IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO.: 13-50226

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELISEO MONTES, JR.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, WACO DIVISION

PETITION FOR REHEARING EN BANC

Patrick Michael Megaro, Esq.
BROWNSTONE, P.A.
Attorneys for Defendant-Appellant
201 North New York Avenue, Suite 200
Winter Park, Florida 32789
(o) 407-388-1900
(f) 407-622-1511
patrick@brownstonelaw.com
New York Bar ID # 4094983
New Jersey Bar ID # 3634-2002
Florida Bar ID # 738913
North Carolina Bar ID # 46770

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure and Rule 28.2.1 of the Fifth Circuit Rules, Applicant-Defendant-Appellant submits that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) Eliseo Montes, Jr. (Applicant-Defendant-Appellant)
2) Patrick Michael Megaro, Esq. (Attorney for Defendant-Appellant);
3) Brownstone, P.A. (Law Firm representing Defendant-Appellant);
4) AUSA Mary Kucera, Esq. (United States Attorney at trial)
5) AUSA Diane Kirstein, Esq. (United States Attorney on appeal)
6) Franklyn Ray Mickelsen, Jr., Esq. (former attorney for Defendant-Appellant)
7) Hon. Walter S. Smith, Jr. (District Court Judge)

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Patrick Michael Megaro, Esq.

STATEMENT PURSUANT TO RULE 35(b)(1)

Defendant-Appellant respectfully requests rehearing en banc in this matter because the panel decision conflicts with a decision of the United States Supreme Court in Massaro v. United States, 538 U.S. 500 (2003), and this Court's decisions in United States v. Stoker, 706 F.3d 643 (5th Cir. 2013), United States v. Bishop, 629 F.3d 462 (5th Cir. 2010), United States v. Munoz-Flores, 324 Fed.Appx. 389 (5th Cir. 2009), United States v. Aguilar, 503 F.3d 431 (5th Cir. 2007), United States v. Villegas-Rodriguez, 171 F.3d 224 (5th Cir. 1999), Jones v. Jones, 163 F.3d 285 (5th Cir. 1998), United States v. Navejar, 963 F.2d 732 (5th Cir.1992), United States v. Bounds, 943 F.2d 541 (5th Cir. 1991), and United States v. Higdon, 832 F.2d 312 (5th Cir. 1987). Consideration by this full Court is necessary to secure and maintain uniformity with both binding Supreme Court precedent and this Court's prior decisions, in which it was held that claims of ineffective assistance of counsel can and should be decided on direct appeal where the record permits sufficient review.

Further, this case involves questions of exceptional importance, to wit: (1) whether a criminal defendant has any burden to disprove any facts presented by the Government at a sentencing hearing and/or facts contained within a Pre-Sentence Report that are used to support an enhancement of a sentence where those facts were not presented to a jury or conceded by the defense; and (2) the practical effect

of such a rule of law imposing a burden of proof on a criminal defendant at sentencing hearings.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii

STATEMENT PURSUANT TO RULE 35(b)(1) iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION 1

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION 1

STATEMENT OF FACTS RELEVANT TO THIS PETITION 1

ARGUMENT AND CITATIONS OF AUTHORITY 12

CONCLUSION AND RELIEF REQUESTED 6

Certificate of Service 7

Certificate of Compliance 7

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Maness v. Meyers, 419 U.S. 441 (1972)……………………………..…………...11

Massaro v. United States, 538 U.S. 500, 504 (2003)……………………..…iii, 7

Strickland v. Washington, 466 U.S. 668 (1984) 6

Trevino v. Thaler, __ U.S. __, 131 S.Ct. 1911 (2013)…………………………...10

United States Court of Appeals for the Fifth Circuit

Jones v. Jones, 163 F.3d 285 (5th Cir. 1998)……………………………...iii, 6, 7

United States v. Aguilar, 503 F.3d 431 (5th Cir. 2007)…………………...…iii, 8

United States v. Bishop, 629 F.3d 462 (5th Cir. 2010) ……………………..…… iii, 8

United States v. Bounds, 943 F.2d 541 (5th Cir. 1991) ……………………….… iii, 8

United States v. Higdon, 832 F.2d 312 (5th Cir. 1987) ……………………… iii, 8

United States v. Holt, 248 Fed.Appx 613 (5th Cir. 2007)………………………...12

United States v. Munoz-Flores, 324 Fed.Appx. 389 (5th Cir. 2009)..................iii, 8

United States v. Navejar, 963 F.2d 732 (5th Cir. 1992).................................... iii, 8

