

No:

**In the
Supreme Court of the United States**

EDUARDO PABON-MANDRELL,

Petitioner,

vs.

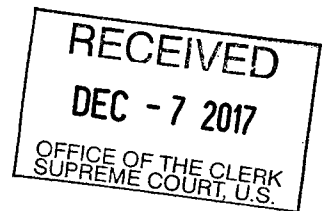
UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Register Number 31107-069
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QUESTIONS PRESENTED FOR REVIEW

Should a writ of certiorari be granted to determine whether the lower courts erred in not granting relief when the record clearly established that there is a reasonable probability that the public was not permitted access to the court during the jury selection?

Should a writ of certiorari is required to determine whether the lower court erred in refusing to recommend relief in light of the untimely filing of the Title 28 U.S.C. § 851 motion?

Should a writ of certiorari is required to address whether Pabon-Mandrell was prejudiced as a result of his inability to communicate with counsel during the trial?

**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. The United States Court of Appeal for the First Circuit and the District Court of Puerto Rico.

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

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PETITION FOR WRIT OF CERTIORARI

Eduardo Pabon-Mandrell, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *United States v. Pabon-Mandrell*, Docket No: 15-1654 and is reprinted as Appendix A to this petition.

The opinion in the denial of Petitioner's Title 28 U.S.C. § 2255 is an unpublished opinion in *United States v. Pabon-Mandrell*, Docket No: 11-2223 and is reprinted as Exhibit B to this petition.

The Report and Recommendation of the Magistrate Judge in the denial of Petitioner's Title 28 U.S.C. § 2255 *United States v. Pabon-Mandrell*, Docket No: 11-2223 is reprinted as Exhibit C to this petition.

STATEMENT OF JURISDICTION

The First Circuit's denial of Petitioner's Title 28 U.S.C. § 2253 was entered on August 24, 2017.

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

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 witness 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 U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE CASE

On March 19, 2007, a Grand Jury sitting in the District of Puerto returned a true bill charging Pabón-Mandrell and forty-one (41) co-defendants with two Counts. (CR. Docket No. 1 of Criminal No. 07-0121).¹ Count One alleged that between an unknown date ("but no later than in or about 2003") and 2007, the defendants knowingly and intentionally conspired to possess with intent to distribute in excess of: one (1) kilogram of heroin, five (5) kilograms of cocaine,

¹ "CR. Docket No." refers to docket in the District Court under Criminal Number, 07-121, "Cv. Docket No." refers to docket in the District Court under Title 28 U.S.C. § 2255 Civil No. 11-2223 (ADC/CVR) and "ADD" refers to the Addendum attached to this Motion permitted by Fed. R. App. P. 27(a)(2)(B)(i).

fifty (50) grams of crack, and one-hundred (100) kilograms of marihuana in violation 21 U.S.C. §§ 841(a)(1), 846, and 860. *Id.* The defendants operated multiple drug points selling heroin, crack, marihuana, and cocaine in the Luis Palés Matos Public Housing Project and the Jardines de Guamaní Public Housing Project of the Borinquen Ward in Guayama, Puerto Rico, for profit and financial gain, possessed firearms, and killed individuals associated with rival organizations, and cooperating with law enforcement. *Id.*

Count Two sought the forfeiture of \$1,500,000 in real or personal property, or substitute assets pursuant to 21 U.S.C. § 853. *Id.* Pabón-Mandrell and eight (8) co-defendants were found guilty of Count One after a jury trial held from February 11, 2008 to February 27, 2008. (CR Docket No. 1123).

On June 6, 2008, the sentencing hearing was held and Petitioner was sentenced to a term of life imprisonment as to Count One. (CR. Docket No. 1567). In addition, the District Court imposed a term of ten (10) years of supervised release, and a one hundred dollars (\$100) Special Monetary Assessment. (CR Docket No. 1575). Count Two was dismissed at the Sentencing Hearing. *Id.*

A timely notice of appeal was filed and the conviction was affirmed on appeal. *See, United States v. Rivera-Rodríguez, et al.*, 617 F.3d 581 (1st Cir. 2010). On January 10, 2011, *certiorari* was denied and the conviction became final. *Pabón-Mandrell v. United States*, __ US __, 131 S.Ct. 960, 178 L.Ed.2d 756 (2011). *See*

Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987)(a conviction that is “final” means a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for *certiorari* finally denied). Therefore, the Section 2255 Petition was timely filed, pursuant to the limitations provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. (Cr Docket No. 2143).

