

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

CASE NO: _____

MARK PROCTOR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

First, whether in its supervisory jurisdiction over the Courts of the United States, and based upon the unique facts and circumstances in the record, this Court should find that the Eleventh Circuit reversibly erred and abused its discretion in dismissing Mark Proctor's appeal for lack of jurisdiction?

Second, whether the conviction is invalid if the necessary elements for federal jurisdiction were neither listed in the plea agreement nor proven beyond a reasonable doubt?

Third, whether it was unconstitutional to punish Mr. Proctor for the same failure to appear offense in two separate cases and impose total punishment of incarceration that is 16 months greater than the statutory maximum for failure to appear in 18 USC 3146?

Fourth, whether it was unconstitutional for the probation office to unilaterally alter the terms of the written plea agreement without notice or hearing, the government honored only a portion of the agreement, and the district court overlooked Fed.R.Crim.P. 32?

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REASONS FOR GRANTING THE WRIT

Reason One: When a *pro se* pleading that contains meritorious grounds but may be procedurally infirm for various reasons such as the movant requested the wrong procedural vehicle for relief, or even if out of time, the movant's claims should not be thrown out. The Court should (1) not just dismiss the matter on a technicality, should (2) consider the matter as though the proper vehicle for relief had been sought, and (3) proceed to entertain the merits of the claim. 15

Reason Two: Proctor was sentenced above his original recommended guidelines range for failure to appear at sentencing. That may have been acceptable had the court not then also sentenced Proctor for the substantive offense of failure to appear, and imposed a consecutive term of 12 months, after effectively doubling the sentence for the underlying case. Fairness, justice, and due process require that Proctor be granted relief and resentenced to a fair and reasonable term or terms and not be punished doubly. 29

Reason Three: Proctor's underlying conviction is for an offense that is not charged. When a conviction is sought by the government for a statutory violation, it is controlled by the statute as written by Congress at the time of the violation. 32

Reason Four: The government may not unilaterally retreat from or modify a plea agreement without a hearing. 35

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

Mark Proctor,
Petitioner,

vs.

The United States of America,
Respondent.

**Petition for a Writ of Certiorari
to the United States Court of Appeals Eleventh Circuit**

PARTIES TO THE PROCEEDING

The United States of America and Mark Proctor were the parties in the district court for the Southern District of Florida and in the Eleventh Circuit Court of Appeals. Mark Proctor respectfully petitions for a writ of certiorari to review the final order of the Eleventh Circuit Court of Appeals, Eleventh Circuit entered on February 2, 2018.

OPINION BELOW

The final order of the United States Court of Appeals, Eleventh Circuit dismissing the appeal for lack of jurisdiction was entered on February 2, 2018. A copy is in the Appendix at the end of this petition at pages 1 to 2. The judgments of the United States District Court, Southern District of

Florida, convicting Mr. Proctor and sentencing him to prison were rendered on February 14, 2006 (underlying) and April 10, 2006 (failure to appear). Copies are in the Appendix at pages 3-8 and 9-14 respectively.

JURISDICTION

The final order of the Eleventh Circuit Court of Appeals was entered on February 2, 2018. This petition is timely filed within 90 days, pursuant to Rule 13.1 of the Supreme Court Rules. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 and Rules 10.1(a) and (c) and Rule 13 of the Supreme Court Rules. The jurisdiction of the Eleventh Circuit Court of Appeals was invoked under Title 28 of the United States Code, Section 1291.

CONSTITUTIONAL PROVISIONS

Fifth Amendment

Capital Crimes; double jeopardy; self-incrimination; due process; just compensation for property

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 the cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice 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.

Sixth Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury and shall be informed of the nature and cause of the accusation; and to have compulsory process for obtaining witnesses in his favor.

Statement of the Case and Facts

Procedural History

Petitioner Mark Proctor had four cases in the Southern District of Florida. Two are civil cases arising from two related (but not consolidated) criminal prosecutions. The underlying prosecution commenced began in 2005 and is the case from which the three others arise.

The Underlying Prosecution ***Case No. 2:05-CR-14022-JEM-1***

In March 2005, in the Southern District of Florida, Mark Proctor was indicted and charged with two counts of alleged activities related to child pornography, one allegation of sexual exploitation of minors, and a forfeiture count. He was released on bond. A jury trial was set. In September 2005, pursuant to a written plea agreement Proctor pleaded guilty to Count 1. Sentencing was set for December 5, 2005 but Proctor failed to appear for sentencing. An arrest warrant issued. Shortly after the sentencing date he was arrested in Mexico, brought to Los Angeles, and

returned to the Southern District of Florida for a bond violation hearing.

In February 2006, Proctor was sentenced on Count 1, to prison for 151 months, ten (10) years' supervised release, and a \$100 assessment. The other charges were dismissed. Proctor filed a notice of appeal, Eleventh Circuit No. 06-11217-J. In December 2008 the Eleventh Circuit issued a mandate affirming the judgment of the district court.

In June 2009 Proctor filed a §2255 motion to vacate, Southern District of Florida No. 09-CV-14218. In 2013 Proctor filed in the district court, a Motion to Compel Performance: Constructive Notice of Breach of Contract. The government responded. Proctor replied. The motion was denied in February 2014. A motion for reconsideration was denied in April 2014. Proctor filed a notice of appeal (Eleventh Circuit No. 14-12564-FF) and was granted leave to proceed on appeal *in forma pauperis* (IFP). In June 2015 the Eleventh Circuit issued a mandate affirming the district court's denial.

