No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MARIANO ALVAREZ — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARIANO ALVAREZ
(Your Name)

P.O. BOX 26040
(Address)

BEAUMONT, TX 77720
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Can doubts in granting a Certificate of Appealability (COA) be resolved in favor of the appellant when considering the severity of his life sentence?

2. Is it debatable among jurists of reason that the appellant's counsel was ineffective for failing to object to the District Court's declaration of a mistrial?

3. Is it debatable among jurists of reason that the appellant's counsel was ineffective for failing to file a motion for recusal or other written objections to the transfer order?

4. Is it debatable among jurists of reason that the appellant's counsel was ineffective for failing to negotiate a plea after the mistrial?

5. Is it debatable among jurists of reason that the appellant's counsel was ineffective when he (counsel) gave the appellant incorrect information regarding an open plea?

6. Is it debatable among jurists of reason that the appellant's counsel was ineffective at sentencing for failing to object to the miscalculation of the sentencing guidelines?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was MAY 29, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States Amendment VI

   "Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right [...] to have the Assistance of Counsel for his defense."

2. Constitution of the United States Amendment V

   "[...] nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

3. 18 U.S.C. § 1956 Laundering of Monetary Instruments

   "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity..."

4. 18 U.S.C. § 3582(c)(2) Modification of an Imposed Term of Imprisonment

   "In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

5. 28 U.S.C. 2253(c)(2) Appeal

   "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

6. 28 U.S.C. § 2255 Federal Custody; Remedies on Motion Attacking Sentence

   "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

7. United States Sentencing Guidelines (U.S.S.G.) § 2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

   "150 KG or more of Cocaine - Level 38"

8. U.S.S.G. § 2D1.1(b)(1) Specific Offense Characteristics

   "If a dangerous weapon (including a firearm) was possessed, increase by 2 levels."

9. U.S.S.G. § 2S1.1(a)(1) Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

   "The offense level for the underlying offense from which the laundered funds

were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined."

10. U.S.S.G. § 2S1.1(b)(2)(B) Specific Offense Characteristics

"If the defendant was convicted under 18 U.S.C. § 1956, increase by 2 levels."

11. U.S.S.G. § 2S1.1 cmt. n.6 Grouping of Multiple Counts

"In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of § 3D1.2 "Groups of Closely-Related Counts).

12. U.S.S.G. § 3B1.1(a) Aggravating Role

"If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels."

13. U.S.S.G. § 3D1.2(c) Groups of Closely Related Counts

"When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."

14. U.S.S.G. Amendment 782

Retroactive amendment to the Guidelines which reduced by 2 levels the offense levels in the Drug Quantity Table of § 2D1.1

STATEMENT OF THE CASE

On July 29, 2008, Mariano Alvarez, Petitioner, was charged in a superseding indictment in Count One with engaging with a drug trafficking conspiracy beginning in January of 2005, and continuing until February of 2007, with co-defendants Eden Flores, Sr., Isauro Casas, Anwar DeLuna, Eduardo Guerra, Guadalupe Hernandez, in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A), and 846. (C.R., 144-53; R.E. Ex. 4)[1] In Count Two, Mr. Alvarez was charged in a money laundering conspiracy, during the same time period, with Eden Flores, Sr., Isauro Casas, Jose Luis Villarreal, and Felix Alvarez, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(I) and 2. (Id.) In addition to the conspiracies alleged, Mr. Alvarez was charged substantively as follows:

Count Three: April 21, 2005, money laundering by delivery of $279,995 in drug proceeds, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(I) and 2.

Count Five: January 13, 2006, money laundering by delivery of $2 million in drug proceeds, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(I) and 2.

Count Six: February 21, 2006, possession of 217 kilos of cocaine with intent to distribute, in violation of 18 U.S.C. § 841(a)(1) and 841(b)(1)(A), and 18 U.S.C. § 2.

Count Seven: May 13, 2006, money laundering by delivery of $35,000 in drug proceeds, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(I) and 2.

Count Eight: July 13, 2006, money laundering by delivery of $413,000 in drug proceeds, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(I) and 2.

(Id.)

