the firearm in

question was an AR-15 and not any other type of firearm. There will be more defendants caught by surprise when sentencing courts decide to apply the Section 3553(a) factors to upwardly vary in ways never contemplated by any party particularly, as in this case, when another guideline provision prohibits it and the statute provides for it.

ARGUMENT

1. **That Constitutional Due Process requires that *Irizarry v. United States*, 553 U.S. 708 (2008) that limited the Notice requirement in Fed.R.Crim.P. 32(h) to Upward Departures be extended to Upward Variances.**

Petitioner was never put on notice by the Court or the Government that the nature and characteristics of the firearm that was the subject of the Section 924(c) count would be applied to upwardly depart his sentence for the drug trafficking count. Given the existence of U.S.S.G. Section 2K2.4, Petitioner was never on notice that such action was possible. Section 924(c) itself provides for a higher minimum mandatory for "assault rifles," but Petitioner was not indicted for it. This lack of notice made his sentence procedurally unreasonable and violated his right to procedural due process.

Petitioner had pled guilty to constructive possession of the AR-15 in furtherance of a drug trafficking offense. The AR-15 had played no role in the undercover police sting.

According to both the Factual Proffer and the PSI, a confidential informant had gone to the Petitioner's residence in Miami to purchase "Molly powder"

(ethylone). The informant parked in front of the house, and Petitioner left the house and approached him twice. The first time was to make sure the informant had the money to buy the drugs. The second time was to give him the drugs in exchange for the money. When Petitioner reached into his pocket to get the drugs, he observed law enforcement approach and he fled. After he was apprehended, he

gave consent to search his house where the AR-15 was found. Petitioner never took the gun outside the house with him to meet with the informant.

In *Irizarry v. United States*, 553 U.S. 708 (2008), this Court held that the District Court need not provide a defendant with prior notice of her intent to issue an upward variance based on 18 U.S.C. Section 3553(a). *Id.* at 716. The Court acknowledged that when the Federal Sentencing Guidelines were mandatory, due process concerns made such notice necessary otherwise "the Rule 32 provision allowing parties to comment on the appropriate sentence—now Rule 32(i)(1)(C)—would be 'render[ed] meaningless' unless the defendant were given notice of a contemplated departure." *Id.,* citing *Burns v. United States,* 501 U.S. 129, 135-36 (1991); See, Fed.R.Crim.P 32(h). As the Court further explained:

> Faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of

"expectancy" that gave rise to a special need for notice in *Burns.*

Irizarry, 553 U.S. at 713-14.

> "Although the Guidelines, as a 'starting point and the initial benchmark,' continue to play a role in the sentencing determination. . . . there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justifiable under the sentencing

> factors set forth in 18 U.S.C. Section 3553(a)." (Citation omitted)

The *Irizarry* Court retained the notice requirement for upward departures. *Id.* at 714-15. The Court reasoned that "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id.* at 714. The notice requirement set out in *Burns* applied to only those cases "which required 'an aggravation or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Id.* *Burns* imposed its notice requirement on "those departures that were based on 'ground not identified as a ground for . . . departure either in the presentence report or in a prehearing submission." *Id.* citing *Burns*, 501 U.S. at 138-39.

Justice Breyer issued a strong dissent in *Irizarry*. *Id.* at 718–22 (BREYER J., dissenting). "The Court creates a legal distinction without much of a difference." *Id.* at 718. A departure and a variance are both "different from the guideline sentence." *Id.* Justice Breyer used the ordinary definition of what would be considered "different" and noted that "the substantive difference between a 'variance' and a 'departure' is nonexistent. . ." *Id.*

According to Justice Breyer, Rule 32's overall purpose was to provide for "focused, adversarial development of the factual and legal issues" related to sentencing." *Id.* at 720 citing *Burns*, 501 U.S. at 134. *Burns* held that construing Rule 32 not to require notice of *sua sponte* departures would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution" of sentencing issues." *Id.* citing *Burns*, 501 U.S. at 137. If these principles are invoked to require notice for departures, why not for variances?

The majority opinion in *Irizarry* downplayed the practical effect of allowing surprise *sua sponte* variances to be sprung on defendants at the last minute. Adding the notice requirement would, in the majority's view, may create unnecessary delay. "[A] judge who concludes during the sentencing hearing that a

variance is appropriate may be forced to continue the hearing even where the content of the Rule 32(h) notice would not affect the parties' presentation of argument and evidence." *Id.* at 715. In those instances where the "factual basis for a particular sentence will come as a surprise to a defendant or the Government," the proper response would be to consider granting a continuance. The majority relied on the "confidence in the ability of district judges and counsel – especially in light of Rule 32's other procedural protections – to make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Id.* at 716.

In the instant case, Petitioner and his counsel were wholly unaware that the nature and characteristics of the firearm would turn what was a garden variety drug case with a Section 924(c) kicker into a sentence that was 40% above the high end of the adjusted guideline range for the drug trafficking offense. Petitioner did not

have the time to contemplate the impact of Section 2K2.4. The Petitioner was unable to make the argument that although he possessed an AR-15 the District Court referred to as an "assault rifle," he was not indicted under that portion of Section 924. The issue of whether the nature and characteristics of the AR-15

warranted an upward variance was sprung on Petitioner by the District Court moments after he had completed his allocution and immediately before sentence was imposed.

