N THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

RONET BLANC,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Issue 1: ISSUE 1: The District and Circuit Courts committed plain error in not considering the then proposed and ultimately approved amendments to the sentencing guidelines which would have resulted in a 6 level decrease in Petitioners ultimate guideline sentencing range and a lower prison sentence making Petitioners sentence unreasonable.

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The Petitioner, RONET BLANC, respectfully prays that a writ of certiorari issue to review the judgment/order of the United States Court of Appeals for the Eleventh Circuit entered on September 5, 2017.

TABLE OF CONTENTS

# TABLE OF CITATIONS

## Cases



## **Statutes and Rules**

## OPINION BELOW

On the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentnece. A copy of the opinion is attached as Appendix A.

## JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

Petitioner was the defendant in the district court and will be referred to by name or as the defendant. The respondent, the Untied States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The Petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

Petitioner's case originates from felony convictions and sentences imposed in the Southern District of Florida. On April 8, 2015 Petitioner was arrested and appeared before the district court to answer to a Criminal Complaint. DE 1, 3 and 4. Petitioner was released on bail on April 10, 2015. DE 6. On April 28, 2015 Petitioner was charged in a Superseding Indictment charging him with Conspiracy to Commit unauthorized access device fraud, Title 18, United States Code § 1029(b)(2) two counts of access device fraud, Title 18, United States Code §1029(a)(2) and three counts of aggravated identity theft, Title 18, United States Code§1028A(a)(1).

On May 4, 2015 Petitioner was arraigned and entered pleas of Not Guilty to all counts of the superseding indictment. DE 18

On June 23, 2015 Petitioner entered a guilty plea to Conspiracy to Commit unauthorized access device fraud, Title 18, United States Code § 1029(b)(2) one count of access device fraud, Title 18, United States Code, § 1029(a)(2) and one count of aggravated identity theft, Title 18, United States Code §1028A(a)(1).

On August 31, 2015 Petitioner was sentenced to 70 months followed by 24 months total sentence 94 months. Three months later on November 1, 2015 the guidelines were amended as argued below which would have resulted in a sentence 6 levels lower. DE 59-60

On June 21, 2016 the district court entered an amended judgment to allow Petitioner to file his belated appeal. DE 78

On June 21, 2016 the belated appeal was timely filed. DE 80

On the Eleventh Circuit Court of Appeals affirmed Petitioners conviction and sentences.

This Petition ensues from that opinion.

## Statement of the Facts

The facts on appeal arise from the record of the change of plea and sentencing proceedings. The evidence of Appellant's offense was as follows: In September 2014, investigators with the U.S. Department of Labor learned that the Michigan Unemployment Insurance Agency, the state agency tasked with distributing federal unemployment benefits for Michigan residents, was paying out numerous claims for different individuals into the same bank accounts. One of the questionable bank accounts was in your name but was receiving Michigan Unemployment Insurance Agency disbursements in the names of numerous individuals, including M.E. and D.W. The bank account was not only opened in your name, it also listed a Florida address of 531 Northeast 141 Street in North Miami, Florida, that matched your address in the Department of Motor Vehicle records. A review of the bank account deposit history determined that from September 1 through October 31, 2014, the Michigan Unemployment Insurance Agency deposited more than $1,000 into your account in the names of claimants M.E. and D.W. Department of Labor investigators determined there were other bank accounts in the South Florida area also receiving numerous payments from the Michigan Unemployment Insurance Agency, including bank accounts in the names of two of Petitioners brothers, including Renet Blanc, as well as multiple known associates of yours and your codefendant. All of the Michigan Unemployment Insurance Agency claimants were contacted. They confirmed they were real people who had not filed unemployment insurance claims, and they had not authorized anyone else to do so. Department of Labor obtained surveillance photos and videos from automatic teller machines in South Florida. The pictures show Petitioner utilizing cards in Petitioners name that were loaded with direct deposit funds from that Michigan Unemployment Insurance Agency program paid out in the names of other individuals. The surveillance footage showed numerous other individuals using cards in Petitioners name and the codefendant's name. At least one card was used by both Petitioner and his codefendant brother to withdraw funds from ATMs at different times. The cards Petitioner and the codefendant used when withdrawing the funds are registered either to you, your significant others or family members. Petitioner were captured on surveillance withdrawing significantly more than $1,000 in fraudulently transferred funds. Law enforcement checked with State of Florida Unemployment Insurance database and compared it to the known address -- your known address. At least five distinct Florida Unemployment Insurance claims utilizing individuals with no association to your residence had claims filed in their names with the address of record as your residence. They were contacted. They confirmed they had not given you permission to use their names or personal information. Surveillance of Petitioners home confirmed he and his codefendant brother resided there, but the identified victims did not. Law enforcement sought and received a search warrant for your home. On March 18, 2015, law enforcement executed the search warrant. Inside Petitioners bedroom, law enforcement uncovered a computer that contained thousands of unique pieces of personal identifying information. In Petitioners brother's bedroom, law enforcement found, among numerous personal items belonging to the codefendant, ledgers, papers and other documents containing the personal identifying information of individuals who did not live at that residence. Law enforcement found W-2s, patient records and handwritten personal -- personally identifying information for at least 20 unique individuals. Included in the personally identifying information in your possession and that of your codefendant was the personally identifying information of an individual named W.B., in whose name fraudulent unemployment insurance benefits had been sought. Petitioner personally received more than $1,000 in a single calendar year as a result of utilizing the personally identifying information of real individuals, many of whom lived outside of Florida, and defrauding multiple state unemployment insurance programs. DE 75-12-16.