Counsel José L. Barreto-Rampollo (“Barreto”) represented Pabón-Mandrell during the pre-trial, trial, and sentencing stages of the prosecution. On direct appeal, he was represented by Counsel Rafael F. Castro-Lang (“Castro-Lang”). On October 16, 2012, the Section 2255 Petition was referred to the Magistrate Judge for a Report and Recommendation. (Cv. Docket No. 12).

On December 4, 2012, and upon examination of the arguments in support of the Section 2255, the Court ordered the transfer of Pabon-Mandrell to the District of Puerto Rico to hold an evidentiary hearing as to the issues of ineffective assistance of counsel for not advancing opposition to the alleged exclusion of persons at the trial - as substantiated by sworn statements submitted with the Section 2255 Petition – and - for trial counsel’s alleged failure to apprise Pabon-Mandrell of the right to testify at trial on his behalf. The court further ordered the appointment of counsel for Pabon-Mandrell under the CJA provisions. (Cv. Docket No. 15).

Appointed counsel, Javier A. Cuyar-Olivo, requested additional time to review the record, receive additional documents from Petitioner's family, meet with Pabon-Mandrell and prepare for the evidentiary hearing. (Cv. Docket Nos. 18, 21 and 23). Those requests were granted. (Cv. Docket Nos. 19, 22 and 24). On September 2, 2013, counsel Cuyar-Olivo informed that, because of medical reasons, counsel Barreto would not be available to testify during the hearing. (Cv. Docket No. 25). Thus, he asked for the evidentiary hearing to be continued to provide time to counsel Barreto to recover, discuss the case with him, and testify at the evidentiary hearing. *Id.* Similar requests were made thereafter on the same grounds.

Sadly, on October 31, 2013, counsel Cuyar-Olivo informed that counsel Barreto passed away. (Cv. Docket No. 32). On November 1, 2013, a status conference was held during which the undersigned inquired whether a hearing was necessary inasmuch as the issues raised in the Section 2255 Petition required the testimony of trial counsel Barreto. Counsel Cuyar-Olivo agreed to meet with his client and inform the court as to whether the hearing was necessary. (Cv. Docket No. 34).

As a result, on November 21, 2013, the District Court held a hearing addressing the issues in the Title 28 U.S.C. § 2255 where Pabon-Mandrell called a witness Ms. Ashley M. Ortiz-Suarez ("Ortiz") and testified on his own behalf. The

Government called as a witness counsel Rosa Bonini-Laracuate (“counsel Bonini”). (Cv. Docket No. 41).

Subsequently, after the hearing, the Magistrate Judge recommended a denial on the merits and the District Court (Cv. Docket No. 41). Pabon-Mandrell filed objections and supplemental objections to the Magistrate’s Report and Recommendation. (Cv. Docket No. 44 and 50). On March 10, 2015, the District Court adopted the Magistrate’s Report and Recommendation in its entirety. (Cv. Docket No. 52, 53).

A certificate of appealability was sought in the First Circuit which was denied on August 24, 2017.

STATEMENT OF THE FACTS

On March 19, 2007, a Grand Jury sitting in the District of Puerto returned a true bill charging Pabón-Mandrell and forty-one (41) co-defendants with two Counts. (Docket No. 1 of Criminal No. 07-0121). Count One alleged that between an unknown date (“but no later than in or about 2003”) and 2007, the defendants knowingly and intentionally conspired to possess with intent to distribute in excess of: one (1) kilogram of heroin, five (5) kilograms of cocaine, fifty (50) grams of crack, and one-hundred (100) kilograms of marihuana in violation 21 U.S.C. §§ 841(a)(1), 846, and 860. *Id.*

The defendants operated multiple drug points selling heroin, crack, marihuana, and cocaine in the Luis Palés Matos Public Housing Project and the Jardines de Guamaní Public Housing Project of the Borinquen Ward in Guayama, Puerto Rico, for profit and financial gain, possessed firearms, and killed individuals associated with rival organizations, and cooperating with law enforcement. *Id.* Count Two sought the forfeiture of \$1,500,000 in real or personal property, or substitute assets pursuant to 21 U.S.C. § 853. *Id.*