In July 2015 Proctor filed in the district court a "Memorandum of Law and Statutes of Rule 60(b) with Judicial Notice Incorporation (not... a 2255 motion)," a motion to appoint counsel, and notice of ripeness of issues. The district court dismissed the proceedings for lack of jurisdiction and denied as moot the motion for counsel. Proctor moved to alter or amend the judg-

ment pursuant to FRCvP 59(e), and filed a second notice of ripeness to rule on the issues and to grant relief. The government responded. In January 2016 the district court denied the motion to alter the judgment.

By July 2017, Proctor had served 151 months and consecutive 12 months term for the second prosecution (failure to appear) and was on work-release in a halfway house. Proctor's parents resided in Portland, Maine. In July 2017, due to his father's terminal illness and impending death, supervision was transferred to the District of Maine. Unfortunately the transfer took so long his father passed away before Mr. Proctor got to Maine.

The Second Prosecution Case No. 2:05-14098-JEM

In December 2005, after his arrest for bond-jumping, Proctor was indicted for failure to appear and criminal contempt. The defense moved to consolidate with the underlying prosecution for purposes of plea and sentence but that was denied. Proctor entered a guilty plea that was accepted by the district court. In February 2006 he was sentenced to 12 months for failure to appear ***to run consecutively to the 151-month term imposed for the original case***, and two years' supervised release. For criminal contempt he was sentenced to a term of six months concurrent to the term of imprisonment in the first case, and two years' supervised release.

In October 2013, Proctor filed a 2255 motion to vacate (FLSD No. 13-CV-14414-JEM). It was denied in 2014. In August 2016 Proctor appealed the order of denial (11th Circuit No. 16-15512-E), the subject of this petition. The federal public defender was appointed, but moved to withdraw, asking that Proctor be allowed to represent himself, or for appointment of other counsel. The motion was denied by the district court, with notification to the Eleventh Circuit.

***The Third Case Case No. 2:09-CV-14218-JEM
Motion Pursuant to 28 U.S.C. 2255***

In 2009 in the underlying case, Proctor filed a 2255 motion to vacate sentence, the government responded, and Proctor filed an affidavit and traverse to the government's answer. In 2010 the magistrate judge issued a report recommending that the motion be denied in its entirety. Proctor filed objections, a memorandum, and a letter regarding appeal. In February 2012 the district court adopted the R&R. Proctor then took an appeal but the district court refused to grant a certificate of appealability (11th Circuit No. 12-11124-F). In March 2012, Proctor was granted leave to appeal IFP. Five months later the Eleventh Circuit dismissed the motion for a certificate of appealability for "[failure] to make the requisite showing," and in Novem-

ber 2012 denied Proctor's motion for reconsideration because there was no new evidence and no new argument of merit to warrant relief.

***The Fourth – and Final – District Court Case
No. 2:13-CV-14414-JEM***

In October 2013 Proctor filed a 2255 motion to vacate, with a supporting memorandum and affidavit. Two weeks later the magistrate judge issued a report recommending that the matter be dismissed. Proctor objected and the report was vacated. Proctor was ordered to demonstrate whether his motion was timely filed, and the government was directed to show cause why the motion should not be granted. Both responses were filed. Proctor moved to amend. A report was entered in May 2014 recommending that (1) the motion to vacate be dismissed as time-barred, (2) no certificate of appealability should issue, and (3) the case be closed. No objections were filed. The district court adopted the R&R.

Facts Necessary to Address the Issues

In a *pro se* a 2255 in October 2013, Proctor addressed his conviction for failure to appear and for contempt of court (FLSD No. 05-CR-14098), explaining that Proctor believed that the conviction had been addressed on direct appeal from his underlying conviction and sentence. He alleged the

improper application of sentence enhancements, including obstruction of justice enhancement for his failure to appear, resulting in a violation of double jeopardy, double-counting, and double sentencing.

The issue in the original appeal was that his that this case was similar to *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), where the Eleventh Circuit found that 18 U.S.C. §2252A(a)(3)(B)), the statute for which Proctor was convicted, was unconstitutionally overbroad and vague.

As the Eleventh Circuit noted in its October 2008 unpublished opinion in the direct appeal, *United States v. Proctor*, 298 Fed.Appx. 832 (11th Cir. 2008), this Court had reversed *Williams*, at 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Thus, even though the Eleventh Circuit held that §2252A(a)(3)(B) was facially unconstitutional, and reversed Williams' conviction, this Court reversed concluding that the statute was neither substantially overbroad nor impermissibly vague. On remand the Eleventh Circuit affirmed Williams' conviction and sentence for pandering child pornography. *United States v. Williams*, 534 F.3d 1371 (11th Cir. 2008). For that reason, Proctor's conviction was affirmed.

The 2013 §2255 motion

Proctor argued in his 2013 §2255 motion that his attorney failed to appeal the second sentence for failure to appear/contempt of court and that (1) counsel was ineffective for failing to file a notice of appeal, and (2) for improper application of enhancements, penalties, and sentencing guidelines all in violation of the Fifth and Sixth Amendments of the United States Constitution. He argued that sentencing characteristics in the outline of charges and penalties for charges were misapplied in the failure to appear/contempt case, as well as in the original case for child pornography. As a result of this error, under FRCrP 52(b), Proctor suffered more than double the advisory sentence, in violation of the plea agreement. The third ground was double jeopardy in violation of the Fifth Amendment, alleging that the indictment for failure to appear and contempt resulted in a double jeopardy violation. Proctor already had been punished for that conduct in the original sentence.

