No. 22-6221

IN THE

SUPREMRE COURT OF THE UNITED STATES

OSCAR MARTINEZ-HERNANDEZ,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OSCAR MARTINEZ-HERNANDEZ,
REG. NO. 09486-069
PROCEEDING PRO-SE
USP FLORENCE ADMAX
U.S. PENITENTIARY
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FLORENCE, CO 81226

DATED: November 25, 2022

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QUESTION(S) PRESENTED

A. **WHETHER FORMER PROSECUTOR WHO INSTITUTED THREE INDICTMENTS AGAINST A DEFENDANT AND 12 YEARS LATER DECIDES TO DEFEND HIM UNDER THE SAME THREE INDICTMENTS VIOLATES TITLE 18 U.S.C. § 207 THE NO CONTACT RULE CONSTITUTES A VIOLATION OF THE DEFENDANTS CONSTITUTIONAL DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL RIGHTS AS SECURED UNDER THE FIFTH AND SIXTH AMENDMENT WHERE FORMER PROSECUTOR COULD NOT HAVE DEFENDED HIM UNDER THE HOUSEKEEPING DOCTRINE CREATING AN ACTUAL CONFLICT OF INTEREST AND THE GOVERNMENT FAILURE TO INFORM THE CONFLICT AND MOVE THE COURT FOR A HEARING VIOLATES THE DEFENDANTS REQUIRES SETTING ASIDE HIS CONVICTION AND A NEW TRIAL ORDER?**

LIST OF PARTIES

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

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In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense.

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§ 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

18 U.S.C.A. § 207

§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on all officers and employees of the executive branch and certain other agencies.--

(1) Permanent restrictions on representation on particular matters.--Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.--Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-

martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending, shall be punished as provided in section 216 of this title.

(3) Clarification of restrictions.--The restrictions contained in paragraphs (1) and (2) shall apply--

(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and

(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia

on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

28 U.S.C.A. § 530B

§ 530B. Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

28 U.S.C.A. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

Currentness

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise

subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him

relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

INTRODUCTION

HERE COMES NOW, Oscar Martinez-Hernandez, (hereinafter "Martinez-Hernandez), proceeding pro-se and under Haines[1] v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), very respectfully prays and requests as follows.

OPINION BELOW

The Court of Appeals for the First Circuit did not issue an opinion in this case. The Court of Appeals simply denied the request for Certificate of Appealability because the appellant failed to make a "substantial showing of the denial of a constitutional right." See Order, dated July 5, 2022, denying Certificate of Appealability. **Appendix C. (APP. 339)**

The opinion of the United States District Court is reported at Martinez-Hernandez v. United States, 2020 WL 4905470 (D.P.R. 2020). **Appendix A. (APP. 70-96)**

JURISDICTION

This Court jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Pursuant to the Supreme Court Rule 13. Review on Certiorari, the time for petitioning a writ of certiorari to review a judgment in any case, civil or criminal, entered by a United States court of appeals is timely when it is fled with the Clerk of this Court within 90 days after entry of the judgment.

The Court of Appeals order denying petitioner's Certificate of Appealability was entered on July 5, 2022, Martinez had until October 3, 2022.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

[1] As the Court unanimously held in Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears " 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Id., at 520-521, 92 S.Ct. at 596, quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

On September 19, 2011, a Grand Jury returned a nine count Superseding Indictment (ECF. No. 582) against the Martinez-Hernandez and his co-defendants alleging conspiratorial narcotic violations along with related allegations of unlawful use and possession of firearms in furtherance of drug-related crimes. Martinez-Hernandez is charged in Counts One through four in this Superseding Indictment. Count One charges the Martinez-Hernandez with a conspiracy to possess with intent to distribute controlled substances from 1998 until the issuance of the indictment in June of 2011. Counts Two through Four charge the Martinez-Hernandez with substantive counts of possess ion with intent to distribute in excess of one kilogram of heroin, in excess of five kilograms of cocaine, and in excess of one thousand kilograms of marijuana, all within a thousand feet of a public school, all in violation of 21 U.S.C. §§ 841(a) and 846.

On August 7, 2012, the Martinez-Hernandez pled guilty to Count One of the Superseding Indictment (ECF No. 2346). The plea agreement allowed the Martinez-Hernandez to request a t a term of imprisonment of two hundred sixty-four (264) months while the United States reserved the right to request a sentence of three hundred and twenty-four (324) months. (See ECF. No. 2346, at 5.) It was also agreed that the government would move to dismiss with prejudice Criminal Cases Nos. 99- 351 (JAF), 99-352 (JAF), and 01-379 (JAF), three other federal indictments then pending against the Martinez-Hernandez. The defense also retained the option of requesting that the sentence to be imposed run concurrently with Martinez-Hernandez's pending life sentences imposed in the Commonwealth of Puerto Rico.

On March 5, 2013, the District Court sentenced the Martinez-Hernandez to a three hundred (300) month prison term to be served concurrently to Martinez-Hernandez's state court sentences (ECF Nos. 3424 and 3439).

On March 19, 2013, Martinez-Hernandez filed notice of appeal. (ECF Nos. 3467). On April 4, 2016, the First Circuit Court of Appeals entered judgment Affirming appeal number 13-4245 and Dismissing appeal number 15-1254.

On June 9, 2017, filed a 28 U.S.C. §2255 petition in the United States District Court for the District of Puerto Rico. [17-cv-1779 (DRD) Document No. 1.] **Appendix B. (APP. 107-121)** Accompanied by a Memorandum of Law in Support Thereof. **Appendix B. (APP. 121-244).** On March 17, 2018, the United States filed Memorandum in Opposition. [17-cv-1779 (DRD) Document No. 24.] **Appendix B (APP. 245-252).** On March 29, 2018, Martinez-Hernandez filed Reply to the United States Memorandum in Opposition. [17-cv-1779 (DRD) Document No. 26.] **Appendix B (APP. 254-257).** On August 20, 2020, the District Court without holding an evidentiary hearing denied the motion, and the Certificate of Appealability ("COA") forthwith. [17-cv-1779 (DRD), Document No. 32 & 33.]. **Appendix B (APP. 97).** On November 13, 2020, Martinez filed Certificate of Appealability, with copy of all corresponding legal documentation. **Appendix (APP. 1-70).** On July 5, 2022, the Court of Appeals denied the COA. **Appendix C (APP. 339).** On October 3, 2022, Martinez timely mailed his Petition for Certiorari, and it was received by the Supreme Court of the United States, on October 4, 2022, it was delivered and pick up. **Appendix D. (APP. 340).** On October 5, 2022, the Clerk of the Supreme Court of the United States rejected the Petition for Certiorari pursuant to Rule 33 because the Brief exceeded the 40 pages limitation, mailed back the Petition to Martinez, and instructed him to refile the Petition within 60 days of date of the rejection notice. Martinez had up and until to December 4, 2022, to refile his Petition for Certiorari.

II. REASONS FOR GRANTING THE PETITION

A. WHETHER FORMER PROSECUTOR WHO INSTITUTED THREE INDICTMENTS AGAINST A DEFENDANT AND 12 YEARS LATER DECIDES TO DEFEND HIM UNDER THE SAME THREE INDICTMENTS VIOLATES TITLE 18 U.S.C. § 207 THE NO CONTACT RULE CONSTITUTES A VIOLATION OF THE DEFENDANTS CONSTITUTIONAL DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL RIGHTS AS SECURED UNDER THE FIFTH AND SIXTH AMENDMENT WHERE FORMER PROSECUTOR COULD NOT HAVE DEFENDED HIM UNDER THE HOUSEKEEPING DOCTRINE CREATING AN ACTUAL CONFLICT OF INTEREST AND THE GOVERNMENT FAILURE TO INFORM THE CONFLICT AND MOVE THE COURT FOR A HEARING VIOLATES THE DEFENDANTS REQUIRES SETTING ASIDE HIS CONVICTION AND A NEW TRIAL ORDER?

