No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN AGUIAR,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DID THE SECOND CIRCUIT ERR BY DISMISSING PETITIONER'S APPEAL WHEN ITS DISMISSAL RESTS ON A BOILERPLATE ORDER STATING ONLY THAT PETITIONER'S APPEAL LACKS AN ARGUABLE BASIS EITHER IN LAW OR IN FACT?

2. DID THE SECOND CIRCUIT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT OT THE UNITED STATES CONSTITUTION BY DENYING HIM AN OPPORTUNITY TO APPEAL THE VERMONT DISTRICT COURT'S MISAPPLICATION OF LAW AND SUPREME COURT PRECEDENT IN RESOLVING PETITIONER'S PETITION FOR WRIT OF ERROR CORAM NOBIS WHICH CHALLENGED HIS 2000-2001 PROCEEDINGS AND PRIOR FEDERAL CRIMINAL CONVICTION?

3. DOES THE VERMONT DISTRICT COURT'S AUGUST 2, 2017 ORDER GRANTING PETITIONER'S MOTION TO IMPORT AN AFTER-THE-FACT REDUCTION OF PETITIONER'S ORIGINAL 2001 SENTENCE FROM THE DISTRICT COURT IN MASSACHUSETTS ENTITLE PETITIONER TO AN APPEAL?

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen Aguiar ("Mr. Aguiar"), proceeding pro se, respectfully asks this Court to grant a writ of certiorari to review the judgment of the Second Circuit Court of Appeals.

I. Opinions Below

The January 11, 2018 opinion and order of the United States Court of Appeals for the Second Circuit dismissing Petitioner's appeal is unpublished and appears at Appendix A of the petition.

The March 9, 2018 opinion and order of the United States Court of Appeals for the Second Circuit denying Petitioner's motion for reconsideration is unpublished and appears at Appendix B of the petition.

The April 29, 2015 opinion and order of the United States District Court for the District of Vermont denying Petitioner's petition for writ of error coram nobis is unpublished and reported as United States v. Aguiar, 2015 U.S. Dist. LEXIS 57527 (D. Vt. April 29, 2015) and appears at Appendix C of the petition.

The August 2, 2017 opinion and order of the United States District Court for the District of Vermont denying Petitioner's motion to alter or amend judgment is unpublished and reported as United States v. Aguiar, 2017 U.S. Dist. LEXIS 123089 (D. Vt. Aug. 2, 2017) and appears at Appendix D of the petition.

The August 2, 2017 order of the United States District Court for the District of Vermont granting Petitioner's motion to update the record and import the modification of Mr. Aguiar's original 2001 term of supervised release is unpublished and appears at Appendix E of the petition.

II. Jurisdiction

On January 11, 2018, The Second Circuit Court of Appeals entered final judgment dismissing Mr. Aguiar's appeal. On March 9, the Second Circuit entered judgment denying Mr. Aguiar's timely filed motion for panel reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. Constitutional and Statutory Provisions Involved

A. Constitutional Provisions

1. Fifth Amendment

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.

2. Sixth Amendment

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a public trial by an impartial jury and to be confronted with witnesses against him, and to have the "Assistance of Counsel for his defence."

B. Statutory Provisions

1. Title 18 U.S.C. § 3583

As part of a sentence of imprisonment, a court may include, impose, or modify a term of supervised release or conditions.

2. Title 18 U.S.C. § 3742

A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence was imposed in violation of law, was imposed as a result of an incorrect application of the sentencing guidelines, or is greater

than the sentence specified in the applicable guideline range.

3. Title 21 U.S.C. § 851

No person who stands convicted of an offense under 21 U.S.C. §§ 841 et seq. shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the convictions to be relied upon.

4. Title 28 U.S.C. § 1651

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

IV. Statement of the Case

On November 6, 2000, Mr. Aguiar was arrested in Burlington, Vermont. In the course of his arrest, law enforcement seized 20.1 grams of heroin[1] and 84.6 grams of cocaine.[1] Mr. Aguiar admitted in a post-arrest statement that the drugs belonged to him. ECF 1.[2]

On November 7, 2000, the district court appointed David J. Williams to represent Mr. Aguiar under the Criminal Justice Act ("CJA"). ECF 3. The court granted the motion. ECF 4.

On December 7, 2000, a federal grand jury returned a two-count indictment. ECF 5. Count one charged Mr. Aguiar with

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[1] The statutory penalty for 20.1 grams of heroin and 84.6 grams of cocaine each fall under 21 U.S.C. §§ 841(a)(1); (b)(1)(C).

[2] Petitioner's references to ECF by themselves cite to the original district court's docket and record below. No. 2:00-cr-119.

possession with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 841(a)(1); (b)(1)(B). Id. at 1. Count two charged Mr. Aguiar with possession with intent to distribute less than 500 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1); (b)(1)(C). Id. at 2.

After receiving discovery material and upon Mr. Aguiar's urging, defense counsel filed a motion to suppress evidence seized by police and alleged post-arrest statements. ECF 9; 12.

On April 10, 2001, before the suppression hearing, counsel met with Mr. Aguiar. Attorney Williams explained to Mr. Aguiar that he faced a potential life sentence. He further explained to Mr. Aguiar that he faced a statutory 10 year to life prison term and an 8 year to life supervised release term on count one of the indictment. Next, counsel presented to Mr. Aguiar two documents from the government that stated if the suppression hearing went forward, it would take Mr. Aguiar to trial; it would seek an obstruction of justice enhancement; and it would oppose any acceptance of responsibility reduction at sentencing. ECF 43 at 13 (April 10, 2001 Fed. R. Crim. P. 11 transcript).

Attorney Williams then surprised Mr. Aguiar with an unexpected plea agreement. Under its terms, Mr. Aguiar would plead guilty to count one of the indictment,[3] but be convicted and sentenced under 21 U.S.C. §§ 841(a)(1); (b)(1)(C). ECF 16 ¶¶ 1-2.