Pabón-Mandrell and eight (8) co-defendants were found guilty of Count One after a jury trial held from February 11, 2008, to February 27, 2008. (Docket No. 1123 of Criminal No. 07-0121). On June 6, 2008, the sentencing hearing was held and Petitioner was sentenced to a term of life imprisonment as to Count One. (Docket No. 1567 of Criminal Case No. 07-0121). In addition, the District Court imposed a term of ten (10) years of supervised release, and a one hundred dollars (\$100) Special Monetary Assessment.

REASONS FOR GRANTING THE WRIT

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

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10 CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on 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 the applicable decision of this Court.... *Id.*

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

QUESTIONS PRESENTED

SHOULD A WRIT OF CERTIORARI BE GRANTED TO DETERMINE WHETHER THE LOWER COURTS ERRED IN NOT GRANTING RELIEF WHEN THE RECORD CLEARLY ESTABLISHED THAT THERE IS A REASONABLE PROBABILITY THAT THE PUBLIC WAS NOT PERMITTED ACCESS TO THE COURT DURING THE JURY SELECTION?

One of the primary issues of ineffective assistance of counsel hurdles the *Strickland v. Washington*, 466 U.S. 668 (1984) standard applies, is that Pabon-Mandrell “must establish both that counsel’s representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” See *Turner v. United States*, 699 F.3d 578 (1st Cir. 2012).

One of Pabon-Mandrell’s most crucial issue in his Title 28 U.S.C. § 2255, was that he alleged that the Courtroom was closed by the U.S. Marshal Service (or a Court Officer), during the jury selection process and his family was not allowed to enter the court. He relied on *Presley v. Georgia*, 130 S.Ct. 721 (2010)(holding that defendant’s sixth amendment right to public trial was violated when the Trial Court excluded the public from the *voir dire* of prospective jurors); *United States v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010) and *Owens v. United States*, 483 F.3d 42 (1st Cir. 2007).

Upon filing his Title 28 U.S.C. § 2255, the court granted an evidentiary hearing, where Pabon-Mandrell presented the testimony of witnesses Ortiz-Suarez.

Ortiz-Suarez, (Pabon-Mandrell's common-law wife), testified that she had known Pabon-Mandrell for over ten years. She recalled that the jury selection began on February 11, 2008, when she went to the Federal Courthouse in Old San Juan. She arrived at the Courthouse the first day of trial and could not enter the Courtroom because a uniformed officer was standing outside and would not allow her to go inside. The unidentified officer advised her that she could not enter the Courtroom because jury selection had started and she could not enter until the jury selection had concluded. Her testimony was clear and concise.

On cross-examination, she testified that on February 11, 2008, she arrived at 9:00 a.m. and went immediately to Courtroom Number 3. There was personnel inside the Courtroom but she did not know what was taking place since she was not allowed inside. The Magistrate Judge took the position that since she did not have personal knowledge and she does not know whether jury selection was taking place or not, the Magistrate Judge did not credit her that testimony. There was no manner in which Ortiz-Suarez could know what was occurring since she was not allowed to enter. All she knows is what she was told by the courtroom officer "could not enter the Courtroom because jury selection had started and she could not enter until the jury selection had concluded."

What should be noted is that Ortiz-Suarez' testimony was not contested. There would be no manner for Ortiz-Suarez to know what is occurring inside the

Courtroom since according to her testimony, which has not been contested, she did not have an opportunity to enter. As such, there is no way that the Magistrate Judge could have discredited her testimony as her entry into the Courtroom was not permitted. Quite to the contrary, whatever was occurring in the courtroom was related to the trial and she should have been allowed to enter. Irrespective whether jury selection was occurring, or whether a hearings motion was being addressed, or whether the trial had begun, the Magistrate Judge does not discredit Ortiz-Suarez' testimony that entry into the Courtroom was in fact restricted. Pabon-Mandrell had a right to have the courtroom accessible to the public, family, and friends.

