NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JOSE GILBERTO PORTILLO

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

Whether the DC Court of Appeals' decision directly conflicts with and seriously undermines controlling authority of the Supreme Court on counsel's fundamental obligations to adequately counsel his client regarding guilty pleas, a process which the Supreme Court has held is a "critical stage" of the proceedings. *See, Lafler v. Cooper,* 132 S.Ct. 1376 (2012); *Missouri v. Frye,* 132 S.Ct. 1399 (2012), where the DCCA generally sanctions an attorney's abandonment of all further efforts to counsel his client and negotiate a plea agreement as long as the attorney makes one unsuccessful attempt, regardless whether, as in the present case,

- the defendant is young, virtually uneducated[1] and does not speak English;
- the attorney who communicated the plea offer does not speak Spanish;
- the defendant faces numerous, serious felonies including two counts of first degree felony murder while armed with aggravating circumstances;
- the government's case against him is overwhelming;
- two cooperating co-defendants admitted to police that although the defendant participated in a burglary and robbery, it was they—not the defendant—who fatally stabbed the decedents;
- there is a 10-month lag between the only attempt at plea negotiations and the trial date; and
- the potential sentence if convicted after trial is in excess of 100 years.

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[1]Petitioner received a 7th grade education in El Salvador, which faces "major challenges in education" including "poor education quality, resulting in a growing number of youth leaving school without basic skills mastery; [and] limited access and inequity for disadvantaged groups such as. . . urban and rural poor, and minorities. . ." www.usaid.gov/el-salvador/education

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PETITION FOR WRIT OF CERTIORARI

Jose Gilberto Portillo respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals ("DCCA") in this case.

CITATION TO OPINIONS BELOW

The DCCA issued an unpublished *Memorandum Opinion and Judgment* ("MOJ") in *Jose Gilberto Portillo v. United States*, 17-CO-262 (DCCA May 29, 2018). *See,* Appendix A. Petitioner filed a petition for rehearing, which was denied on September 18, 2018. *See*, Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254. The DCCA issued its final decision in this matter on September 18, 2018. Pursuant to Supreme Court Rule 13.3, this petition has been timely filed within 90 days of September 18, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner and two codefendants were charged with burglary, armed robbery, and first degree felony murders of two senior citizens in 2009. CJA attorney Ferris Bond, who speaks very little Spanish, was appointed to represent Petitioner on March 30, 2009[2]; CJA attorney John Machado, fluent in Spanish, was appointed as co-counsel on October 23, 2009. Two

[2]For some, but not all visits to the jail, Bond used a Spanish interpreter.

cooperating codefendants, who admitted to police that they, not Petitioner, fatally stabbed the decedents, pled guilty soon after their arrests to second degree murders. They each were sentenced to *40* years. Petitioner proceeded to trial, was convicted on all counts, and was sentenced to *137.5* years. Petitioner appealed, asserting ineffective assistance of his two trial counsel for failing to adequately advise him regarding pleading guilty and the plea negotiation process.

The DC Court of Appeals twice remanded Petitioner's case, first for the trial court to assess pretrial effective assistance of counsel by considering "all of the ways that language issues can impact pretrial preparation, including, but not limited to, lawyer-client communication and translation of documents related to the case," *see, Portillo v United States*, 62 A.3d 1243, 1256 (D.C. 2013)(Appeal No. 11-CF-0431)("*Portillo I*"), then second, to assess whether "counsel effectively communicated with Petitioner regarding the nature of the charges against him and the option and advisability of pleading guilty or undertaking to negotiate a guilty plea, or whether, notwithstanding any deficiencies in this area, the government met its burden of proof to show that trial counsel was effective." *See, Memorandum Opinion and Judgment*, Appeal No. 14-CO-791 (D.C. April 12, 2016) ("*Portillo II*"). On both remands the trial court found pretrial counsel were effective. The *MOJ* in this case represents this Court's affirmance of the trial court's findings from the second remand.

There is no conceivable way to find, based on the testimony of the attorneys and

records of their jail visits, that they adequately counseled Petitioner regarding pleading guilty or negotiating a plea agreement. This is what the record showed:

Bond "assumed" he discussed pleading and a debriefing with Petitioner at a December 30, 2009 jail visit, though he had no notes and no clear recollection of what they discussed. He testified that he discussed with Petitioner that he could be convicted of burglary and murder on an aiding and abetting theory, though he had no notes of *when* and in *what context*. He then attended a scheduled February 22, 2010 debriefing, which he terminated when Petitioner's information contradicted the government's evidence in part.