Petitioner did not submit written objections to his presentence investigation report and requested the District Court to find a -8 level downward variance from the guidelines due to the young age of Petitioner, 24, the lack of sophistication of the offense, the high attributable loss amount and the high $2,100,000 versus the actual amount received by Petitioner $63,336 and the high number of access devices attributed to Petitioner most of which were never used by Petitioner. DE 76-6-10 The District Court imposed sentence as follows: "Let me make clear on the record, then, that notwithstanding what I see in the presentence report before me that Mr. Blanc's offense level is a 27 with his criminal history category of 1. For Count 1, the guidelines recommend a sentence of between 70 to 87 months. I have given very careful consideration to the factors in 18 U.S. Code §3553, this defendant's history and characteristics. He is the older of the two conspirators and the one who profited more as between the two of them from his theft of money and his theft of people's identities over time. The offenses that bring Mr. Blanc before the Court are very serious. Mr. Widlanski has addressed that already, as have I in the prior sentencing hearing of the coconspirator brother. The sentence I impose must serve to deter Mr. Blanc, as well as others. And we don't seem to be doing a very good job of deterrence because identity theft is never-ending. There is no stop to it, and cases come before me all the time. The sentence I impose should not result in unwarranted sentencing disparity. And now understanding what his offense level is, the records before me show something different. It's my intention to resentence Renet to something a little lower, because I do think, even though Renet was not entitled to the minor role, but certainly Ronet, the older, presumably wiser, smarter brother, the one who had greater information on his computer, is the more culpable of the two. And even though we don't have much information, as Mr. Widlanski noted, because there has not been a debrief, I think it is Ronet who was the mastermind, and so the two brothers should not receive the same sentence. It is the judgment of the Court, Mr. Blanc, that you are committed to the Bureau of Prisons to be imprisoned for 94 months. The term consists of 60 months as to Count 1, 70 months as to Count 2 and 24 months consecutive as to Count 4. You are to pay restitution in the amount of $63,366." DE 76-15-17 The District Court's sentence was at the low end of Petitioner's guideline sentencing range of 70-87 months reflecting an offense level of 27 and a criminal history category of I, followed by a mandatory 24 month term.

Petitioner's Pre-Sentence Investigation Report paragraph 33 contained an upward adjustment of +6 levels "because the offense included 250 or more victims, the offense level is increased by six levels 2B1.1(b)(2)(A). On May 1, 2015, prior to the sentencing hearing the United States Sentencing Commission enacted a proposed sentencing guideline amendment which modified this guideline to require that one or more victims suffered a substantial financial hardship. The financial hardship requirement became effective November 1, 2015 and eliminated the +6 level increase discussed above. The amended guideline text is as follows: (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing<u>; or (iii) resulted in substantial financial hardship to one or more victims</u>, increase by 2 levels; 26 (B) involved 50 or more victims <u>resulted in substantial financial hardship to five or more victims</u>, increase by 4 levels; or (C) involved 250 or more <u>victims resulted in substantial financial hardship to 25 or more victims</u>, increase by 6 levels (new language underlined.)

## REASONS FOR GRANTING THE WRIT

Issue 1: The District and Circuit Courts committed plain error in not considering the then proposed and ultimately approved amendments to the sentencing guidelines which would have resulted in a 6 level decrease in Petitioners ultimate guideline sentencing range and a lower prison sentence making Petitioners sentence unreasonable.

