NO. 23-6634

ORIGINAL

IN THE UNITED STATES SUPREME COURT

ANDRES COLON-MIRANDA, aka Tuto, aka Tutin,
Petitioner

Vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

9th day of October of 2023

Andres Colon-Miranda, pro-se
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I. QUESTION(S) PRESENTED

A. What is the appropriate standard of review when an appellate court improperly grants a motion for summary dismissal that has the practical effect of dismissing an entire cause of action?

B. Whether the First Circuit Court of Appeals committed reversible error when it indulged the government's litigation strategy of filing a motion for summary disposition a day before its merits brief was due, violates the due process?

C. Whether the Court's granting of Summary Dismissal would amount to an abuse of discretion and miscarriage of justice because this case raised issue(s) of exceptional importance under the "package doctrine" used under the then-mandatory sentencing guidelines pursuant to USSG § 3D1.2?

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18 U.S.C. 1956(h)

21 U.S.C. 841(a)

21 U.S.C. 841(b)(1)(A)(iii)

21 U.S.C. 846

21 U.S.C. $$ 848(e)(1)(A)

United States Sentencing Guidelines (Manual Edition1997)

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IV. PETITION FOR A WRIT OF CERTIORARI

Andres Colon-Miranda, an inmate currently incarcerated at Federal Correctional Institution in South Carolina, pro-se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

V. OPINIONS BELOW

The First Circuit's opinion is reported at United States v. Andres Colon-Miranda, aka Tuto, aka Tutin, 21-1864 (1st Cir. July 10, 2013) and reproduced at App. ____. The opinion of the District Court for the District of Puerto Rico is reproduced at App. _____.

VI. JURISDICTION

The Court of Appeals entered judgment on July 10, 2023. App. ____. On July 25, 2023, the time for Petitioner Andres Colon-Miranda to file a petition for rehearing was enlarged to and including August 24, 2023. [21-1864] (ALW) [Entered: 07/25/2023 02:46 PM]. The petition for rehearing was not filed. On September 1, 2023, a mandate was issued.

Petitioner Andres Colon-Miranda invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) & 28 U.S.C. § 1257 , having timely filed this petition for a writ of certiorari within ninety days of the United States Court of Appeals for the First Circuit's judgment.

VII. Statutory And Constitutional Provisions Involved

18 U.S.C. 924(c)(l)

18 U.S.C. 1512(a)(1)

18 U.S.C. 1956(h)

21 U.S.C. 841(a)

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21 U.S.C. 846

21 U.S.C. $$ 848(e)(1)(A)

United States Sentencing Guidelines (Manual Edition1997)

U.S.S.G. § 3D1.2

United States Constitution, Amendment V:

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 put twice 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.

United States Constitution, Amendment XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. VIII.

VIII. INTRODUCTION

The issue(s) presented in this case is of a genuine, significant and substantially important because it will determine the standard of review the First Circuit Courts uses when reviewing the government's litigation strategy of filing a **motion for summary disposition** a day before its merits brief was due.

This case also raises issue(s) of exceptional importance under the **"package doctrine"** used under the then-mandatory sentencing guidelines pursuant to USSG § 3D1.2. A writ of certiorari should be granted.

IX. STATEMENT OF THE CASE

The substantive facts of this matter have been set forth in Petitioner Andres Colon- Miranda's original motion and First Circuit's appellate brief No. 21-1864, as well as in **United States v.Collazo-Aponte**, 216 F. 3d 163 (1st Cir. 200). Therefore, only facts necessary for the resolution of this petition for a writ of certiorari are stated here.

A. Original proceedings

Petitioner Andres Colon-Miranda was the subject of a seventeen count charged in a third superseding indictment rendered by a District of Puerto Rico Grand Jury on June 26, 1997. He was tried before a jury. On February 16, 1998, he

was found guilty as to counts one, fifty-one, fifty-three, fifty-four, fifty-five, fifty-seven, fifty-eight, fifty-nine, sixty, sixty one, sixty-two, sixty-three, sixty-four, sixty-five, and sixty-six. (Appx. A)

Relevant here, Count one charges that from in or about the beginning of 1986, the exact date being unknown to the Grand Jury, and continuing thereafter up to and including the date of the return of this indictment, within the District of Puerto Rico, and elsewhere, [defendants], Andrés Colón-Miranda, aka "Tuto," did conspire with each other, and with other persons known and unknown to the Grand Jury, to possess with intent to distribute and to distribute at least fifty (50) grams or more, the exact quantity being unknown, of a mixture and substance containing a detectable amount of cocaine base

