

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NATHAN BROWN

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. May a conviction and sentenced based on a induced or coerced Plea Agreement be the basis for determination of procedural and substantial reasonableness?
2. Was there a procedural error when calculating the United States Sentencing Guidelines recommendation by stacking §2G2.1 and §2G2.2 offenses when the US Sentencing Guidelines Manual specifically states that these offenses cannot be stacked?
3. May a Appellate Court make a ruling in a case absent jurisdiction under 28 USC §1291 because the court lacked a final order in the district court?
4. Was there an abuse of discretion when the Court of Appeals vacated its own final order absent any motion from either party to do such?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITIONER FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix B to the petition and is reported at United States v. Brown, 843 F.3d 74 (CA2 2016). The Original opinion from the Second Circuit Court of Appeals appears at Appendix C to the petition and is reported at United States v. Brown, 826 F.3d 51 (CA2 2016).

The opinion of the United States district court is reported at No. 12-CR-145-GLS and Appendix A is left open for the Court.

JURISDICTION

The date on which the United States Court of Appeals initially decided Petitioner's case pursuant to Title 28 §1291 jurisdiction was June 14, 2016.

The date on which the United States Court of Appeals decided my case absent jurisdiction pursuant to Title 28 USC §1291 was December 6, 2016.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 14, 2017, and a copy of the order denying rehearing appears at Appendix

D.

An extension of time to file the petition for a writ of certiorari was granted to and including November 17, 2017 on September 28, 2017 in Application No. 17A348.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 USC §1621

Title 18 USC §1623(d)

Title 18 USC §2251(a)

Title 18 USC §2252A(a) (5) (B)

Title 18 USC §2256

Title 18 USC §3553

Title 28 USC §994(a) (1)

Title 28 USC §1291

Fed.R.Crim.P. Rule 11

Fed.R.Crim.P. Rule 52

Fed.R.App.P. Rule 2

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2012 United States Sentencing Guidelines §2G2.1

2012 United States Sentencing Guidelines §2G2.2

2012 United States Sentencing Guidelines §3D1.2

AMENDMENT FIVE TO THE UNITED STATES CONSTITUTION

AMENDMENT SIX TO THE UNITED STATES CONSTITUTION

See Appendix E for pertinent text of each citation

STATEMENT OF THE CASE

On March 9, 2012 the Petitioner was arrested by Homeland Security Investigation Agents. The Petitioner was indicted on March 21, 2012 with a Five Count indictment. On June 19, 2012 the Petitioner unknowingly plead guilty by reason of false inducement.

The Petitioner was promised a 5K1.1 downward departure in exchange for entering into a Plea Agreement to plead guilty in the United States District Court for Northern New York, which was not provided.

Defendant: Let me first begin by saying that the prosecution has, through Mr. Sacco himself, offered me an agreement to which they said in return accepting the plea agreement and going to a proffered statement to answer questions in regards to software that I would be provided with a 5K1.1.

Sentencing Transcripts Pg: 16 Ln: 3-8

Court: You may have thought something was forthcoming by 5K, but the law is such that it didn't. It's that simple.

Sentencing Transcripts Pg: 20 Ln: 4-6

The Petitioner was found by the District Court to have been not knowing in his entering of a plea agreement.

Defendant: In doing that, I'm -- it brings
into question my ability to put
faith in this attorney to fully
represent me to the proper ability
by neglecting to provide me with
information I requested from the
beginning, could have directly
influenced many of my decision to
the courts.

Sentencing Transcripts Pg: 16 Ln: 10-14

Court: There is no doubt in my mind that
-- there's much you might not
understand ...

Sentencing Transcripts Pg: 17 Ln 18-19

Court: What I'm sayin' to ya is while
you may not, in the posture of
the situation you find yourself,
understand every nuance of what's
transpired since your arrest ...