The Court should not dismiss Petitioner's lack of notice complaint on the theory advanced by the Government in its Response Brief; that he had notice going into his sentencing that he was looking at a Career Offender sentence considerably higher than what he ultimately received. That argument mis-represented the importance of prior notice of the ***basis*** for an upward variance to Petitioner's right to procedural due process. Petitioner is not complaining that he was sentenced to a longer sentence than he anticipated. He is complaining that he was unaware that the nature and characteristics of the firearm would or even could form the basis for an upward variance.

Petitioner acknowledges that he was facing a Career Offender sentence.

However, if he was not sentenced as a Career Offender, then he had not only been looking at a reduction of his Criminal History Category VI to Category V, but he would have received a reduction in his Offense Level. Once the District Court had decided not to sentence him as a Career Offender, Petitioner's sentencing range

was reduced from 262-327 months to 70-87 months as to the drug trafficking count. If he were sentenced as a Career Offender, and the Court wanted to give him a downward variance, it would have only reduced his Criminal History category. See, *United States v. Johnson*, 934 F.2d 1237, 1239 (11th Cir. 1991). These calculations were discussed at the beginning of the sentencing hearing. By not sentencing Petitioner as a Career Offender, the Sentencing Range was 70-87 months for the drug trafficking count.

It was not the amount of time that controls the due process considerations for purposes of unfair and prejudicial surprise. It was the nature of the issue that the District Court was going to rely upon. In this case, that his possession of an AR-15 in his residence would or even could be used to increase his sentence for the drug trafficking count particularly considering his understanding that he would receive a consecutive five (5) year sentence on the Section 924(c) offense.

The record clearly shows that Petitioner and his counsel were ambushed at sentencing. The safeguards described in *Irizarry* such as competent counsel aware of all the relevant sentencing issues, a judge who has heard from both sides before making her decision, and issues flagged by the Government did not safeguard

Petitioner from a procedurally unreasonable sentence. Petitioner's procedural due process rights were violated thereby, and he is entitled to be resentenced.

2. That Procedural Due Process was violated when a Sentencing Court applied a factor listed in 18 U.S.C. Section 3553(a) to Enhance a Sentence in Violation of an Express Guideline Provision and *Apprendi v. New Jersey,* 530 U.S. 466 (2000) that Rendered the Sentence Substantively Unreasonable.

The comments made by the District Court at sentencing indicated that she was clearly troubled by the AR-15 "assault rifle" that had been seized from Petitioner's home. Petitioner raised the question before the Eleventh Circuit that justifying the upward variance was based on the nature and characteristics of the firearm violated U.S.S.G. Section 2K2.4.

Section 2K2.4, Comment 4 provides that where a sentence includes conviction and enhancement for a violation of 18 U.S.C. Section 924(c), the Court

may not "apply any specific offence characteristic for possession, brandishing, use or discharge of any explosive or firearm when determining the sentence for the underlying offence." U.S.S.G. Section 2K2.4 cmt. n. 4 (2012). The Comment goes on to state that "[a] sentence under this guideline accounts

forbids any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under 1.3 (Relevant Conduct).' *Id*.

On appeal, Petitioner argued that the District Court could not consider the characteristics of the firearm in sentencing for the drug offense because he was already receiving a five (5) year consecutive sentence for the gun already. The Eleventh Circuit validated the upward variance by deciding that the District Court's comments regarding the AR-15's characteristics could properly be considered as a factor in Section 3553(a). *Rios II,* at *3-*4.

Petitioner was charged with possessing a firearm in furtherance of a drug trafficking offense in violation of Section 924 (c) (1) (A) (i). He was not charged in Subsection B which states in pertinent part:

> **B)** If the firearm possessed by a person convicted of a violation of this subsection—

> **(i)** is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years;

The District Court sentenced Petitioner for an offense for which he was not charged. This was a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny.

Petitioner argues that it was improper for the District Court to have applied an impermissible factor to enhance his sentence for the drug trafficking offense when that factor was subsumed in the consecutive five (5) year sentence under Section 924(c). However, even if the Court were to conclude he was in error as a matter of law, it can clearly see the prejudice Petitioner suffered because of the lack of notice. While these arguments may or may not persuade this Court, they

may have persuaded the District Court not to grant an unrequested upward variance. Limiting *Irizarry* to upward departures but not upward variances were, as Justice Breyer observed a distinction without a difference. This Court needs to

accept certiorari to revisit *Irizarry* and provide guidance on the extent to which a sentencing court can apply pursuant to Section 3553(a) factor "circumstances of the offense" which are addressed elsewhere in the Guidelines and criminal statutes as they pertain to relevant conduct.

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation set forth in U.S.Sup.Ct. Rule 33.1(g), because it contains 5,042 words.

/s/ Charles G. White

CHARLES G. WHITE, ESQ.

CONCLUSION

Upon the arguments and authorities aforementioned, Petitioner requests this Court accept certiorari in this case.

Respectfully submitted,

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