[3] According to Attorney Williams, it was lawfully allowed for Mr. Aguiar to plead guilty to count one of the indictment, 21 U.S.C. §§ 841(a)(1); (b)(1)(B), but be convicted and sentenced under 21 U.S.C. §§ 841(a)(1); (b)(1)(C) pursuant to the plea agreement. ECF 16.

The agreement further detailed that Mr. Aguiar's statutory sentencing range under § 841(b)(1)(C) was zero to 30 years in prison to be followed by six years to life of supervised release. Id. ¶ 2. The plea agreement also stipulated to a fixed guideline offense level of 26. Id. ¶ 6.

Mr. Aguiar, who had been intent on proceeding with the scheduled suppression hearing, expressed to counsel his discomfort with the coercive nature of the circumstances in having to make such a life-changing decision on such short and unexpected notice.

Attorney Williams had the district court transition the scheduled suppression hearing into a Fed. R. Crim. P. 11 change of plea hearing. During the plea colloquy, Mr. Aguiar expressed to the district court his reluctance to not proceed with the suppression hearing and that prosecutors were threatening him with more time if he decided to proceed. ECF 43 at 11-32 (April 10, 2001 Rule 11 transcript). The government represented that it would take Mr. Aguiar to trial if he proceeded with the scheduled suppression hearing. Id. at 13. Given Mr. Aguiar's repeated reluctance to accept the government's plea agreement, the district court took two recesses so that Mr. Aguiar could consult with Attorney Williams to make his decision. During each of those recesses, Attorney Williams told Mr. Aguiar that he was facing a life sentence and that he should accept the government's plea agreement. In the end, Mr. Aguiar advised the court that it was within his best interests to accept the plea agreement. Id. at 32.

At no time throughout the 2000-2001 criminal proceedings did the United States attorney file with the district court or

serve on Mr. Aguiar or Attorney Williams an information under 21 U.S.C. § 851.

On July 23, 2001, Mr. Aguiar was sentenced to a 92 month prison term to be followed by a six year statutory mandatory minimum term of supervised release[4] pursuant to the government's plea agreement. ECF 25.[5]

Relying on Attorney Williams's advice, Mr. Aguiar did not pursue a direct appeal or seek collateral relief.

In January 2007, Mr. Aguiar was released from federal custody and began serving his six year term of supervision in the District of Massachusetts, see United States v. Aguiar, No. 1:07-cr-10257, ECF 1-2 (D. Mass. 2007), after the district court in Vermont transferred jurisdiction of Mr. Aguiar's supervised release to Massachusetts under 18 U.S.C. § 3605.

In January 2007, Mr. Aguiar began his participation in the Court Assisted Recovery Effort ("CARE") program out of the Boston, Massachusetts district court. The CARE program is an intensive outpatient drug program that offers its participants who complete the program a one year reduction of their original term of federal supervised release. In January 2008, Mr. Aguiar successfully completed and graduated the CARE program. See Aguiar, No. 1:07-cr-10257, ECF 13 (D. Mass. 2007).

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[4] Under U.S.S.G. § 5D1.2(a)(2) (2001), Mr. Aguiar's supervised release mandatory guideline range was at least two but not more than three years.

[5] Mr. Aguiar's amended 2001 criminal judgment order cites that he was convicted of 21 U.S.C. §§ 841(a)(1); (b)(1)(B). ECF 25 at 1. This is error. Mr. Aguiar was instead convicted of 21 U.S.C. §§ 841(a)(1); (b)(1)(C) pursuant to the plea agreement. ECF 16.

In July 2009, Mr. Aguiar was arrested and charged in Vermont with new criminal conduct related to a drug conspiracy. The U.S. District Court in Vermont again appointed David Williams under the CJA to represent Mr. Aguiar. United States v. Aguiar, No. 2:09-cr-90, ECF 47 (D. Vt. July 31, 2009).

In August 2009, United States Probation Officer ("USPO") Andrew Laudate filed under seal in the U.S. District Court for the District of Massachusetts a warrant petition to revoke Mr. Aguiar's federal supervised release. Aguiar, No. 1:07-cr-10257, ECF 10 (D. Mass. Aug. 27, 2009)(filed under seal and unavailable on the Massachusetts district court's docket); see also ECF 32 (the district court in Vermont's December 12, 2011 receipt of the sealed warrant petition).

After a breakdown in the attorney-client relationship after a conflict of interest months before Mr. Aguiar's 2011 trial for conspiracy because Mr. Aguiar would not accept the government's plea agreement after counsel insisted that he do so, Attorney Williams retaliated; he ceased allowing Mr. Aguiar to review or receive his own legal documents and ceased consulting Mr. Aguiar about the vital decisions of his case throughout the remainder of his representation. See Aguiar, No. 2:09-cr-90, ECF 767 at 63-67 (Magistrate's report and discussion of the issue). On April 11, 2011, a jury convicted Mr. Aguiar of conspiracy and other drug counts, see id., ECF 479, and a sentencing date was set for December 12, 2011.

On December 12, 2011, at approximately 11:00 a.m., unbeknown to Mr. Aguiar, the district court in Vermont received from the

district court in Massachusetts a fatally defective order transferring jurisdiction of Mr. Aguiar's supervised release "to the United States District Court for the Northern District of Georgia" under 18 U.S.C. § 3605. ECF 31. Despite this defect, the district court in Vermont nevertheless invoked jurisdiction. Id. Also, the district court received USPO Laudate's "sealed" warrant petition to revoke Mr. Aguiar's supervised release from the Boston, Massachusetts district court. ECF 32.

On December 12, 2011, at approximately 1:30 p.m., Mr. Aguiar was brought before the court and seated next to Attorney Williams expecting to be sentenced in United States v. Aguiar, No. 2:09-cr-90, ECF 629 (D. Vt. 2011)(December 12, 2011 district court sentencing transcript).