The fourth ground was (a) the plea was not voluntary, and (b) the plea agreement was breached. There was no *quid pro quo* for accepting the guilty plea to charges of failure to appear and contempt of court. The government gave up nothing. There was no consideration for a lawful con-

tractual agreement. *See, Evanstad v. United States*, 494 F.Supp. 146 (8th Cir. 1980). Good time credit was improperly calculated. Proctor was held in overcrowded BOP facilities. *United States v. Leitch*, U.S. Dist. Lexis 27796 (11-cr-00609, 2d Cir. 2013). Proctor believed that counsel addressed these matters on appeal, but later learned that they did not because no appeal was taken from the second judgment and sentence.

In June 2014 the district court adopted the report of the magistrate judge recommending that the court (1) dismiss the motion to vacate as time-barred; (2) issue no certificate of appealability, and (3) close the case. No objections were filed.

In August 2016 Proctor filed a notice of appeal, motion for appointment of counsel, and for leave to proceed IFP. The magistrate recommended that the motion to appoint counsel and to proceed IFP be denied, that the Eleventh Circuit be so notified, and that the Rule 52(b) notice of appeal request be denied with prejudice,

...however to the extent the Defendant means to seek collateral §2255 relief, the denial should be without prejudice to the Defendant asking the Eleventh Circuit for leave to do so in compliance with 28 U.S.C. §2255(h).

The district court adopted those recommendations.

At the original sentencing the prosecutor said that the guidelines range was 87 to 108 months, but after the failure to appear it increased to 151 months based on (1) eliminating the 3-point reduction for acceptance of responsibility, and (2) adding two points for obstruction of justice...

... which are clearly enunciated in the guidelines about when you fail to appear for sentencing. It is not so much the Court is punishing the defendant in and of itself only for the crime. It's for the crime as a basis, and then for the defendant's ignoring the authority of the Court and ignoring the Court's order to be here for sentencing that increases his guidelines.

At sentencing defense counsel mentioned the motion to consolidate the two cases for sentencing, and the court responded:

. . I don't know [if the sentence for failure to appear must be served consecutively]. If it is, it is, but I don't know that. If I had consolidated them I still would have considered whether to make it consecutive or concurrent.

It seems to me that he violated the law on two occasions. What militates in his favor is the fact that that conduct resulted in an increase in the guidelines range and the offense level; and, therefore, has already somewhat been considered, but I don't know that matters because I have not researched it. I was not going to consolidate them....I have not [looked up whether the sentence must be served consecutively].

Was the Motion Filed Out of Time?

In response to the magistrate's inquiry about limitations, Proctor argued that direct appeal of a federal conviction is a matter of right and that

his case was similar to *United States v. Doles*, No. 03-132-CR-01 (N.D.GA 2006), where failure to timely file a 2255 motion was directly caused by counsel. Doles was granted a new appeal. The district court dismissed the judgment without prejudice and re-entered the judgment to allow a new time period for filing an appeal under FRAP 4(b). Proctor said that he has diligently pursued all remedies in his case and was unaware of the relief available in 2255. He thought that counsel included both cases in the appeal because they were “inextricably intertwined.” He assumed that if he won on the issues regarding the underlying case, then the second prosecution would not exist because the second matter arose solely because of the underlying case. The second case was a “direct proximate cause from the first.” Proctor argued that this Court liberally construes *pro se* filings to accord review on any legally justifiable basis. The statute of limitations must not be applied too harshly because dismissing a first §2255 motion is particularly serious. Proctor was unaware of the option and ability to file an out of time §2255 motion to obtain a direct appeal. He had no legal advice from anyone until 2013 when he conferred with a small inmate advisory group and was advised that in order to obtain his due process right to an appeal that was never filed, he should file a §2255 motion, and that limita-

tions for a §2255 motion may be subject to equitable tolling. Counsel's errors deprived Proctor of his right to a direct appeal. He asked the district court to dismiss the judgment without prejudice, and to re-enter it allowing a new time period within which to take a direct appeal.

The Report Recommending Denial

In May 2014 the magistrate entered a 17-page report based upon Proctor's *pro se* motion (FLSD No. 13-CV-14414), his response on limitations, the government's response to the order to show cause, the PSR, and relevant portions of the underlying criminal case. The report states that Proctor seeks *vacatur* of his conviction and sentence (for failure to appear/contempt) on three grounds: (1) ineffective assistance of counsel for failing to file a direct appeal, (2) trial court improperly applied sentencing guidelines in violation of the constitution, (3) the charge in the second case violated the protection against double jeopardy because movant was punished for the same crime in the underlying case, and (4) his plea was involuntary.

The procedural history was set out on pages 2-4 of the order: In December 2005 movant was charged in FLSD with failure to appear and contempt of court, both misdemeanors, arising from his failure to appear for

sentencing while on release for sentencing in case 05-CR-14022. In February 2006 movant pled guilty to the present indictment. In April 2006 Proctor was sentenced to 12 months in prison for Count 1, and 6 months for Count 2. Count 1 was to be served consecutively to the sentence in Case No. 05-CR-14022. Proctor did not appeal this sentence. Accordingly the convictions became final on April 17, 2006 when time expired to file a notice of appeal. He had one year from the date his conviction became final to timely file a federal habeas petition, April 17, 2007. In October 2013, seven years later, movant filed this 2255 motion.