B. DISCUSSION

1. MARTINEZ-HERNANDEZ DEFENSE COUNSEL FORMER PROSECUTOR VIOLATION OF TITILE 18 U.S.C. SECTION 207 AND HOUSEKEEPING DOCTRINE CREATED AN ACTUAL CONFLICT OF INTEREST IN VIOLATION AND HIS SIXTH AMENDMENT RIGHT.

a. THE LAW

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). Absent a valid waiver, effective assistance includes conflict-free counsel. Mountjoy v. Warden, 245 F.3d 31, 36 (1st Cir.2001). To demonstrate a conflict of interest Sixth Amendment right violation, Martinez-Hernandez must establish that an actual conflict of interest adversely affected his lawyer's performance. See Cuyler v. Sullivan, 446 U.S. 335, 349–50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). See also Brien v. United States, 695 F.2d 10, 15 (1st Cir.1982)("[T]he conflict must be real, not some attenuated hypothesis having little consequence to the adequacy of representation."). In cases of successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties. See United States v. Lemieux, 532 F.Supp.2d 225, 230 (D.Mass.2008) (quoting Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. (D.R.I.2008) (quoting Lemieux). The First Circuit requires the defendant

to show that: (1) the attorney could have pursued a plausible alternative defense strategy and (2) the alternative trial tactic was inherently in conflict with or not pursued due to the attorney's other loyalties or interests." Familia–Consoro v. United States, 160 F.3d 761, 764 (1st Cir.1998). See also United States v. Soldevila–Lopez, 17 F.3d 480, 486 (1st Cir.1994).

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee). See United States v. Miller, 624 F.2d 1198 (3d Cir.1980). In Hernandez v. Mondragon, 824 F.2d 825 (10th Cir.1987) the court said if there was a substantial relationship between the representation of the witness and the present case the conflict issue would be significant. See also United States v. Martin, 39 F.Supp.2d 1333 (D. Utah 1999) (Disqualifying former Assistant United States Attorney for substantial conflict by prior involvement). And also United States v. Clark,[2] 333 F.Supp.2d at 794–95 (former Assistant United States Attorney's assignment to criminal defendant's case, approval of prosecution memorandum in that case, receipt of investigative reports, discussion of case with lead law enforcement agent, and assistance in obtaining records and subpoenas barred him from later serving as criminal defendant's counsel); United States v. Martin, 39 F.Supp.2d 1333, 1335 (D.Utah 1999) (same).

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[2] Under § 207(a), a former government employee is disqualified only if the particular matter involves the same "specific party or parties." United States v. Clark, 333 F.Supp.2d 789, 794 (E.D .Wis.2004). In addition, a former employee is disqualified under this provision only if, while working for the Government, he participated in the matter "personally and substantially." Id. (citations omitted.) The phrase "personally and substantially" is defined in 5 C.F.R. § 2637.201(d), as follows:

The restrictions of section 207(a) apply only to those matters in which a former Government employee had "personal and substantial participation", exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. It is essential that the participation be related to a "particular matter involving a specific party."

Clark, 333 F.Supp.2d at 794.

Under Title 5 U.S.C.A. § 301 (West 1996), commonly known as the "Housekeeping Statute," federal agencies are granted authority to prescribe regulations governing the agency,[3] including regulations for "the custody, use, and preservation of its records, papers, and property." The statute also provides that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." Id. Pursuant to this authority, the Justice Department promulgates regulations that governs the production of information in the course of a proceeding in which the United States is a party. In any federal, . . . case or matter in which the United States is a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official. Individual government agents cannot escape adherence to governmental regulations. See Associated Builders & Contractors of Texas Gulf Coast, Inc. v. U.S. Dept. of Energy, 451 F.Supp. 281 (S.D.Tex.1978). Regulation prohibiting Department of Justice employee from disclosing information or producing material in Department files or disclosing information or producing material acquired as part of performance of official duties, without prior approval by appropriate Department official or Attorney General have been upheld as valid. See United States v. Allen 554 F.2d 398 (C.A.10, 1977).

[3] The DOJ has adopted Touhy regulations pursuant to 5 U.S.C. § 301, restricting the ability of department employees to produce documents. (Docket No. 10 at p. 7.) The regulations governing the disclosure of information by DOJ employees or agents are set forth at 28 C.F.R. § 16.21 et seq. These regulations generally prohibit current and former DOJ employees from producing or disclosing information acquired as part of their official duties "without prior approval of the proper Department official." 28 C.F.R. § 16.22(a).

b. FACTUAL ARGUMENT

According to the record before the District Court and the Court of Appeals Martinez-Hernandez's trial counsel Attorney Sonia Torres was an Assistant United States Attorney (hereinafter "AUSA"), in the Criminal Division for the District of Puerto Rico, (hereinafter "DPR") from 1995 through December 2006. As AUSA she was charged with the duty to investigate, collect, analyze, and corroborate evidence in support of criminal prosecutions in violation of the laws against the United States.

In July 2002, she became the chief of the criminal division up until September 2006, when she resigned. The Criminal Division supervises the enforcement of all federal criminal laws except those that are specifically assigned to other divisions. And her mayor duties, responsibilities and job description are well established in the United States Attorneys Manual (hereinafter "USAM")[4]

While in charge of the criminal division she was responsible for supervising and ensuring that all UASA assigned to the criminal division under her wing will consult with her all-open criminal investigations, the identities of the criminal suspects violating the laws, and the evidence supporting the violation of the criminal statutes in order to select the appropriate charges for prosecution. See USMA[5]

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[4] The Criminal Division will provide assistance to a U.S. Attorney in any matter within the jurisdiction of the Division. The Division will also attempt to assist a U.S. Attorney in any matter related to the Federal Rules of Criminal Procedure or Speedy Trial Problems. Finally, the Division will serve as a conduit for a U.S. Attorney to a higher authority within or without the Department on matters within its jurisdiction. Investigating suspected or alleged offenses against the United States, see JM 9-2.010; Causing investigations to be conducted by the appropriate federal law enforcement agencies, see JM 9-2.010; Declining prosecution, see JM 9-2.020; Authorizing prosecution, see JM 9-2.030; Determining the manner of prosecuting and deciding trial related questions; Recommending whether to appeal or not to appeal from an adverse ruling or decision, see JM 9-2.170; Dismissing prosecutions, see JM 9-2.050.

[5] 9-27.300 - SELECTING CHARGES—CHARGING MOST SERIOUS OFFENSES
Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial

She was also in charge of authorizing all plea agreements negotiations including those regarding substantial assistance, non-prosecutorial agreements in return for cooperation. See USMA[6]

While in charge of the criminal division she was also in charge of supervising and approving sentencing recommendations regarding cooperation. See USMA[7]

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guidelines sentence, including mandatory minimum sentences.

To ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney. All but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision therein. Each United States Attorney's Office and litigating division of the Department is required to promulgate written guidance describing its internal indictment review process.

[6] 9-27.400 - PLEA AGREEMENTS GENERALLY
The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part X, **approval of the United States Attorney, appropriate Assistant Attorney General, or designated supervisory official is required**. This approval is required whether or not a case is resolved through a negotiated plea.

Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. **Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals.**

9-27.600 - ENTERING INTO NON-PROSECUTION AGREEMENTS IN RETURN FOR COOPERATION—GENERALLY
Except as hereafter provided, the attorney for the government may, **with supervisory approval**, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

JM 9-27.600 describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: (1)the unavailability or ineffectiveness of other means of obtaining the desired cooperation; (2)the apparent necessity of the cooperation to the public interest; and (3) **the approval of such a course of action by an appropriate supervisory official.**

Supervisory Approval. Finally, **the prosecutor should secure supervisory approval before entering into a non-prosecution agreement.** Prosecutors working under the direction of a United States Attorney must seek the approval of the United States Attorney or a supervisory Assistant United States Attorney.

[7] 9-27.730 - MAKING SENTENCING RECOMMENDATIONS

To avoid unwarranted disparities and to further the goal of uniform treatment of similarly situated defendants, the attorney for the government should first consider whether a sentence within the advisory sentencing guidelines range reflects an appropriate balance of the factors set forth above. In the typical case, such a recommendation will be

Under the responsibilities imposed pursuant to USMA Sonia Torres substantially participated and personally involved in the criminal investigation and prosecution which resulted in the criminal indictments against Martinez-Hernandez criminal cases Cr. 99-351 (JAF), Cr. 99-352 (JAF) and had to supervise criminal prosecution in Cr. 01-379 (JAF).

