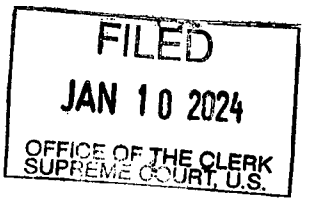
23-6585 ORIGINAL

No:



In the
Supreme Court of the United States

ARNULFO FAGOT MAXIMO,

Petitioner,

vs.

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

Arnulfo Fagot Maximo
Register Number: 91748-083
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

QUESTIONS PRESENTED FOR REVIEW

I. Should a writ of certiorari be granted to since the Fourth Circuit Court of Appeals erred in not granting a Certificate of Appealability

II. Should a writ of certiorari be granted when the District Court allowed the government's improper vouching for the testimony of witnesses

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of Virginia.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

No:

In the
Supreme Court of the United States

ARNULFO FAGOT MAXIMO,

Petitioner,

vs.

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

Arnulfo Fagot Maximo, ("Maximo") Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, was entered on November 3, 2023, *United States v. Fagot-Maximo*, No. 22-7082, 2023 U.S. App. LEXIS 29311 (4th Cir. Nov. 3, 2023) and is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, whose judgment is herein sought to be reviewed, was entered on August 17, 2022, an unpublished decision in *Fagot-Maximo* v. *United States*, No. 1:18cr00290, E.D. Va. August 17, 2022) is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on November 3, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in

> actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. Fifth Amendment.

The Sixth Amendment to the Constitution of the United States provides:

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

Id. Sixth Amendment.

STATEMENT OF THE CASE

According to the government, Fagot-Maximo played an important role in a conspiracy that involved transporting thousands of kilograms of cocaine along the Central American route. Fagot-Maximo is from the Department of Gracias a Dios,[1] Honduras, a remote region commonly

[1] This is similar to a State in the United States. (Doc. 225 p. 32)

known as "La Mosquitia." (Doc. 225 p. 32). La Mosquitia is situated on the northeastern corner of Honduras, bordering Nicaragua and the Caribbean Sea. *Id.* It is the closest point in Honduras to Colombia. *Id.* 33-34. The region's location, remoteness, and weak law enforcement presence make it the most popular area of Honduras for receiving shipments of cocaine from Colombia. *Id.* 30-34.

In La Mosquitia, Fagot-Maximo owned a beachfront property near the town of Raya, close to the Nicaraguan border. *Id.* at 78, 83, 87-90, 143, 152-153, 208-213, 242, 348, 498. There, Fagot-Maximo received shipments of cocaine sent by Colombian suppliers via small speedboats known as "go-fast boats," clandestine aircraft, and submarines. Individual shipments carried hundreds, and sometimes thousands, of kilograms of cocaine. (Doc. 81, Doc. 226, p. 54, 61-63, 123, 169-176, Doc. 227, p. 91-92, 137-145). Sometimes Fagot-Maximo owned the cocaine loads that he received; at other times, he received cocaine shipments for other traffickers in exchange for a fee (e.g., 10% of the product). (Doc. 226, p. 144-145, Doc. 228 p. 41) After receiving the cocaine in La Mosquitia, Fagot-Maximo then worked with other drug-trafficking organizations to move the cocaine into the interior of Honduras, toward Guatemala. He

often worked with the Montes DTO and its leader, Noe Montes-Bobadilla (also known as "Ton" or "Tom" Montes), to move the cocaine to its base of operations in the town of Francia, located in the neighboring Department of Colón. (Doc. 226, p. 64-65, 105-106, 159, 225-229; Doc. 227 p. 132, 144; Doc. 228, p. 41.) Once the cocaine arrived in Francia, Fagot-Maximo and the Montes DTO worked with other drug-trafficking organizations, such as the Valle drug-trafficking organization (Valle DTO), to transport the cocaine to Guatemala. (Doc. 226, p.225-226; DE:227, p. 61-66, 76-78, 135-144; Doc. 228, p. 41). Drug traffickers in Guatemala transported the cocaine to the Mexican cartels, which smuggled it into the United States. (Doc. 226, p.161-163; Doc. 227, p. 67-68, 140-141, p.146).

Two witnesses estimated that they trafficked around 10,000 kilograms of cocaine with Fagot-Maximo. (Doc. 226, p.144, Doc. 227, p. 95). Other witnesses provided testimony reflecting that they trafficked comparable amounts with him, if not more. (Doc. 225, p. 79, 82, Doc. 226, p. 16, 65-67; Doc. 227, p. 47, 140-141). In exchange, Defendant was paid in millions of U.S. dollars, part of which he used to pay his Colombian suppliers. (Doc. 225, p. 92, Doc. 226, p. 66, 166, 79-88, Doc. 228, 20-21, 25.)