From that point on Bond essentially abandoned Petitioner. He waited *five months after the debriefing,* until July 23,2010, to visit Petitioner again, despite Petitioner having contacted him in April 2010 to explain what was happening. At that July visit, according to Bond, his investigator "translated the fingerprint report and Brady disclosure" for Petitioner. Bond said nothing at the hearing about having discussed on that visit anything about pleading guilty. Bond showed up again *three months later*, in October, *only because Petitioner complained to the court*. Again, he said nothing at the hearing indicating that he counseled Petitioner about pleading guilty at that time. Bond reappeared on November 27, *two days before trial began*, for the sole purpose of preparing for trial. Even if Bond's testimony that he explained aiding and abetting burglary and murder is credited, the record suggests that the discussion occurred *perhaps* on December 30, 2009 (although he had no recollection and no notes indicating when, exactly, he explained aiding and abetting), and, moreover, beyond the

one failed plea attempt, there is nothing in the record to support a finding that he took any further steps to counsel Petitioner about pleading guilty, assure Petitioner understood, or reinitiate the plea process.

Machado, who speaks Spanish fluently, was appointed as co-counsel on October 23, 2009 to facilitate communications with Petitioner.[3] He waited *ten weeks* to visit Petitioner and when he finally showed up with Bond on December 30, 2009, all he could recall of that meeting was that he "probably" told Petitioner what his role would be.

*Machado did not attend the debriefing and did not visit Petitioner again at the jail until October 24, 20**10***. So much for creating "magic." *See*, footnote 3, *supra* When asked if he was ever part of any discussions with Petitioner about plea bargaining, Machado responded, "[T]hat bridge had been crossed already," it was "already a done deal." Of course, that was not true. He admitted that he "became more involved" in the case only "when we were getting close to the trial," which coincided with his testimony that he explained felony murder in the context of what type of defense they could present at trial.[4]

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[3]Machado bragged at the evidentiary hearing, "I think one of the skills that I've worked on and honed in this job is to kind of break things down into the most common denominator in order to be understood." It is "essential," he testified, that Spanish speaking people new to the United States understand everything: "[A]s a regular practice I've been telling them how things break down in very basic words and usually it's more of trying to avoid the standard legal vernacular." Machado claimed "there's kind of this magic thing that happens" when a Spanish-speaking attorney is appointed, and that his "speaking to [Petitioner] in Spanish did help as far as communication with the client."

[4]In an astonishing development, one month after the DCCA rejected Petitioner's claims of John Machado's neglectful conduct in this case, two of the same Judges on Petitioner's panel issued a published decision approving the suspension of John Machado

The record, which shows near abandonment of Petitioner after a single attempt to counsel him about and negotiate a plea agreement, simply does not support a finding that *either* attorney spent the necessary time to ***adequately*** counsel their young, uneducated, Spanish speaking client about the law as applied to the facts in his case, the obvious perils of going to trial when the government has his fingerprints in the house and *two* cooperating defendants, the benefits of pleading guilty and negotiating a plea agreement, the potential sentences he faced after trial vs. pleading guilty, or that they gave him their professional advice on this crucial decision.

REASONS FOR GRANTING THIS WRIT

I THE DCCA'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND PRECEDENT OF FEDERAL COURTS REGARDING COUNSEL'S OBLIGATIONS TO HIS CLIENT AS TO PLEADING GUILTY AND THE PLEA NEGOTIATION PROCESS.

A. Supreme Court and Federal Court Precedent.

"Defendants have a Sixth Amendment right that extends to the plea-bargaining process." *Cooper,* 132 S.Ct at 1384; *also see Frye,* 132 S.Ct at 1407-1408 ("[C]riminal

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from practicing law in the District of Columbia for 90 days because he "neglected a client whom he was appointed to represent in a criminal case under the Criminal Justice Act (CJA)," disregarded Court orders and failed to respond to Bar Counsel's inquiries. *In re John L. Machado*, No. 18-BG-554 (D.C. June 28, 2018). The basis of the *Machado* decision was a March 28, 2018 26-page *Report and Recommendation* of the Board on Professional Responsibility Ad Hoc Hearing Committee. That report indicated that Machado had been admonished for similar neglectful conduct in 2001 and again in 2014 and states that between 2001 and 2014, *there had been no misconduct*. The DCCA, however, was aware of Petitioner's claims against Mr. Machado since his initial appeal filed in 2011.

defendants require effective counsel during plea negotiations"). This is so because "[t]he constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." *Cooper* at 1385.

"The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Frye* at 1407. "The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. . .[C]ounsel may and must give the client the benefit of counsel's professional advice on this crucial decision.'" *Cardoza v. Rock*, 731 F.3d 169, 178 (2d Cir. 2011)(quoting *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996)); *also see United States v. Ramsey*, 323 F.Supp 2d 27, 42-43 (D.D.C. 2004) (A deprivation of the Sixth Amendment right to effective assistance can result from the failure to advise a defendant of the "substantial advantages of aborting the trial" and pleading guilty in view of the strength of the government's case). "[W]hen there is a strong likelihood of conviction after trial, it is difficult to imagine effective representation that does not include affirmatively seeking the best plea bargain possible given the circumstances of the case and defendant." *Effective Plea Bargaining Counsel*, 122 Yale L.J. 100 (2013).