United States v. Stoker, 706 F.3d 643 (5th Cir. 2013) ……………………..… iii, 8

United States v. Trujillo, 502 F.3d 353 (5th Cir. 2007)…………………………..12

United States v. Villegas-Rodriguez, 171 F.3d 224 (5th Cir. 1999) ………….. iii, 8

Other Circuits

McQueen v. Swenson, 498 F.2d 207 (8th Cir.1974)………………………………7

United States v. Archer, 671 F.3d 149 (2d Cir. 2011)…………………………….....11

United States v. Alvarez, 358 F.3d 1194 (9th Cir. 2004)………………….........11

United States v. Bailey, 227 F.3d 792 (7th Cir. 2000)……………………………11

United States v. Bell, 667 F.3d 431 (4th Cir. 2011)………………………………11

United States v. Brennan, 326 F.3d 176 (3d Cir. 2003)…………………….....11

United States v. Bryant, 571 F.3d 147 (1st Cir. 2009)…..……………………….10

United States v. Davis, 679 F.3d 177 (4th Cir. 2012)…………………....……..11

United States v. Maliszewski, 161 F.3d 992 (6th Cir. 1998)……………………..11

United States v. McKanry, 628 F.3d 1010 (8th Cir. 2011)……………………….

United States v. Miller, 910 F.2d 1321 (6th Cir. 1990)……………………….…..11

United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989)……………………..11

United States v. Rollins, 544 F.3d 820 (7th Cir. 2008)…………………….……..11

United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000)…………………………..

United States v. Savarese, 686 F.3d 1 (1st Cir. 2012)………………………….…10

United States v. Schmidt, 244 Fed.Appx. 902 (10th Cir. 2007)…………………..11

United States v. Tucker, 716 F.2d 576 (9th Cir.1983)……………………………..7

United States v. Washington, 714 F.3d 1358 (11th Cir. 2013)………….……….10

Other Authority

28 U.S.C. § 2254..6

28 U.S.C. § 2255...8, 9

STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

Pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure, counsel for Defendant-Appellant believes that en banc consideration is necessary to secure uniformity with this Court's prior decisions and this case involves questions of exceptional importance, as indicated below.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION

Eliseo Montes, Jr. was convicted of conspiracy to distribute marijuana and conspiracy to launder money after a jury trial in the United States District Court for the Western District of Texas, Waco Division. He timely perfected an appeal to this Court, challenging his conviction and sentence. This Court affirmed the conviction and sentence in an unpublished decision dated February 4, 2014, a copy of which is attached.

STATEMENT OF FACTS RELEVANT TO THIS PETITION

The evidence presented by the Government at trial established that Montes, a police officer employed by the Laredo Police Department, participated in a marijuana-distribution network by investing money, arranging shipments, and assisting co-conspirators by making a false traffic stop while on duty to provide a cover story for lost money. Unlike most Federal drug conspiracy prosecutions, here there were no wiretap recordings containing incriminating conversations between Defendant-Appellant and others concerning drug activity or money laundering. There were no controlled purchases of narcotics. There were no

narcotics recovered from Defendant-Appellant's home or any place over which he had dominion and control.

At trial, Montes testified in his own defense, and was cross-examined as follows, without any objection by trial counsel:

> Q: How many times have you gone over your testimony for here today?
> A: **None, ma'am**.
> Q: **So you've not met with your lawyer or any representative of your lawyer's office to go over your testimony**?
> A: **No, ma'am**. We've talked about my -- that I was going to have to testify, but we didn't make no type of outline or anything like that.
> Q: **So y'all didn't talk about the different areas that you were going to discuss here today**?
> A: **Actually, no. I was trying to get my attorney to do that and he didn't want to**.
> Q: So this was -- your testimony's just off the cuff? This man here had never discussed with you about what you were going to testify to today?
> A: Well, I mean, we -- I mean, he -- he mentioned things that might be brought up like, I mean, the stop to explain it, I mean, but he didn't tell me how to testify or we didn't go through an outline.
> Q: No. I didn't ask if he told you what to say. **I just asked how many times y'all had either practiced or gone over it**.
> A: **No. Not the testimony, ma'am**.
> Q: **So y'all never went over your testimony?**
> A: **Not the testimony.**

(USCA5 1648–1649).

In addition to the foregoing, there were numerous instances where trial counsel affirmatively elicited damaging testimony from the case agent who testified for the

Government, permitted a Federal law enforcement agent to vouch for the credibility of a cooperating witness, failed to object to clearly-inadmissible opinion testimony that Montes' lifestyle resembled that of a rich drug dealer, and failed to object to other evidence that was inadmissible hearsay or opinion testimony.

