

IN THE
SUPREME COURT OF THE UNITED STATES
MAY TERM, 2018

No. _____

FERNANDO REYES-ROJAS
PETITIONER

V.

UNITED STATES OF AMERICA
RESPONDENT

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

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I. QUESTION PRESENTED

(A) WHETHER DISTRICT COURTS CAN CONSIDER A DEFENDANT'S COOPERATION THAT WAS MADE AFTER THE ACCEPTANCE BY THE COURT OF A C-TYPE PLEA, BUT BEFORE THE DEFENDANT'S SENTENCE, ABSENT A DOWNWARD DEPARTURE MOTION BY THE GOVERNMENT UNDER U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

II. LIST OF PARTIES

The caption of the case contains the names of all parties in the instant petition.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court Of Appeals for the First Circuit which affirmed a judgment of the District Court for the district of Puerto Rico.

III. CITATIONS OF THE OFFICIAL OPINIONS BELOW

The official citation of the case at the Court of Appeals is, United States v. Fernando Reyes-Rojas, 15-2291 (1st Cir. P.R., 02/21/2018)(unpublished)

IV. STATEMENT OF BASIS OF JURISDICTION

The district court entered judgment on October 14,2015, Petitioner appealed to the First Circuit Court of Appeal on the same day. On August 15, 2017, the First Circuit affirmed the district court judgment. On August 24,2017, Petitioner filed a Panel Rehearing Petition. On February 12,2018, the Court of Appeals denied the Petition for Rehearing. The mandate was

issued on February 21, 2018. Therefore, the Supreme Court's Jurisdiction is invoked under Title 28 U.S.C. § 1254(1), which confers jurisdiction on this Honorable Court to review on Writ of Certiorari the judgment in question.

V. RELEVANT STATUTORY PROVISIONS INVOLVED IN THE CASE

18 USC §3553(a)(1)

VI. STATEMENT OF THE CASE

Petitioner along with several codefendants were arrested and charged with Hobbs Act violation under Title 18, U.S.C. §1951(a), Robbery of USA Property under Title 18 U.S.C. §2114(a) and 2, and aiding and abetting one another, to carry and use firearms, to wit brandish three handguns during and in relation to a crime of violence, in violation of Title 18 U.S.C. §924(c) and 2.

On December 5, 2014, after reviewing the discovery, Mr. Reyes pleaded guilty pursuant to a C-type plea before a magistrate judge. Under the terms of the Plea agreement a base offense level of twenty (20) was established, pursuant to U.S.S.G. §2B3.1(a). Loss amount was calculated between \$10,000 but less than \$50,000, and a one (1) level increase was added, pursuant to USSG §2B3.1(b)(7)(B). A firearm was brandished or possessed, during the commission of the offense, and therefore a five (5) level increase was added, pursuant to U.S.S.G. § 2B3.1(b)(2)(C). (ECF# 156)

Petitioner accepted that he was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, and four (4) levels were increased pursuant to USSG §3B1.1(a). Petitioner demonstrated timely acceptance of responsibility for the instant

offense, and a two (2) level decrease was applied pursuant to USSG §3E1.1(a); for a total adjusted level of twenty-eight (28).

The parties recommended a sentence at the upper end of the applicable guidelines range for a total offense level of twenty-eight (28). The parties agree that the offenses will not combine or group with criminal case 14-427 (JAF) and that the sentences for each case will run consecutive to one another. The parties agreed that, no further adjustment or departures to the Petitioner's base offense level should be sought by the parties. Petitioner Reyes agreed that if sentenced according to the terms, conditions and recommendations of the plea, he would waive and surrender his right to appeal the judgment and sentence in this case. On February 25, 2015, the District Court adopted the Magistrate's Report and Recommendation, regarding the Acceptance of Reyes' Guilty Plea.

The Pre-Sentence Report was disclosed on February 26, 2015. On March 25, 2015, Mr. Reyes filed a Motion to continue his Sentencing Hearing. In his motion, Reyes informed that the government interviewed him in order to assess his capacity to cooperate with the government. The Court granted Reyes' request and postponed the sentencing hearing for May 12, 2015. On March 29, 2015, the Court re-set the Sentencing hearing for June 22, 2015. On June 15, 2015, the district court granted the undersigned's motion to continue and set the sentencing hearing for July 28, 2015. On July 16, 2015, the court changed the sentencing hearing for August 13, 2015.

On August 3, 2015, Petitioner's Attorney received an email from the AUSA in charge of the case. The email indicated that since Mr. Reyes did not agree to cooperate, the government will not use him or planned to use him in the upcoming trial against Trinidad, and therefore the

government was not filing the 5K Motion. This was incredible, since Mr. Fabio Trinidad had pleaded guilty since July 16, 2015 and there was not trial scheduled.

After receiving the email, on the same date (August 3, 2015), Mr. Reyes filed a motion to withdraw his Guilty Plea. The next day, August 04, 2015, Mr. Reyes requested the court to issue a subpoena to summon the attorney for co-defendant Fabio Trinidad, to the sentencing hearing. The purpose of the motion was to show the court that Reyes' cooperation was indeed used by the government and that the government was backing down on the promise made, to file the 5K Motion. On the same date the court denied Reyes the opportunity to present evidence of his cooperation, during the sentencing hearing, without explanation.