Without any type of advance notice or documents from either the district court or Attorney Williams, the sentencing court confronted Mr. Aguiar unexpectedly with a revocation of his Massachusetts term of supervised release. Id. at 1. Attorney Williams misled the court by stating that he "had known about the [sealed] violation and that it was filed [under seal] in 2009 for some time." Id. at 2:22.

The court first addressed the revocation of supervised release. Id. at 2-4. It then addressed Mr. Aguiar's conspiracy and other drug counts. Id. at 5-22. After the court made its findings, it pronounced Mr. Aguiar's 360 month prison term and term of supervised release and conditions. Id. at 22-26. Turning next to the revocation of supervised release, the sentencing court stated:

> Now in regard to the violation of supervised release, the Court has found that by the defendant being

> convicted of this offense, he violated terms of supervised release.
>
> It is the sentence of the Court the defendant be committed to the custody of the Bureau of Prisons for a period of three years; that's to be run concurrently with this particular offense. It's not to be followed by supervised release. Supervised release is to be imposed in the underlying offense. And as a result, once that three-year sentence is completed, that sentence is over.
>
> Both the defendant and the government may have the right to appeal this sentence as set forth in Title 18 U.S. Code, section 3742. If the defendant is unable to pay the costs of an appeal, he has the right to apply for leave to appeal in forma pauperis and request the court to appoint counsel for him. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant. Notice of appeal by the defendant must be filed within 14 days of the date of judgment is entered on the docket pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure.

Id. at 26-27. Before leaving the courtroom, Mr. Aguiar told Attorney Williams to file a notice of appeal and consistent with his understanding of the sentencing court's statements, he wrote to the district court to file a pro se notice of appeal and mailed it to the court. See Aguiar, No. 2:09-cr-90, ECF 598 (D. Vt. Dec. 21, 2011). Mr. Aguiar took such action because there was a conflict of interest between he and Attorney Williams and Mr. Aguiar did not trust his attorney's motives since he had ceased allowing Mr. Aguiar to review or receive his legal documents and ceased consulting Mr. Aguiar about any aspects of the case including Mr. Aguiar's wishes to appeal his revocation.

Mr. Aguiar's letter was titled "RE: APPEAL OF SENTENCE." Id. Mr. Aguiar did not write any docket number on his pro se notice of appeal. Consistent with the district court's statements, Mr. Aguiar reasonably understood that his pro se notice of appeal related to both his revocation and drug convictions given the

nature of his joint sentencing.

Once the clerk of the court received Mr. Aguiar's notice of appeal, however, the clerk wrote on the document only "2:09-cr-90-1," see id., when in fact the pro se notice of appeal included Mr. Aguiar's revocation conviction and sentence, case no. 2:00-cr-119. The clerk erred by failing to file a notice of appeal on Mr. Aguiar's behalf in both cases and by writing only one docket number on Mr. Aguiar's pro se notice which he intended to include his sentence for both his revocation and his drug offenses in response to the sentencing court's statements. Id.

After his 2011 conviction, Mr. Aguiar consistently sought access to his legal documents from Attorney Williams and then from the district court without success. See, e.g., Aguiar, No. 2:09-cr-90, ECF 673; 683; 708; 714; 719; 728 (motions to compel either the government or counsel to provide Mr. Aguiar legal documents of his case). What few legal documents Mr. Aguiar did receive from counsel that were being filed with the Second Circuit on appeal, see United States v. Aguiar, No. 11-5262, 737 F.3d 251 (2d Cir. 2013), only gave rise to more questions.

In August 2012, Mr. Aguiar received and reviewed a copy of counsel's appellate brief and saw that Attorney Williams had failed to mention his supervised release revocation. He then wrote to counsel asking why since Mr. Aguiar understood that counsel had appealed it. ECF 67-2 (Mr. Aguiar's 2012 letter to Attorney Williams). He also insisted that counsel include the revocation in the corrected version of the appeal. Id. Counsel responded and told Mr. Aguiar that he could not file a direct appeal for his

revocation of supervised release. ECF 67-3 (Attorney Williams's 2012 letter to Mr. Aguiar). Counsel further told Mr. Aguiar that he would not be filing another brief. Id.

Based on counsel's misleading representations, Mr. Aguiar wrongly understood first that the law did not allow him to file a direct appeal for a revocation of supervised release,[6] and second, that the finality of his revocation was not final for the purposes of 28 U.S.C. § 2255(a) until the appellate process of his case had concluded and after Attorney Williams no longer represented him.

In September 2012, Mr. Aguiar next received and reviewed a copy of counsel's appellate appendix which contained a copy of his 2001 docket sheet for United States v. Aguiar, No. 2:00-cr-119 (D. Vt. 2001). Given Mr. Aguiar's new awareness of, and familiarity with, 21 U.S.C. § 851 and its requirements after prosecutors relied on the statute to enhance his 2011 sentence for conspiracy, see, e.g., Aguiar, No. 2:09-cr-90, ECF 396 (D. Vt. Feb. 11, 2011)(government's filing of a § 851 information), he did not see anything on the 2001 docket sheet that indicated whether a § 851 information had been filed in the 2001 case. Also in the appendix, however, Mr. Aguiar saw for the first time a copy of USPO Laudate's warrant petition for his revocation which did specifically indicate that a § 851 information had in fact been filed. See ECF 32 (Massachusetts district court warrant petition detailing that a § 851 information had been filed for Mr. Aguiar's

[6] Mr. Aguiar's misled understanding was further supported by the district court's failure to file the pro se notice of appeal for Mr. Aguiar's revocation of supervised release conviction and sentence as he had requested. See supra at 9-10.

"Original Offense").

Since Attorney Williams and the district court were each unwilling to allow Mr. Aguiar to access his legal documents and given the unknown nature of the filings on the Massachusetts court's docket, see Aguiar, No. 1:07-cr-10257 (D. Mass. 2007), and Mr. Aguiar's indigent status and lack of resources, he could not resolve this discrepancy but diligently began ongoing efforts to do so.

