

No:

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

ALEX N. MORALES VELEZ,

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

Alex N. Morales-Velez
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QUESTIONS PRESENTED FOR REVIEW

I. Should a writ of certiorari be granted to determine whether the First Circuit Court erred in not remanding the appeal when the record before the court established that the government had breached the terms of the plea agreement.

**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 United States District Court for the District of Puerto Rico.

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

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I, Alex N. Morales Velez, the Petitioner herein, respectfully prays that a Writ of Certiorari is 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The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *United States v. Morales-Velez*, Docket No: 15-1134 and is reprinted as Appendix A to this petition.

STATEMENT OF JURISDICTION

The First Circuit's denial of Morales' direct appeal was entered on April 5, 2018.

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

STATEMENT OF THE FACTS

1. Overview of the Offense

Alex N. Morales Velez (hereinafter Morales), was charged in a six count Indictment criminal case 14-284 (JAF), in the District of Puerto Rico on April 23, 2014. Count One was charged with a conspiracy to possess with intent to distribute controlled substances which states that in or about and between August 2010 through the return of the instant Indictment, in the Municipality of Mayaguez, District of Puerto Rico, and within the jurisdiction of the Court. It alleged that Morales knowingly and intentionally combined, confederated and agreed with others to commit an offense against the United States, that is: to possess with intent to distribute one kilogram of heroin, five kilograms of cocaine, two hundred and eighty grams of crack and one hundred kilograms of marijuana, all within one thousand feet of property comprising a housing facility owned by a public housing authority, that is, the Res. Rafael Hernandez, Res. Manuel Hernandez Rosa and El Carmen Public Housing Projects, in violation of Title 21 U.S.C. Sections 841(a)(1) and 860. All in violation of Title 21 U.S.C. 846.

Morales was charged in Count Two from August 2010 through the return of the instant Indictment in the Municipality of Mayaguez, District of Puerto Rico, and within the jurisdiction of this Court with aiding and abetting with the possession with intent to distribute at least one kilogram of heroin within one

thousand feet of a housing facility owned by a public housing authority, that is Res. Rafael Hernandez, Res. Manuel Hernandez Rosa and El Carmen Public Housing Projects. All in violation of Title 21 U.S.C. Sections 841(a)(1) and 860, and Title 18 U.S.C. 2.

Count Three is charged from August 2010 through the return of the instant Indictment in the Municipality of Mayaguez, District of Puerto Rico, and within the jurisdiction of this Court of aiding and abetting others and of knowingly and intentionally possessing with the intent to distribute at least 5 kilos of cocaine within one thousand feet of a housing facility owned by a public housing authority, that is Res. Rafael Hernandez, Res. Manuel Hernandez Rosa and El Carmen Public Housing Projects. All in violation of Title 21 U.S.C. § 841(a)(1) and 860, and Title 18 U.S.C. 2.

Count Four charged from August 2010 through the return of the Indictment in the Municipality of Mayaguez, District of Puerto Rico, and within the jurisdiction of this Court with aiding and abetting others, knowingly and intentionally possessing with intent to distribute two hundred and eighty grams or more of crack within one thousand feet of a housing facility owned by a public housing authority, that is Res. Rafael Hernandez, Res. Manuel Hernandez Rosa and El Carmen Public Housing Projects. All in violation of Title 21 U.S.C. Sections 841(a)(1) and 860, and Title 18 U.S.C. 2.

Count five charges Morales with possessing with the intent to distribute at least 100 kilograms or more of marijuana from August 2010 till the return of the instant Indictment in the Municipality of Mayaguez, District of Puerto Rico, and within the jurisdiction of the Court of aiding and abetting, of knowingly and intentionally possessing the drug within one thousand feet of a housing facility owned by a public housing authority, that is Res. Rafael Hernandez, Res. Manuel Hernandez Rosa and El Carmen Public Housing Projects. All in violation of Title 21 U.S.C. Sections 841(a)(1) and 860, and Title 18 U.S.C. 2.