Mr. Alvarez pleaded not guilty to the charges, and his trial commenced on November 5, 2008, (1 T.R., Voir Dire, 3), before the Honorable Randy Crane, a

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1 Since there does not appear to be a uniform page numbering from defendant to defendant, the Petitioner will cite to the Fifth Circuit page numbers from Mariano Alvarez's Clerk's Record. As to the transcripts of the two trials, Petitioner will cite to the trial, the day of the trial, and the page as, e.g.- for the first trial, (1 Tr., 1st Day, p.); second trial, (2 T.R., 1st Day, p.).

United States District Judge for the Southern District of Texas, McAllen Division. Mr. Alvarez's trial concluded on December 8, 2008, when Judge Crane declared a mistrial. (1 T.R., 19th Day, 8; R.E., Ex. 8) Sua sponte, the court transferred the case to the Houston Division for retrial. (Id.) The second trial began on July 6, 2009, (2 Voir Dire, 4), and concluded on July 21, 2009, when the jury found Mr. Alvarez guilty on Counts One, Two, Three, Five, and Six, and not guilty on Counts Seven and Eight. (C.R., 2473-74; R.E., Ex. 5)

On December 2, 2009, Judge Crane sentenced Mr. Alvarez on Counts Two, Three, and Five to concurrent terms of twenty years' confinement. (Id.) Mr. Alvarez was additionally ordered to pay $500 in mandatory assessments in aid of crime victims, pursuant to 18 U.S.C. § 3013. (Id.) On December 7, 2009, Mr. Alvarez filed a timely Notice of Appeal, duly perfecting his appeal to the Fifth Circuit Court of Appeals. (C.R., 2643-44; R.E., Ex. 3) The Petitioner's conviction was affirmed by the Fifth Circuit on April 8, 2014. (Cr. Dkt. No. 887)

On June 22, 2015, Alvarez filed a § 2255 Motion before the District Court in McAllen, claiming he suffered ineffective assistance of counsel because his counsel failed to (1) object to the declaration of a mistrial; (2) file a motion for recusal or object to the transfer; (3) negotiate a plea after the mistrial; (4) provide correct information regarding an open plea; and (5) object to the presentence investigation report and the Court's calculation of the guidelines. (Cv. Dkt. No. 1) The District Court denied his motion on March 16, 2017, citing that "[n]one of Petitioner's arguments have merit." Further, the Court denied Alvarez a Certificate of Appealability. (Cv. Dkt. No. 13)

Alvarez appealed the District Court's denial of a COA; however, the District Court held, "The applicant presents sufficient evidence to find that [he] is a pauper," but denied him a COA. (Cv. Dkt. No. 19) The Petitioner appealed this determination to the Fifth Circuit Court of Appeals, who affirmed the denial of

a COA on May 29, 2018. (Appeal No. 17-40491)

STATEMENT OF FACTS

Alvarez's trial counsel failed to object to the District Court's declaration of a mistrial. The mistrial was declared because a juror engaged in an extrinsic investigation regarding a UPS label, and he proceeded to share this information with the jury. The District Court did not question the jury as a whole and found that the juror's extrinsic investigation was sufficient to taint the jury as a whole.

When the mistrial was declared, the District Court sua sponte transferred the case to the Houston Division for retrial. (1 T.R., 19th Day, 8). The Court advised the parties that the Court was not interested in trying a case for a month in Houston (Id., 15). The Petitioner's request for an alternate transfer to Corpus Christi was denied. (Id., 14-15)

After the mistrial, the Petitioner wanted to enter a plea agreement; however, his trial counsel failed to contact him, the Petitioner, between the first and second trials. Counsel filed a motion to withdraw. (Exhibit G, § 2255 Motion) Upon reception of payment, counsel withdrew his motion to withdraw. (Id.) Petitioner did not meet with his counsel until the first day of the second trial.

Petitioner's trial counsel misadvised him, the Petitioner, about the legal aspects and ramifications of an open plea. Had the Petitioner been advised correctly, he, the Petitioner, would have entered into an open plea by pleading guilty to the indictment.