Sentencing Transcripts Pg: 19 Ln:25

Through Pg: 20 Ln: 2

The Petitioner was sentenced on January 29, 2013 in the
United States District Court for the Northern District of New
York for 3 counts of violation of 18 USC §2251(a) and 2 counts
of a violation of 18 USC §2252A(a)(5)(B) resulting in the

imposition of a 720-month total sentence; a term of lifetime supervised release; and a Restitution Order. The Petitioner promptly filed a Notice of Appeal to the Second Circuit Court of Appeals. The Court of Appeals initially vacated the Petitioner's Sentence and remanded the case back to the district court on June 14, 2016 [Docket 114]. The Court of Appeals entered this final order on June 14, 2016 at 11:22 AM [Docket 121]. The Second Circuit Court of Appeals subsequently vacated this final order and issued a new opinion on December 6, 2017, absent any motion or petition to do such from either party involved in this case [Docket 140 through 146]. The Petitioner moved the Second Circuit Court of Appeals for a panel rehearing / rehearing en banc, which the court denied on June 16, 2017. The Petitioner subsequently attempted to file a Rule 19.2 Motion to this Honorable Court on two separate occasions which the Second Circuit Court of Appeals denied through neglect.

The Petitioner was granted an extension of time to file this Petition on September 28, 2017 that extended the time to and including November 17, 2017.

REASONS FOR GRANTING THE PETITION

The Petitioner raises four questions of substantial import to this Honorable Court that if allowed to set precedence would result in a grave miscarriage of justice to not only the Petitioner but also countless other defendants in the United States judicial system, including creating a public impression that would undermine the perceived fairness and ethical nature of the courts and court system.

Question One:

There are instances in federal criminal proceedings where procedural requisites for consent are specified and a right cannot be waived except with a defendant's own informed consent. The requirement is satisfied by a colloquy between judge and defendant, reviewing all of the rights listed in Fed.R.Crim.P. Rule 11, *Gonzalez v. United States*, 553 US 242, 247 (2008). Guilty pleas must be knowing and voluntary to be valid, *McCarthy v. United States*, 394 US 459, 466 (1960). Federal Rules of Criminal Procedure Rule 11 governs the rules for the court for plea and plea agreements. Rule 11(b)(2) states that the court must address whether a Plea is voluntary and that it does not result from force, threat, or promises. This clearly shows that any promise outside that written within the plea agreement would necessarily void any such plea or plea agreement.

"In any case, it is entirely clear that a breach does not cause the guilty plea, when entered, to have been unknowing

or involuntary. It is precisely because the plea was knowing and voluntary (and hence valid) that the Government is obligated to uphold its side of the bargain.", *Puckett v. United States* 556 US 129, 137 (2009). The Petitioner was informed by his counsel present at the change of plea hearing to state that he was not promised anything and that he was doing so voluntarily because if he did not do so the government would "ensure that he got at least three life sentences" in addition to being promised a 5K1.1 for changing his plea to guilty, signing the agreement and demonstrating use of software to federal agents. None of these conditions would be presented in the Plea Agreement because doing so would invalidate the Plea. The Petitioner was told by counsel that he would be sentenced below the mandatory minimum for his offense because he was promised a 5K1.1 from the United States. Counsel stated that these details would not be in writing and not be in the plea agreement itself otherwise the agreement would be void. Counsel suborned the Petitioner to commit perjury by telling him all the Petitioner had to do was state he was doing this voluntarily and no promises were made, which the Petitioner did do at the change of plea hearing. "This Court's precedents requiring that certain waivers be personal, knowing, and voluntary are thus simply irrelevant. Those holdings determine whether error occurred, but say nothing about the proper standard of review when the claim of error is not preserved.", *Puckett v. United States*, *supra* at 138. However, the Petitioner made the court aware of this fraud, inducement, and

coercion at sentencing as the Petitioner did not feel comfortable with his counsel's advise, and as the Petitioner was finally able to have access to legal material began research that the Petitioner found was contrary to counsels statements. The court found that the Petitioner did in fact believe that he was promised a 5K1.1 in exchange for the guilty plea, See Sentencing Transcripts Pg: 20, Ln: 4-5. The Court also found that the Petitioner did not understand the proceedings at numerous points of the travels through the judicial system up to that point, see Sentencing Transcript Pg: 19 Ln: 24 through Pg: 20 Ln: 2.

Simply to rely on the concept that the Petitioner stated at the change of plea hearing that he was not promised anything in exchange for the plea agreement undermines the nature of justice by allowing governmental misconduct to supercede the defendant's rights when he is suborned to commit perjury. See Title 18 USC §1621 et seq.. To allow that to stand the Petitioner should not have been allowed to change his plea to a guilty plea because he had already stated before the court that he was not guilty prior. Just as a change of plea before the court would fall under 18 USC §1623(d), so does the Petitioner's declaration of having made false statements regarding the inducement and coercion to enter in the plea agreement.