(crack), five (5) kilograms or more, the exact quantity being unknown, of a mixture and substance containing a detectable quantity of cocaine, and (1) kilogram or more, the exact quantity being unknown, of a mixture and substance containing a detectable amount of heroin, all in violation of 21 U.S.C. Section 841(a)(1), 841(b)(1)(A) and 846. Count fifty-one charges that from on or about February 28, 1993, and continuing thereafter at least up to and including April 1, 1994, the exact dates being unknown to the Grand Jury, within the District of Puerto Rico, and elsewhere, defendants, Andrés Colón-Miranda, did conspire with each other, and with other persons known and unknown to the Grand Jury, to counsel, command, sons known OUT induce, procure, and cause the intentional killing of Luis Rosario-Rodriguez, Edwin Rosario Rodriguez, Richard Rosario-Rodriguez and other individuals whom the defendants believed to be associated with Luis Rosario-Rodriguez, Edwin Rosario-Rodríguez, and Richard Rosario-Rodriguez in their illicit drug-distribution activities, while the defendants were engaging in a conspiracy to possess with intent to distribute controlled substances as alleged in count one of the indictment, all in violation of 21 U.S.C. $$ 848(e)(1)(A) and 846.

B. The Sentence

On July 9, 1998, Petitioner Colon-Miranda was sentenced to life imprisonment for violations to Count One: 21 U.S.C. Sec. 846 and 841(a)(l) & 841(b)(1)(A)(iii) Conspiracy to possess an excess of fifty (50) grams of cocaine base (crack), five kilograms of cocaine, and a kilogram of heroin; a Class A felony; Counts Fifty-One, Fifty-Three, Fifty-Four, Fifty-Five,

Fifty-Seven, Fifty-Eight, Fifty-Nine, and Sixty-Two: 21 U.S.C. Sec. 848(e)(l)(A), 846, and 841(b)(1)(A(iii)); Class A felonies; Counts Sixty, Sixty-One, Sixty-Three and Sixty-Four:18 U.S.C. 1512 (a) Tampering with a witness,victim, or an informant, Class A felonies; Count Sixty-Five: 18 U.S.C. 924(c)(l)-Unlawful use of a firearm during and in relation to a drug trafficking offense, a Class C felony; and Count Sixty-Six: 18 U.S.C. 1956(h) - Laundering of Monetary Instruments; plus five (5) years supervised release. (Appx. B)

At the sentencing, Petitioner Colon-Miranda's guideline base offense level was set by reference to his 21 U.S.C. $ 848(e) charge (which was driven by the underlying cocaine base distribution) as well as the murder in furtherance of the Drug Conspiracy, which was then subject to a multiple count adjustment under §3D1.4, and produced a higher offense level. PSR ¶¶ 13, 14, 20, 26, 32, 38, 44, 50, 56, 62 & 68. With a total offense level of 43, and Criminal History Category I, this resulted in a then-mandatory guidelines range of Life for the above named Counts One, Fifty-One, Fifty-Three, Fifty-Four, Fifty-Five, Fifty-Seven, Fifty-Eight, Fifty-Nine, and Sixty-Two: See 21 U.S.C. Sec. 848(e) (l)(A), 846, and 841(b)(1)(A(iii)); Class A felonies. (Appx. C)

Importantly, it should be noted that Petitioner Colon-Miranda was sentenced before **United States v. Booker**, 543 U.S. 220 (2005), under the then mandatory and unconstitutional sentencing guidelines regime. Further, no drug weight was ever found by the jury. The drug weight was entirely determined by the Court using a preponderance of the evidence standard, and at sentencing the Court ruled that there was "more than 1.5 kilograms [of

cocaine base] involved." Applying the applicable provision of the sentencing guidelines as they existed on the date of PetitionerColon-Miranda's sentencing, the quantity of at least 1.5 kilograms of cocaine base had a base offense level of 38. (USSG Manual Edition 1997).

C. The First Step Act-motion and the district court's denial

On 06/10/2021, Petitioner Colon-Miranda filed a motion seeking relief under § 404 of the First Step Act of 2018. (D.C. 4047). He asserted that under the Act, he would be subject to a 30-year statutory maximum rather than mandatory life sentence. On 07/30/201, pursuant to Administrative Directive, Misc14-426 (ADC), the United States Probation Officer (USPO) and government was ordered to respond within 20 days. (D.E. 4057).