STATEMENT OF THE FACTS

On October 8, 2015, a grand jury in the Eastern District of Virginia returned an indictment charging six members and associates of the Montes DTO, including Fagot-Maximo, with conspiring to distribute cocaine for importation into the United States, in violation of Title 21 U.S.C. § 959(a) and 963. (Doc. 1). The indictment described Fagot-Maximo as an associate who received cocaine for the Montes DTO in the Department of Gracias a Dios. (*Id.* at 4-7). The indictment also charged Noe Montes-Bobadilla, the leader of the Montes DTO, for his participation in the conspiracy. Both Fagot-Maximo and Montes-Bobadilla were captured in 2017 and extradited to the United States, stopping at Guantanamo Base, in Cuba for refueling and proceeding to Washington, D.C. On November 27, 2018, the trial began which resulted in a return of a verdict of guilt against Fagot-Maximo. On May 9, 2019, Fagot-Maximo was sentenced to 396 months followed by five years supervisory release and a $100.00 special assessment. (Doc. 282). Fagot-Maximo proceeded on appeal, however, on February 26, 2020, the Fourth Circuit affirmed the sentence and conviction. *See United States v. Fagot-Maximo*, 795 F. App'x 213 (4th Cir. 2020). No writ of certiorari was

sought.

In July 2021, Fagot-Maximo filed his Motion to Vacate under § 2255 — his first such motion. (Doc. 383). In this § 2255 Motion, Fagot-Maximo argued that he received ineffective assistance of counsel due to his counsel's failure: (1) "to challenge the jury venire," (2) "to challenge the venue for the 21 U.S.C. § 963 conspiracy offense," and (3) "to object to the government's improper vouching for the testimony of witness[es] . . . Suazo, and . . . Carrion . . . after the government inferred that [their] testimony was truthful during [their] direct [examination]." (Doc. 383 at 4-7; see also Doc. 384, Memorandum in Support). After a complete briefing, the District Court denied the motion. (Doc. 424). Fagot-Maximo filed a timely notice of appeal. (Doc. 426.).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with 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 power of supervision.
>
> (b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

ARGUMENT

I. SHOULD A WRIT OF CERTIORARI BE GRANTED TO SINCE THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN NOT GRANTING A CERTIFICATE OF APPEALABILITY.

A. Fagot-Maximo's Sixth Amendment Constitutional Right for Failing to Challenge the Jury Venire.

The Sixth Amendment guarantees a right to a jury selected from a group representing a fair cross-section of the community. See *Duren v. Missouri*, 439 U.S. 357, 360 (1979); *United States v. Terry*, 60 F.3d 1541, 1544 (11th Cir. 1995) (citing *Taylor v. Louisiana*, 419 U.S. 522, 528-30 (1975)). "The equal protection clause guarantees the Defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

Under the three-part test created by the Supreme Court in *Batson*, a Defendant may establish a prima facie case of discrimination by the Prosecutor by showing that: (1) the Defendant is a member of a distinct racial group; (2) the Prosecutor has used the challenges to remove from the venire members of the Defendant's race, and (3) other facts and circumstances surrounding the proceedings raise an inference that the

Prosecutor discriminated in his or her selection of the jury pool. *Batson*, 476 U.S. at 96-97; see also *Keel v. French*, 162 F.3d 263, 271 (4th Cir. 1998). In *Powers v. Ohio*, 499 U.S. 400 (1991), the Supreme Court modified *Batson* to allow Defendants of racism different than the excused juror to have the standing to raise *Batson* challenges. See *Powers,* 499 U.S. at 415. Once a Defendant establishes a prima facie case, the burden shifts to the prosecution to advance a nondiscriminatory reason for the exercise of the preemptory challenges. *Batson*, 476 U.S. at 97. The trial court will then determine whether the Defendant has proven intentional discrimination. *Id.* at 96.