As the Petitioner plainly stated, and the district court found, the Petitioner believed he was promised a 5K1.1 as part of the Plea Agreement even though it was not present in the written agreement. Under this Court's standard of Puckett v.

United States, *supra*, the Government is now bound by that agreement to provide what was promised. The catch of the matter is that once that occurs the Petitioner's Plea Agreement itself is invalidated as a whole under this Court's precedence of *McCarthy v. United States*, *supra*. Verbal agreements are just as binding as written agreements, See *United Steelworkers of America v. CCI Corp*, 395 F.2d 529 (CA10 1968) cert denied 393 US 1019 (1969), and as such the verbal agreement that the Petitioner believed existed between him and the Government necessarily invalidates any plea agreement between the parties as stipulated by *McCarthy v. United States*, *supra*.

As clarified in *United States v. Vonn*, 535 US 55 (2002) and *United States v. Dominguez Benitez*, 542 US 74 (2004), a Rule 11 error may be of the Rule 52(a) type or the Rule 52(b) kind, depending on when the error was raised. When Rule 52(a) governs, the prosecution has the burden of showing harmlessness, but when Rule 52(b) controls, the defendant must show that the error effects substantial rights. *United States v. Vonn*, 535 US at 62. Since the Petitioner was not silent at sentencing, and made the court aware of this error it should have been presented to the appellate court as a Rule 52(a) error to which the United States had the burden of proving that the promise of a 5K1.1 and inducement and/or coercion of the Petitioner to plead guilty was harmless error. Merely because the appellate counsel failed to bring this to the direct attention of the appellate court does not diminish the harm of this error, and as the Petitioner will show his

substantial rights were violated when he was induced and/or coerced to plead guilty in the district court.

Pleading Guilty implicates the Fifth Amendment privilege against self incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury. *Boykin v. Alabama*, 395 US 238, 243 (1969). There is no doubt that being induced to plead guilty by unfulfilled promises by the Government is a substantial harm to a defendant. The Court held that Rule 52(b) controlled, and prescribed the standard a defendant silent until appeal must meet to show "plain error", namely, "a reasonable probability that, but for the [Rule 11] error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 US at 83. Here, the defendant may NOT be considered silent on the district court record, but silent as far as the appellate proceedings are concerned, because his counsel failed to address this issue before the appellate court; thereby requiring the Petitioner to now demonstrate that he would not have entered into that plea agreement absent the promises made and the coercion experiences. See *United States v. Davila*, 569 US ___, 186 Led2d 139 (2013).

In *Padilla v. Kentucky*, 559 US 356 (2010), a plea offer was set aside because counsel had misinformed the defendant of its immigration consequences, this Court made clear that "the negotiation of a plea bargain is a critical" stage for ineffective-assistance purposes, *Id.* at ___, 176 led2d 284 at 298, and rejected the argument made by the State in this case

that a knowing and voluntary plea supercedes defense counsel's

errors. *Hill v. Lockhart*, 474 US 52 (1985), established that the Strickland's two-part test governs ineffective-assistance claims in the plea bargain context. The reality is "that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas.", *Missouri v. Frye*, 566 US 134, 139 (2012). Plea bargains have become so central to today's criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render adequate assistance of counsel that the Sixth Amendment requires at critical stages of criminal process. *Missouri v. Frye*, 566 US 134, 182 Led2d at 387-390 (2012).

Plea bargains are essentially contracts. When the consideration for a contract fails- that is, when one of the exchanged promises is not kept- the court does not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; the court says that the contract was broken. The party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely; but that is not the same thing as saying that contract was never validly concluded. When a defendant agrees to a plea bargain, the government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek remedy, which might in some cases be rescission of the agreement. Allowing him to take back the consideration he has furnished, that is, to withdraw his plea. *Puckett v. United States*, 556 US 129, 137 (2009). There is no contention that the Petitioner's

counsel has waived- that is intentionally relinquished or

abounded, *United States v. Olano*, 507 US 725, 733 (1993), the Petitioner's right to seek relief from the Government's breach. The objection is rather that the Petitioner forfeited the claim of error through his counsel's failure to raise the argument in the appellate court.