In complying with her duties as an AUSA she personally involved in the development, interviews and cooperation provided by Orlando Rosa Rodriguez a/k/a Oly, who was indicted in Cr. 98-009(CCC) and Cr. 97-082(SEC) and represented by attorney Marlene Aponte. (Exh. 6-Statement under penalty of perjury of attorney Marlene Aponte) [17-cv-1779 (DRD), DE No. 3] **(APP. 204)** AUSA Torres appeared representing the government in both of those cases. (Exh 7(a)-7(b)) [17-cv-1779 (DRD), DE No. 3] **(APP. 205, 206, 207-210)** As a federal cooperating witness, Rosa-Rodriguez provided information during one of his debriefings about his alleged personal involvement with Martinez-Hernandez in drug trafficking in La Perla. (Exh. 8) [17-cv-1779 (DRD), DE No. 3] **(APP. 211-215).** On 6/4/12, the government announced its intent to utilize the testimony of Rosa-Rodriguez against Martinez-Hernandez if he elected to proceed to trial in Cr. 99-3520AF) and Cr. 01-3790AF). (Exh. 9) [17-cv-1779 (DRD), DE No. 3] **(APP. 216-217).**

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appropriate. However, based on an individualized assessment of the facts and circumstances of the case, a prosecutor could conclude that a sentence above or below the guideline range better serves the public interest and the purposes of sentencing. Before recommending a sentence that reflects a departure or variance from the advisory guideline range, **the attorney for the government must obtain supervisory approval.**

1. Sentences Above or Below the Guidelines. Using the advisory guidelines as a touchstone, the attorney for the government should seek sentences that reflect an appropriate balance of the factors set forth in § 3553. In the typical case, this balance will continue to be reflected by the applicable guidelines range, and prosecutors generally should advocate for a sentence within that range. However, JM 9-27.730 recognizes that an individualized assessment of the facts and circumstances of a particular case could lead to the conclusion that a sentence above or below the advisory guidelines range would be more appropriate. **In such an event, prosecutors may make such recommendations with supervisory approval.**

5. Substantial Assistance. When making a sentencing recommendation, the attorney for the government may consider whether, and to what extent, the defendant has provided substantial assistance in the investigation or prosecution of others. **The attorney for the government must obtain supervisory approval before filing any substantial assistance motion pursuant to section 5K.1.1 of the Sentencing Guidelines or Federal Rule of Criminal Procedure 35. This requirement is addressed in JM 9-27.400.**

In preparation for using Rosa-Rodriguez as a witness in criminal case 11-cr-251 (DRD) the government debriefed him on March 30, 2011, and he related to the government that "Martinez-Hernandez AKA Cali on one occasion delivered to him 50 kilograms of cocaine marked with the symbol of Toyota." (Exh. 16) [11-cr-241 (DRD) document 3757-9 page 12 of 20]. **(APP. 232).** Since Rosa-Rodriguez' testimony pertained to drug trafficking occurring in La Perla, he was a potential Rule 404(b) witness against Martinez-Hernandez in Cr. 11-241(DRD), which charged a narcotics trafficking conspiracy occurring in La Perla, allegedly beginning on or about the year 1998. (Docket No. 3)

During the period of (2002-2006) that Sonia Torres was the chief of the criminal division, criminal indictments in Cr. 99-351 (JAF), Cr. 99-352 (JAF) and Cr. 01-379 (JAF) were all open, pending against Martinez-Hernandez, and under her watch.

In fact, she participated substantially and had a personal involvement in all the plea agreements approved in criminal case Cr. 01-379 (JAF) since they were all approved by Sonia Torres as the supervisor of criminal division. See Plea Agreement with government's[8] version of the facts attached as to Julio Rivera (ct) (Entered: 07/11/2002) [DKT #200 01-cr-379 (JAF)]. See also Plea Agreement with government's version of the facts attached as to Miguel De-Los-Santos-Avila (ct) (Entered: 07/11/2002) [DKT #202 01-cr- 379 (JAF)]. And also Plea Agreement with government's version of the facts attached as to Paulino Gil-Marte (ct) (Entered: 07/11/2002) [DKT #203 01-cr- 379 (JAF)]; Plea Agreement with government's version of the facts attached as to Manuel Buenaventura Brito-Tolentino (ct) (Entered: 07/11/2002) [DKT #204 01-cr- 379 (JAF)]; Plea Agreement with government's version of the facts attached as to Pedro Martinez (ct)

[8] Martinez-Hernandez submits that all these plea agreements were review, approved and bear the signature of Sonia Torres who was the Chief of the Criminal division, however, all remain seal.

(Entered: 07/11/2002) [DKT #205 01-cr- 379 (JAF)]. Plea Agreement with government's version of the facts attached as to Jason Machado-Morales (ct) (Entered: 07/11/2002) [DKT #207 01-cr-379 (JAF)]; Plea Agreement with government's version of the facts attached as to Jose Luis Andrades-Maldonado (ct) (Entered: 07/11/2002) [DKT #209 01-cr- 379 (JAF)]; and Plea Agreement with government's version of the facts attached as to Wilfredo Andujar-Guzman (ct) (Entered: 07/11/2002) [DKT #210 01-cr- 379 (JAF)].

Furthermore, during the discovery discussions pertaining to the evidence in criminal case 01-cr-379 (JAF) AUSA Massuco warned Sonia Torres about her personal involvement in Martinez's criminal investigation and prosecution when he related in an email that "**much of the evidence you will be looking for comes from cooperators who will not be burned for your guy's sake, believe there are 3 or 4 in 379 alone. I have recordings in 379 that I am tracking down, and Cases 99-351, 99-352, 01-379? They were on your watch. (Exh. 18).** [11-cr-00241-DRD document 3466-1 page 10of 11]. **(APP. 240). Moreover,** this fact alone would have precluded her from challenging the government's evidence since her knowledge over the criminal information was develop when she was the prosecutor in the form of interviews of cooperating witness and federal agents and handling of the criminal evidence. This conflict would have force the United States to raise the housekeeping defense against allowing her to release or use the information known when she was a government prosecutor to then assist Martinez-Hernandez in his defense, as his counsel.

While supervising the criminal division Sonia Torres also knew that Oscar Martinez-Hernandez and alias of Juan Finol was a fugitive hiding in Venezuela and that as chief of the criminal division she had the responsibility locating and extraditing him, and although she had the means and the resources to do so she never requested his extradition.

When Martinez-Hernandez was extradited to P.R., he met with legal counsel Castro-Schmidt who recommended him to retain former AUSA Sonia Torres **because of her relations with the U.S. Attorney's Office**,[9] and whom she believed could obtain a better deal for him. As a result of that recommendation, Martinez Hernandez retained AUSA Sonia Torres, who then became lead counsel in all of his pending cases. Prior to that visit, Martinez-Hernandez had never heard of Attorney Sonia Torres.[10] (Exh. 2) [17-cv-1779 (DRD), DE No. 3] **(APP. 227)** Prior to assuming his representation, Counsel Torres told him she did not have any conflicts of interest in his cases. **(APP. 227)**

On 3/20/12, Castro-Schmidt filed her appearance in the cases. (Exh. 10 – Docket No. 218) [17-cv-1779 (DRD), DE No. 3] **(APP. 218-220).** On 4/10/12, Martinez-Hernandez entered into a contract with attorney Torres, **paying her the astronomical amount of $200,000 for pre-trial services, and if he decided to go to trial, he would have to pay more.** (Exh. 11) [17-cv-1779 (DRD), DE No. 3] **(APP. 221).** Counsel Castro-Schmidt **was paid $100,000 for her pre-trial work**. (Exh. 2) [17-cv-1779 (DRD), DE No. 3] **(APP. 28).** During their joint representation, said attorneys never filed any pre-trial motions on his behalf.

When Counsel Torres received discovery that reflected Orlando Rosa-Rodriguez was a

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[9] This is exactly what Congress prohibited when enacting Title 18 U.S.C. § 207(a)(1) Congress enacted § 207(a) "to protect the public from an individual attempting to use not the expertise, but the specific knowledge obtained while serving as a public servant. Among other things, the statute seeks to prevent such knowledge from being used against the government itself." United States v. Clark, 333 F. Supp. 2d 798, 793 (E.D. Wis. 2004). Section 207(a)(1) provides in pertinent part: Any person who is an officer or employee ... of the executive branch of the United States ..., and who, after termination of his or her service or employment with the United States ..., knowingly makes, with the intent to influence, any communication to or appearance before any ... court ... of the United States ... on the behalf of any other person ... in connection with a particular matter—(A) in which the United States ... is a party ..., (B) in which the person participated personally and substantially as such officer or employee, and (C) which involved a specific party or specific parties at the time of such participation [is restricted from representation of the private party].