Pabon-Mandrell testified that he proceeded to trial with ten other defendants who were all in custody. He was seated in the Courtroom behind counsel's table. He was not aware if anyone gave the instructions not to allow the public into the Courtroom. He does recall that he did not see his family members in the Courtroom and inquired from his trial counsel what had happened that his family was not present.

On cross-examination, Pabon-Mandrell testified that he was sitting in the Courtroom looking forward and does not know at times what was happening behind him in the Courtroom or what was happening outside of the Courtroom. He does know, that his family members were not allowed into the Courtroom which is

consistent with the sworn affidavits presented on the record and with the testimony presented by Ortiz-Suarez.

Counsel Bonini testified that she was a counsel for co-defendant Jose Rivera-Moreno ("Rivera-Moreno") in Criminal No. 07-121 (ADC). Bonini testified that she was present during the jury selection and the proceeding was open to the public. She further elaborated that Judge Delgado-Colon was very careful in allowing the public in during jury selection and that she saw people coming in and out of the Courtroom including family members. She testified that she recalls seeing family members of Rivera-Moreno during jury selection.

However, during cross-examination counsel Bonini indicated that the jury selection was in the former Courtroom of Judge Dominguez. She did not recall details of the proceedings because it took place almost six (6) years earlier. Bonini testified that family members were allowed to sit in the back of the rows of the Courtroom; even those behind the defendants. She does not recall what family member from Rivera-Moreno was present during the jury selection but she recalls some family members were indeed present.

In reaching a determination of denial on the Title 28 U.S.C. § 2255, the Magistrate Judge decided that Ortiz-Suarez' testimony showed that she had no personal knowledge of what happened inside the Courtroom when she arrived on February 11, 2008, at 9:00 A.M. since she remained outside the Courtroom in the

hallway all the time. The Magistrate Judge determined that based on her lack of personal knowledge, that Ortiz-Suarez does not know what was occurring inside the Courtroom, therefore, no weight to her testimony was provided. The Magistrate Judge's position is in error. Ortiz-Suarez was clear that she was not allowed to enter, thus, she could not know what was occurring inside.

The Magistrate's Report on this issue failed as a matter of common sense. First, Ortiz-Suarez could not have known what was occurring inside the Courtroom, since she was not permitted to enter. That clearly supports the allegations of ineffectiveness raised by Pabon-Mandrell in light of the Supreme Court's decision in *Presley*. The sole purpose of Ortiz-Suarez testifying during the hearing was to present what occurred "in the hallway" not inside the Courtroom. Ortiz-Suarez cannot present testimony as to occurrences inside the Courtroom since she was not allowed access to the Courtroom. Her testimony was clear and concise. In fact, Ortiz-Suarez' testimony that she waited outside the Courtroom for over two hours and was not allowed to enter during that time has not been disproved.

The Magistrate Judge discredited all the sworn affidavits under the position that they were written in English, drafted by a fellow inmate, based on what Pabon-Mandrell told the inmate to write and mailed to his family in Puerto Rico. Magistrate Judge did not inquire from Ortiz-Suarez, or Pabon-Mandrell family

members, Norma Pabon-Mandrell (Pabon-Mandrell's Sister) Carmelo Mandrell Torrez, Angel Pabon Nieves (Pabon-Mandrell's Father), Norman Torrez-Rivera (Pabon-Mandrell's Grandmother), Ulises Resto Pico, and Norman Mandrell Torrez (Pabon-Mandrell's Mother), whether the affidavits were translated to them in Spanish by someone in Puerto Rico prior their execution. The Magistrate Judge took the erroneous position, that since the affidavits were written in English and since the parties only speak Spanish that no credibility determination can be provided to the affidavits.

There was no justification to discredit the English affidavit as no evidence was presented during the hearing that the family members did not review and concur with a translator on the contents of the affidavit prior to having them executed. Having the Magistrate Judge discredit all the affidavits under the blank assumption that they were written in English to Spanish speaking affiants, are not grounds to reject their content.

Furthermore, when the Magistrate Judge reached a conclusion that no credible evidence was presented that neither Pabon-Mandrell nor his family members and friends who signed the sworn affidavits were in the Federal Courthouse that day, is another conclusion that was reached improperly. The sworn affidavits clearly alleged that access to the Court was not permitted.