On appeal, Montes cited to and directly quoted these portions of the record, arguing that he received ineffective assistance of counsel, and showed how the evidence substantially prejudiced him and affected his defense.

Prior to and at sentencing, Montes objected to various portions of the Pre-Sentence Report, specifically challenging the enhancement for a firearm and asserted that because no evidence was submitted to the jury regarding possession of a firearm during the course of the conspiracy, and no specific finding was made, enhancement of his sentence would violate the Sixth Amendment. He argued that it was the Government's burden of proving the facts beyond a reasonable doubt; in the alternative, it was the Government's burden to prove the facts by clear and convincing evidence. One of the main issues was whether Montes possessed a firearm when he effected a phony traffic stop of an alleged co-conspirator. At sentencing, the case agent testified that the dashboard camera of Montes' police car was disengaged during the traffic stop, and that he himself did not witness Montes with a firearm. Similarly, there was no other trial testimony or any other indication that Montes possessed a firearm during this traffic stop. Montes argued that the Government failed to prove that he possessed the weapon during the traffic stop,

and objected to the District Court's assumption that he had, in fact, possessed a weapon.

Montes raised these same arguments on appeal, asserting that the Government failed to meet the requisite burden, and therefore his sentence was procedurally unreasonable. Montes also argued that because the District Court summarily pronounced sentence without giving an individualized statement of reasons (and without giving the defense an opportunity to make further argument), the sentence was substantively unreasonable.

This Court issued an unpublished decision on February 4, 2014. This Court held that that "[t]he record in the instant case is insufficiently developed to permit proper review of Montes's alleged grounds of ineffective assistance." This Court did not address Montes' ineffectiveness claims any further than that single sentence.

With respect to the sentencing issue raised in the appeal, this Court held that Montes' failure to present rebuttal evidence to demonstrate that the Pre-Sentence Report was "materially untrue, inaccurate, or unreliable" precluded him from relief from the sentence. This Court further held that because Montes did not "challenge sufficiently Schutt's testimony that Montes received three firearms after a coconspirator died" he could not be heard to complain of his sentence on appeal. This Court did not decide Montes' Sixth Amendment claims with respect to his sentence.

ARGUMENT AND CITATIONS OF AUTHORITY

A. Ineffective Assistance of Counsel Claims

In the instant case, the record is sufficiently clear that trial counsel utterly failed to prepare Montes to testify as a witness. As one reads through the block-quoted cross-examination cited above, the incredulity of the Assistant United States Attorney is readily apparent: how could a defense attorney simply throw their client up on the witness stand with no preparation whatsoever in a Federal drug conspiracy trial where the minimum sentence was 10 years imprisonment, and the maximum life imprisonment? Yet, that is **exactly** what the record clearly establishes. At no point during this exchange did trial counsel register an objection that perhaps this line of questioning impermissibly intruded upon the attorney-client privilege, or trampled confidentiality. It is unimaginable that if trial counsel had actually prepared his client to take the witness stand he would not exercise some form of self-preservation. The absence of an objection, a request for a sidebar, and an explanation by trial counsel to the District Court that he did, in fact, prepare his client speaks volumes. That the Government did not defend trial counsel's failure to prepare his client likewise speaks volumes.

By holding that the record in this case is not sufficiently developed for review, this Court implicitly holds that a lawyer's failure to prepare their client to testify in their own defense at trial does not constitute ineffective assistance of counsel unless the lawyer is permitted an opportunity to offer a self-serving

explanation as to their failure. This is inconsistent with the standard set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a court to evaluate counsel's actions or inaction for objective reasonableness, rather than counsel's subjective reasons.

That holding is further inconsistent with this Court's decision in Jones v. Jones, 163 F.3d 285 (5th Cir. 1998), where this Court reviewed an order from the United States District Court for the Eastern District of Louisiana granting the Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In Jones, the District Court found that trial counsel was ineffective as a result of several failures, one of which was that counsel called the Petitioner to testify without any preparation and then "gave the case away to the prosecution." Id. at 296. While this Court appeared to agree that counsel was ineffective on this ground, it held that the Petitioner was procedurally barred because she failed to exhaust her state court remedies as required by the Anti-Terrorism and Effective Death Penalty Act.