[10] Castro-Schmidt falsely informed the Court in her Motion in Compliance that when she initially" entered her appearance as counsel for Mr. Martinez-Hernandez he informed the undersigned that Attorney Torres-Pabon would also be appearing as the attorney in the multiple cases pending against him in this court." (Docket No. 3613, pg. 3)

witness in at least two of his indictments, she spoke to Martinez-Hernandez about her personal involvement with him, admitting that, while she was a prosecutor, Rosa-Rodriguez was a witness of hers. Martinez-Hernandez told her Rosa-Rodriguez was lying about his purported drug trafficking with him since he would never sell drugs to a friend of his enemies, and Rosa-Rodriguez was a friend of Papin and Richie, two of the persons Martinez-Hernandez had been convicted of murdering in the local court. Attorney Torres never mentioned to Martinez-Hernandez or the Court about the conflict of interests this situation created (Exh. 2), [17-cv-1779 (DRD), DE No. 3]. **(APP. 28)**

The Government who was being represented by AUSA Massucco to prosecute Martinez-Hernandez in criminal case 01-cr-379 (JAF) discovered that Sonia Torres had a conflict of interest in representing Martinez-Hernandez and brought to her attention the issue early during litigation, about her substantial participation and personal involvement in Martinez's three criminal indictment **"No conflicts? Cases 99-351, 99-352, 01-379? They were on your watch. Is this guy going to cooperate or what?" Much of the evidence you will be looking for comes from cooperators who will not be burned for your guy's sake, believe there are 3 or 4 in 379 alone. I have recordings in 379 that I am tracking down. (Exh. 18).** [11-cr-00241-DRD document 3466-1-page 10of 11]. **(APP. 240).** Despite being aware of the actual conflict AUSA Massucco never informed the Court of the conflict, nor did Sonia Torres ever inform the Court that AUSA Massucco had warned her about the actual conflict of interest she had in representing Martinez-Hernandez. Instead, both opted in keeping the information away from the Court, so that the Court would have hold a hearing to determine whether she should remain as his counsel, so that Sonia Torres would plead Martinez-Hernandez guilty without litigating any of the potential legal defenses Martinez-Hernandez could have prevailed absent a conflict- free legal representation.

Once Sonia Torres found herself trapped between the potential disqualification proceedings due the conflict of interest discovered by the government based on her former participation in his criminal investigations and personal knowledge of the government criminal and privileged information she had access while being a line prosecutor and then the Chief of the Criminal Division, the weakness of the government's witnesses testimonies, the weakness in the government's case, the potential contradictory evidence, the Brady material or any government misconduct the government may have had committed while she supervising the U.S. Attorney's Office or effectively assisting Martinez-Hernandez in his criminal defense she opted for abandoning Martinez-Hernandez because she knew that the government would have invoked the restriction[11] imposed pursuant Title18 U.S.C. SECTION 207[12] and she would have been disqualify by the Court from continuing in participating in the case.

In trying to escape her Sixth Amendment effective assistance defense duty to Martinez-Hernandez Sonia Torres went and sought refuge in her former subordinate in the United States Attorney's Office AUSA Maria Dominguez who at the time now was the new chief of the criminal division and had the authority to directly and privately approve her a plea agreement where Martinez-Hernandez cold be convince that under her alleged influences with the U.S. Attorney

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[11] One of the main reasons was that she was not going to be able to raise Martinez-Hernandez meritorious speedy trial act violation allegation against her own interest since she never requested his extradition during her tenure as the chief of the criminal division, she opted for the most simple, turn her back on Martinez-Hernandez, due to the statutory loyalties imposed under 18 US.C. Section 207.

[12] 18 U.S.C. § 207(a)(1). Section 207(a) disqualifies a former AUSA if (1) the particular matter involves the same "specific party or parties," and (2) if, while formerly employed as an AUSA, the attorney participated in the matter "personally and substantially." See id. Same matter involving specific parties "Although the statute defines 'particular matter' broadly to include 'any investigation, ... charge, accusation, arrest, or judicial or other proceeding,' ... only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1)." 5 C.F.R. § 2641.201(h)(1). While "[t]he particular matter must involve specific parties both at the time the individual participated as a Government employee and at the time the former employee makes the communication or appearance, ... the parties need not be identical at both times." 5 C.F.R. § 2641.201(h)(3). "The same particular matter may continue in another form or in part. In determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed." 5 C.F.R. § 2641.201(h)(5).

Office for the DPR she avoided him from getting a life sentence in exchange for an alleged lenient guilty plea, avoiding having to return Martinez-Hernandez back his $200,000.

Martinez-Hernandez submits that had Sonia Torres or the government timely informed the Court of actual conflict of interest, the Court would have held a hearing prior to Martinez-Hernandez pleading guilty and would have disqualify her from being his legal representative. Furthermore, Martinez-Hernandez submits that apart from the constitutional violation committed against his right to be free from conflict-free legal representation and the effective assistance of counsel, this Honorable Court is in the moral and ethical obligation to apply ethical rules imposed on all attorneys who litigate in the District Courts. The duty to ensure that the government and defense lawyers strictly follow the State Ethical Rules[13] where they are litigating, and the observing Congress ethical laws are as fundamental as enforcing and observing the law, and this Honorable Court should send a clear message that this type of conduct will not be tolerate in this Circuit.

In reviewing the legislative history of the Ethics in Government Act indicates that its objectives are to ensure government efficiency, eliminate official corruption and promote the even-handed exercise of administrative discretion. S.Rep.No. 170, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. And Adm. News 4216. The Act is a general standard and a statement of federal policy for what is to be considered proper ethical conduct by former government officials. Id. Noting the weakened public confidence in government and the deep public uneasiness with officials who switch sides, the Senate Report states that § 207 seeks to avoid even the appearance of public office being used for personal or private gain. Id. Section 207 was amended by Public

[13] 28 U.S.C.A. § 530B. Ethical standards for attorneys for the Government
(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

Law 101–194, Title I, § 101(a) on November 30, 1989, effective January 1, 1991; it now *501 restricts a former employee who "knowingly makes, with the intent to influence, any communication to or appearance before any ... court ... in connection with a particular matter ... which such person knows or reasonably should know was actually pending under his or her official responsibility[14] ..." 18 U.S.C. § 207(a)(2) (Supp.1989).

Moreover, contrary to the District and Appellate Court, other courts have found a conflict of interest in cases like Martinez-Hernandez and have disqualified former government attorneys pursuant to § 207 without expressly finding a violation of § 207, even though their contact with the matter while employed by the government was minimal. See Kessenich v. Commodity Futures Trading Commission, 684 F.2d 88 (D.C.Cir.1982), where the Court disqualified a former government attorney whose only contact with the case in question while employed by the Commission was to receive the complaint and forward notice of it to the defendant. In that case the attorney argued that his participation was merely ministerial and did not create a conflict of interest nor make him privy to confidential information. The Court examined 18 U.S.C. § 207 (1976), which focused on whether the employee had "participated personally and substantially" in the matter, stated:

> Our present concern for the integrity of the judicial and administrative process does not require that we determine whether the statute has been violated, and indeed it would be precipitous to do so. It is sufficient to note that there is a real possibility that Burr's representation of Rosenthal may be criminal. Id. At 95.

In United States v. Miller, 624 F.2d 1198 (3d Cir.1980), the Court disqualified a former

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[14] Title 18 U.S.C.A. § 202, defines "official responsibility as follows:

§ 202. Definitions.

(b) For the purposes of sections 205 and 207 of this title, the term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

assistant U.S. Attorney, even though he testified that he had no general supervisory responsibility and had no direct involvement in the preparation of the case in question, because he had "some advisory responsibility." Id. At 1200. The Court found that, although 18 U.S.C. § 207 (1980) did not prohibit the attorney's appearance, he was barred by the Code of Professional Responsibility. Id. At 1202. See also Culebras Enterprises Corporation v. Rivera–Rios, 846 F.2d 94 (1st Cir.1988). Rule 1.11 of the Model Rules provides that an attorney "shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public ... employee, unless the appropriate government agency consents after consultation." The policy considerations underlying DR9–101(B) include:

> The treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil. (Emphasis added.)

Similarly, in United States v. Dorfman, 542 F.Supp. 402, 410 (N.D.Ill.1982), the Court stated that although a former U.S. Attorney had not violated § 207(b) (1978), and although the Court could not render an advisory opinion as to whether continued representation would violate § 207(b), the Court could disqualify the attorney if his appearance would violate the Code of Professional Responsibility.

The First Circuit Court of Appeals should also be concerned with the integrity of the legal process, it must be careful in allowing a representation which may violate federal criminal laws or the rules of professional conduct.