The district court judge in the Petitioner's case acted in a similar manner to that in *Santobello v. New York*, 404 US 257 (1971). The trial judge proceeded anyway to impose the 1-year sentence, reassuring Santobello that the prosecutor's recommendation did not affect his decision, 404 US at 259-260. This Court vacated the conviction and remanded the case because "the interest of justice" would thus best be served. *Id.* at 262. In the Petitioner's case the sentencing judge - who was the same judge who accepted the plea agreement - continued at sentencing after learning and stipulating to the fact that the Petitioner believed that he was promised a 5K1.1 in exchange for pleading guilty.

"Stipulations freely made and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions. This general rule is especially applicable where the United States government is a party to the agreement." *United States v. Shapiro*, 879 F.2d 468, 470-471 (CA9, 1989) (internal citations and quotation marks omitted). "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 US 149, 153, 154 (1923). At the sentencing proceedings

the Government is called upon to testify on their own behalf

during the proceedings and when the Petitioner made his declarations of the inducement by the Government in his entering in a plea agreement the Government had their opportunity to refute such a claim made under oath. The Government's and the Petitioner's counsel's silence on the Record are of "the most persuasive character" that the Petitioner's accusations are true and accurate. See *Anderson v. Superintendent of the Elmira Correctional Facility*, 2008 US App LEXIS 1065 (CA2, 2008); *United States v Canova*, 412 F.3d 331 (CA2, 2005) (gov't failure to object in the district court waives their argument on direct appeal); *United States v Crosby*, 397 F.3d 103 (CA2, 2005); *United States v Lawlor*, 168 F.3d 633 (CA2 1999).

The matter at the core of this issue is that either the Petitioner was promised a 5K1.1 as part of the plea agreement that did not come to fruition and the Government must be made to fulfill their promise in that agreement, and thus invalidating the plea agreement because the Petitioner was induced to enter into such an agreement with promises outside the written agreement or presented to the judge as is required by Rule 11; or the Petitioner was induced with false promises to enter into the plea agreement thus making such an agreement void. Guilty pleas are valid if both "voluntary" and intelligent"; the record must affirmatively disclose that a defendant who pleads guilty enters his plea understandingly and voluntarily. *Brady v. United States*, 397 US 742 (1970). See also *United States v. Jackson*, 390 US 570 (1968). In the

instant case the Record plainly defeats such a conclusion of

"voluntary".

The Judge himself admitted that the Petitioner was under the impression that there was substantial consideration for a reduced punishment offered from the government as part of the plea agreement. see Transcripts Pg: 20 Ln: 4-5 (inapposite to United States v Pavloyianis 996 F.2d 1467 (1993) (where the Court of Appeals saw nothing on the record to indicate prosecutorial misconduct)).

Question Two:

The Courts have held that the reasonableness of a sentence imposed for a violation of federal law begins with the range of sentence recommended by the United States Sentencing Guidelines ("USSG" or "Guidelines"). The Guidelines thus continue to guide the district courts in exercising their discretion by serving as "the framework for sentencing", Beckles v. United States, __ US __, 197 Led2d 145, 154 (citing Peugh v. United States 569 US __, __, 186 Led2d 84 (2013)). In the Petitioner's case the guidelines were calculated using the USSG Manual and misapplied. The rules set forth within the Petitioner's sentencing range were calculated with the Guidelines. This Court has held that a miscalculation of a defendant's proper recommended sentence results in a procedural error that mandates the vacatur of the defendant's sentence and a remand for proper sentencing. Molina-Martinez v. United States, 578 US __, 194 Led2d 444 (2016).

When the probation officer performed the calculations of

the Petitioner's recommended sentence within the Guidelines

she, either recklessly or intentionally, misapplied the rules set forth within the USSG Manual.

Under the Guidelines Part G -Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors and Obscenity, §2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production, the Commentary cites the Statutory provision that would fall within this Guideline calculation to include 18 USC §2251(a-c). Under the Guidelines Part G -Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors and Obscenity, §2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor, cites the Statutory provision that would fall within this Guideline calculation to include 18 USC §2252A(a)(5) to be set at a Base Offense Level of 18, USSG §2G2.2(a)(1). The 2012 USSG Manual plainly states under Part D - Multiple Counts, §3D1.2 Groups of Closely Related Counts, the rules set forth for grouping of offense that involve "substantially the same harm". As part of this subsection the USSG states: "Offenses covered by the following guidelines are to be grouped under this subsection: ...§§2G2.2". However, the Guidelines go further in stating:

"Specifically excluded from the operation of this subsection

are: ... §§2G2.1".