After Mr. Aguiar continued writing letters to Attorney Williams explaining the discrepancies surrounding his prior conviction and its use as a predicate conviction under U.S.S.G. § 4B1.1 to enhance his sentence, for example, counsel responded by telling Mr. Aguiar that he must wait until his entire case was final and he could then raise those issues under § 2255. ECF 73-3 (Attorney Williams's 2013 letter to Mr. Aguiar).

In May 2014, Mr. Aguiar met a jailhouse lawyer who agreed to assist him with his legal efforts. In September 2014, prison staff told Mr. Aguiar that he was no longer in custody on his revocation of supervised release sentence. ECF 67-4 (copy of August 2017 e-mail between Mr. Aguiar and prison staff discussing the issue).

The jailhouse lawyer told Mr. Aguiar that a petition for writ of error coram nobis was the only way he could challenge his 2001 case and prepared the coram nobis petition filed by Mr. Aguiar in the district court. ECF 37 (coram nobis petition); ECF 49-1 (Royer Declaration).

Only after the government opposed the petition, see ECF 44, and revealed that no § 851 information had ever been filed in

either the Massachusetts or Vermont district courts was Mr. Aguiar able to resolve the § 851 discrepancy in his 2001 case.

On April 29, 2015, the district court denied the coram nobis petition on timeliness and lack of prejudice grounds. Appendix C (ECF 48). The jailhouse lawyer then assisted Mr. Aguiar with preparing and filing a Fed. R. Civ. P. 59(e) motion arguing that the district court erred in its analysis. ECF 49. Later, Mr. Aguiar learned that the district court's analysis and lack of prejudice conclusion relied on an incomplete record. See, e.g., Appendix C at 12 (denying Mr. Aguiar's coram nobis petition on lack of prejudice grounds since his "re-arrest in 2009 in the midst of his supervised release term rendered [Attorney Williams's deficient advice] essentially harmless"); but see infra:

In June 2015, Miriam Conrad of the Office of the Federal Defender in Boston, Massachusetts sent to Mr. Aguiar a copy of his Massachusetts docket sheet after the district court in Boston had entered an after-the-fact ordering that Mr. Aguiar's 2001 term of supervised release was reduced by one year in 2008 for having graduated the CARE program. See Aguiar, No. 1:07-cr-10257, ECF 13 (D. Mass. entered May 28, 2015).

On July 6, 2015, Mr. Aguiar filed a motion in the district court in Vermont moving the court to update the record to import the one year modification of his original term of supervised release, see ECF 50, and appended a copy of the docket sheet sent by Federal Defender Conrad. ECF 50-1. The jailhouse lawyer assisting Mr. Aguiar told him that any further challenge to any aspect of his 2001 case must wait until after the court ruled on

the motion.

On August 2, 2017, the district court denied Mr. Aguiar's June-2015 filed Fed. R. Civ. P. 59(e) motion related to his coram nobis petition. Appendix D (ECF 63). The court did, however, grant Mr. Aguiar's motion to update the record and import the modification of Mr. Aguiar's 2001 term of supervised release by reducing Mr. Aguiar's supervised release term by one year. Appendix E (ECF 62). Mr. Aguiar then filed a timely notice of appeal. ECF 64.

The appeal was docketed by the Second Circuit. United States v. Aguiar, No. 17-2547 (2d Cir. Aug. 17, 2017). Attorney Williams moved the Second Circuit to withdraw as Mr. Aguiar's counsel of record and the motion was granted. Id., ECF 9.

On January 11, 2018, the Second Circuit entered an order denying Mr. Aguiar's motion to appoint counsel and dismissed his appeal stating only that the appeal lacks an arguable basis either in law or in fact. Appendix A. Mr. Aguiar moved the Second Circuit to clarify its boilerplate order so that Mr. Aguiar had a case-specific understanding of how the court arrived at its finding and the basis of its denial. Id., ECF 32. Mr. Aguiar also moved the court for panel reconsideration arguing that the Second Circuit erred in dismissing Mr. Aguiar's meritorious appeal. Id., ECF 34. The court below denied both motions. Appendix B. Mr. Aguiar now seeks relief from this Court.

V. Reasons for Granting the Writ

Mr. Aguiar petitions this Court for relief from the Second Circuit's blatent disregard for the rule of law and Mr. Aguiar's

right to due process which demands that this Supreme Court of the United States excercise its supervisory power here. Each and every proceeding held in connection with Mr. Aguiar's 2000-2001 criminal case was prejudiced by an inapplicable 21 U.S.C. § 851 statutory enhancement. Mr. Aguiar was unknowingly misled to believe that a 21 U.S.C. § 851 enhancement in fact applied by: the government ; the courts, and an incompetent defense attorney. The court below has now held that Mr. Aguiar's pursuit of relief has no arguable basis in either law or fact. This is wrong.

First, Mr. Aguiar, proceeding pro se, remains uninformed as to how or why the Second Circuit Court of Appeals decided to dimiss his appeal because it apparently has no arguable basis in either law or fact, see Appendix A, but nevertheless asserts that his appellate claims are meritorious and the court below misapplied this Court's holding in Neitzke v. Williams, 490 U.S. 319 (1989), in issuing his order. Appendix A. When asked to clarify its boilerplate order and provide case-specific reasons on which its finding relied so that Mr. Aguiar could present this Court with a clear and concise argument, the court below declined Mr. Aguiar's request. Appendix B at 2.

Second, Mr. Aguiar also asserts that the Second Circuit Court of Appeals violated his right to due process under the Fifth Amendment to the United States Constitution by disallowing him an opportunity to appeal the district court's misapplication of the governing law in resolving his petition for writ of error coram nobis under 28 U.S.C. § 1651, the All Writs Act.

Third, this case is unusually complex given the nature of

district court proceedings in both Vermont and Massachusetts.