In essence, the District Court has disregarded Pabon-Mandrell's sworn affidavits which are not disproved by the record before the Court and refused to accept the content of the sworn affidavits in order to determine whether Pabon-Mandrell is entitled to relief or not. That error requires this court's permission to proceed further.

Ironically, the Magistrate's Report and Recommendation finds counsel Bonini's testimony as candid, although she did not recall details of the proceedings since they occurred "six (6) years ago." The Court notes that it finds her testimony consistent at all times regarding the jury selection. What the record does not conclude is whether the court was open or not to the public. The Government presented one witness, counsel Bonin and on the same token, discredited all of Pabon-Mandrell's statements from his witnesses.

This Court should wonder whether Attorney Bonini's recollection of the facts was sufficient enough to recall specifically the jury selection portion of the trial, but not to recall the other sections of the trial which occurred on the same day.

SHOULD A WRIT OF CERTIORARI IS REQUIRED TO DETERMINE WHETHER THE LOWER COURT ERRED IN REFUSING TO RECOMMEND RELIEF IN LIGHT OF THE UNTIMELY FILING OF THE TITLE 28 U.S.C. § 851 MOTION?

Pabon-Mandrell's case was called for jury selection on February 11, 2008. Sometime in the morning, preliminary matters were taken care of before the jury selection began. It can be inferred that the jury selection was not taking place at 9:00 a.m.

Just prior to the jury selection, the Court handled several matters in Chambers to address housekeeping issues where according to the court minutes, the Government advised the parties of its intention to file a Notice of Enhancement pursuant to Title 21 U.S.C. § 851 as to Defendants 1-2, 5, 7, 15-16. Outside of the presence of the jury, the aforementioned Defendants (Pabon-Mandrell being one of them), were brought into Court assisted by counsel and an interpreter, where they were advised of the Government's intent. According to the court minutes, the Court confers with the parties and jury selection begins.

Section 851(a)(i), of Title 21 of the United States Code provides as follows:

(1) No person who stands convicted of an offense under this part shall be sentenced to an increased punishment by reason of one or more prior conviction, unless before trial, or before the entry of a plea of guilty, the United States Attorney files an information with the Court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States Attorney that the facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of plea of guilty, the Court may postpone the trial or the taking of the

plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

Id. Title 21 U.S.C. § 851.

The Magistrate Judge took the position that it was clear that the notification was provided prior to the commencement of the jury selection. (CR. Docket # 1026 and 1034). The Magistrate Report relying on a colloquy that occurred during the sentencing hearing determined that the § 851 requirements were met:

THE COURT: The court is aware that Mr. Barreto has raised the issue concerning the sufficiency of the notice given by the government under section 851, that relates to the proceedings and ways of establishing a prior conviction. And the court takes notice that section 851(a) requires that the notice be filed before trial. That the information must be filed with the court and that the government must serve copy of the information to the defendant and to counsel of course to give counsel and defendant due process and notice so that he can properly prepare and defend and challenge those convictions. And that what is required is a clear notice or signal without ambiguity of the governments intent to seek the enhanced penalties based on the particular conviction. This concept has been sustained in the cases, by different Court of Appeals, *U.S. versus Hamilton*, 208, 531, 2000 case. **And in this case when we looked to the specific facts it remains clear within the record that first of all this defendant knew of the prior convictions to which the government alludes by the pretrial services report, which is the first time that notice of prior bad acts and convictions is given to counsel, that happened on April 3, 2007. Then we have the information that was filed by the government, at docket 1026, stated here by the government,** within the same, even though I agree with counsel in the sense that no further details in terms of what events, how it transpired, date in which he pled or date in

which sentence was given, the notice properly provides the plaintiffs conviction, the criminal case number, the nature of the offense which are controlled substance, provides notice that it is a felony and that the conviction is understood to be final.

[....]

There are cases that establish clearly that the notice has to be given before trial and that before trial means before the jury selection begins. **This was rightfully done in this case.** Actually even the description and explanation was given in open court to this defendant in the presence of counsel at the request of defense counsel.

Id. (CR Docket No. 1894, Tr. Sent. June 6, 2008, at pp. 9-12.)