Count Six charged using and carrying a firearm during and in relation to a drug trafficking crime from August 2010 till the return of the instant Indictment in the Municipality of Mayaguez, District of Puerto Rico, and within the jurisdiction of the Court with aiding and abetting others and knowingly using and carrying a firearm, as defined in Title 18 U.S.C. 921(a)(3), during and in relation to a drug trafficking crime as is defined in Title 18 U.S.C. 924(c)(2) a violation of Title 21 U.S.C. 846, involving a conspiracy to possess with intent to distribute controlled substances, as charged in Counts One through Five. All in violation of Title 18 U.S.C. Sections 924(c)(1)(A) and 2.

On August 28, 2014, the Morales pled guilty to Count One and Count Five of the Indictment in Criminal Case No-14-284, pursuant to a plea agreement under the provisions of Rule 11 (c)(1)(B) of the Federal Rules of Criminal Procedure

He was sentenced on December 10, 2014, to 171 months for Count One and 60 months for Count Five to run consecutively for a total of 211 months.

Morales proceeded on appeal alleging that the Government had breached the terms of the plea agreement by not recommending the low end of the guidelines as stipulated by the parties. The Government breached the agreement by recommending the middle and high end of the applicable guideline. By violating the terms of the agreement at the moment of his change of plea, the waiver of appeal clause was not enforceable.

The First Circuit Court of Appeals affirmed the sentence and conviction. This timely request for a writ of certiorari follows.

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 applicable decision of this Court.... *Id.*

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

QUESTIONS PRESENTED

I. SHOULD A WRIT OF CERTIORARI BE GRANTED TO DETERMINE WHETHER THE FIRST CIRCUIT COURT ERRED IN NOT REMANDING THE APPEAL WHEN THE RECORD BEFORE THE COURT ESTABLISHED THAT THE GOVERNMENT HAD BREACHED THE TERMS OF THE PLEA AGREEMENT.

On August 28, 2014, Morales pled guilty to Count One and Count Six, with the assistance of a translator. During this hearing, the Court made sure among others that the Morales could answer background questions and found him competent. At the end of this exchange, the Morales assured that he had received and discussed with counsel the indictment. All the standard plea agreement and guidelines explanations were provided.

The Court then stated the following guideline computation. Upon pleading guilty to Count One, the parties established a base offense level of 32 pursuant to 2D1.1(c)(4). Because the drugs were sold within 1,000 feet from a protected location there was a 2 level increase pursuant to U.S.S.G. 2D1.2(a)(1). Two (2) additional points were added for Morales' aggravating role as a leader pursuant to U.S.S.G. 3B1.1(c). Due to Morales' acceptance of responsibility, a 3 level decrease would be warranted under U.S.S.G. 3E1.1. For a total adjusted level of 33. The recommendation is a sentence at the lower end of the applicable guideline range. (Change of plea transcript page 22, line 14-16, App. 22)

Additionally, Morales agreed to plead guilty to Count Six, in which the

parties would recommend a consecutive sentence of five (5) years. (Change of plea transcript page 22, line 16-17 App. 22) Finally, the Court reiterated the waiver of appeal clause and Morales affirmed he understood. (Page 22 line 20-24, App. 22)

The Court stated:

“You’re also waiving your right to appeal if you get sentenced that way, and you will not be seeking any further adjustments or departures.” (Change of plea transcript page 22 line 20-24, App. 22)

Morales was sentenced on December 10, 2014, before Honorable Judge Fuste. Defense Counsel brought forth to the attention of the Court during her allocution all the 3553(a) factors that warranted consideration towards sentencing Morales to the lower end pursuant to the plea agreement.

In 18 U.S.C. 3553(a)(4) and (5) Congress directed sentencing courts to use the guideline that is *“in effect on the date the defendant is sentenced.”* The Government's position was that based on an offense level of 33, Criminal History Category IV the appropriate sentence to be imposed was 168 months for Count I, consecutive to a sentence of 60 months for Count VI, for a total sentence of 248 months. There were numerous erroneous calculations based on the government's assessment of the proper sentence pursuant to the plea agreement stipulated by the parties.