On 08/30/2021, the USPO filed its motion in compliance with court's order in re Petitioner Colon-Miranda's motion for relief under the First Step Act. (D.E. 4071). On its motion, the USPO alleged that "Petitioner Colon-Miranda is not eligible for a sentence reduction, as the defendant is subject to guideline and statutory mandatory life sentence, pursuant to Title 18, USC section 848(b) mandated a statutory life sentence. Furthermore, it claimed that on June 12, 2019, the district Court denied a previous motion requesting a sentence reduction based on the same grounds asserted in the First Step's motion (docket No.3907)." (USPO at 2-3, Appx. D)(Doc. 4071 Filed 08/30/21). **The Government did not file its response.**

Therefore, on 09/13/2021, Petitioner Colon-Miranda filed a motion for an extension of Time to file a Disagreement Memorandum twenty (20) days

after the Government filed its response to Petitioner Colon-Miranda's motion, in order to properly address both responses. (D.E. 4078). On 09/27/2021, the district court granted Petitioner Colon-Miranda's Motion for Extension of Time to File his Disagreement Memorandum. (D.E. 4082). However, on 10/06/2021, the district court unexpectedly entered an order adopting the USPO's reasoning and denying Petitioner Colon-Miranda's motion for sentence reduction. (D.E. 4087)(Appx. E).

D. The Appeal

On 10/11/2021, Petitioner Colon-Miranda filed a notice of appeal and on June 23, 2022, Appellant's brief was filed. Thereafter, on June 28, 2022, assistant United States Attorneys Mariana E. Bauza-Almonte and Thomas F. Kumbler filed their NOTICE of Appearance on behalf of Appellee United States. Subsequently, as the record shows, the United States filed four (4) motions requesting extension of time and , **after almost 17 months**, it was notified that Petitioner Colón-Miranda moved for a sentence reduction under 404 of the First Step Act (Doc. 4047), it filed a motion for summary disposition.

Petitioner Colon-Miranda filed a RESPONSE TO UNITED STATES'S MOTION FOR SUMMARY DISPOSITION and submitted that the Honorable Court should disregard the United States' motion to summary disposition because it was submitted out of time. On July 10, 2023, the First Circuit Court of Appeals entered its final JUDGMENT granting the United States' motion for summary disposition. (JUDGMENT entered by William J. Kayatta, Jr., Appellate Judge; Jeffrey R. Howard, Appellate Judge and Lara E. Montecalvo,

Appellate Judge. 21-1864. AFFIRMED. [21-1864] (ALW)). This petition for a writ of certiorari ensued.

X. REASONS FOR GRANTING THE WRIT

1. Whether the Court of Appeals committed reversible error and violated the due process of law when it indulged the government's litigation strategy of filing a motion for summary disposition a day before its merits brief was due?

A. TIMELESS

The timing for filing a motion for summary disposition is especially important. Some courts have strict timing requirements for filing motions for summary disposition, which will only be excused in extraordinary cases. For example, a party may raise a motion for summary disposition at any time on jurisdictional ground.

In the present case, the government's litigation strategy of filing a motion for summary disposition a day before its merits brief was due is problematic because the government never filed a response in the district court, which means that it waived its right. Furthermore, on appeal, the government has already filed four (4) motions for extension of time despite the fact that the First Circuit Court has warned that "no further shall be sought absent extraordinary circumstances," and the government never presented any "extraordinary circumstance" to justify its action, after 17 months that it was notified that Petitioner Colón-Miranda moved for a sentence reduction under 404 of the First Step Act (Doc. 4047).

The government's practice here has been widely used in other circuits, and as the Seventh Circuit held in **U.S. v. Fortner**, 455 F.3d 752 (7th Cir. 2006); **United States v. Lloyd**, 398 F.3d 978, 980 (7th Cir. 2005); and **Ramos v. Ashcroft**, 371 F.3d 948, 949-50 (7th Cir. 2004), that "[t]he strategy is this: instead of filing a brief on the due date, the Appellee files something else, such as a motion to [summary disposition or] dismiss. The goal and often the effect is to obtain a self-help extension of time even though the court (as the case at bar) would be unlikely to grant an extension if one were requested openly." See **U.S. v. Fortner**, 455 F.3d 752 (7th Cir. 2006); **United States v. Lloyd**, 398 F.3d 978, 980 (7th Cir. 2005); and **Ramos v. Ashcroft**, 371 F.3d 948, 949-50 (7th Cir. 2004)("a last-minute motion, if necessary, should be filed along with a timely brief, not in place of it"). Therefore, the Court should have not tolerated said action.