During jury selection, in this case, there was only one (1) Hispanic in the jury pool. Fagot-Maximo is Honduran and speaks limited Spanish but his main language is aa dialect of his native country. The Government used a preemptory challenge to strike the *only* Hispanic in the complete jury pool. Additionally, the record reflects that Fagot-Maximo's jury was not selected from a group that represented a fair cross-section of the community. As of 2016, Alexandria Washington, and Arlington Cities had only 40,642 persons granted lawful permanent residence status of those 7.9% are classified as Latino or Hispanic. This calculation reflects

that there should be an estimated 3,800 persons eligible to serve in the petite juries. To have only one (1) Hispanic/Latino in a jury pool does not represent a fair cross-section of the community.

Hispanics are a distinctive group in the community. The representation of Hispanics in venires from which his jury was selected is not fair and reasonable concerning the number of Hispanics in the community. This under-representation is due to the systematic exclusion of Hispanics in the jury selection process. As such, the trial counsel had a professional obligation to object to the lack of Hispanics in Fagot-Maximo's Trial. The Sixth Amendment right to a jury selected from a group representing a fair cross-section of the community was violated. See, *Kimmelman*, 477 U.S. at 384 "a single, serious error may support a claim of ineffective assistance of counsel." By failing to challenge the makeup of the jury pool upon noticing that the only Hispanic in the jury pool was stricken, the counsel's performance was deficient. This error, severely prejudiced Fagot-Maximo because the distinctive group was not represented. Based upon this fact, Fagot-Maximo is entitled to relief and/or an Evidentiary Hearing to allow the parties to brief and address the matter as to why counsel's failure to address the claim before the

District Court cannot be considered a Sixth Amendment ineffective assistance of counsel violation. As such, the Appellate Court's decision was in error in not granting a certificate of appealability, this Court should grant a writ of certiorari and remand the matter to the appellate court.

II. SHOULD A WRIT OF CERTIORARI BE GRANTED WHEN THE DISTRICT COURT ALLOWED THE GOVERNMENT'S IMPROPER VOUCHING FOR THE TESTIMONY OF WITNESSES

This argument was straight forward. The argument in this claim was Juving A. Suazo Peralta ("Peralta") and Ronald J. Carrion Zala ("Zavala") were called to testify as government witnesses. As any typical cooperators, Peralta and Zavala reviewed his plea agreements and explained what repercussions they faced if they did not testify "truthfully" during trial:

Q. When did you plead guilty?

A. January of 2015.

Q. And where was the court that you pled guilty in?

A. Miami, Florida.

Q. And what were you originally sentenced to when you pled guilty?

A. 208 months in prison.

Q. Before you pled guilty, did you sign a plea agreement?

A. Yes, sir.

Q. Does that plea agreement obligate you to cooperate with the Government?

A. Yes, sir.

Q. And what's your understanding of your obligation under the plea agreement?

A. To always be available to provide any information the Government might need of me, provide any testimony, and share any information that might be useful to the U.S. Government.

Q. And do you understand that your obligation is to tell the truth?
A. Yes, sir, always tell the truth.

Q. What would happen if you didn't tell the truth?

A. Problems, additional charges.

Q. And what are you hoping to get out of cooperating with the Government?

A. Well, a reduction in my sentence.

Q. And who decides if you will get a reduction in your sentence?

A. The judge.

Q. Besides this possibility of a lowered sentence, has anything else been
promised you?

A. No, sir.

Q. Have you had your sentence reduced yet?

A. Yes, sir.

Q. Is that the result of cooperation in other cases?
A. Yes, sir.

Q. What's your current sentence?

A. 102 months in prison.

Id. (Doc. 227 at 27-30, Trial Peralta's Testimony).

A similar dialogue occurred with government witness Zavala during his direct testimony:

Q. Are you currently incarcerated?

A. Yes.

Q. What are you incarcerated for?

A. For conspiracy regarding drugs and the importation of more than 2,000
kilos.

Q. Where were you convicted?

A. Miami, Florida.

Q. What sentence did you receive?

A. 108 months.

Q. Did you plead guilty?

A. Yes.

Q. When you pleaded guilty, did you enter into an agreement with the Government?

A. Yes.

Q. Did that agreement contain cooperation provisions?

A. Yes.

Q. What's your understanding of your obligations under those provisions?

A. That I should cooperate with the United States Government with respect to the experience that I have -- the experiences I have had in my life, and that I should tell the truth as required by the Government.

Q. Are you testifying today pursuant to that cooperation agreement?

A. Yes.

Q. Do you hope to receive a benefit in return?

A. Yes.

Q. What's that benefit?

A. Well, I know that the Government can recommend a reduction in my sentence, but at the end of the day it's the judge who decides.