Turning to the merits of this case it was Ms. Castro–Schmidt's on words that Sonia Torres appearance was necessary because her relationship with the U.S. Attorney Office for the DPR

would influence a good plea deal was made "knowingly" and "with the intent to influence," a move that Counsel's Castro–Schmidt and Sonia Torres knew were prohibited but that also would have trigger a disqualification as required by section 207, as warned by AUSA Massucco the common element required by both this section and Rule 1.11 that the appearance be in connection with a matter in which she had participated personally and substantially as a public officer or employee, when he stated to her no conflict, these cases were under your watch.

Finally, as already argued above Sonia Torres could not have challenge the government's evidence since it was herself who develop the same. Thus, creating an actual conflict interest because the United States would have raise the housekeeping defense prohibiting her from releasing or even using her knowledge over the criminal information she acquired while being a government prosecutor to assist Martinez-Hernandez in his defense, as her counsel, while being the former prosecutor who brought the three criminal indictments against him.

THEREFORE, based on these reasons, this Honorable Court should find that Martinez-Hernandez trial counsel's Castro- Schmidt and Sonia Torres were laboring under an actual conflict of interest under the Housekeeping Act during the legal representation of his criminal prosecution in violation of 18 U.S.C. Section 207 and his Sixth Amendment Right the effective assistance of counsel during the criminal prosecution.

2. MARTINEZ-HERNANDEZ DEFENSE COUNSEL DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE DURING THE LITIGATION OF HIS CRIMINAL TRIAL BY SUPPRESSING MERTORIOUS AVAILABLE CONSTITUTIONAL DEFENSE WHICH WOULD HAVE PLACE HIS CASE IN A DIFFERENT OUTCOME DUE TO HER ACTUAL CONFLICT OF INTEREST.

a. THE LAW

To succeed on an ineffective assistance of counsel claim, a habeas petitioner "must demonstrate both: (1) that 'counsel's performance was deficient,' meaning that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment'; and (2) 'that the deficient performance prejudiced the defense. See United States v.. Valerio, 676 F.3d 237, 246 (1st Cir.2012) (quoting Strickland, 466 U.S. at 687). The prejudice element is relaxed, however, if the petitioner " 'demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. Yeboah–Sefah v. Ficco, 556 F.3d 53, 73 (1st Cir.2009) (quoting Strickland, 466 U.S. at 692–94) (additional citation omitted).

In Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the Supreme Court held that delay of eight-and-one-half years between defendant's indictment and his arrest violated his Sixth Amendment right to speedy trial. Several Court of Appeals have followed this same trial. See United States v. Velazquez, 749 F.3d 161, 174 (3d Cir.2014)("If authorities choose to ignore available leads about a suspect's whereabouts in favor of other tasks, they may nonetheless be found negligent within the context of the speedy trial right."). See also United States v. Garza, 222 Fed.Appx. 947, 948 (11th Cir. 2007) (noting ATF agent's initial physical surveillances of the defendant's father's residence, but ensuing failure to make any further surveillances or visits to the residence for over five years). The Ninth Circuit in United States v. Reynolds, 231 Fed. Appx. 629 (9th Cir., May 3, 2007) in accord with the ruling in Doggett reversed the District Court's ruling that Reynolds failed to establish prejudice, and its denial of the motion to dismiss. Id. At 630. The Ninth Circuit found that a ''fifty-six-month delay between indictment and arrest is presumptively prejudicial".

b. FACTUAL ARGUMENT

After being convicted in the local courts in 1999 for murder, petitioner Martinez-Hernandez fled to Venezuela where he remained a fugitive until extradited by said country to the United States on January 24, 2012. (Exh. 1) [17-cv-1779 (DRD), DE No. 3] **(APP. 161).** At the time he fled the jurisdiction, he was not indicted in Federal Court and his flight was unrelated to the subsequent indictments filed against him in Cr. 99-351, Cr. 99-352, Cr. 01-379, and Cr.11-241. (Exh. 2 – Statement of Petitioner) [17-cv-1779 (DRD), DE No. 3] **(APP. 171)**

In Venezuela, Martinez-Hernandez lived under the assumed name of Juan Carlos Finol, which was known to federal authorities who mentioned said name as his alias when the indictment in Cr. 01-379 OAF) was filed on 11/6/01. (Exh. 3) [17-cv-1779 (DRD), DE No. 3] **(APP. 178).** Martinez-Hernandez had numerous official Venezuelan documents under said alias with his photo and address where he could be located. (Exh. 4(a)-4(e). **(APP. 182-198).** As appears from Exh. 4(e), [17-cv-1779 (DRD), DE No. 3] **(APP. 198-199)** the Federal Treasury Dept. had Finol's Venezuelan's address and personal identification data in a report rendered on 7/09/01. Notwithstanding said knowledge, federal authorities made no efforts to obtain his extradition. When he was detained in Venezuela by police of said country in an unrelated matter, he was arrested based on the P.R. local murder Interpol warrant that existed, not on any federal extradition requests or warrants. (Exh. 5) [17-cv-1779 (DRD), DE No. 3] **(APP. 200)**

As explained infra, when he was extradited to P.R., Martinez-Hernandez hired the legal services of counsels Castro-Schmidt and former AUSA Sonia Torres.

During their joint representation, said attorneys never filed any pre-trial motions on his behalf. Although Martinez-Hernandez brought to her attention that he felt that a motion to dismiss the indictments in Cr. 99-3510AF), Cr. 99-3520AF) and Cr. 01-3790AF), could be filed due to the extreme delay of the government in waiting in excess of 12 years to arrest him, when the

government knew that he was in Venezuela, and that also as to Cr. 11-241(DRD), he was also in Venezuela since the year 1999, and it was impossible to prove he was engaged in drug trafficking in La Perla and he had a good chance of being acquitted.[15] Attorney Torres told Martinez-Hernandez that he had not been extradited due to conflicts that existed between the United States and Venezuela. She never brought to his attention that her being head of the Criminal division of the U.S. Attorney's Office during tenure between the years 2002-2006 created a potential conflict of interests as to that issue nor did she ever inform the Court about the potential conflict. The U.S. Attorney's Office did not either. Aware of said conflicts, she and counsel Castro-Schmidt concentrated on obtaining a plea agreement. The government, who was aware of Counsel Torres' conflicts of interest and divided loyalties,[16] took advantage of said situation and provided to Martinez-Hernandez the worst plea that was negotiated in Cr. 11-241(DRD).

Leaders and drug point owners, who had engaged actively in drug trafficking in La Perla and who were also charged with firearms offenses where Martinez-Hernandez was not, received plea agreements with substantially lower sentencing recommendations: Jorge Colon-Colon (def. #4) 121-151 months. (Docket No. 1428); Carlos Serrano- Gonzalez[17] (def. #5) 130-144 months. (Docket No. 2297); Julio Serrano-Gonzalez[18] (def. #7) 121-151 months. (Docket No. 1432); Norberto Rosario-Miranda (def. #6) 121-135 months. (Docket No. 1367); Eliseo Salazar-Martinez (def. #8) 97-151 months. (Docket No. 1574); Luis Virella-Agosto

[15] This appears to be true. Appearing counsel is retained in the appeals of three defendants that went to trial in that case, has read and studied all of the evidence presented in that case and no evidence was presented linking Martinez-Hernandez to drug trafficking in La Perla.

[16] The divided loyalties are patent. For years, she was a prosecutor and head of the criminal division where Martinez-Hernandez had three pending indictments and would have loved to apprehend and prosecute him. Now, she was defending him in those same cases where she had developed one of the cooperating witnesses against him and had appeared in two as a prosecutor, and was privy of criminal information which she could not use even if she wanted too because the government would have invoked 18 U.S.C. s 207, and disqualify her from legally representing him.

[17] Third Offender.

[18] Second Offender.

(def. #11) 120 months. (Docket No. 3793); Ismael Rivera Berney[19] (def. #14) 156 months. (Docket No. 1578); Francisco Colon Quinones[20] (def, #15) 135-168 months. (Docket No. 1435). The murderous leader at La Perla Jose Herrera-Rodriguez a/k/a Cascote (def. #3) received a plea of 20 years (Docket No. 1706). Martinez-Hernandez, who was not charged in the firearms count, received a plea for the drug conspiracy that recommended a sentence of 264-324 months (Docket No. 2346, pg. 5).

The other indictments, where the conflicts of interest were more obvious, were dismissed. He pled guilty to an indictment the government could not prove beyond a reasonable doubt his guilt at trial.