The report refers to the one-year limitation for a 2255 motion under AEDPA. Movant argued that he was entitled to tolling of the limitations because he had a constitutional right to an appeal and because he was ignorant of the law regarding filing a 2255 motion. The report concluded that Proctor failed to meet his burden to show that he was entitled to equitable tolling of limitations. Equitable tolling is available only for a showing of extraordinary circumstances and due diligence.

The report also recommended that no certificate of appealability be issued because movant did not demonstrate the denial of a constitutional right or a reasonably-debatable issue. No objections were filed.

REASONS FOR GRANTING THE WRIT

Reason One: When a *pro se* pleading that contains meritorious grounds but may be procedurally infirm for various reasons such as the movant requested the wrong procedural vehicle for relief, or even if it is filed out of time, the movant's claims should not be thrown out. The Court should (1) not just dismiss the matter on a technicality, should (2) consider the matter as though the proper vehicle for relief had been sought, and (3) proceed to entertain the merits of the claim. It is settled law in this Court and the Eleventh Circuit that improvidently-filed *pro se* proceedings in criminal- related matters should not be dismissed when the claim raised has merit and warrants relief.

The Eleventh Circuit should have treated the proceedings as though relief had been sought via a proper remedy such as an extraordinary writ, or should have directed the district court to vacate the judgment without prejudice and then reinstate it to permit Proctor to take a belated direct appeal. Accordingly, if Proctor's §2255 motion was time-barred, and if his appeal was considered to be time-barred, then both the Eleventh Circuit and the district court should have considered Proctor's claims for relief as a petition for an extraordinary writ for imposition of an illegal sentence that

ignored, disregarded, or failed to correctly apply the sentencing guidelines.

The sentences were imposed *ultra vires*, because the district court failed to follow the requirements of the United States Sentencing Guidelines. Proctor's Rule 52(b) proceedings should have been reinstated or the appeal should have been considered to be a request to proceed with a successive 2255 because the relief sought was based upon new law in this Court's April 20, 2016 decision in *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016). Appellate courts have discretion to remedy forfeited error when the error was not intentionally relinquished or abandoned, the error is plain, clear or obvious, the error affected the defendant's substantial rights meaning that but for the error the outcome would have been different; and the appellate court should exercise its discretion to correct a correctable injustice if the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

In the alternative, the Eleventh Circuit should have ordered that the Rule 52(b) proceedings be reinstated in the district court, and/or that his appeal be construed as a request to proceed with a successive §2255 motion based upon new law established by the United States Supreme Court in *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016), decided in 2016.

Justice Kennedy wrote that appellate courts have discretion to remedy a forfeited error when the error was not intentionally relinquished or abandoned, the error is plain, clear or obvious, and the error affected the defendant's substantial rights meaning that but for the error the outcome would have been different; and the court of appeals should exercise its discretion to correct such a correctable injustice if the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

In accordance with the AEDPA in 1996, codified at 28 U.S.C. §2255, before leave to file a second or successive 2255 motion may be granted by an appellate court, the applicant has the burden to make a *prima facie* showing that his motion is based upon a new rule of constitutional law, that previously was unavailable, and was made retroactive to cases on collateral review by this Court.

The Eleventh Circuit should have treated the motion as though relief had been requested by a proper remedy that would not be time barred. In the alternative this Court should direct the Eleventh Circuit to remand to the district court to dismiss the judgment without prejudice and then reinstate it in order to allow Proctor a belated direct appeal.

In *United States v. Phillips*, 225 F.3d 1198, 1201 (11th Cir. 2000), the

Eleventh Circuit held that when a district court within the Circuit concludes that an out of time appeal in a criminal case is warranted as the remedy in a §2255 proceeding, it should effect that remedy as follows: (1) the criminal judgment from which the out-of-time appeal is to be permitted should be vacated; (2) the same sentence should then be re-imposed; (3) upon re-imposition of the sentence, the defendant should be advised of all the rights associated with an appeal from any criminal sentence; and (4) the defendant also should be advised of the time for filing a notice of appeal from the re-imposed sentence, as provided in Rule 4(b)(1)(A)(1) of the Federal Rules of Appellate Procedure. *Phillips, supra*, at 1201.

Alternatively, if the district court believed that it could not grant relief because it the motion was time-barred, then in the alternative the proceedings could and should have been treated as a request for an extraordinary writ. There are several requests for extraordinary review that could have been filed, such as a petition for writ of common law habeas corpus under §2241, or alternatively a petition for writ of certiorari on grounds that the district court's ruling violated the essential requirements of law; or for writ of prohibition on grounds that the district court's decision allowed a sentence to stand even though it was entered *ultra vires*,

not following the requirements of the United States Sentencing Guidelines; or a writ of mandamus to require the district court to impose a sentence using correct application of the Sentencing Guidelines, without improper double-counting, and without improperly violating the protection against double jeopardy.