Q. Have you testified in a criminal case before?

A. Yes.

Q. Have you been cooperating with the United States Government for a couple years now?

A. Yes.

Q. Have you previously received a reduction in your sentence?

A. Yes.

Q. What's your sentence now?

A. I was resentenced to 59 months.

(Doc. 227, p. 7-9, Zavala's Trial Testimony)

Four things can be ascertained by the testimony elicited by the Government: (1) that the witnesses' plea agreement is contingent on providing conditioned only upon you providing full, complete, and truthful cooperation; (2) that the witness is required to "tell the complete truth"; (3) that if the witness does not "tell the complete truth" there could be "problems, additional charges." *Id.* (Doc. 227, p. 27 Zavala's Trial Testimony). In essence, if the witness lies, he will not receive the benefit of a reduced sentence at any stage.

However, a problem arises when the prosecutor elicits from the witness that his sentence has already been reduced (an unnecessary statement), thus since the sentence can only be reduced if the witness testified truthfully. Thus, no truthful testimony, no sentence reduction.

By eliciting that the sentence was already reduced, the government is advising the jury that the witness testimony was in fact, truthful. The elicited testimony leads the jury to the conclusion that the witness has provided truthful information and that the information has been corroborated since the witness's sentences were already reduced. The elicited testimony leads the jury to believe that since no repercussions have been suffered by the witness, that the information he has provided has in essence been verified by the government. Fagot-Maximo understands that it is perfectly permissible for a prosecutor to introduce a witness's plea agreement on direct examination, even if it includes a truthfulness provision. *United States v. Magallanez*, 408 F.3d 672, 679-80 (10th Cir.), *cert. denied*, 546 U.S. 955, 126 S. Ct. 468, 163 L. Ed. 2d 356 (2005). The prosecutor may also, discuss the truthfulness provision and make sure the witness is aware of the consequences of failing to tell the truth. *United States v. Bowie,* 892 F.2d 1494, 1498 (10th Cir. 1990). This is intended to allow the prosecutor to head off claims that the witness's testimony is suspect due to the plea agreement. "Use of the 'truthfulness' portions of [plea] agreements become impermissible vouching only when the prosecutors explicitly or implicitly indicate that

they can monitor and accurately verify the truthfulness of the witness's testimony." *Id.* at 1498. Such independent verification can take the form of statements about polygraph tests or detective monitoring. *Id.* In essence, the jury was led to believe that the prosecutor has a way to monitor the witness's testimony for its veracity and they [the Government] knew, the witnesses were being truthful in their testimony, thus their sentences were reduced before their testimony. The jury could reasonably infer that the government would not have "reduced" their sentences if it had not independently verified the truthfulness of the testimony. The Supreme Court's opinion in *Miller-El* made clear that whether to grant a COA is intended to be a *preliminary* inquiry, undertaken before full consideration of the petitioner's claims. *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003) (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); *Id.* at 1040 (noting that "a claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail") (emphasis added); *Id.* at 1042 (noting that "a COA determination is a separate proceeding, one distinct from the

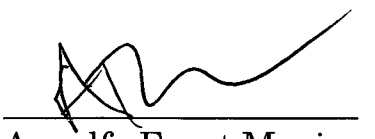
underlying merits"); *Id.* at 1046-47 (Scalia, J., concurring) (noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such "full consideration" in the course of the COA inquiry is forbidden by § 2253(c). Id. at 1039 ("When a court of appeals side steps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is, in essence, deciding an appeal without jurisdiction."). *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003). Here this Court must only agree that based on the record, Fagot-Maximo is entitled to have the case proceed further, not that he will be victorious on the merits of his claim. Even if the District Court has denied all the claims without an evidentiary, (an error in this case) this Court has the authority to grant the relief and expand upon it. V*alerio v Dir. of the Dep't of Prisons,* 306 F3d 742 (9th Cir. 2002), cert den (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788) (court of appeals not only has the power to grant COA where a district court has denied it as to all issues but also to expand COA to include additional issues when a district court has granted COA as to some but not all issues.) As such, this court must agree, that a jurist of reason

would have agreed that there was a strong possibility that the jury relied on the government vouching of its witnesses to convict Fagot-Maximo, thus permitting the matter to proceed further. It was error not to grant a Certificate of Appealability in the Court of Appeals.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Fourth Circuit.

Done this 10, day of January 2024.



Arnulfo Fagot Maximo
Register Number: 91748-083
FCI Williamsburg
P.O. Box 340
Salters, SC 29590