Martinez-Hernandez reviewed the discovery in his cases with paralegal Papo Rosado, who informed him that attorney Sonia Torres had a conflict of interest that was affecting his representation since as chief of the criminal division from 2002-2006, she was in charge of trying to obtain his extradition from Venezuela, where the government knew his location during that time period. In order to file a motion to dismiss for speedy trial violations, she would have to be a witness against herself, and would have had to resign from the case since could not have been the his trial counsel and witness at the same time affecting her ability to provide an effective defense as secured under the Sixth Amendment.

Martinez-Hernandez submits that trial counsel Sonia Torres conflict of interest deprived him of the effective assistance of counsel because she failed to pursue a speedy trial act violation committed by the government in his case which would have resulted in the dismissal of criminal cases 99-351, Cr. 99-352, Cr. 01-379 due to excessive delay in arresting and bringing him to justice

[19] Second Offender.
[20] Second Offender.

for thirteen years when the government knew about his whereabouts and failed to act according to law.

From 1999 until his arrest in 2012, Martinez-Hernandez had become a resident of Venezuela. He inscribed his marriage in 2002 utilizing his real name and later under the alias Juan Carlos Finol lived openly at Ave. El Milagro, Edi£, Lago Park, Apartamento 6B, Maracaibo, Estado Zulia, Venezuela. He married Mayoring Yadu Navarro-Ocando, a Venezuelan citizen, and had two children, Oscar Abdiel Final Navarro, born April 24, 2000, and Valeria Sofia Final-Navarro, born August 26, 2004. Martinez-Hernandez resided in Maracaibo, Venezuela, where he remained for the last 13 years. while living in Venezuela, Martinez-Hernandez acted like a regular citizen, and even registered himself with the Venezuela National Council Electorate who issued him an Electorate Card, under the name which appeared in Indictment, Juan Carlos Fino], with Card Number V-1922569. (Exh. 4(a)-4(e) **(APP. 182-198).** The indictment in Cr. 01-3790AF) succinctly establishes that the government knew he had absconded to Venezuela and was using the alias Juan Carlos Finol. Martinez-Hernandez appears in Counts One and Seven of the indictment that identify him under the alias Carlos Finol charging him with conspiring from September 2000 to November 2000, to import 780 Kilograms of cocaine into the United States from Venezuela. (Exh.3) **(APP. 178).** The indictment confirms that the government knew Martinez-Hernandez was residing in Venezuela under his alias Carlos Fino] since at least the year 2000 yet made no effort to arrest or extradite him from said country.

The facts of this case are indistinguishable from Doggett, Velazquez, and Reynolds, and should lead to the same result. First, the delay of 12 years was "uncommonly long" according to precedent. It is seven times longer than what is required to trigger presumptive prejudice, and it is 7 years longer than the "extraordinary" delay witnessed in Doggett. Second, the delay as in Doggett

is attributable to the government who was aware of where he resided. The government did not use INTERPOL's international warrant red flag protocol or the Diplomatic Security Agency in the American embassy in Venezuela to search for, locate, and apprehend Martinez-Hernandez, as it should have. Martinez-Hernandez lived and worked openly under a known alias, the Government knew his whereabouts since before the indictment in 2000. Nor did Torres during her tenure as head of the Criminal Division from 2002-2006 initiate any extradition request from Venezuela even though she knew during that time period where he was located and under what name. Nor can the government successfully argue that a Motion to Dismiss due to pre- trial delay was meritless because it was caused by Martinez-Hernandez' flight. At the time Martinez-Hernandez fled to Venezuela, he had not been indicted in Cr. 99- 3510AF), Cr. 99-3520AF) or Cr. 01-3790AF). He was in the middle of jury deliberations in the local courts on murder charges. He did not flee to Venezuela to avoid any federal prosecution. Under these circumstances his flight was totally unrelated to the subsequent federal indictments filed against him. When he was detained by Venezuelan authorities, his arrest was made on the basis of the local court's Interpol arrest warrant filed against him, not for the federal charges. (Exh. 5). **(APP. 200)** Since Martinez-Hernandez fled to Venezuela prior to being charged in federal court (Exh. 2), **(APP. 163)** it cannot be seriously argued that said flight was to avoid federal prosecutions.

Under these circumstances, the government had to prove that it had made a good faith effort to extradite him. See U.S. v. Walton, 814 F.2d 376, 380 (7th Cir. 1987) (Defendant's absence from the country did not relieve the government from its obligations to make good faith efforts to have him returned . . . the due diligence factor should be adjudicated on a case by case basis taking into account the totality of circumstances.); U.S. v. Blanco, 861 F.2d 773, 778 (2nd Cir. 1988): ("It is

clear that the government has a constitutional duty to make a diligent, good faith effort to bring a defendant to trial promptly.")

Here, notwithstanding the government's knowledge of where Martinez-Hernandez could be located, and in knowing his assumed name, it made no good faith effort to extradite him. Nor can it be argued that any efforts to extradite him from Venezuela would have been fruitless as numerous fugitives have been extradited from Venezuela to the U.S. during the time period Martinez-Hernandez was living there. See U.S. Department of State Second Report on International Extradition of 2001 which states as to Venezuela: "Venezuela is a party to the 1988 UN Drug convention, and by the terms of the Convention narcotics trafficking and related money laundering are deemed extraditable under the bilateral extradition treaty... Venezuela has demonstrated good faith in extraditing non-Venezuelans to the United States.

On other occasions, the Venezuelan authorities have arranged for the deportation or expulsion of none-citizens to stand trial in the United States." (Exh. 14) The same assessment appears in the Third Report on International Extradition: "Venezuela has demonstrated good faith in extraditing non-Venezuelans to the United States. Since the last report, Venezuela has extradited one non-national to the United States." (Exh.15). **(APP. 230)**

Moreover, evidence that the government could have extradited Martinez- Hernandez from Venezuela can be concluded from the fact that in 2002, while Sonia Torres was head of the criminal division, drug trafficker David Vazquez Rios a/k/a "Canito Arecibo" was extradited from Venezuela to the District of Puerto Rico U.S. (Exh. 16), **(APP. 238)** and in 2009 was also Julio Mendez too (Exh. 17) **(APP. 239)**. See also statement under penalty of perjury of Martinez-Hernandez who asserts that while living in Venezuela, Tono Lena, Jaime Alberto Renteria, Frank- and Salomon Camacho were extradited to the U.S.9 (Exh. 2). **(APP. 163)**

The litigation of this issue was foreclosed due to Sonia Torres own conflict of interest in trying to argue against the United Stated before the court that while being the former head of the criminal division from 2002-2006 the government failed to extradite her former criminal defendant and now legal client (Martinez-Hernandez) from Venezuela to the U.S. Which triggered AUSA Massucco legal warning "No conflicts? Cases 99-351, 99-352, 01-379? They were on your watch. Is this guy going to cooperate or what?" (Exh. 18). **(APP. 240)**

Sonia Torres was aware of the merits of said issue can be gleaned from her discovery letter to the government dated June 21, 2012 where she requested: "Any documents that demonstrate the government was actively seeking to arrest Oscar Martinez, e.g. extradition request." (Exh. 19, pg. 2) **(APP. 241)** Nevertheless, she knew for a facts that there was no record that government had ever requested his extradition since she was in charge of executing the request that she never did, an issue that would have been unfair for the government to litigate and caused her an actual conflict of interest. Nonetheless, she informed Martinez-Hernandez that she had received discovery from the government that they had told her they made no efforts to extradite him because of the bad relationship existing between the two countries, dismissing the issue with the self-serving allegation. This excuse is false as can be seen from Exh. 14-17. **(APP. 234 and 239)**

As held in United States v. Cronic, 466 U.S. 648, 658-59 (1984): "The presumption of prejudice arises in circumstances where: (1) there exists a "complete denial of counsel" or a denial of counsel "at a critical stage" of the defendant's trial; (2) defense counsel fails to "subject the prosecution's case to meaningful adversarial testing"; or (3) counsel is called upon to render assistance where competent counsel very likely could not."

Martinez-Hernandez submits, that all three circumstances exist since no trial could be held due to Torres' prior intervention with cooperating witness Rosa-Rodriguez whom she would have

to cross examine; her prior position as head of the criminal division from 2002-2006 further deprived Martinez-Hernandez of counsel in the pre-trial stages since it placed her in the difficult position of attacking the government's failure to arrest him while she was head of the criminal division during that time period and the government knew where he could be located in violation of his speedy trial act. All of these limitations clearly hampered or dissuaded her from subjecting the prosecution's case to adversarial testing which she never did, and it deprived Martinez-Hernandez of effective assistance of counsel during plea negotiations since she was not in a position to fight the government due to said limitations. An attorney in her position was not in a position to render competent legal representation. See United States v. Schell, 775 F.2d 559, 566 (4th Cir. 1985), where the Court set aside defendant's conviction due to successive legal representation stating:

> "We conclude that due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter." The inverse is of equal application, an attorney who represented the government and developed a cooperating witness against a defendant cannot subsequently represent the defendant in those cases where her former witness will testify on the same matter he provided cooperation against the defendant.