"[P]rior to trial an accused is entitled to rely upon his counsel to make an independent

examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). In advising a defendant, counsel should "inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed. . ." *Purdy v. United States*, 208 F.3d 41, 45 (2d Cir. 2000). A defendant "has the right to make a reasonably informed decision whether to accept a plea offer" and his "[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." *United States v. Day*, 969 F.2d 39, 43 (3rd Cir 1992). Among other duties, counsel has an obligation "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Counsel should consider "the defendant's comprehension of the various factors that will inform his plea decision." *Id*. "If the attorney has investigated the case thoroughly, and at the same time has worked closely with the client so as to develop a relationship of trust and respect, the likelihood of inducing the defendant to accept an appropriate plea offer increases dramatically." White, Welsh S., *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL L. Rev. 323 at 371.

In the present case, at the time he was pending trial,

- Petitioner was young, virtually uneducated[5] and did not speak or read English;
- The attorney who communicated the plea offer did not speak Spanish;
- The Spanish-speaking attorney appointed to assist in communicating with Petitioner did not participate in counseling him about the plea negotiation process, nor did he attend the one and only debriefing;
- Petitioner faced numerous, serious felonies including two counts of first degree felony murder while armed with aggravating circumstances;
- The government's case against him was overwhelming;
- Two cooperating co-defendants admitted to police that although Petitioner participated in a burglary and robbery, it was they—not the Petitioner—who fatally stabbed the decedents;
- There was a 10-month lag between the only attempt at plea negotiations and the trial date; and
- The potential sentence if convicted after trial (which became a reality at his sentencing) was in excess of 100 years.

The facts of this case simply do not support a finding based on established legal precedent by this Court and federal courts that Petitioner's attorneys adequately counseled him regarding plea negotiations.

B. No "Clear And Convincing" Evidence That Petitioner's Attorneys Adequately Counseled Him Regarding the Plea Process.

In determining whether pretrial counsel was effective, the DCCA applied the standard of review under *Monroe-Farrell*[6] that the government had the burden to prove "by clear and

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[5]Petitioner received a 7th grade education in El Salvador, which faces "major challenges in education" including "poor education quality, resulting in a growing number of youth leaving school without basic skills mastery; [and] limited access and inequity for disadvantaged groups such as. . . urban and rural poor, and minorities. . ." www.usaid.gov/el-salvador/education

[6]*Monroe v. United States*, 389 A.2d 811 (D.C. 1978); *Farrell v. United States*, 391 A.2d 755 (D.C. 1978).

convincing evidence" that counsel "effectively communicated with Petitioner regarding the nature of the charges against him and the option and advisability of pleading guilty or undertaking to negotiate a guilty plea." *Portillo II*, Order at 2. Criteria to be considered included "(1) whether counsel conferred with the defendant as often as necessary and advised him of his rights. . ."*Portillo I* at 1253 (quoting *(John) Matthews v. United States,* 459 A.2d 1063, 1065 (D.C.1983) (citing *Monroe*, 389 A.2d at 821). "Clear and convincing evidence is most easily defined as the evidentiary standard that lies somewhere between preponderance of the evidence and evidence probative beyond a reasonable doubt;" such evidence "would produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Ingersoll v. Ingersoll*, 950 A.2d 672, 693 (D.C. 2008) (citation omitted).

In one breath the DCCA acknowledged that the record "about what the lawyers told Petitioner and when they told him is *not as clear as it might be*" and that the "*nature of the detail"* was *"limited*." *MOJ* at 5 (emphasis added). Yet in the next breath, it found "clear and convincing evidence that the trial lawyers communicated *effectively enough* with Petitioner about plea bargaining to satisfy the Sixth Amendment." *Id*. (emphasis added). As shown by the vague testimony and the jail visit chart, this record does not even come close to showing effectiveness by "clear and convincing" evidence. Petitioner knows of no legal precedent, and the DCCA cited none, revising the "clear and convincing evidence" standard to include an "unclear" and "limited" record.

The dearth of evidence as to *what* Bond and Machado discussed with Petitioner about

pleading guilty and *when* they may have had such discussions belies the DCCA's finding that the attorneys were effective. They had no notes and no independent recollection of discussions. The jail visits, which were extremely infrequent as to Bond and almost non-existent as to Machado until just before trial began, show that they could not *possibly* have spent sufficient time to explain this extremely serious and complicated case to a young, uneducated, non-English speaking client. "[T]he very strength of the government's case makes the decision to go to trial rather than accept a plea rather puzzling." *United States v. Winstead*, 890 F.3d 1082, 1088 (D.C. Circ. 2018).