The Petitioner was induced to plead guilty to three (3) counts of a violation of 18 USC §2251(a) and two (2) counts of a violation of 18 USC §2252A(a)(5)(b). For the purposes of calculating a recommend sentence under the Guidelines the probation officer twice stacked one count of a violation of §2G2.1 offense with a §2G2.2 offense, which is strictly prohibited by the USSG §3D1.2. When the Commission wrote the USSG Manual they specifically stipulated which conduct was and was not to be stacked together. The probation officer, either deliberately or through incompetence, did not follow those rules when calculating a recommended sentence for the Petitioner.

The Guidelines anchor every sentence imposed in federal district courts. The Guidelines are "in a real sense the basis for the sentence", *Molina-Martinez v. United States*, 569 US ___, 194 Led2d 444 (quoting *Peugh v. United States*, 569 US ___, 186 Led2d 84 (2013)). The Due Process Clause requires that rules governing the imposition of sentence be drafted "with sufficient definiteness that ordinary people can understand" them, and "in a manner that does not encourage arbitrary and discriminatory enforcement", *Kolender v. Lawson*, 461 US 352, 357 (1983). As the Guidelines definitively state that 18 USC §2251(a) offenses are "specifically excluded from the operation [] subsection [3D1.2]", then a Guideline recommendation for that offense must be calculated on that offense exclusively and not stacked with another offense. The

fact that the Petitioner's USSG Recommendation is based on the

stacking of USSG §2G2.1 and §2G2.2 offense together to obtain a Guideline range, show without a doubt that the Petitioner's Due Process rights have been violated when any recommendation made by these calculations are not constrained by the law. A district court must "begin all sentencing proceedings by correctly calculating the applicable Guideline range.", *Gall v. United States*, 552 US 38, 49-50 (2007). A district court that incorrectly calculated the Guideline range commits reversible procedural error, see *Gall* 552 US at 51, and a district court that imposes a sentence within the correct Guideline range, by contrast, may be afforded a presumption that the sentence it has imposed is reasonable, see *Rita v. United States*, 551 US 338, 347 (2007).

The importance of the Guidelines in the sentencing process makes them "not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez*, 578 US at ___, 194 *Led2d* 444.

The Petitioner has plainly shown that the error in the district court presents a "significant procedural error", *Gall* *supra* at 51. The Petitioner's entire USSG calculation was based on a miscalculation and misapplication of the rules set forth in the USSG Manual. This error is reversible under this Court's holdings in *Peugh*, *supra*; *Molina-Martinez*, *supra*, and *Gall*, *supra*, this entitles the Petitioner to have his sentence vacated and this case remanded back to the district court for further proceedings.

Question Three:

The Second Circuit Court of Appeals lacked jurisdiction under 28 USC §1291 over the Petitioner's case when the Petitioner's sentence was vacated and that case was remanded back to the district court. The Court of Appeals no longer had a final order in the Petitioner's case, and there was no sentence for the Appeals Court to review as Petitioner's sentence was vacated.

In the instant case the original June 14, 2016 opinion of the Second Circuit Court states "we REMAND for resentencing in accordance with the procedures set forth in *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), and in light of this opinion.", June 14, 2016 opinion page 26 lines 3-5. This is plainly a final order relinquishing jurisdiction back to the district court. The appellate court now needs a final judgement in the district court to assume jurisdiction again. Final judgements in criminal cases means the imposition of a sentence. *United States v. Foster*, 278 F.2d 567 (CA2, 1960), cert den 364 US 834 (1960); see also *United States v. Young*, 544 F.2d 415 (CA9, 1976), cert den 429 US 1024 (1976); *United States v. Neumann*, 556 F.2d 1218 (1977) (in criminal cases final judgment within language of 28 USC §1291 means order sentencing defendant); *United States v. Romero*, 642 F.2d 392 (CA10, 1981) (decision in criminal case is not final for purposes of appeal until sentence is imposed).

Final decisions appealable under 28 USC §1291 are "judgement" as defined in Fed.R.Crim.P. 54(a), which must,

under Fed.R.Crim.P. 58 be set forth on separate documents,

distinct from jury verdict or non jury decision of the court. *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (CA1, 1980). "Final" judgement is one that ends litigation on merits and leaves nothing for the court to do but execute judgement; in criminal context, finality comes with conviction and imposition of the sentence, *United States v. Breeden*, 366 F.3d 369 (CA4, 2004).