Last, Mr. Aguiar asserts that both the district court and Second Circuit inappropriately declined to consider that the August 2017 order, see Appenix E, reducing Mr. Aguiar's original term of supervised release is a new unconsidered fact that allowed Mr. Aguiar to satisfy the issue of both timeliness and Strickland v. Washington's two-part test on which the district court relied to deny Mr. Aguiar's ineffective assistance of counsel ("IAC") claims on lack of prejudice grounds.

A. The Second Circuit Unjustly Dismissed Petitioner's Appeal and Misapplied the Law

Although the Second Circuit's order below is ambiguous, see Appindix A, Mr. Aguiar assumes that it relies on this Court's holding in Neitzke, 490 U.S. at 325 and its own opinion, see Pillay v. INS, 45 F.3d 14, 17 (2d Cir. 1995), to conclude that Mr. Aguiar's appeal is frivolous under either 28 U.S.C. § 1915(d) or that Mr. Aguiar's "petition presents no arguably meritorious issue for [the Second Circuit's] consideration." Pillay, 45 F.3d at 17. Neither legal theory applies here.

The Neitzke Court made it clear that § 1915(d) grants a court "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but the unusual power to pierce the veil of [a civil] complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Neitzke at 327. In Pillay, the Second Circuit held that § 1915(d) did not apply since the filing fee had been paid.

Given the Pillay citation referenced by the court below in its order, see Appendix A, the dismissal at issue presumably rests

on a finding that Mr. Aguiar's appeal lacks a single arguable meritorious issue. Mr. Aguiar counter's first that the Second Circuit has misapplied this Court's Neitzke opinion to his case and this Court should intervene to correct such misapplication. Second, for the reasons above, and those below, Mr. Aguiar's appeal has multiple arguable claims that should be resolved on their merits de novo.

B. The Second Circuit Violated Petitioner's Right to Due Process by Denying Him Appellate Review After the District Court Incorrectly Applied the Legal Standard for Timeliness and Ignored Key Facts on the Issue in Resolving Petitioner's Claims

The basis on which the Second Circuit's conclusion that Mr. Aguiar's appeal has no arguable basis in law or fact remains baffling. Mr. Aguiar therefore prays that this Court will intervene and instead consider his claims directly.

1. The district court incorrectly applied the standard for timeliness and overlooked key facts bearing on the issue

The district court acknowledged that Mr. Aguiar had been represented by the same attorney since 2001. Appendix C at 10. The district court did not conduct an evidentiary hearing nor consider Mr. Aguiar's explanation that his attorney not only had an obvious conflict of interest in the success of Mr. Aguiar's efforts here, but also actively impeded and misled Mr. Aguiar's efforts to pursue his rights. The district court overlooked these and other facts and misapplied the standard for evaluating the timeliness of Mr. Aguiar's claims.

a. Baseline date

The district court's computation of the petition's

timeliness began with a determination that the baseline date for that computation was 2011, when Mr. Aguiar learned of the coram nobis remedy:

> Aguiar also reports that he first learned of the coram nobis remedy in 2011. Nonetheless, he failed to file his petition until approximately three years later. Courts in this Circuit have widely held that such a delay is unacceptable.

Id. at 9.

Mr. Aguiar asserts first that the correct baseline date should have been September 2012 when he first received a copy of the 2001 docket sheet suggesting that a § 851 information may not have been filed, see ECF 47-1 ¶ 8 (Aguiar Declaration), and a copy of a supervised release violation petition imported from the Massachusetts district court where his 2001 criminal case and court records had been transferred which specifically indicated that a § 851 information had in fact been filed and was presently filed on the Massachusetts docket for his original offense. Id. ¶ 10; see also Rodriguez v. United States, 2012 U.S. Dist. LEXIS 17350 (S.D.N.Y. Dec. 4, 2012)(holding that the baseline date is the date the petitioner "became aware of the alleged deficiency in his conviction"); Medina v. United States, 2012 U.S. Dist. LEXIS 34467 (S.D.N.Y. Feb. 21, 2012)("[I]n light of the special solicitude to be shown to pro se litigants and the lenient timeliness standard for coram nobis relief, Medina's statement that he 'recently' became aware of the constitutional deficiency in his conviction is a sufficient explanation, at least at the present stage of the proceedings, of why he did not attack his conviction earlier.").

The district court should have therefore determined first that the period to be accounted for prior to the filing of the petition was from September 2012, when Mr. Aguiar discovered the conflicting documents of his case and the potential unconstitutionality of his conviction, to September 2014, when the petition was filed, i.e., a period of two years, not three.

b. The district court misapplied the law to conclude that a lapse of time before the filing of a coram nobis petition is per se unacceptable

In electing to wrongly resolve the timeliness of Mr. Aguiar's claims, the district court cited several unreported district court cases to support the proposition that "[c]ourts in this Circuit have widely held" that a delay such as Mr. Aguiar's "is unacceptable." Appendix C at 9. The cases cited by the district court, however, did not hold that a two (or three) year delay in filing a coram nobis petition is unacceptable per se. Rather, each of those cases held that the petitioner's delay was unacceptable because he or she offered no reason at all for the delay: See Rodriguez v. United States, supra ("In this case, petitioner has not provided a sound reason for waiting more than two years after Padilla was decided to attack his conviction."); Ejekwu v. United States, 2005 U.S. Dist. LEXIS 28433 (E.D.N.Y. Nov. 14, 2005) ("Petitioner completed his supervised release in October of 1996. He offers no real justification, however, for why he waited until the end of 2001 to file this petition."); Mastrogiacomo v. United States, 2001 U.S. Dist. LEXIS 9761 (S.D.N.Y. July 10, 2001) (petitioner "has offered no exuse nor suggested any extenuating circumstances whatsoever for his delay."). See also Cisse v.