The District Court misapplied the United States Sentencing Guidelines by using the Petitioner's conduct in the underlying drug conspiracy to impose a role enhancement and gun bump when calculating his adjusted level for money laundering under USSG § 2S1.1(a)(1). The proper calculation for Petitioner's drug conspiracy was 38 for the drug amount, plus 4 for leadership, plus 2 for

the gun bump. This totaled 44 for the offense level. The money laundering guidelines should have been 38, plus a 2 level increase under § 2S1.1(b)(2)(B), for a total of 40.

The District Court stated that a misapplication of the Guidelines would be error. (Cv. Dkt. No. 13 at 7) A calculation, as provided by the Petitioner in Reasons for Granting the Petition (this petition), substantiates this error.

The Sentencing Commission revised the Drug Quantity Table in § 2D1.1 of the United States Sentencing Guidelines by passing Amendment 782 in 2014. The Petitioner would have been eligible for this reduction had he accepted a plea offer and been awarded a three-point reduction before sentencing.

The Petitioner is serving a life sentence for a non-violent drug offense, and for related money laundering charges.

REASONS FOR GRANTING THE PETITION

The Standard for Issuing a Certificate of Appealability

The Supreme Court delineated the standard for the issuance of a certificate of probable cause (which is now known as a Certificate of Appealability or "COA") in Barefoot v. Estelle, 463 U.S. 880, 892-893 (1993). The same standard applies to a COA. The Court agreed with the lower courts which had ruled that in order to obtain a certificate of probable cause, a petitioner is required to make a substantial showing of the denial of a federal (viz., constitutional) right. Id. at 893 (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971)).

The Court also quoted with approval Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980) (citing United States ex rel. Jones v. Richmond, 245 F.2d 234 (2d Cir. 1957)), which explained that in order to make a substantial showing of the denial of a federal right, a petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. 463 U.S. at 893 n.4. Also see Lozada v. Deeds, 498 U.S. 430, 431-432 (1991). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") changed the standard from the denial of a federal right to the denial of a constitutional right.

In Miller-El v. Cockrell, 154 L.Ed.2d 931 (2003), the Supreme Court stated:

> We look to the District Court's application of the AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurist of reason. This threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact, the statute forbids it.
>
> §§
>
> To that end, our opinion in Slack[1/] held that a COA does

1/ Slack v. McDaniel, 529 U.S. 473 (2000).

> not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with Section 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." Barefoot, supra, at 893 n.4.

Id. at 950. Moreover, any doubts about granting a COA are to be resolved in favor of the applicant and the court may consider the severity of his sentence in resolving this question. Sonnier v. Johnson, 161 F.2d 941 (5th Cir. 1998); Styron v. Johnson, 262 F.3d 438, 444 (5th Cir. 2001).

Appellant will establish that the issues raised in his §2255 motion are debatable among jurist of reason; that a court could resolve the issues in a different manner; and/or that the questions are adequate to deserve encouragement to proceed further.

I. APPELLANT HAD INEFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE

A. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DISTRICT COURT'S DECLARATION OF A MISTRIAL

The Double Jeopardy Clause of the United States Constitution will not preclude a defendant from being retried after the district court declares a mistrial over defense objection if the mistrial was justified by "manifest necessity." If a defendant consents to a mistrial, the "manifest necessity" standard is inapplicable and double jeopardy ordinarily will not bar a reprosecution. See United States v. El-Mezain, 664 F.3d 467, 559 (5th Cir. 2011).

Appellant raised this issue on direct appeal. The Fifth Circuit Court of Appeals ruled that Appellant's counsel failed to object to the district court's declaration of a mistrial and the manifest necessity standard did not apply.

(Exhibit A from §2255 motion). Based on the Fifth Circuit's ruling, Appellant submitted an extensive §2255 motion, arguing, inter alia, that his counsel provided ineffective assistance when he, the attorney, failed to object to the District Court's declaration of a mistrial. (See 2255 motion pp. 20-34).

The District Court ruled that even if Appellant's counsel had raised an objection to a mistrial, retrial would not have been precluded because the mistrial was on the basis of "manifest necessity." As a result, Appellant is unable to demonstrate prejudice because there would have been a retrial regardless of whether an objection was raised. (See Opinion and Order pp. 4-5).