Florida Rule of Appellate Procedure 9.040(c) provides that if a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought. There is no comparable federal rule, but the same reasoning and rationale is the law of the Eleventh Circuit, and has been found to be applicable in case law in this Court as well. In *Zelaya v. Sec., Fla Dept. of Corr.*, 798 F.3d 1360, 1366(11th Cir. 2015), Judge Marcus, writing for the Court, explained that in criminal matters federal courts liberally construe pleadings by *pro se* litigants to facilitate their access to relief (in contrast to the general rule in civil proceedings that the plaintiff is the master of the complaint. *United States v. Jones*, 125 F.3d 1418 1428 (11th Cir. 1997)).

Pleadings filed by *pro se* prisoners should be held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972) (*per curiam*). Courts are duty-bound to look

beyond the labels of motions filed by *pro se* to interpret them under whatever statute would provide relief. *Zelaya, supra*, at 1366, citing *Andrews v. United States*, 373 U.S. 334, 337-38, 83 S.Ct. 1236 (1963).

Zelaya also states at page 1366, that adjudication on the underlying merits of a claim should not be not hampered by reliance upon the title the petitioner puts on his document. Doing so ***acknowledges the importance of allowing meritorious claims to be heard and decided regardless of mere pleading defects introduced by legally unsophisticated litigants.***

The sentences imposed were illegal because they subjected Proctor to double jeopardy, and did not following requirements of the sentencing guidelines. Thus, Proctor's claims should be construed to have been made in a petition for extraordinary relief, and thereupon the sentences both should be vacated and the cause remanded for imposition of a new, fair, reasonable sentence or sentences.

The February 2006 for the underlying case incorporated severe enhancements for Mr. Proctor's failure to appear at sentencing. The failure to appear was charged separately and then punished again in April 2006 with an additional, consecutive prison term. In February there was a sentencing enhancement (without notice) for obstruction of justice under §3C1.1 for

failure to appear at sentencing. Also Mr. Proctor lost the promised 3-point reduction for acceptance of responsibility, which resulted in a substantial increase of 64 months, although the statutory maximum for one count of failure to appear for sentencing is 60 months incarceration.

In addition to already having being punished for failure to appear due to the enhanced punishment in the underlying prosecution, Proctor was charged in a subsequent indictment with the offenses of failure to appear under 18 U.S.C. §3146, and contempt under 18 U.S.C. §401. The sentence for those charges added an additional 18 months to the 151 month sentence, although six months were to be served concurrently, the 12 months for failure to appear was required by law to be served consecutively. The combined total became **76 months' additional incarceration**, which was unfair, excessive, unnecessarily harsh, and in contravention to the spirit and intent of the Sentencing Guidelines.

Failure to appear under 18 U.S.C. §3146(a) "...is an offense punishable by imprisonment for a term of five years or more, [the punishment for such an offense is] a fine ... or imprisonment for not more than five years, or both." Under 3146(b)(2) a prison term under this section shall be consecutive to the sentence of imprisonment for any other offense.

United States Sentencing Guidelines Section 2J1.6 (failure to appear) application note 3, states that in the event of a conviction on both the underlying offense and also the failure to appear, the failure to appear is treated under § 3C1.1 (obstructing or impeding the administration of justice) as an obstruction of the underlying offense, and ***the failure to appear and the charge for the underlying offense are grouped together under §3D1.2(c)***. The combined sentence will then be constructed to provide a “total punishment” that satisfies the requirements of both §5G1.2 and 18 U.S.C. §3146(b)(2).

Proctor was denied the benefit of §3D1.2(c) because he received a combined sentence for the first offense, imposing full punishment for the failure to appear (in the guise of enhancements), and was punished again at the separate sentencing hearing for the second case that should have been consolidated but was not. This was double-dipping at its worst, rising to the level of double jeopardy. The defense asked consolidate for sentencing, but the court refused, imposing this illegal, *ultra vires*, unauthorized, double, excessive punishment.

The district court reversibly erred when it failed to follow Guidelines Sections 2J1.6 and 3D1.1-1.5 (grouping of closely related counts). The

guidelines refer to “the combined sentence,” the “total punishment.” “[T]he grouping rule applies.” At sentencing on the underlying case, when asked about grouping the failure to appear with the underlying offense, the court, in contravention to the guidelines, stated “... I don’t know that matters because I have not researched it. I just was not going to consolidate them.” Because the court failed to research or follow the guidelines, Mark Proctor filed an appeal relying on this Court’s decision in *Molina-Martinez v. United States*, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016).

The Fifth Amendment Double Jeopardy Clause provides that no person “shall be subject to the same offence to be twice put in jeopardy of life or limb.” *Beverly v. Jones*, 854 F.2d 412, 414 (11th Cir. 1988), *cert. denied*, 490 S.Ct. 2104 104 L.Ed.2d 665 (1989) (quoting the Fifth Amendment, Cl. 2). When analyzing a double jeopardy claim, the Court should look to *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.306(1932) (two offenses were the same unless each required proof of an additional fact not required in the other). *Beverly*, 854 F.2d at 414. “[T]herefore, a greater offense is the same as any lesser offense included within it since it is invariably true that the lesser offense requires no proof beyond that which is required for the greater one.” *Ibid* .

(citing *Brown v. Ohio*, 432 U.S. 161, 168 , 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)).