However, the dissent opined that:

> In my view, this case presents one of the more shameful pictures of legal representation that I have reviewed as a judge. Notwithstanding that his client was charged with the crime that, if convicted, would send her automatically to the penitentiary with a life sentence, counsel never had a serious conference with Jones to discuss her trial testimony nor other trial issues.
>
> …
>
> Moreover, Jones's attorney basically handed her head to the prosecutor on a silver platter, when he allowed her to testify without having (1) advised her of her right not to do so; (2) advised her as to whether, in his legal opinion, she should

do so; and (3) discussed with her how her testimony would impact her defense. Under these circumstances, Jones's testimony was so disastrous that there is little wonder that the jury reached the verdict it did.

Id. at 307.

This Court's February 4, 2014 decision is likewise inconsistent with at least three other Circuits, in which counsel was held to be ineffective for failing to properly interview and prepare defense witnesses, much less the defendant. United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) (citing United States v. Tucker, 716 F.2d 576 (9th Cir.1983) (defense counsel ineffective for failing to interview witnesses); McQueen v. Swenson, 498 F.2d 207 (8th Cir.1974) (same)

This Court's February 4, 2014 position is further inconsistent with clearly-established Supreme Court precedent. In Massaro v. United States, 538 U.S. 500 (2003) the Supreme Court clearly held that claims of ineffective assistance can and should be raised in direct appeal when the record is clear, even sua sponte. This Court has repeatedly held the same in United States v. Stoker, 706 F.3d 643 (5th Cir. 2013), United States v. Bishop, 629 F.3d 462 (5th Cir. 2010), United States v. Munoz-Flores, 324 Fed.Appx. 389 (5th Cir. 2009), United States v. Aguilar, 503 F.3d 431 (5th Cir. 2007), United States v. Villegas-Rodriguez, 171 F.3d 224 (5th Cir. 1999), Jones v. Jones, 163 F.3d 285 (5th Cir. 1998), United States v. Navejar, 963 F.2d 732 (5th Cir.1992), United States v. Bounds, 943 F.2d 541 (5th Cir. 1991), and United States v. Higdon, 832 F.2d 312 (5th Cir. 1987).

There are sound policy reasons for this Court to rehear this case en banc and hold, consistent with Supreme Court precedent and other Circuits, that the utter failure of an attorney to prepare their client to testify as a witness in a Federal drug conspiracy trial is objectively unreasonable and thus ineffective.

Where, as here, the record is clear and permits adequate appellate review, hearing a claim of ineffective assistance on direct appeal dispenses with unnecessary and protracted additional litigation in the form of (1) a petition for certiorari in the United States Supreme Court, (2) a potential appeal to the United States Supreme Court, (3) a 28 U.S.C. § 2255 petition in the District Court, (4) a potential motion for a certificate of appealability in this Court, (5) a potential appeal from the denial of a 28 U.S.C. § 2255 petition in this Court, (6) a second potential petition for certiorari in the United States Supreme Court, and (7) a second potential appeal in the United States Supreme Court.

Practically speaking, it is also likely that if this Court does not hear this claim at this juncture, it will never be fully and fairly litigated. It is no secret that evidentiary hearings on § 2255 petitions are rarely granted. If this Court adheres to its February 4, 2014 decision to kick the proverbial can down the road to a § 2255 petition filed in the District Court, it is extremely unlikely that the petition will receive a hearing in court. Based upon experience, the likely scenario is as follows: Montes will file his petition, the Government will respond with an affidavit from trial counsel offering either a self-serving explanation for his action

and inaction (or, in the alternative, assert that he actually did prepare Montes to testify), the Government will oppose an evidentiary hearing, and the District Court will likely deny the § 2255 petition without a hearing, depriving Montes the ability to cross-examine trial counsel and challenge an affidavit which will sound the death knell for his ineffective assistance claims.

Statistically, the chances for a Certificate of Appealability being granted by this Court are just as, if not more, remote than an evidentiary hearing. This is the way Montes' ineffective assistance of counsel claims will be likely to be addressed. While this view may seem pessimistic, it cannot be denied that it is realistic. This is how ineffective assistance of counsel claims become capable of repetition, yet evade review, and is the exact evil that the Supreme Court sought to prevent in Trevino v. Thaler, __ U.S. __, 131 S.Ct. 1911 (2013). To say otherwise would be to indulge in intellectual dishonesty.

B. Sentencing Claims

This Court's February 4, 2014 decision seems to announce a new emerging rule of law and trend in this Circuit: a criminal defendant has a burden of disproving or "sufficiently challenging" facts upon which the Government seeks to enhance a sentence or Guidelines calculation. That a criminal defendant has any burden of disproving evidence submitted by the prosecution has not endorsed by any court in the American criminal justice system because it directly conflicts with a criminal defendant's fundamental right to hold the prosecution to its burden of

proof and a defendant's right to remain silent. These rights predate the guarantees contained within the Bill of Rights.