Although the court addressed the filing of the § 851 notice during the sentencing hearing, the minutes from the sentencing hearing do not address the untimeliness of the filing. The Court failed to address whether the pleading was timely filed. The record shows an untimely filing after jury selection had already occurred.

The Court determined that Pabon-Mandrell was aware of the prior convictions to which the Government alluded to in the pretrial services report, under the position that according to CR. Docket Entry # 1026, Pabon-Mandrell was placed on notice of the Government's intentions to file a Notice of Enhancement. The Government's statements of what it intended to do or not do are not a substitute for the statutory requirements. See Title 21 U.S.C. § 851.

Ironically, a careful review of Docket Entry # 1026, clarifies that the § 851 Notice of Enhancement was not filed until quite possibly 11:15 a.m. (See Exhibit A, Title 28 U.S.C. § 2255). As per the Court's minutes and the Magistrate's conclusions, jury selection did not occur until 11:00 AM.

When the District Court relied on that same document to deny the relief in the § 2255, the decision was contrary to the face of the document. The "timestamp clock on the document" shows that the § 851 Notice was filed after 11:00 A.M. It is inconclusive whether Pabon-Mandrell's Title 21 U.S.C. § 851 Notice of Enhancement was filed prior to the selection of the jury. See *United States v. Pinillos-Prieto*, 419 F.3d 61, 63 (1st Cir. 2005)(All that is required in a 21 U.S.C. § 851(a)(1) is that the filing was made before jury selection.).

In the instant matter, as per the Exhibit that the Court could review the filing of the Title 21 U.S.C. § 851, it appears that the document was filed closer to 11:15 A.M. after the jury selection had begun as per the Court's notes.

SHOULD A WRIT OF CERTIORARI IS REQUIRED TO ADDRESS WHETHER PABON-MANDRELL WAS PREJUDICED AS A RESULT OF HIS INABILITY TO COMMUNICATE WITH COUNSEL DURING THE TRIAL?

Pabon-Mandrell alleged in his Title 28 U.S.C. § 2255 that based on the seating arrangements during the trial, that he was not able to communicate with his attorney on the strategy to follow during the defense of the case.

Counsel Barreto did not object to the restrictions placed, which limited his input in his jury selection, peremptory challenges, or advise to counsel on some other areas of cross-examination. (Cv. Docket No. 1 at pp. 18-20). Pabon-Mandrell gave significant weight to the input he would provide his counsel to cross-examine a key government witness (Carlos Brito-Pacheco) during his trial. Pabon-Mandrell “wanted [Barreto] to cross-examine him [...] concerning the fact that he robbed me, he attempted to murder me, that somebody hires him to murder me, and that it would show his bias against me. This would had [sic] demonstrated his actual bias, false testimony, and his reasons for testifying.” *Id.* at pp. 18-19.

The Magistrate Judge reached a conclusion that Pabon-Mandrell did not advance any other basis for this argument. However, the argument was very well presented, Counsel Barreto did not object to the fact that Pabon-Mandrell could not communicate with him during the trial. The record does not disprove the allegations raised by Pabon-Mandrell. Although the Magistrate Judge takes the position that this case confirms that Pabón-Mandrell has not met his burden, the

Magistrate's Report fails to establish how this conclusion was reached. There is no affidavit from trial counsel or otherwise to support the Magistrate's position. Neither does the Magistrate's reasoning that Pabon-Mandrell did not raise the issue on appeal, thus the issue is waived merit the results. See, *Belford v. United States*, 975 F.2d 310, 313 (7th Cir.1992)(" (1) issues that were raised on direct appeal, absent a showing of changed circumstances; (2) non constitutional issues that could have been but were not raised on direct appeal; ... and (3) constitutional issues that were not raised on direct appeal, unless the section 2255 petitioner demonstrates cause for the procedural default as well as actual prejudice from failure to appeal.") *Id.*

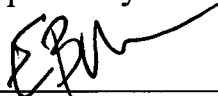
In this case, there was no default. The issue was raised and preserved under an ineffective assistance of counsel claim, preserved and properly raised on a Title 28 U.S.C. § 2255. The issue was whether counsel was ineffective for not advising the Court that Pabon-Mandrell had limited communication with counsel during the trial.

CONCLUSION

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

Done this 21, day of November 2017

Respectfully submitted,



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