In *United States v. Elliott*, 467 F.3d 688 (7th Cir. 2006), the Seventh Circuit vacated a sentence for failure to appear (18 U.S.C. §3146(a)(2)), and the remanded for resentencing because the district court erred in calculating the advisory guidelines range applicable to the offense for the following reasons: (1) post-*Booker*, the calculation of the applicable advisory range was the starting point for sentencing, (2) the district court adopted the obstruction of justice enhancement under U.S.S.G. §3C1.1, which resulted in the offense level being increased by two levels, (3) the enhancement did not apply because deceit was part of the offense of failure to report to prison, none of his lies obstructed justice or prevented his arrest, and U.S.S.G. §2J1.6, application n.2, which applied to his crime, stated that using an alias did not justify enhancement of offense level, (4) it was possible that the sentencing guidelines calculation error affected the defendant's sentence, and (5) on remand the district court should give close attention to the duration of the defendant's flight from justice when considering the deterrent factor under 18 U.S.C. §3553(a)(2)(B), because duration of flight was not taken into account by U.S.S.G. §2J1.6.

The Eleventh Circuit erred here in dismissing for lack of jurisdiction where the district court failed to follow the mandate of the guidelines in sentencing on the underlying offense, and then punished Proctor twice by a consecutive term for the same offense, doubling the sentence for failure to appear at sentencing. This illegal, excessive sentencing warranted relief.

In the alternative, the Eleventh Circuit erred in failing to reinstate the Rule 52(b) proceedings in the district court, and/or considered his appeal as a request for a successive §2255 motion because the relief sought was founded upon new law from this Court, Molina-Martinez v. United States, April 20, 2016, finding that appellate courts have discretion to remedy forfeited error when the error was not intentionally relinquished or abandoned, is plain, clear or obvious, and affected the defendant's substantial rights meaning but for the error the outcome would have been different; and the court of appeals should have exercised its discretion to correct this correctable injustice because the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

Proctor asked the Eleventh Circuit to consider his appeal as a request to reinstate his Rule 52(b) proceedings, or in the alternative as an application

for leave to file a §2255 motion to vacate or correct on grounds of this Court's 2016 decision in *Molina-Martinez*, *supra*.

Under AEDPA, before leave to file a second or successive 2255 motion may be granted the applicant has the burden to make a *prima facie* showing that his motion is based upon a new rule of constitutional law, that previously was unavailable, and is retroactive to cases on collateral review by this Court. Proctor finds himself in a situation very similar to *Molina-Martinez*', and is entitled to relief for the same reasons and rationale. When sentencing *Molina-Martinez*, the district court applied a guidelines range higher than the applicable range. The error went unnoticed by the court and the parties. No timely objection was entered. The error was not noticed until appellate briefing. The defendant raised the error. The Fifth Circuit refused to correct it because in its view, defendant could not establish a reasonable probability that but for the error he would have received a different sentence. That standard was held by this Court to be excessively "rigid." Justice Kennedy explained at 136 S.C. 1341-42, that most courts of appeals do not have so rigid a standard. In recognition of the central role that the Sentencing Guidelines play in sentencing, other circuits have concluded that a district court's application of an incorrect guidelines range

can serve as evidence of an effect on substantial rights. As examples, the decision cites *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) (application of an erroneous guidelines range “runs the risk of affecting the ultimate sentence regardless of whether the court ultimately imposes a sentence within or outside” that range); *United States v. Vargem*, 747 F.3d 724, 728-29 (9th Cir. 2014); and *United States v. Story*, 503 F.3d 436, 440 (6th Cir. 2007). The Sixth, Ninth, and Tenth Circuits recognize that in most cases when a district court adopts an incorrect guidelines range, there is a reasonable probability that the defendant’s sentence would be different absent the error. Certiorari was granted to in *Molina-Martinez* to resolve the conflict. At 136 S.Ct. 1345, Justice Kennedy opined that nothing in the text of Rule 52(b), its rationale, or the Court’s precedents supports a requirement that a defendant seeking appellate review of an unpreserved guidelines error make some further showing beyond the fact of the erroneously higher guidelines range that set the wrong framework for the sentencing proceedings. This is so even if the ultimate sentence falls within both the correct and incorrect range.

When a defendant is sentenced under an incorrect Guidelines range - whether or not the defendant’s ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.

Ibid. It follows that when a defendant shows that the district court used an incorrect range, he should not be barred from relief simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used. In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect higher guidelines range, has demonstrated reasonable probability of a different outcome. In most cases that would suffice for relief if the other requirements of Rule 52(b) were met. The government, of course, may point to parts of the record to counter an ostensible showing of prejudice. If, however, the record is silent as to what the district court might have done had it considered the correct guidelines range, the defendant may demonstrate that the court's reliance on an incorrect range, in most instances, is sufficient to show an effect on substantial rights.

In an ordinary case a defendant satisfies his burden to show prejudice by pointing to the application of an incorrect, higher guidelines range and the sentence he received thereunder. Absent unusual circumstance he is not required to show more. The court reviewing a sentencing error cannot apply a categorical rule requiring additional evidence in cases where the district court applied an incorrect range but nevertheless sentenced the defendant

within the correct range. The defendant may rely on the application of an incorrect guidelines range to show an effect on his substantial rights. *Molina-Martinez*, 136 S.Ct. at 1348.