United States, 33 F.Supp. 2d 336, 344 (S.D.N.Y. 2004)(petitioner "has failed to provide any sound reasons why he did not raise these issues in a timely fashion..."); United States v. Rankin, 1 F.Supp. 2d 445, 454 (E.D. Pa. 1998)(petitioner "provides no explanation for the [two year] delay."); United States v. Abramian, 2014 U.S. Dist. LEXIS 133135 (C.D. Cal. Sept. 22, 2014)(petitioner "does not explain why she waited more than four years after she was taken into immigration custody (and thus learned the potential immigration consequences of her plea) to seek advice of counsel concerning the vacation or modification of her criminal conviction...Because she fails to offer any justification for this delay, the Court must dismiss her petition.").

Mr. Aguiar asserts next that these cases held nothing more than that a delay of two years or more, in the absence of "any extenuating circumstances whatsoever," Mastrogiacomo, supra, requires a finding that a coram nobis petition is untimely. Having understood them to mean that a petition is rendered untimely by the passage of time itself, irrespective of extenuating circumstances, the district court deemed Mr. Aguiar's petition untimely without giving proper weight to the extenuating circumstances present in his case. Notwithstanding that the Second Circuit dismissed Mr. Aguiar's appeal, it explained:

> A district court considering the timeliness of a petition for a writ of error coram nobis must decide the issue in light of the circumstances of the individual case...The Morgan Court states only that a petitioner need demonstrate "sound reasons" for the delay, which we interpret as calling to the attention of the district court the circumstances surrounding the petitioner's failure to raise the issue earlier...the critical inquiry, then, is whether the petitioner is able to show justifiable reasons for the delay.

Foont v. United States, 93 F.3d 76, 79 (2d Cir. 1996).

Having unfairly focused on the fact of Mr. Aguiar's delay in filing the petition rather than on whether the delay was justified, the district court failed to give due consideration to the reasons for the delay set forth by Mr. Aguiar, under penalty of perjury, in his verfied petition and the declaration attached to his reply. Those reasons included the following:

At the outset, Mr. Aguiar's attorney impeded Mr. Aguiar's efforts to obtain documents in his favor to pursue his rights and actively misled Mr. Aguiar's understanding of the law consistent with conduct prohibited by this Court. See Holland v. Florida, 560 U.S. 631 (2010). Attorney Williams was conflicted since he represented Mr. Aguiar in his 2000-2001 criminal case. Clearly, Attorney Williams was supposed to be representing Mr. Aguiar's interests under the Vermont ABA Rules of Professional Conduct. In response to Mr. Aguiar's letters as he diligently sought information and documents from counsel, Attorney Williams provided only bits and pieces of information and selectively chose which letters to answer and which to ignore. He further ignored every attempt to communicate by phone or e-mail, see, e.g., ECF 47-1 ¶¶ 6; 13; 20-22; 28-30, made by Mr. Aguiar in order to pursue his rights and how to proceed under the law. Counsel also failed to provide Mr. Aguiar his documents [both past and present] as he diligently tried to investigate his potential claims.

For the seven months following Mr. Aguiar's receipt of the two confusing documents detailed above, i.e., a 2001 docket sheet with no reference to a § 851 information indicating that a § 851

had been filed and a revocation petition from Massachusetts that specifically referenced the § 851 statute for Mr. Aguiar's original offense indicating that an information had been filed, in September 2012, Mr. Aguiar was confined in segregated housing without access to his legal documents. Id. ¶¶ 14-18. Despite this, Mr. Aguiar continued to write to the district court and his attorney for his documents. Id. ¶¶ 20-22. After he was finally released to the general population, Mr. Aguiar spent the next nine months diligently trying to obtain documents without which his petition could not have been filed, including the indictment and plea agreement. Id. ¶¶ 28-39. Mr. Aguiar obtained those documents in February 2014, and filed his petition in September 2014, a mere seven months later, see id., with the help of a jailhouse lawyer. ECF 49-1 (Declaration of Randall Royer). In finding the petition untimely, the district court alluded to Mr. Aguiar's circumstances, but never expressly addressed whether they amounted to "justifiable reasons for the delay." Foont, supra.[7]

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[7] Not only did the district court not hold a hearing to consider Attorney Williams's conflict of interest or that he actively impeded Mr. Aguiar's efforts in pursuing his claims, the court overlooked a key fact bearing on timeliness when, in discussing Mr. Aguiar's traumatic brain injury, it stated that "he does not explain why, despite this alleged injury, he was able to file in 2014 and not earlier." Appendix C at 10. But Mr. Aguiar explained in his petition that his

> mental impairments, in conjunction with the complexity of the law, facts, and procedures, and the cumulative effect of his incarceration and the other aforementioned reasons [caused his] delay in filing this petition. He simply lacked the focus, stability, and presence of mind to overcome these obstacles to filing any sooner.

ECF 37 at 21. He further explained that he required the help of a jailhouse lawyer in preparing the petition. ECF 47-1 ¶ 44 (Aguiar Decl.); See also ECF 49-1 ¶¶ 3; 6 (Royer Decl.)(explaining that Mr. Aguiar could not have presented his claims without help).

Because the district court incorrectly applied the standard for the timeliness of Mr. Aguiar's petition, declined to consider critical facts that caused his delay, and misapplied the law surrounding Mr. Aguiar's diligence in the pursuit of his claims, Mr. Aguiar is entitled to relief.

C. The District Court Applied the Wrong Legal Standard as to Strickland Prejudice in a Guilty Plea Context

In passing on the underlying constitutional claim, the district court determined that Mr. Aguiar had not met the prejudice prong of this Court's test in Strickland v. Washington, 466 U.S. 668, 694 (1984), for ineffective assistance of counsel ("IAC"). The court reasoned that Mr. Aguiar could not show prejudice resulting from his decision to forego trial and plead guilty because he was likely to be convicted at trial anyway; because he may not have received the downward departures post-trial that he received after pleading guilty; and because Mr. Aguiar's re-arrest in 2009 on new charges rendered his attorney's deficient performance "essentially harmless." Appendix C at 11-12. Mr. Aguiar respectfully asserts that these findings, and the conclusion of a lack of prejudice for his IAC claims, reflect the use of the incorrect legal standard for measuring prejudice in a guilty plea context.