The Appellate Court reviews sentencing arguments raised for the first time on appeal for plain error. United States v. Barrington, 648 F.3d 1178, 1195 (11th Cir. 2011). Plain error occurs when the district court (1) made an error; (2) that error is plain or obvious; (3) the error affects a substantial right of the defendant; and (4) the error "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." United States v. Raad, 406 F.3d 1322, 1323 (11th Cir. 2005). Petitioner submits that his guideline sentence range of 70-87 months would be reduced to 37-46 months by applying the then proposed amended guidelines which were enacted May 1, 2015, prior to his sentencing and became effective November 1, 2015 four months after Petitioner's sentencing. Petitioner concedes that he did not ask the District Court to consider the pending amended guideline at sentencing. Petitioner submits that it was plain error for the District Court and Appellate Court not to consider and or apply the favorable pending amended guidelines, via a downward variance, in order to avoid the imposition of a disproportionately high penalty on Petitioner when compared to identically situated defendants being sentenced after November 1, 2015. The amendment process is an important institutional component of the federal sentencing system which in the interest of fairness cannot be ignored. Each year the commission proposes amendments May 1 which automatically become enacted absent rejection by the United States Congress on November 1. Petitioner argues that he should be granted the benefit of the new guideline even though the guidelines technically in effect on the date of his sentencing were higher as ultimately computed. The District Court has the discretion to impose a downward variance sentence in order to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." U.S.S.C. 3553(a)(6) The district court is required to consider all the factors contained in 18 U.S.C. § 3553(a) and decide whether the factors support the sentence. United States v. Pugh, 515 F.3d 1179, 1191 (11th Cir. 2008). Petitioner submits that under the current (post November 1, 2015 amendment) guideline scheme, the fact that a defendant would receive a sentence 6 levels lower simply due to an arbitrary sentencing date creates an unwarranted disparity in sentence. The courts have long recognized that the application of a Sentencing Guidelines or its commentary retroactively must operate to the defendant's benefit. United States v. Masferrer, 514 F.3d 1158, 1163 (11th Cir. 2008) In the Masferrer decision the Court approved the use of the guideline in effect at the time of sentencing whenever advantageous to the defendant. In United States v. Marin, 916 F.2d 1536, 1538 & n.4 (11th Cir. 1990) the Court vacated Marin's sentence and remanding for the District Court to apply the more favorable guideline in effect when the defendant was sentenced. Although this Court applies the version of the sentencing guidelines and commentary in effect on the date of sentencing "pursuant to the Ex Post Facto Clause, if applying that version of the Guidelines would result in a harsher penalty, a defendant must be sentenced under the Guidelines in effect at the time when she committed the offense." Citing: United States v. Kapordelis, 569 F.3d 1291 (11th Cir. 2009) Also in United States v. Simmons, 368 F.3d 1335, 1338 (11th Cir. 2004) the Court affirmed use of the guidelines in effect at the time of the offense. This Court has also recognized that the application of a guideline retroactively could still violate the Ex Post Facto Clause even though the Sentencing Guidelines had been rendered advisory, see United States v. Booker, 543 U.S. 220 (2005) This Court held in United States v. Wetherald, 636 F.3d 1315, 1320-22 (11th Cir. 2011) that the application of the correct Guidelines range remains of critical importance" under an advisory sentencing scheme, because of the "simple reality" that the Guidelines "provide a starting point or 'anchor' for judges," Id. at 1321 (quoting United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008). The Court went further holding that "we will . . . find an Ex Post Facto Clause violation when a district judge's selection of a Guidelines range in effect at the time of sentencing rather than that at the time of the offense results in a substantial risk of harsher punishment." Id. at 1322.

This Court held recently in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), that "a defendant sentenced under an incorrect Guidelines range can rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range" so as "to establish an effect on substantial rights." Id. at 1349. Based on the same concerns we identified in Wetherald, 636 F.3d at 1321-22, about the significant role the Guidelines play, Molina-Martinez, 136 S. Ct. at 1345-46, 1349, and the inability of some "defendants to find evidence of the Guidelines' influence beyond the sentence itself," id. at 1347, this Court concluded that defendants "who have shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range have demonstrated a reasonable probability of a different outcome" under Federal Rule of Criminal Procedure 52(b), id. at 1346. "There may be instances when," the Court acknowledged, "despite application of an erroneous Guideline range, a reasonable probability of prejudice does not exist" to substantiate a claim for relief because the record establishes that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." Id. at 1346-47. If "the record is silent as to what the district court might have done had it considered the correct Guidelines range," the Court explained, "the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." Id. at 1347.

There is nothing in the record of this case to suggest that the district court would not have implemented the lower guideline range had that issue been raised at sentencing. The district court sentenced Petitioner at the low end of the guidelines computed at sentencing. As a practical matter Petitioner's case could have been continued until after November 1, 2015 in order to eliminate the issue entirely as the new guideline which was 6 levels lower did in fact become effective on November 1, 2015. A variance likewise would have achieved the same result. At the time of sentencing the new guideline had already been adopted by the commission and was being used to support variances in other similar cases.

The appellate court determined that the standard of review for the determination of whether a downward variance should be granted and whether or not the sentence is reasonable requires a two-part inquiry in evaluating a sentence's reasonableness, A) the Court must ensure that the district court did not commit a significant procedural error, such as improperly calculating the guideline range, treating the guidelines as mandatory, failing to consider Section 3553(a) factors, selecting a sentence based on clearly erroneous factors, or failing to explain adequately the chosen sentence; and B) to review the sentences substantive reasonableness by examining the totality of the circumstances, including an inquiry into whether the statutory factors in Section 3553(a) supports the sentence in question. United States v. Gonzalez, 550 F.3d 1319, 1323 (11th Cir. 2008) Petitioner submits that his sentence is not reasonable under the same rationale cited above regarding downward variance.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

DATED this 1st day of December, 2017.

Respectfully submitted,

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# APPENDIX "A"