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IN THE
SUPREME COURT OF THE UNITED STATES

OSCAR HERNANDEZ MALDONADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals properly affirmed the trial court's determination that the defendant was denied effective assistance of counsel when his counsel waived previous objections filed to the presentence report without the consent of the defendant and in asserting as a basis for a downward departure or variance the issue of cultural assimilation without securing the services of an expert in that area of the law or offering expert testimony in that regard.

PARTIES TO THE PROCEEDINGS

Oscar Hernandez Maldonado is the Petitioner.

The United States is the Respondent.

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**OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN
THE COURT BELOW**

The unpublished decision of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's conviction is included at A1.

BASIS FOR JURISDICTION IN THE SUPREME COURT

Petitioner, Oscar Hernandez Maldonado, requests the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered June 27, 2023. This Court has jurisdiction to consider this petition under 28 U.S.C. §1254(1).

The United States District Court for the Western District of North Carolina had jurisdiction under 18 U.S.C. §3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction under 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Supreme Court Rule 10(a):

a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Amendment VI, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was charged in a one count Bill of Information with employing, using, persuading, inducing, enticing and coercing a minor victim to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, knowing and having reason to know that such visual depiction would be transported using any means and facility of interstate and foreign commerce; and knowing and having reason to know that such visual depiction would be transported in and affecting interstate and foreign commerce; and using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce, by any means, including by computer; and the visual depiction was transported using any means and facility of interstate and foreign commerce; and the visual depiction was transported in and affecting interstate and foreign commerce; and defendant did aid and abet others in said conduct; in violation of Title 18, United States Code, Sections 2251(a) and 2251(e). Petitioner entered into a plea agreement with the United States in which he agreed to plead guilty to the one count Bill of Information. The trial court imprisoned him for a term of 360 months. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. Petitioner filed his brief and two volume joint appendix. The government, rather than filing a responsive brief, filed a motion to dismiss. The Fourth Circuit denied the motion to dismiss in an unpublished decision filed June 27, 2023, but affirmed

the criminal judgment of the district court without any further briefing or oral arguments.

ARGUMENT

Question

Whether the United States Court of Appeals properly affirmed the trial court's determination that the petitioner was not denied effective assistance of counsel on the record when his counsel waived previous objections filed to the presentence report without the consent of the petitioner and in asserting as a basis for a downward departure or variance the issue of cultural assimilation without securing the services of an expert in that area of the law or offering expert testimony in that regard

A criminal complaint was filed March 1, 2019. No bill of indictment was filed, but it was waived. A one count bill of information was filed November 27, 2019. On that same day petitioner's plea agreement was entered. While there were certain waivers as to the right to appeal contained in the plea agreement, the right to appeal based on ineffective assistance of counsel was not waived. The plea to a violation of 18 U.S.C. Section 2251(a) and (e) carried a minimum sentence of 15 years and a maximum sentence of 30 years.

Following the filing of the draft presentence report petitioner filed his objections to the presentence report which contained significant factual objections which would have been highly relevant to petitioner's request for a downward departure and variance that were subsequently raised at the sentencing hearing. A final presentence investigation report was filed, which by and large recommended no changes to the draft report. Petitioner filed a sentencing memorandum and a supplemental sentencing memorandum under seal.

At the sentencing hearing petitioner's counsel requested a variance and a downward departure from 360 months to 180-240 months. When the court inquired at the sentencing hearing whether there were any outstanding objections to the presentence report, defense counsel responded "None of significance that would affect the guidelines calculation". In his appeal petitioner contended that the act of his defense counsel in waiving the outstanding objections to the presentence report without his concurrence constitutes ineffective assistance of counsel. The transcript does not reflect that the petitioner agreed to such waiver. The defense counsel's reliance on the fact that those objections may not have affected the guideline calculations is inapposite. Since *Booker* the guidelines are no longer binding on the court. Under the statute the petitioner could have been sentenced to as little as 15 years. Therefore, those objections could have been and were relevant in determining what the petitioner's sentencing should have been under the statute in view of the request for downward departure and variance. Secondly, in regard to the acts of ineffective assistance of counsel petitioner asserts that his counsel failed to effectively represent him in regard to the issue of significant cultural assimilation into the United States. Petitioner's counsel raised this in his sentencing memorandum stating that a downward departure variance "is available for a defendant with a significant cultural assimilation into the United States, who will be required to return to his home country at an advanced age." His counsel cites United States Sentencing Guidelines Section 2L1.1 *cmt.* n. 9. This was relied on at the sentencing hearing as a basis for a downward departure or variance. At

the sentencing hearing his counsel argued that contention but failed to obtain or offer testimony of any expert in this area of the law to support his contention in that regard.

The ineffectiveness challenge herein which consisted of the waivers of objections to the presentence report and inadequacy of cultural assimilation argument were never brought to the attention of the trial court by petitioner's counsel. Consequently, petitioner contends that this error, on the part of his trial counsel, appears fully of record and can be raised in this proceeding in that "the lawyer's ineffectiveness conclusively appears on the record. *United States v. Baldovinos*, 434 F.3d 233, 239 (4th Cir. 2006)." *U.S. v. Howell*, 584 Fed. Appx. 108 (2014). This ineffectiveness of counsel appears fully of record and needs no further development. *United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010). This is an exception to the rule that ineffectiveness claims should generally be raised in a 28 U.S.C. Section 2255 motion to allow the record to be developed sufficiently. *See also, Massaro v. United States*, 538 U.S. 500, 504-06 (2003).

Strickland v. Washington, 466 U.S. 668, 687-88, 692 (1984) requires that to demonstrate ineffectiveness, a defendant must establish both a deficient performance by his counsel and prejudice resulting from such deficiency. Petitioner argues that his counsel's ineffectiveness alleged above, violates both prongs of *Strickland* and can be raised on direct appeal when, as here, it is shown conclusively in the record. *United States v. Benton*, 523 F.3d 424, 435 (4th Cir. 2008). *Strickland* is the polar star concerning claims of ineffectiveness of counsel.

REASONS FOR GRANTING THIS PETITION

Petitioner was convicted as a result of a plea of the criminal offense described in the one count Bill of Indictment. He was sentenced to 360 months imprisonment. In his appeal his sole issue was that he was denied the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This ineffective assistance of counsel arose in two respects. First, it is asserted that by waiving the objections previously filed in the presentence report without the consent of the petitioner he failed to receive effective assistance of counsel. Secondly, a basis of the ineffective assistance of counsel arose in that petitioner's counsel asserted as a basis for downward departure or variance the issue of cultural assimilation; yet, counsel failed to secure the services of an expert in that area of the law or offer expert testimony in that regard. The issue of the ineffective assistance of counsel raised in this appeal appears in the record and requires no further development. The case was decided in an unpublished decision without benefit of oral arguments. Moreover, it was decided following a motion by the government to dismiss the appeal. While the Court of Appeals denied the motion to dismiss, without requiring further briefing or oral arguments, it affirmed the petitioner's conviction. Severe prejudice inheres to petitioner from the foregoing which implicates Supreme Court Rule 10(a) which calls for an exercise of this Court's supervisory power.

CONCLUSION

Based on the foregoing, petitioner respectfully requests his case be considered for a grant of a petition for certiorari to correct the errors of the Court of Appeals for the Fourth Circuit as set forth above.

Respectfully submitted,

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