On August 17, 2015, the government filed a response to Reyes' Motion To Withdraw His Guilty Plea. The government alleged, that Reyes pled guilty voluntarily and with full knowledge and that there was no cooperation entered with the United States. On August 26, 2015, the Magistrate Judge issued a Report and Recommendation (R&R) to the presiding Judge, recommending denying Reyes' motion to withdraw his guilty plea. (Counsel did not object to the August 26, 2015 R&R. On October 14, 2015, the court held the sentencing hearing. (ECF# 310)

The Court overruled all arguments and adopted the August 26, 2015 R&R of the magistrate Judge recommending the court no to permit Reyes to withdraw his guilty plea. The court, proceed to sentence Mr. Reyes following the terms of the C-type plea agreement, to 121 months, consecutive with criminal case 14-427(JAF). Petitioner Appealed to the Court of Appeals For The First Circuit. Petitioner argued, that the waiver of appeal on his plea agreement was not enforceable, that the District court erred in not allowing Petitioner to withdraw his guilty

plea, and that the district Court erred by concluding that it could not Reject Mr. Reyes' C-Type Plea, so that Reyes could argue his cooperation.

On August 15, 2017, the Court of Appeals concluded that:

“We have reviewed the record in this case. Even if we assume *arguendo* that the appellate waiver should not be enforced, we find no error in the district court’s refusal to vacate appellant’s guilty plea or in its acceptance of the plea agreement.”

On August 24, 2017, Petitioner filed a Petition for Rehearing. Petitioner argued that even if the Court understood that the district court was correct in not vacating Mr. Reyes-Rojas’ guilty plea (Issue 1) or in its acceptance of the plea (Issue 2), the Court of Appeals had not addressed Petitioner’s third issue, whether the district court can consider a defendant’s cooperation that was made after the acceptance by the court of the C-type plea, but before the defendant’s sentence, absent a downward departure motion by the government under U.S. Sentencing Guidelines Manual § 5K1.1, was not addressed by the Court.

On February 12, 2018, the Court of Appeals denied Petitioner rehearing request without addressing the issue presented. Petitioner respectfully states that the Issue is of first impression, and therefore the court should grant Certiorari in the present case. Mr. Reyes is presenting an issue of fairness and justice in sentencing, and the matter goes directly to the district court power to administer justice.

VII. REASONS FOR GRANTING THE PETITION

Mr. Reyes sat with prosecutors and agents for a debriefing, and provided information about various criminal activities, including his involvement in his case. Reyes also provided information about co- defendant Fabio Trinidad-Martinez, who was the only co-defendant that

was going to trial in the case. As Trinidad's case was approaching trial, the United States requested, and Mr. Reyes agreed, to have a second debriefing. Mr. Reyes again provided the government information regarding Trinidad. Mr. Reyes cooperated, and the District Court repeatedly reasoned that *had this case* not been a C- type plea, the court could have considered the proffers and the willingness of Mr. Reyes to at least provide some information to the government.

There is little doubt also that the government received all the benefits from Reyes' debriefings, since his debriefing and cooperation were not limited to the indictment itself, but other possible areas of criminal investigations. Under 18 USC §3553(a)(1) a sentencing court has to consider the "history and characteristics of the defendant," *without limitation*. *United States v. Landrón-Class*, 696 F.3d 62, (1st Cir. P.R. Aug. 29, 2012)

Mr. Reyes respectfully alleges that the district court erred in understanding that it did not have the power to consider Reyes' cooperation absent a motion under §5K1.1 from the Government. Petitioner argued that district court reasoning was in conflict with First Circuit court precedent in *United States v. Landrón-Class*, 696 F.3d 62 (1st Cir. 2012).

In *Landron-Class*, the court of Appeals held that district courts could consider cooperation without the government filing of a §5K1.1 motion. The Issue in the present case is whether cooperation can be considered, after the court accepts a Type –C plea, absent a downward departure motion by the government under U.S. Sentencing Guidelines Manual § 5K1.1, before sentencing.

Reyes' count of conviction does not have a minimum mandatory term of imprisonment, and it was to Mr. Reyes' advantage to receive a benefit from the information provided. Also, the court repeatedly reasoned that had this case not been a C-type plea, the court could have considered the proffers and the willingness of Mr. Reyes to at least provide some information to the government.

Statements made by the District Judge like:

“the Court has accepted that plea and is bound by that plea”; “But, again, the analysis doesn't change because the Rule 11 (c)(1)(C) type plea, I accepted that plea, I am bound by that plea. And absent any requests from the government under a 5K1 motion it doesn't have to be statutory under §3553(e) because there's no mandatory minimum. But under the 5K1.1, absent that motion, I cannot depart downwards or vary based on substantial assistance.”

are a clear indications, that the district court understood that it could not consider cooperation even with an accepted Type-C plea, in the absence of a §5K1.1 motion.

Petitioner cooperated with the government, and the district court seemed willing to adjust the sentence, if it was not “bound” by a Type C plea.: “Had this not been a (c)(1)(C) type plea of course, I could have considered the proffers and the willingness of your client to at least provide some information to the government, but it's a (c)(1)(C) type plea.” (SH at page 20, Lines 8-12) Here the district court indicated a willingness to provide just punishment but did not do so because it understood that it could not absent a §5K1.1 motion.

Petitioner deserves that this issue be discussed and decided by this Honorable Court. By granting the Instant Certiorari Petition, the Supreme Court can guide all district courts that want

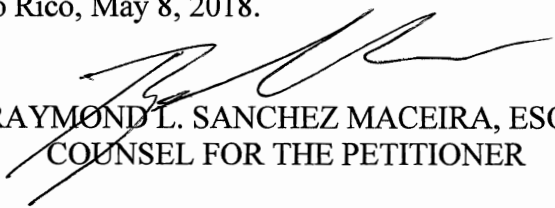
to consider cooperation, which started after the Change of plea hearing but before Sentencing with a Type C-plea.

VIII. CONCLUSION

Petitioners respectfully understand that the arguments presented warrant that this Honorable Court Grant the instant writ of certiorari.

Respectfully submitted,

In Santurce, Puerto Rico, May 8, 2018.



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