As the Second Circuit explained:

> To satisfy the second prong of Strickland in the context of plea negotiations, the defendant must show that there is a reasonably probability that were it not for counsel's errors, he would not have pled guilty and would have proceeded to trial.

United States v. Arteca, 411 F.3d 315, 320 (2d Cir. 2005)(citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)); see also Lee v. United

States, ___ U.S. ___, 137 S. Ct. 1958 (2017). Cf. ECF 37 at 9 (Mr. Aguiar's petition citing Arteca and Hill). As this Court has explained, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

Hence, the district court's emphasis on its belief that Mr. Aguiar would likely have been convicted at trial reveals that it employed an outcome-determinative approach to weighing prejudice, and failed to inquire as to whether, in the absence of counsel's misadvice as to Mr. Aguiar's sentencing exposure at trial, Mr. Aguiar's "decision to reject the plea bargain would have been rational under the circumstances." See United States v. Orocio, 645 F.3d 630, 643 (3d Cir. 2011)("The Supreme Court...requires only that a defendant have rationally gone to trial in the first place, and it has never required an affirmative demonstration of likely acquittal at such a trial as a sine qua non of prejudice.").

The Second Circuit has explained that:

> While a district court's assessment that proceeding to trial would be irrational may be an adequate basis for a finding of no-prejudice in connection with some IAC claims, the court should, before reaching a conclusion as to prejudice, take into account all relevant factors.

Gonzalez v. United States, 722 F.3d 188, 132 (2d Cir. 2012). In Mr. Aguiar's case, the district court did not take all such factors into account and it considered some irrelevant ones.

For example, the district court deemed it significant to the question of prejudice that, at Mr. Aguiar's Rule 11 hearing, "defense counsel explained that even if the suppression motion was

successful his client was likely to be convicted on the basis of other evidence." Appendix C at 12. But what defense counsel actually explained was that if his argument for suppression of Mr. Aguiar's alleged post-arrest statements was successful, and that if his argument for suppression of the search of the boxes of drugs at the police station was unsuccessful, then Mr. Aguiar would have to contend with the latter inculpatory evidence at trial. ECF 43 at 18-22 (April 2001 Rule 11 transcript). While defense counsel conceded that the latter argument was "a long shot," id. at 22, and that "we have to win it all today or [Mr. Aguiar] loses some advantages potentially," id. at 21, counsel never stated that Mr. Aguiar would have been found guilty even if his arguments for suppression of both the statements and the drugs were unsuccessful. And again, while Attorney Williams acknowledged that "[w]e would have to run the table for this strategy to be successful," id. at 20, counsel never characterized this strategy as futile or hopeless.

Indeed, counsel's argument was well-grounded in the law and stood a reasonable chance of succeeding. That argument was that

> The boxes that fell to the ground were opened sometime later at the police station without a warrant, and they weren't opened subsequent -- or immediately subsequent to the arrest of Mr. Aguiar, and my position was that as time progressed, the need for a warrant went up.

Id. at 18. This argument was based on Supreme Court jurisprudence as described in, e.g., United States v. Lartey, 716 F.2d 955 (2d Cir. 1983)(explaining that under United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), where there is no danger that evidence may be destroyed or that harm

will come to agents, "there is no justification...for a warrantless search as incident to a lawful arrest."). Accordingly, nothing about counsel's discussion of the suppression motion before the district court suggests that a decision by Mr. Aguiar to reject the plea agreement and proceed to trial would have been irrational.

The district court also deemed that prejudice did not exist because during the Rule 11 hearing Mr. Aguiar "admitted his guilt and agreed to the government's factual proffer." Appendix C at 12. Mr. Aguiar points out that it was error for the district court to consider this fact in determining prejudice. As the Third Circuit Court of Appeals explained in an analagous situation, a petitioner's admission of guilt "does not end the Hill inquiry because, had he not pled guilty, there would not have been any acknowledgement of guilt in open court foreclosing a rational decision to go to trial." Orocio, 645 F.3d at 645. Mr. Aguiar admitted guilt during a Rule 11 hearing; had he not been participating in a Rule 11 hearing and instead proceeded with the suppression hearing and trial, he would have not admitted his guilt. In other words, the district court's reasoning is circular, and based on an inappropriately irrelevant factor.

The district court's finding of no prejudice was also based on the fact of Mr. Aguiar's "re-arrest in 2009 in the midst of his supervised release term," which "rendered [counsel's poor advice] essentially harmless." Appendix C at 12. The legal standard for Strickland prejudice under these circumstances, however, is whether, absent counsel's poor advice, Mr. Aguiar's decision to

go to trial would have been rational; since Mr. Aguiar cannot have known when he was weighing a decision to plead guilty in 2001 that he would be re-arrested in 2009, his re-arrest cannot have been a factor in his decision and thus is irrelevant to the question of prejudice. Cf. Gonzalez, 722 F.3d at 132 (prison term actually imposed on petitioner "seems an inappropriate factor in the court's consideration of whether going to trial would be rational" since that term, "being unknown to [the petitioner], could not be a factor in his decision.").

Again applying an impermissible outcome-determinative standard, the district court found prejudice lacking because Mr. Aguiar "received downward departures at sentencing, including acceptance of responsibility, and...those departures may not have been awarded in the face of a likely government objection post-trial." Appendix C at 12. It is true that Mr. Aguiar's expectations as to any departures he might receive would be relevant to the question of whether a decision to forego the plea agreement would have been rational; it is also true, however, that the district court took pains to assure Mr. Aguiar that a decision to go to trial would not foreclose an acceptance of responsibility departure. In the district court's words:

> The reason I asked to take a look at the record -- the letters is to -- just make sure there wasn't some sort of representation to Mr. Aguiar that there was necessarily going to be obstruction of justice or necessarily not acceptance of responsibility, because obviously that's my call, and clearly those letters are absolutely correct.