Reason Two: Proctor was sentenced above his original recommended guidelines range for his failure to appear at sentencing. That may have been acceptable had the court not then also sentenced Proctor for the substantive offense of failure to appear, and imposed a consecutive term of 12 months, after effectively doubling the sentence for the underlying case. Fairness, justice, and due process require that Proctor be granted relief and resentenced to a fair and reasonable term or terms, and not be doubly punished.

The Fifth and Sixth Amendments of the United States Constitution preclude a court from violating a defendant's due process rights in plea bargaining. Proctor entered into a plea agreement that later was altered by the probation office when they added eleven levels of upward departures in the form of enhancements the elements of which were not listed on the indictment or in the plea agreement. Or were the elements read into the record at the plea colloquy. Probation further violated Proctor's due process rights by arbitrarily changing the agreed length of supervised release from

three years to ten years without notice.

The district court further violated Proctor's Fifth Amendment rights when it allowed him to be punished twice for the same offense of failure to appear. A two-level enhancement was applied under 3C1.1 without notice. The three levels for acceptance of responsibility were taken away. These five levels added 64 months of incarceration to the sentence. He was then charged with and convicted of one count of failure to appear and one count of contempt. This added another 12 months of incarceration to the 64 months for the same failure to appear offense, all in violation of the Fifth Amendment Due Process and Double Jeopardy clauses, in addition to 18 USC 3146. Failure to appear authorized a maximum total punishment of 60 months, not 76. The conclusion is ineluctable that Proctor was over-sentenced by sixteen months. When factoring in his good conduct credit his release date should have been February 2015.

This Court should reject both the district court's and the Eleventh Circuit's rulings that kept Proctor illegally incarcerated with no factual basis for denying all relief sought. At this posture of the proceedings, with Mr. Proctor presently on supervised release, that ten year term should be reduced by the amount of time that he served in prison that exceeded the legal

sentence that could have been imposed.

The Eleventh Circuit has ignored this Court's precedent on plain error based on Rule 52(b), Fifth Amendment Due Process, this Court's landmark decision in *Apprendi v. New Jersey*, 503 U.S. 466 (2000), which brings into play the Sixth Amendment. This Court further should reject the government's retreat from their obligations under the flawed plea agreement solely based on Proctor's failure to appear. Certainly Proctor does not deny that he failed to appear at sentencing, but that did not deter this Court in *United States v. Puckett*, 556 U.S. 129 (2009) from ruling on plain error, and as the Seventh Circuit ruled in *United States v. Fraizer*, 213 F.3d 409 (7th Cir.), cert.denied, 531 U.S. 1015 (2000), a hearing must be held before the government can retreat from its obligations in a plea agreement. That never happened here.

This Court should employ its case-by-case approach regarding plain constitutional error, that is reversible regardless of when or how it is brought forward. This case is rife with multiple due process violations. Consideration should be given to clarify that noncompliance with the terms of a plea agreement is a due process violation and affects all criminal cases and convictions, warranting correction of errors for the defendant.

There is no factual, legal, congressional, or common sense policy to perm it lower courts to reject relief for due process and plain error violations. Proctor prays that this Court will exercise its supervisory authority by reviewing this case, reversing the Eleventh Circuit's dismissal of the appeal, and finding that the sentence exceeded the district court's jurisdiction, power, and authority.

Reason Three: Proctor's underlying conviction is for an offense that is not charged. When a conviction is sought by the government for a statutory violation, it is controlled by the statute as written by Congress at the time of the violation.

Congress made a purposeful determination in its amendment to 2252 crimes in 2003, not to exercise its full Commerce Clause power. The plain terms conveyed that it intended to punish only those who move images or materials across state lines, when proven beyond a reasonable doubt. *United States v. Schaefer*, 501 F.3d 1197 (10th Cir. 2007). Proctor's accused offense took place in April 2004, so this case is governed by the applicable language of Section 2252A as amended on April 30, 2003. It mandates that at least three images in the defendant's possession must travel in interstate commerce to obtain a valid conviction.

Proctor should be granted relief because the government could not have proved beyond a reasonable doubt that any violation of interstate commerce had occurred. Count One of the indictment states, “On or about April 6, 2004, in St. Lucie and Miami-Dade Counties in the Southern District of Florida and elsewhere ... [defendant] distributed materials in interstate commerce, by computer ... a violation of ... Section 2252A(a)(3)(B) and (b)(1).”

The government agrees that this offense took place between two counties in the Southern District of Florida, that are approximately 120 miles apart, not in two different states. *See, United States v. Johnson*, 246 F.3d 749 (5th Cir. 2001) (plea lacked factual basis for connection to interstate commerce).

The government totally failed to list specific required “elements” of the offense to secure a valid conviction as this Court stated in *United States v. Hess*, 124 U.S. 483, 484 (1888), confirming that an indictment must be “accompanied with such a statement of facts and circumstances as will inform...” *See also, Blitz v. United States*, 153 U.S. 308, 315 (1894); and *United States v. Hooker*, 841 F.2d 1225 (4th Cir. 1988). In 2007 the Tenth Circuit confirmed in *Schaefer, supra*, that an internet connection standing

alone does not satisfy the “interstate commerce nexus, and the government must prove the transmission moved images across state line.” A mere statement does not prove the interstate nexus.