Other Circuits have consistently held that the defendant has no burden to disprove or prove anything at sentencing – rather, "[w]hen the government seeks to apply an enhancement under the Sentencing Guidelines over a defendant's factual objection, it has the burden of introducing "sufficient and reliable" evidence to prove the necessary facts by a preponderance of the evidence." United States v. Washington, 714 F.3d 1358 (11th Cir. 2013), see also United States v. Bryant, 571 F.3d 147 (1st Cir. 2009); United States v. Savarese, 686 F.3d 1 (1st Cir. 2012); United States v. Archer, 671 F.3d 149 (2d Cir. 2011); United States v. Brennan, 326 F.3d 176 (3d Cir. 2003); United States v. Davis, 679 F.3d 177 (4th Cir. 2012); United States v. Bell, 667 F.3d 431 (4th Cir. 2011); United States v. Miller, 910 F.2d 1321 (6th Cir. 1990); United States v. Maliszewski, 161 F.3d 992 (6th Cir. 1998); United States v. Rollins, 544 F.3d 820 (7th Cir. 2008); United States v. Bailey, 227 F.3d 792 (7th Cir. 2000); United States v. McKanry, 628 F.3d 1010 (8th Cir. 2011); United States v. Alvarez, 358 F.3d 1194 (9th Cir. 2004); United States v. Schmidt, 244 Fed.Appx. 902 (10th Cir. 2007).

There is a practical problem to imposing a rule of law that requires a criminal defendant to present rebuttal evidence at sentencing to disprove facts that support a sentence enhancement. The Fifth Amendment protects a defendant from being compelled to self-incriminate. Maness v. Meyers, 419 U.S. 441, 453 (1972).

The key to a defendant's right to assert the Fifth Amendment is that he must claim the privilege, and that no penalty can accompany the assertion of such claim. United States v. Perez-Franco, 873 F.2d 455, 462 (1st Cir. 1989). While a defendant at a sentencing hearing may choose to assert his Fifth Amendment privilege and remain silent, a defendant does not have "a free choice to admit, to deny, or refuse to answer if he knows he will be incarcerated for a longer period of time if he does not make the incriminating statements." Id. (internal quotations omitted).

The law in this Circuit, as well as other Circuits, permits a sentencing court to impose a two-level enhancement for obstruction based upon a District Court's determination that a defendant made a false statement or introduced false evidence at sentencing. United States v. Holt, 248 Fed.Appx 613 (5th Cir. 2007); United States v. Trujillo, 502 F.3d 353 (5th Cir. 2007). This also results in a loss of a three-level reduction for acceptance of responsibility.

Thus, a rule of law requiring a defendant to present rebuttal evidence results in the classic "damned if you do, damned if you don't" scenario. A defendant can silently acquiesce to factual assertions he knows to be incorrect in a Pre-Sentence Report or urged by the Government, and take his lumps in the form of sentence enhancements; or, he can bet the farm and introduce evidence to challenge this, praying that the District Court credits his evidence over the Government. If not, he now has salt rubbed into the wound in the form of an additional two-level

enhancement for obstruction and a possible loss of a three-level reduction for an acceptance of responsibility (in guilty plea cases), a five-level swing in the wrong direction which results in years of added imprisonment. This is fundamentally unfair and this rule of law should be changed to reflect the fundamental principle that a criminal defendant bears no burden of proof.

CONCLUSION AND RELIEF REQUESTED

For these reasons set forth herein, this Court should rehear this case en banc.

Dated: Winter Park, Florida
February 6, 2014

Respectfully Submitted,

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Patrick Michael Megaro, Esq.
BROWNSTONE, P.A.
Attorneys for Defendant-Appellant
201 North New York Avenue, Suite 200
Winter Park, Florida 32789
(o) 407-388-1900
(f) 407-622-1511
patrick@brownstonelaw.com
New York Bar ID # 4094983
New Jersey Bar ID # 3634-2002
Florida Bar ID # 738913
North Carolina Bar ID # 46770

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2014, I served a copy of the foregoing upon the parties listed below via ECF

Clerk of the Court
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

AUSA Diane D. Kirstein, Esq.
United States Attorney's Office
601 N.W. Loop410, Suite 600
San Antonio, Texas 78216

____
Patrick Michael Megaro, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font.

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Patrick Michael Megaro, Esq.