ECF 43 at 25 (Rule 11 transcript)(emphasis added). In assessing the significance Mr. Aguiar may have assigned to the potential for an

acceptance of responsibility departure in weighing whether to plead guilty or go to trial, this Court should assume that Mr. Aguiar took this admonition by the district court at face value, i.e., he may have deemed to have believed that an acceptance of responsibility departure was not contingent on whether he pled guilty or went to trial. Hence, that Mr. Aguiar ultimately received the departure should not be dispositive of the question of whether going to trial would have been rational absent counsel's misadvice as to his sentencing exposure.

In sum, the district court acknowledged that Mr. Aguiar "now contends that his attorney's poor advice was a substantial factor in his decision to plead guilty," see Appendix C at 12, but it used the wrong legal standard, overlooked relevant facts, and considered irrelevant ones in concluding that Mr. Aguiar suffered no prejudice because "the likelihood of his conviction at trial" and "his re-arrest in 2009...rendered that advice essentially harmless." Id. As Mr. Aguiar asserted in his petition, see ECF 37 at 9, the correct standard for determining Strickland prejudice when a petitioner asserts that his attorney's misadvice caused him to plead guilty and forego a trial is whether there is "a reasonable probability that were it not for counsel's errors, he would not have pled guilty and would have proceeded to trial." Id. (petition quoting Arteca and Hill). This involves determining whether "a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372. In making this determination, a district court must, "before reaching a conclusion as to prejudice, take into account all relevant

factors." Gonzalez, 722 F.3d at 132. As Mr. Aguiar also explained in his petition, in a case where a defendant claims that his attorney's overestimation of his sentencing exposure at trial induced his guilty plea, one such relevant factor is "the discrepancy between the alleged advice and the actual minimum sentence" the defendant faced at trial. ECF 37 at 10 (petition quoting United States v. Fuller, 769 F.2d 1095, 1098 (5th Cir. 1985)). Another such factor is whether a defendant demonstrated a reluctance to plead guilty [as Mr. Aguiar did] when operating under the misunderstanding as to his sentencing exposure at trial. Id. at 12 (citing United States v. Lewis, 477 Fed. Appx. 79, 83 (4th Cir. 2012)); see also Gonzalez at 133 (a defendant's attempt to withdraw his guilty plea and go to trial "is a factor that ... must be considered by the court in assessing whether there is a reasonable probability that but for substandard performance by counsel, the defendant would have chosen to eschew the plea and go to trial.").

Simply put, a reviewing court would be inclined to agree that that the denial of Mr. Aguiar's claims and the district court's misapplication of the law as detailed above is arguable in both law and fact and reviewable and the Second Circuit was therefore wrong to refuse appellate review by finding that the appeal was frivolous. This Court should grant certiorari.

D. The District Court's Order Granting Petitioner's Motion to Import an After-the-Fact One Year Reduction of His Term of Supervised Release Allowing Him to Satisfy the District Court's Nevertheless Inadequate Conclusions of Timeliness and Strickland Prejudice is a Sound Reason that Warrants Appellate Review of Petitioner's Case

As detailed above, the district court records and the

21 U.S.C. § 851-related errors and criminal proceedings of Mr. Aguiar's criminal case are confusingly divided between the Districts of both Massachusetts and Vermont. Compare, e.g., United States v. Aguiar, No. 2:00-cr-119, ECF 22 (D. Vt. July 23, 2001)(sentencing proceedings imposing an inapplicable § 851 enhancement) with ECF 50-1: United States v. Aguiar, No. 1:07-cr-10257, ECF 2 (D. Mass. Sept. 13, 2007)(docket sheet detailing Massachusetts district court sentencing proceedings re-imposing an inapplicable § 851 enhancement) and ECF 32 at 1 (revocation petition imported from the Massachusetts district court citing that a § 851 information was filed for Mr. Aguiar's "original Offense"). Notwithstanding that the district court's finding of Strickland prejudice is flawed, even assuming that the district court's analysis of Strickland prejudice in Mr. Aguiar's case was correct, the after-the-fact reduction of Mr. Aguiar's original term of supervised release as granted by the district court in response to Mr. Aguiar's motion, see Appendix E (ECF 62), which transpired in the Massachusetts district court in 2008 for Mr. Aguiar's CARE participation, was a new unconsidered fact that impacts both the timeliness and prejudice reasoning of the district court in Mr. Aguiar's favor. This new fact alone warranted appellate review. Here's why:

The district court's lack of prejudice conclusion rests on harmless error since "[i]n 2009, having served fewer than three years of his supervised release...[Mr.] Aguiar was arrested... and his supervised release was revoked," see Appendix C at 5, and thus his "re-arrest in the midst of his supervised release term rendered [Attorney Williams's deficient] advice essentially

harmless." Id. at 12. Given that Mr. Aguiar's supervised release term began in January 2007 after being released from federal custody, see ECF 50-1 at 2, and was arrested on July 30, 2009 for conspiracy, and assuming the three year term of supervised release as reasoned by the district court and applying the imported one year January 2008 reduction of Mr. Aguiar's term of supervised release, see Appendix E (ECF 62), however, would have ended Mr. Aguiar's term of supervised release in January 2009 -- six months before he was arrested. Moreover, because this fact did not become available until after the district court decided Mr. Aguiar's coram nobis petition, such circumstances warranted the district court to consider that evidence. The district court elected instead to ignore that evidence. Mr. Aguiar states that this was a viable appellate issue overlooked by the Second Circuit and Mr. Aguiar asks that this Court grant certiorari on this issue if nothing else.

VI. Conclusion

Mr. Aguiar's prays that this Court grant him the relief under his complex circumstances in this case given his pro se status.

Respectfully submitted,

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