Because the offense with which Proctor was charged took place before either of the 2252 statutes carried language such as “facility of or “affecting interstate commerce,” the government cannot garner a conviction without proving that each item crossed state lines. And the ambiguous term “elsewhere” certainly cannot prove transmission across state lines. In *United States v. Henriques*, 234 F.3d 263 (5th Cir. 2000) the Fifth Circuit wrote “... in violation of 18 U.S.C. §2252A(a)(3)(B), defendant’s child pornography conviction was reversed on a finding that the government failed to adequately link each image to internet (interstate commerce); “thus evidence is insufficient to support a guilty verdict.”

Neither the indictment nor the plea agreement attempted to link any of the seven hyperlinks that Proctor was accused of sending to factual “interstate commerce.” In *United States v. Wilson*, 182 F.3d 737, 744 (10th Cir. 1999), the Tenth Circuit confirmed that if the government failed to independently link each image to interstate commerce, it would not allow a conviction to be obtained without proving each element beyond a reasonable

doubt. Schaefer continued: “Exercising jurisdiction under 18 USC 1291, we hold that the government failed to offer sufficient evidence we hold that the government failed to offer sufficient evidence to establish the jurisdictional nexus of a movement across state lines (movement in interstate commerce).”

Equally important to Mr. Proctor’s case, Schaefer maintained “... no evidence indicated where the website [he] accessed was based, where the website’s servers were located, or whether [his] internet provider’s server was housed.” In 2004 when Proctor was charged, Section 2252 did not allow the government to base a conviction on a mere reference or connection to the internet, but required facts be proven that all transmissions crossed state lines. Thus the government could not have proved beyond a reasonable doubt any interstate commerce violation, and thus the conviction is invalid.

Reason Four: The government may not unilaterally retreat from or modify a plea agreement without a hearing. *See, United States v. Fraizer*, 213 F.3d 409 (7th Cir.), cert.denied, 531 U.S. 1015 (2000). In September 2005 Proctor entered into a plea agreement with the government. The district court accepted it as written. Proctor was sentenced beyond the scope

of his plea agreement when Probation altered the written agreement by adding enhancing elements that were not in the indictment or the plea agreement.

In *United States v. Puckett*, *supra*, 556 U.S. 129 (2009), this Court confirmed that plea agreements essentially are contracts. Justice Sotomayor concluded in a concurring opinion in *Freeman v. United States*, 564 U.S. 522 (2011), that a sentence imposed pursuant to a FRCrP 11(c)(1)(c) plea agreement is based on that written agreement, not the guidelines, even if they may be relevant to the plea negotiations.

Proctor's plea agreement stated that the government promised to dismiss Counts Two and Three after sentencing, give Proctor no more than three years' supervised release, and recommend a three-level reduction for acceptance of responsibility and recommend sentencing at the low end of the guidelines.

At sentencing hearing in February 2006, it was argued that the 15 levels of enhancements were not part of the plea agreement that Proctor had entered into. Thus although Count Three (possession of child pornography) was dismissed, the elements of the dismissed offense were included in the guidelines as "aggravating factors" and so applied by the court.

In *United States v. Locke*, 643 F.3d 235 (7th Cir. 2011), the Seventh Circuit held that the district court erred in considering transactions underlying dismissed counts as relevant conduct. In *United States v. Vaval*, 404 F.3d 144 (2d Cir. 2005), the Second Circuit reversed a conviction because the PSR varied in several ways from the plea agreement.

At issue in the present case are a two level enhancement for age under 12 years, a four level enhancement for sadistic and masochistic conduct, a five level enhancement for possession of over 600 images of child pornography, a two level enhancement for distribution of child pornography which is covered by the statute, and a two level enhancement for use of a computer which also is covered by the statute (15 levels of enhancements).

Because those elements were used to increase the sentence, they violated Proctor's Fifth and Sixth Amendment rights, depriving him of due process by increasing his incarceration. In *Santobello v. New York*, 404 U.S. 257 (1971) this Court held that a criminal defendant has a due process right to enforce the obligations of his plea contract, and further held in *United States v. Tucker*, 404 U.S. 443, 447 (1972), that due process requires a defendant to be sentenced based upon accurate information.

Probation further altered the plea agreement when it arbitrarily changed the term of supervised release from the promised three year term to ten years. The government did not comply with the terms of the plea agreement. When the government agrees to bind itself to a plea agreement regarding sentencing recommendations, any deviation from the recommendations is a breach, and is not immaterial. *Santobello, supra*.

CONCLUSION

Based upon the foregoing arguments and authorities, Mark Proctor respectfully prays that this Honorable Court will grant its most gracious writ, and thereupon will grant all relief to which he is entitled, including to vacate and reverse the order of the Eleventh Circuit summarily dismissing his appeal, thereby allowing the district court to dismiss his §2255 motion and denying a certificate of appealability; and will remand the cause with instructions to reinstate the Rule 52(b) proceedings; and/or in the alternative to allow Mr. Proctor to proceed with a §2255 motion based upon the change in the law in *Molina-Martinez v. United States*, April 2016; and/or in the alternative to vacate the sentences imposed in Proctor's original and second prosecutions and remand the cause for a new sentencing hearing or hearings

correctly applying the guidelines, and especially precluding double punishment for failure to appear.

Mr. Proctor has served his overly-lengthy sentence of incarceration. No one can return those years of his life to him. He is presently serving a term of supervised release that was agreed in the parties' written plea agreement to be three years, but then was altered or modified and increased to ten years. As a result, the reduction in sentence should be applied to the term of supervised release.

Very respectfully submitted,

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