The Government failed to make any attempt to show that the remand order could have serious or irreparable consequences, or that immediate appeal was necessary pursuant to 28 USC §1291(a)(1) to effectually challenge the court order. See *Garner v. US West Disability Plan*, 506 F.3d 957 (CA10, 2007).

Final judgement rule applicable to federal courts pursuant to 28 USC §1291 requires that, except in narrow circumstances in which right would be irretrievably lost absent immediate appeal, litigants must abide by District Court's judgements, and suffer concomitant burden of trial, until end of proceedings before gaining appellate review; and in instance such as the Petitioner's the Government must suffer the concomitant burden of going back before the district court for a new sentencing procedure until the end of those proceedings. *Van Cauwenberghe v. Biard*, 486 US 517 (1988).

Title 28 USC §1291 is not generally available as a source of appellate jurisdiction over prosecutorial appeals of final orders. *Government of Virgin Islands v. Douglas*, 812 F.2d 822

government to appeal a criminal judgement. The government's appeal to a district court's order reducing a defendant's sentence to time served was dismissed. *United States v. Ferri*, 686 F.2d 147 (CA3, 1982). Where applicability of sentencing enhancement statute is at issue, appeal by government from sentence is not authorized under criminal collateral order doctrine. *United States v. Patterson*, 882 F.2d 595 (CA1, 1989), cert den 493 US 1027 (1990).

Decree reversing and remanding "for further proceedings not inconsistent with the opinion of this court" was final and appealable where nothing remained but ministerial duty of entering decree. *Gulf Refining Co. v. United States*, 269 US 125 (1925).

The Appealable judgement must not only be final but complete, *Cosme v. Marquez*, 94 F.2d 908 (CA1, 1938); *Hunter v. Federal Life Ins Co*, 103 F.2d 192 (CA8, 1939); *Milton v. United States*, 120 F.2d 794 (CA5, 1941). The fundamental rule requiring finality of decision as basis of appeal must be followed unless express authorization for different procedure can be found. *United States v. Rosenwasser*, 145 F.2d 1015 (CA9, 1944).

Under 28 USC §1291 the Federal Courts of Appeals have jurisdiction to review only "final decisions", *United States v. McDonald*, 435 US 850 (1978); see also *Bachowski v. Usery*, 545 F.2d 363 (CA3, 1976); *Arthur Anderson & Co. v. Finesilver*, 546 F.2d 338 (CA10, 1976), cert den 429 US 1096 (1977);
Domaco

(CA2, 1977).

Furthermore, the Petitioner's Due Process rights have been violated because he has a right to have his case be heard only in a court in accordance with the Constitution. *Leary v. United States*, 395 US 6 (1969). To have three judges in a court of limited jurisdiction make a ruling in the case absent jurisdiction is in violation of Article III § 2, this is expatriation and treason to the Constitution. "[The federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 6 Wheat 264, 404 (1821).

The United States Second Circuit Court of Appeals derives its authority from Article III of the United States Constitution as is authorized by Congress in Title 28 USC 1291 et seq. The Constitution requires that 1) Courts MUST take jurisdiction if it should, and 2) can NOT take jurisdiction where it may not. See *Cohens v. Virginia*, 6 Wheat 264 (1821); *United States v. Will*, 449 US 200 (1980).

The limitation of review by the Court of Appeals to final decisions of the District Court is statutory and Jurisdictional. See *Cohen v. Beneficial Industrial Corp.* 337 US 541 (1941).

The Court noted the "universally recognized rule of common law" that, absent jurisdiction, a "court can render no judgement for or against either party". *Mansfield, C. & L. M. R. Co, v, Swan*, 111 US 379, 387 (1884). A federal court may

not award relief on the basis of a constitutional decision

absent jurisdiction conferred by Congress. When a federal court violates these jurisdictional limitations the standard practice is to remand the case. *United States v. Clark*, 445 US 23, 37 (1980).

The proper remedy in this instance would be for this Honorable Court to acknowledge the procedural error in issuing a second opinion absent jurisdiction, to vacate the second jurisdictional deficient order by the Second Circuit Court of Appeals, and remand this case back to the District Court in accordance with the original June 14, 2016 court order.