Furthermore, multiple times the DCCA references the *"lawyers"* (*plural*) as having "communicated with [Petitioner]" about pleading guilty, *MOJ* at 3; "explained to Petitioner the key information about plea bargaining," *MOJ* at 4; "explained to Petitioner that he was in serious trouble," *MOJ* at 4; told him "`the facts of life'—that the outlook at trial was bleak," *MOJ* at 7; "advised Petitioner, and he understood, that he likely would be convicted of two murders. . if he went to trial and that the resulting sentence would be long." *MOJ* at 9. However, *nothing in this record supports the finding that Machado ever told Petitioner that information*— Machado himself testified that that bridge had already been crossed and he *abandoned* Petitioner until close to trial— and the only evidence that Bond *possibly* may have discussed *some* of that information was on December 30, 2009 (though Bond had no notes of what he told Petitioner) and *not again after the first failed debriefing* in the context of negotiating a plea agreement. The DCCA erred in finding "clear and convincing"

evidence that the attorneys adequately counseled Petitioner regarding plea negotiations.

C. The DCCA's Fixation on Petitioner's Claim of Innocence Ignores The Lack of Evidence That He Was Adequately Counseled By Either of His Attorneys on Pleading Guilty.

The DCCA fixated on the attorneys' claims that Petitioner insisted he was innocent of the murders.[7] Whether Petitioner insisted on his innocence has no relevance, however, *unless there is clear and convincing evidence that the attorneys adequately counseled him* about pleading guilty and negotiating a plea agreement and despite that, he insisted he was innocent. An attorney may not rely solely on a defendant's repeated insistence that he does not want to plead guilty to justify his failure to inform or advise the client, *Purdy* at 46, citing *Boria* at 497, for "many a defendant, seemingly utterly intransigent as to the possibility of pleading guilty, finally cave in when confronted with the ugly reality of what probably would happen to him if he did not." *Kates v. United States*, 930 F.Supp 189, 192 (E.D. Pa. 1966). Indeed, the fact that Petitioner insisted he was not guilty of felony murder is further proof that his attorneys did not spend the necessary time to adequately counsel him about the law as it applied to the charged conduct.

The DCCA also incorrectly relies on Petitioner's claim of innocence when it found

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[7]The DCCA states, "The effectiveness of the lawyers' communications should be assessed in the context of their duty to defend a client who insists he is not guilty of murder." *MOJ* at 7, citing *Butler v. United States*, 414 A.2d 844, 849 (D.C. 1980)(en banc). It also states that the trial court would not be permitted to inquire into discussions between a defendant and his attorney during a *Monroe* hearing without violating the attorney-client privilege. *MOJ* at 7-8. This is irrelevant here, where the evidentiary hearing occurred on remand and the trial court expressly found that Petitioner's pretrial IAC claims were "broad enough to include waiver" of the privilege.

that "the lawyers reasonably believed that [an] additional debriefing the government would have required before it would extend a plea offer would be more harmful than helpful." *MOJ* at 5. Again, what the "lawyer*s*" believed about the benefit of another attempt at debriefing was based *solely on the one failed debriefing and not on any discussions they had with Petitioner or advice they gave him about pleading guilty subsequent to the one failed attempt.* The DCCA erred in finding that Petitioner's claim of innocence relieved his attorneys' obligation to adequately counsel him regarding pleading guilty.

D. The DCCA's Finding that Once is "Effective Enough" Cannot Be Reconciled with Legal Precedent.

Petitioner knows of no legal precedent, and the DCCA cited none, revising the Sixth Amendment standard of "effective assistance of counsel" to "*effective enough*." By tweaking the standard to fit the factually inadequate record, the DCCA undermines the importance and necessity of defense counsel obligations during this critical stage of the proceedings. *The nature of the case and of the client matter*. One attempt to counsel and negotiate a plea agreement was not *"effective"* where the client is a young, uneducated man who does not speak or read English, the charges were extraordinarily serious, the government's case against him was overwhelming, he was facing more than 100 years if convicted at trial, and there was more than sufficient time between the first failed attempt and the trial date to further counsel him and re-initiate plea negotiations.

The DCCA erred in finding that one attempt by the non-Spanish speaking attorney sufficiently satisfied the attorneys' obligations to adequately counsel a young, non-English

speaking, uneducated client who is facing extremely serious felonies and an extremely lengthy sentence, where the government's evidence against him—including confessions of the two codefendants—is overwhelming. This Court should be concerned that the DCCA's decision sends the wrong message to criminal defense attorneys that they need not comply with this Court's precedent regarding the serious obligations of counsel as to the plea negotiation process and may provide the most minimal assistance to their clients regarding pleading guilty and the plea negotiation process.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his Petition.

Respectfully submitted,

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