As in **United States v. Fortner**, 455 F. 3d 752 (7th Cir. 2006), the government's submission in this case was sixteen (16) pages long, and but for the formal requirements of Federal Rule of Appellate Procedure 28, it is essentially a brief on the merits. But by filing it the government wasted the resources of the court because Six judges had ultimately considered the appeal: three on the motion panel and three on the merits panel. The government could have made these same arguments in a brief and moved to waive oral argument if it felt that argument would be unhelpful. See FED. R. APP. P. 34. Therefore, such motion should not have been granted particularly in this criminal appeal where substantial punishment [LIFE SENTENCE] has

been imposed. Due process and fairness required more than a simple motion for summary disposition. See **United States v. Adeniji**, 179 F.3d 1028, 1029-30 (7th Cir. 1999) (Posner, J., in chambers).

The government here, like in the above-named cases, took a shortcut filing a motion for summary disposition and sought to delay the briefing in the event the motions were denied and it needed to file a full brief. See **U.S. v. Fortner**, 455 F.3d 752 (7th Cir. 2006). So this case presents the same element of self-help as in **U.S. v. Fortner**, 455 F.3d 752 (7th Cir. 2006); **United States v. Lloyd**, 398 F.3d 978, 980 (7th Cir. 2005) and **Ramos v. Ashcroft,** 371 F.3d 948, 949-50 (7th Cir. 2004).

Based on all the foregoing, Petitioner Andres Colon-Miranda respectfully submits that it is time that this Honorable Court takes firm control of this case and guides it to a swift conclusion granting the requested writ of certiorari.

B. Whether the Court's granting of Summary Dismissal would amount to an abuse of discretion and miscarriage of justice because this case raised issue(s) of exceptional importance under the "package doctrine" used under the then-mandatory sentencing guidelines pursuant to USSG § 3D1.2?

Here, the then-mandatory sentencing guidelines directed the district court to use the offense level for the most serious offense of the grouped counts in fixing the base offense level (BOL) and some of these counts involved the death of a person which the jury did not make a finding that death resulted

from the conspiracy in violation of Petitioner Colon-Miranda's constitutional rights as set forth in **Apprendi v. New Jersey**, 530 U.S. 466, 490 (2000).

In its argument, the government asserted that "the jury found Colon guilty of tampering with a witness by murder in Counts 63 and 64, which is set forth in 18 U.S.C. § 1512(a)(1). (DE 2192, 2195)." "The mandated statutory punishment for such offense is "in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112." 18 U.S.C. § 1512(a)(3)."

Thus, the government asserted that "Colón-Miranda's statutorily mandated life sentences for other counts preclude any harm because any First Step Act reduction would have no effect on the amount of time he spends in prison." And ColónMiranda's present motion under the First Step Act would not allow him to alter those two counts' sentences either because the 18 U.S.C. § 1512(a)(1) witness tampering by murder offense statutory penalties were not modified by section 2 or 3 of the Fair Sentencing Act and made retroactive by the First Step Act and is therefore not a "cover offense" under § 404 of the First Step Act. See First Step Act of 2018, § 404, 132 Stat. at 5222.

So even assuming arguendo if the district court were to reduce his sentence for Count 1, the government claimed that he will be serving the

same statutory minimum sentence of life in prison for either count—Count 63 or Count 64, rendering any error in this appeal harmless."

But the government ignore that the district court was working under the then-mandatory sentencing guidelines grouped these counts of conviction pursuant to USSG § 3D1.2. (See USSG § 3D1.2 authorizing grouping, for sentencing purposes, of counts that involve the same harm). However, with the grouped count dropped out of the equation, Petitioner Colon-Miranda's GSR will now depend on the district court's fact finding. See, e.g., **United States v. O'Brien**, 435 F.3d 36, 41 (1st Cir.2006); **United States v. Vega Molina**, 407 F.3d 511, 535 (1st Cir.2005); see also **United States v. Phillips,** 219 F.3d 404, 420 (5th Cir.2000) (vacating entire sentence on all counts of conviction because the sentence was calculated through a grouping that contained vacated counts).