Courts have recognized that the most common example of an actual conflict arising from successive representation occurs where an attorney's former client serves as a government witness against the attorney's current client at trial. See United States v. McCutheon, 86 F.3d 187, 189 (11th Cir. 1996). See also United States v. Malpiedi, 62 F.3d 465, 469 (2nd Cir. 1995). And also Takacs v. Engle, 768 F.2d 122, 125 (6th Cir. 1985).

THEREFORE, based on these reasons, this Honorable Court should find that Martinez-Hernandez Defense counsel deprived him of the effective assistance during the litigation of his criminal trial by suppressing meritorious available constitutional defense which would have place his case in a different outcome due to her actual conflict of interest.

3. THE GOVERNMENT PLEA NEGOTIATION IN HAVING TRIAL COUNSEL ABANDONED MARTINEZ-HERNANDEZ PRETRIAL CONSTITUTIONAL DEFENSES AND ALLOWED HER TO KEEP HER PECUNIARY INTEREST IN EXCHANGE FOR NOT REPORTING TO THE COURT TRIAL COUNSEL ACTUAL CONFLICT OF INTEREST VIOLATED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

Martinez-Hernandez submits that the failure of the government, Sonia Torres, and Castro-Schmidt to inform the Court about the actual or potential conflict also creates grounds to set aside Martinez- Hernandez guilty plea since no inquiry was ever made as to these particular allegations of conflict of interest or a valid waiver obtained from him.

a. THE LAW

Defense attorneys, have the obligation upon discovering potential conflicts of interests, to advise the Court of the problem at once. See Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978). See also Cuyler v. Sullivan, 446 U.S. 335,346 (1980). In Wheat v. United States, 486 U.S. 153, 159 (1988), the Court recognized as an example of conflict when "an attorney who has a previously or ongoing relationship to an opposing party, even when the opposing party is the Government. Under these circumstances the "appropriate inquiry focuses on the adversarial process... ", quoting U.S. v. Cronic, 466 U.S. 648,657, n. 21 (1984)

b. FACTUAL ARGUMENT

Here, former AUSA Dominguez should not have decided the conflict of interest issue and by doing so failed in her duty which required her to inform the Court of the matter. As recognized in Tatum, supra at 379-380; "when a conflict situation becomes apparent, the government has a duty to bring the issue to the court's attention and, if necessary, move for disqualification of counsel. Cf. United States v. Agurs, 427 U.S. 97, 110-11 (1976). Their failure to alert the Court of the conflict prevented the Court from fulfilling its obligations when confronted

with this type of problem. A District Court, when alerted to a potential conflict of interest, "must affirmatively participate in the waiver decision in order for the waiver to be valid" by addressing the defendant personally to ensure that conflict of interest waiver is knowing and intelligent. Wood v. Georgia, 450 U.S. 261,272 (1981); Cuyler v. Sullivan, 446 U.S. 335,347 (1980); Zuck v. Alabama, 58 F.2d 436, 440 (5th Cir. 1979) CF. United Statrs v. Foster, 469 F.2d 1 (1st Cir. 1972). See also Cuyler v. Sullivan, 446 U.S. 335, 348-350 (1980); Familia-Consoro v. United States, 160 F.3d 761, 764 (1st Cir. 1998).

THEREFORE, based on the aforementioned reasons, this Honorable Court should find that the failure of the government and trial counsel's to inform the Court of the trial attorneys were laboring under an actual conflict of interest during the legal representation of his criminal prosecution resulted in a violation of his due process rights.

4. MARTINEZ-HERNANDEZ SUBSTITUTED TRIAL COUNSEL FAILURE TO TIMELY ADDRESS THE ACTUAL CONFLICT ISSUE WITH COURT BY REQUESTING THE WITHDRAWAL OF THE GUILTY PLEA ALSO RESULTED IN DENIAL OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

a. THE LAW

In United States v Colon-Torres, 382 F.3d 76, 85-86 (1st Cir. 2004), the First Circuit ruled that:

> "The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." It is well settled that this right to effective assistance of counsel attaches at all critical stages of the trial, United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967), including at sentencing.

b. FACTUAL ARGUMENT

Martinez-Hernandez submits that Attorney Luis R. Rivera violated Martinez-Hernandez' 6th

Amendment Constitutional right to effective assistance of counsel because he failed to raise in a timely manner the conflicts of interests that existed in Torres and Castro-Schmidt's legal representation, although he specifically hired him to bring to the Court's attention the correct factual basis for said conflicts and for failing to move the Court to withdraw the plea agreement in a timely fashion. His failures affected the merits of Martinez-Hernandez' direct appeal that would have otherwise prospered if he had presented the conflict of interest's issues in a timely and correct manner.

As appears from Martinez-Hernandez' statement, attorney Luis R. Rivera was retained due to the conflicts of interests that Torres had, so that he could raise the issue before the District Court prior to sentencing. (Exh. 2) **(APP. 163).** Rivera assumed Martinez- Hemandez' legal representation on 8/16/12 (Docket No. 2440) just nine days after his change of plea hearing was held (Docket No. 2349). Although he was aware at that time of the conflicts that existed and the specific reasons for its existence, Rivera did nothing to alert the Court. Instead, he crossed his arms filing no motions concerning the matter and, on 12/11/12, filed a motion to continue the sentence hearing scheduled for 12/13/12 for the sole reason that he needed additional time to review the PSR with defendant. (Docket No. 3133) The Court set aside the sentence hearing sine die. (Docket No. 3142) On 3/04/13, the Court scheduled the sentencing hearing for 3/05/13. (Docket 3413) Throughout that 7-month period after he had assumed Martinez-Hernandez' legal representation, Rivera never filed any motion to withdraw the guilty plea based on Torres' conflicts of interests. It wasn't until the day of the sentence hearing that Rivera filed an Emergency Motion to Continue the sentence hearing falsely alleging that he had "recently" discovered that Torres had an actual conflict of interests that had affected Martinez-Hernandez' plea bargaining process in violation of his Constitutional 5th Amendment Due Process Rights and his 6th Amendment Constitutional

Right to conflict-free representation. The only factual basis mentioned in the two-page motion was that Torres had been the lead prosecutor in one of the cases she had plea bargained, Cr. 01-3700AF). (Docket No. 3421) Said motion was totally deficient since, aside from being filed tardily, it failed to raise the material facts that justified a finding of actual conflict in that Torres was the prosecutor that developed government cooperating witness Rosa-Rodriguez and her tenure as head of the criminal division of the U.S. Attorney's Office from 2002-2006 compromised her ability to file a motion to dismiss three of the four indictments filed against him as has been already argued. Prior to sentencing, Rivera never moved the Court to set aside the guilty plea.

The Court refused to continue the sentence hearing, heard oral argument from Rivera, who again failed to make a record as to the real reasons why Torres had a conflict of interests and, on the basis of Rivera's misguided arguments, denied the existence of a conflict. (fr. Sent. H.-Docket No. 3569)

After the sentence hearing was held, Rivera, for the first time, filed on 3/19/13 a Motion to Dismiss or Withdraw Plea. In said motion, Rivera again failed to identify the real reasons why Torres had a conflict of interests. (Docket No. 3466) As was subsequently stated by the First Circuit when it decided Martinez-Hernandez' direct appeal, by that time the District Court did not have jurisdiction to entertain such a motion since, pursuant to Fed. R. Cr. P. 11I, a District Court may not withdraw a guilty plea after it imposes sentence. At that time, it may only be set aside on direct appeal or collateral attack. U.S. v. Martinez-Hernandez, 818 F.3d 39, 47 (1st Cir. 2016). All subsequent motions and rulings by the District Court were entered without jurisdiction and the Appeals Court refused to consider their merits. (Id. At 48-49)

On direct appeal, the issue of Torres' conflict of interests was decided exclusively on Rivera's generalized allegations of conflict made in his motion for continuance filed the day of

sentencing and his oral arguments during the sentence hearing, which did not justify a finding of actual conflict. (Id. 46-47) The Court of Appeals refused to decide the merits of the arguments raised by Martinez-Hernandez in his Nunc Pro Trunc Motion filed by attorney Castro-Lang, precisely because the District Court had no jurisdiction to entertain the same. (Id. At 49)

Thus, Rivera's ineffectiveness deprived Martinez-Hernandez from being able to develop the conflicts issue properly on direct appeal. Under these circumstances, it is clear Martinez-Hernandez has established deficient performance and prejudice. Had attorney Rivera raised the issues promptly and detailed the factual matters that warranted a finding of conflicts of interests, there is a reasonable probability that the result would have been different. If he had presented the conflicts issue correctly, the Court would have been required to celebrate a waiver hearing which Martinez-Hernandez would not have agreed to and the Court would have set aside the guilty plea.