First, the lower end of the sentencing guideline for an offense level of 33 for a criminal history IV is 188 with a range up to 235. Second, because Morales

was sentenced after November 2014 he qualified for the two level reduction pursuant to Amendment 782. The appropriate guideline range for the day of his sentencing is offense level 31. Under a criminal history score of IV the the lower end of the guideline was 151. If in fact, the government meant 168 based on an offense level of 31 then 60 consecutive months for Count VI rendered a sentence of 228 months and not 248 as requested. The correct sentencing range for Morales was 151-188. The correct recommendation at the lower end of the applicable guideline was 151 months, not 168 nor 180 as requested by the Government. (Sent. Tr. pg.14, line 8-14).

The waiver of appeal of the plea agreement is enforced if "the defendant knowingly and *waives the right to appeal the judgment and sentence in this case, provided the defendant is sentenced in accordance with the terms and conditions set forth in the Sentence Recommendation provisions of this Plea Agreement.*"

In this case, the language of the agreement clearly and unambiguously provides for Morales to be recommended a sentence at the lower end of the applicable guideline.

"Ordinarily, whether the government has breached its plea agreement with a defendant is a question of law and our review is plenary." See *United States v. Doe*, 233 F.3d 642, 643-44 (1st Cir. 2000) [citing *United States v. Clark*, 55 F.3d 9,

11 (1st Cir. 1995)]; *United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992).

“When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *United States v. Riggs*, 287 F.3d 221, 224 (1st Cir. 2002); *Saxena*, 229 F.3d at 5-6. “This requirement prohibits, therefore, “not only an explicit repudiation of the government’s assurances but must in the interest of fairness be read to forbid end runs around them.” *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985), quoted in *United States v. Frazier*, 340 F.3d 5, 10 (1st Cir. 2003); *Saxena*, 229 F.3d at 6; *Canada*, 960 F.2d at 269.

Morales’ plea agreement was quite specific in that the lower end would be recommended for Count I at the time of sentencing. (Plea Agreement page 5 paragraph X, Add. 28). A clause was included prohibiting the parties from arguing “further guideline adjustments or departures.” *Id.* At sentencing, the United States departed from the agreement by the parties by recommending middle to high range sentences and this constitutes a material breach of the Plea Agreement. The Court may have been affected by the misleading representations of the Prosecutor that produced harm at the moment of sentencing. Morales was not sentenced to the lower end of the applicable guideline but instead was sentenced to middle to high range for a total of 171 months for Count I. The Court may have discretion in

sentencing the Morales but the Government was bound by the agreement and thus a plain error may have induced the Honorable Judge to not sentence at the lower end of the applicable guideline.

The Court at the moment of sentencing took into consideration the Presentence Report (Sentence Transcript page 15 line 7-25, App. 43)

Rule 32 of Criminal Procedure states that the presentence report must:

- (A) identify all applicable guidelines and policy statement of the Sentencing Commission;
- (B) calculate the defendant's offense level and criminal history category
- (C) state the resulting sentencing range and kinds of sentences available

The probation officer correctly applied the applicable guidelines and sentencing range for Morales. Applying Amendment 782 the total offense level was reduced from Level 33 to Level 31.

The correct guideline range for Morales was 151-188. The lower end of the applicable guideline as stipulated by the parties pursuant to the plea agreement was 151 months, not 168 or 180 as requested by the Government. Although the Presentence Report had the correct calculations it is impossible to know the Honorable Judge's state of mind at the moment of sentencing and whether the increase in the range recommended by the Government had a negative impact on the Court. The First Circuit honored the appellate waiver.

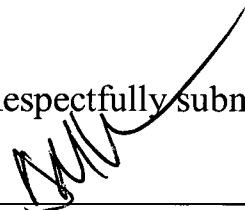
When the appellate waiver was enforced, it was based on the terms of the plea agreement. Those terms cannot be enforced against Morales based on the initial breach by the government. As such, the granting of a writ of certiorari and remand is required in the instant matter.

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 26, day of May 2018

Respectfully submitted,



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