But the district court has never made such a finding, and Petitioner Colon-Miranda, whose right of allocution must be held sacrosanct, will be entitled to contest that point. See e.g., **United States v. De Alba Pagán**, 33 F.3d 125, 129 (1st Cir.1994) (explaining that "[t]he right of allocution affords a criminal defendant the opportunity to make a final plea to the judge on his own behalf prior to sentencing"); see also id. at

130 (warning that "if the trial court fails to afford a defendant either the right of allocution . or its functional equivalent, vacation of the ensuing sentence must follow automatically").

Even apart from changes in the GSR, the dropped count will also alter the dimensions of the "sentencing package." That circumstance, in and of itself, may lead a sentencing court to impose a different sentence. See, e.g., **United States v. Pimienta-Redondo**, 874 F.2d 9, 17 (1st Cir.1989) (en banc) (affirming a different sentence given by the district court at resentencing on a single count of conviction after vacation of a conviction on a parallel count).

Perhaps most important, the sentencing guidelines, which were viewed as mandatory when Petitioner Colon-Miranda was originally sentenced, are now interpreted as advisory. See **United States v. Booker**, 543 U.S. at 240-41, 125 S.Ct. 738. This means that whether or not the GSR or the statutory penalties remain the same, the sentencing court has now much greater latitude in shaping a particular sentence because he is no longer subject to an automatic life sentence and the Supreme Court's **Concepcion** decision last June acknowledged "the broad discretion that judges have historically exercised when imposing and modifying sentences, and acknowledged that district courts deciding Sec 404(b) motions regularly consider evidence of...

unrelated, nonretroactive Guidelines amendments when raised by the parties," **Concepcion v. United States**, Case No 20-1650, 2022 U.S. LEXIS 3070 (June 27, 2022); See also, **Gall v. United States**, ---U.S. ----, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007) and **United States v. Martin**, 520 F.3d 87, 91 (1st Cir.2008).

In the present matter, the district court has never had the opportunity to consider **Concepcion's** holdings when it evaluated Petitioner Colon-Miranda's case for sentencing relief. Moreover, "The jury was not instructed that . . . death was an element, nor was there any special finding[] by the jury that the government proved beyond a reasonable doubt that there was a death." See **Mathis v. United States,** 579 U.S. 500, 518 (2016)("If statutory alternatives carry different punishments, then under Apprendi they must be elements."); **Burrage v. United States**, 571 U.S. 204, 210 (2014) ("Because the 'death results' enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt.").

Therefore, Petitioner Colon-Miranda respectfully submits that the life sentence violated Apprendi and that the Apprendi violation constitutes an extraordinary and compelling reason for the appellate court to have denied the government's motion for summary dismissal and granted a sentence reduction under the First Step Act of 2018., 18 U.S.C. § 3582(c)(1)(B).

XII. CONCLUSION

The United States Supreme Court recently held, "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." **Concepcion**, 142 S. Ct. at 2396. Therefore, the vehicle Petitioner Colon-Miranda relies upon for sentence reduction is a statute whose very purpose is to reopen final judgments. **Concepcion v. United States**, ____ U.S. ____, 142 S. Ct. 2389, 2399 n.3 (2022) ("No one doubts the importance of finality [of criminal judgments]. See also, Cf. **United States v. Trenkler**, 47 F.4th 42, 48 (1st Cir. 2022) ("Compassionate release is a narrow exception to the general rule of finality in sentencing.").

For the foregoing reasons, Petitioner Andres Colon-Miranda respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment of the First Circuit Court of Appeals.

Respectfully submitted this 9th day of October of 2023.

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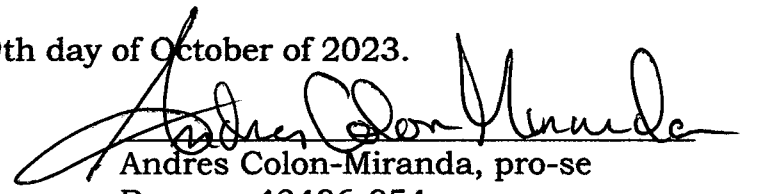
XIII. CERTIFICATE OF PRO-SE COUNSEL

I, Andres Colon-Miranda, pro-se, hereby certify that all the foregoing statements made by me are true and correct to the best of my knowledge and belief, pursuant to 28 U.S.C. Section 1746.

Respectfully submitted this 9th day of October of 2023.



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