5. THE DISTRICT COURT COMMITED PROCEDURAL ERROR BY ASSESSING CREDIBILITY TO THE CONTROVERSY ON AN EMPLTY RECORD WITHOUT FIRST HOLDING AN EVIDENTIARY HEARING TO INVESTIGATE THE FACTUAL ALLEGATION RAISED BY MARTINEZ- HERNANDEZ DESERVED CREDIBILITY REQUIRING AS REQUIRING AN EVIDENTIARY HEARING TO RESOLVED THE CONTROVERTED FACTS AND ISSUES BETWEEN THE PARTIES UNDER THE RULES GOVERNING 2255 PROCEEDINGS.

Martinez-Hernandez submits that the District Court committed error in not holding an evidentiary hearing as required pursuant to the rules governing 2255 proceedings and this Circuit case law.

a. THE LAW

Section 2255 provides that a petitioner is entitled to an evidentiary hearing "[u]nless the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief." Under this "exacting standard," Bender v. United States, 387 F.2d 628, 630 (1st Cir.1967) (per curiam), a 2255 motion can be dismissed without a hearing only if: (1) "the petitioner's

allegations, accepted as true, would not entitle [him] to relief," Dziurgot v. Luther, 897 F.2d 1222, 1225 (1st Cir.1990) (per curiam); or (2) those allegations cannot be accepted as true because "they are contradicted by the record, inherently incredible, or conclusions rather than statements of facts." United States v. Monthsquera, 845 F.2d 1122, 1124 (1st Cir.1988) (per curiam). See, e.g., Hernandez–Hernandez v. United States, 904 F.2d 758, 762 (1st Cir.1990); Porcaro v. United States, 784 F.2d 38, 40 (1st Cir.) (per curiam), cert. denied, 479 U.S. 916 (1986); DeVincent v. United States, 602 F.2d 1006, 1009 (1st Cir.1979).

In arguing that a hearing is necessary under section 2255, the applicability of Fontaine v. United States, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973); and Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962)) (remanding for evidentiary hearing on motion to vacate sentence and withdraw guilty plea under § 2255 where allegations in support of the motion, "while improbable, cannot at this juncture be said to be incredible."), is always appropriate.

b. FACTUAL DISCUSSION.

It is Martinez-Hernandez's position that he presented the District Court evidence in the form of a sworn declaration filed by Rosa-Rodriguez' trial counsel Marlene Aponte attesting that he was a witness developed by Sonia Torres against Martinez-Hernandez. Furthermore, Martinez-Hernandez also filed documentation attesting that AUSA Massucco knew that the government was aware of Sonia Torres' actual conflict of interest, and evidence contrary to the court's findings that AUSA Massucco himself announce Rosa-Rodriguez as a witness had Martinez-Hernandez had chosen to stand trial. In addition, Martinez-Hernandez as shown this honorable court that Sonia Torres' mayor duties and responsibilities established in the United States Attorneys Manual alone would have produced the necessary evidence to established that knew all about Martinez-

Hernandez criminal investigations and prosecutions while being the Chief of the Criminal Division during her tenure in the years 2002-2006 had the Court to grant him the opportunity to seek and get the discovery in he quest for the truth.

The District Court instead summarily dismiss Martinez-Hernandez's section 2255 motion, although the motion, the files and record of the case conclusively show that Martinez-Hernandez's claims were adequate on their face, entitling Martinez-Hernandez to relief. When the law as established requires an evidentiary hearing on a motion to withdraw a guilty plea when a defendant alleges facts which, if taken as true, would entitle him to relief." See United States v. González, 202 F.3d 20, 29 (1st Cir.2000). Specifically, a defendant is entitled to an evidentiary hearing unless the facts alleged are " 'contradicted by the record or are inherently incredible and to the extent that they are merely conclusions rather than statements of fact.' " United States v. Crooker, 729 F.2d 889, 890 (1st Cir.1984) (quoting Otero-Rivera v. United States, 494 F.2d 900, 902 (1st Cir.1974)); see also Machibroda v. United States, 368 U.S. 487, 496, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962) (remanding for evidentiary hearing on motion to vacate sentence and withdraw guilty plea under § 2255 where allegations in support of the motion, "while improbable, cannot at this juncture be said to be incredible."). Dalli v. United States, 491 F.2d 758, 760 (2d Cir.1974) (appellate court views summary dismissal with disfavor if motion was supported by "a sufficient affidavit") (emphasis in original); Thus, the threshold issue is "whether, if the evidence should be offered at a hearing, it would be admissible proof entitling the petitioner to relief." Dalli, 491 F.2d at 760 (emphasis added).

Martinez-Hernandez's allegations were not so inherently incredible, vague or conclusory, as to warrant dismissal without a hearing. A review of the record in this case reveals that Martinez-Hernandez's factual and legal contentions did not contradicted the record. Indeed, because the

factual allegations relate "primarily to purported occurrences which were not attended or deeply investigated by the Court during pre-trial stage of this case, the District Court decision to dismiss Petitioner's section 2255 on an empty record was totally inappropriate. Machibroda v. United States, 368 U.S. 487, 494–95 (1962); accord, e.g., Hernandez–Hernandez v. United States, 904 F.2d at 762; United States v. Giardino, 797 F.2d 30, 32 (1st Cir.1986). And although Petitioner's factual contentions, to be sure, were supported by the partial record Martinez-Hernandez submitted, the court should have had allowed Martinez-Hernandez the opportunity to examined Sonia Torres and AUSA Massucco, and given him the opportunity to request documentation in the hands of the government to prove his case. Instead it only allowed him to introduction of affidavits which are "not the record of the case." See Bender v. United States, 387 F.2d 628, 630 (1st Cir.1967). See also United States v. Butt, 731 F.2d 75, 77–78 (1st Cir.1984) ("material issues of fact may not be resolved against the petitioner solely by relying on ex parte, sworn or unsworn, statements of the government ... or defense counsel"); and also Miller v. United States, 564 F.2d 103, 106 (1st Cir.1977) ("Affidavits may assist only in determining if there is a genuine issue of fact to resolve"), cert. denied, 435 U.S. 931 (1978). Moreover, this is not a case involving allegations "that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection." Machibroda v. United States, 368 U.S. at 495; see, e.g., Ouellette v. United States, 862 F.2d 371, 377–78 (1st Cir.1988). As indicated, Martinez-Hernandez's contentions relate to alleged occurrences which were privy only to the government which in this were AUSA Massucco and former AUSA Sonia Torres and the court should had inquired deeply into Martinez-Hernandez' allegations

Therefore, the district court erred in not holding an evidentiary hearing and should have not dismiss the case without further factual development of the same.

Reasonable jurist would find that the district court's assessment of the constitutional claims "debatable or wrong," Miller-El v. Cockrell, 537 U.S. 322, 337-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (quoting Slack v. *879 McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). The standard for issuing a Certificate of Appealability is a very low one. Miller-El, v. Cockrell, 537 U.S. 322, 338 (2003), and Martinez-Hernandez has made a substantial showing that the constitutional issues he raises are debatable among jurists of reason.

CONCLUSION

WHEREFORE, based on all the aforementioned reasons, the First Circuit panel who attended Martinez-Hernandez COA should have resolved the issues in a different manner, and the questions presented were adequate to deserve encouragement to proceed further. The Supreme Court should reevaluate the COA denial that was entered in this case, and reconsider by way of writ of certiorari the issues respectfully submitted in this petition, accordingly.

The petition for a writ of certiorari should be GRANTED.

Respectfully submitted, in Florence, Colorado, on this the 25th day of November, 2022.

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I hereby certify pursuant to 28 U.S.C. § 1746, that a true and exact copy of this document was mailed to the following address:

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In accordance with Supreme Court Rule 33 this document complies with the 40-page limitation.