Question Four:

Incorporating all of the reasons stated in Question Three, the Petitioner expands the question to include that the Second Circuit Court of Appeals would have abused its discretion if it relied on Fed.R.App.P. Rule 2 to justify the actions of the court.

"[A]pplying a unitary abuse-of-discretion standard" does not shelter a court that makes an error of law, because "[a] court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law". *Cooter & Gell v. Hartmarx Corp.*, 496 US 384, 403, 405 (1990). "A District Court abuses its discretion if it bases it's ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence or renders a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117 (CA2 2008).

inconclusive," on the other hand, it is well established that under §§ 1291 and 1292(a) "there may be no intrusion by appeal" of the unresolved issue. The reasons are manifest. If the appellate court addressed the issue in such an inconclusive posture, it either would render an advisory opinion that had no binding effect or, if binding effect were intended, would usurp the authority of the district court to pass on the issue in the first instance. 'Appeal gives the upper court a power of review not one of intervention.'" *Walters v. Nat. Assn of Radiation Survivors*, 473 US 305, 345-346 (1985). The Court has "long recognized that such intervention is barred under §§ 1291 and 1292(a)", *Walters v. Nat. Assn of Radiation Survivors*, *supra*.

Once the Second Circuit Court of Appeals vacated the original sentence and remanded for resentencing by the district court they entered into the record a final order, Docket # 114-121. The Appellate Court relinquished jurisdiction back to the District Court with that final order. Because there was no sentence imposed on the Petitioner by the district court at that point to constitute a final order for the court of appeals to assume jurisdiction, the Appellate Court was absent jurisdiction to enter any additional order of any kind, absent a majority of the sitting circuit judges upon motion by one of the parties.

While there are mechanisms within the judicial process for one party or the other to petition the court of appeals to revisit a decision - Fed.R.App.P Rule 35 for example - no such

vehicle was utilized in this instant case. Absent a majority of the circuit judges who are in regular active service ordering the Petitioner's proceedings to be heard or reheard by the court of appeals there was no authority for the appellate court to utilize Rule 2 to circumvent Due Process and assume jurisdiction from the lower court. In fact, Rule 35 plainly states within its text that rehearing and hearings en banc are not favored and must meet one of two conditions to be justified. Both conditions require that a Petition be made for a rehearing with suggestion for hearing en banc and must be made by a majority vote of all the actively sitting circuit judges. The only petition filed after the issue of the appellate courts final order was a petition by the government for an extension of time Docket # 123, which was subsequently denied as moot. Docket # 134.

Just as District Court rulings which are not final are not subject to appellate review and the Court of Appeals has no jurisdiction to review the same under 28 USC §1291, *Kadar Corp. v. Milbury*, 549 F.2d 230 (CA1, 1977), similarly the Appellate Court cannot assume jurisdiction absent a second imposition of a sentence by the district court.

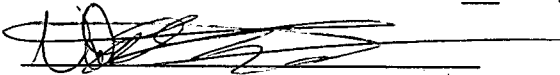
The Record is unclear as to whether the Second Circuit Court of Appeals simply acted sua sponte without jurisdiction - as shown in Question Three - or if that court abused its discretion in order to assume jurisdiction through other means.

This Honorable Court has the authority to remand this case back to either the District Court for resentencing in

accordance with the original June 14, 2017 Court Order from the Second Circuit Court of Appeals, or in the alternate remand this case back before the appellate court for that court to fully develop the record and answer the claim of the lack of jurisdiction in that court.

Conclusion:

For the reasons shown above, this Honorable Court should hear this petition before it to answer the questions presented. "In the exercise of [the Supreme Court's] appellate jurisdiction [the Court has] the power not only to correct errors in the judgement under review but to make such disposition of the case as justice requires." *Honeyman v. Hanan*, 300 US 14, 25 (1937). This Court has held that it has a "virtually unflagging obligation" to exercise jurisdiction conferred on them by Congress, *Colorado River Water Conservation Dist. v. United States*, 424 US 800, 813, 817-818 (1976) (citing *Cohens v. Virginia*, 6 Wheat 264 (1821)). This Honorable Court has the duty to correct the errors of the lower courts, as well as the obligation to answer questions of jurisdiction that are brought before it. Respectfully submitted, on this the 14 day of November, 2017.



Nathan Brown 11/14/2017