This Court should grant a COA regarding this issue; for, it is debatable or could be resolved in a different manner. Appellant contends that the extrinsic information regarding the UPS label in this case was of little importance against the Government's overwhelming evidence. Although the District Court originally had planned to question the jury as a whole to determine possible taint, it chose not to do so, finding, instead, that the extrinsic evidence regarding the UPS label was sufficient, in itself, to taint the jury as a whole. The District Court failed to follow appropriate protocol and, consequently, abused its discretion in granting a mistrial on the ground of jury taint.

It is undoubtedly debatable as to whether Appellant's counsel was ineffective for failing to object to the District Court's declaration of a mistrial, as the Fifth Circuit stated:

> "Alvarez did not explicitly object to the mistrial or provide the District Court with notice and opportunity to address the double jeopardy concerns he now raises on appeal. 'A prior expression of a desire to continue the trial will not save a defendant from the implied consent doctrine,' including a defendant's expressed desire to proceed to a verdict prior to the District Court's declaration of a mistrial. Palmer, 122 F.3d at 219 2/ ; see also United States v. Benjamin, 129

2/ United States v. Palmer, 122 F.3d 215 (5th Cir. 1997).

F. App'x 887, 889 (5th Cir. 2005) (finding defendant impliedly consented to mistrial when he "did not contemporaneously and expressly object" to the District Court's declaration of a mistrial, but rather filed a "motion to bar retrial on ground of double jeopardy" nearly two weeks after the trial court declared a mistrial. Palmer, 122 F.3d at 219. Alvarez indicated to the court that he would like to proceed to a verdict, but this is distinct from raising a double jeopardy concern before the District Court. Indeed, after the District Court declared a mistrial, Alvarez suggested retrial in a venue other than Houston rather than objecting to the mistrial. See Nichols, 977 F.2d at 974 3/ (finding implied consent to mistrial despite defendant's expression of displeasure at possibly retrying the case because defendant did not make an express objection and "implied his consent to the retrial by failing to object to the mistrial and by rescheduling the new trial."). As such, he impliedly consented to the mistrial and double jeopardy does not bar his retrial. See El-Mezain, 664 F.3d at 559; Palmer, 122 F.3d at 218. The District Court did not err in denying Alvarez's motion to dismiss the indictment." 4/

(United States v. Alvarez, 2014 WL 1364827 p.6, Exhibit A from §2255 motion.)

Appellant submits that it is debatable whether he is unable to establish prejudice because there would have been a retrial regardless of whether an objection was raised as ruled by the District Court. (See Opinion and Order pp. 4-5). Another Court could resolve this issue in a different manner. The Fifth Circuit specifically stated that counsel failed to object to a mistrial; and, as such, the Supreme Court should grant a COA regarding this issue.

B. COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION FOR RECUSAL OR OTHER WRITTEN OBJECTIONS TO THE TRANSFER ORDER

At the time it declared a mistrial, the District Court sua sponte transferred the case to the Houston Division for retrial. (Exhibit D from §2255 motion) (1 T.R., 19th Day, 8).5/ The Court informed the parties that it had obtained the Houston Division's consent to the transfer, and the case would be heard there by another judge. Id., 14. The Court advised the parties that it

3/ United States v. Nichols, 977 F.2d 972 (5th Cir. 1992)
4/ United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011)
5/ Because there were two trials, Appellant will cite to the trial, the day of trial, and the page as, e.g. - for the first trial, (1 T.R., 1st Day, p.); for the second trial, (2 T.R., 1st Day, p.)

had been asked to take the case with him to Houston, but the Court was not interested in trying a case for a month in Houston. Id., 15. Counsel's request for a transfer to the Corpus Christi Division, because three of the attorneys were from the Valley, was denied. Id., 14-15.

The matter of the Court's decision to transfer the case to the Houston Division for retrial was revisited at a status conference held in McAllen on February 26, 2009. (Exhibit E from §2255 motion). Although the Court had not wanted to retry the case, as well as wanting a Houston Division judge to hear it, that option was no longer viable. Id., 6.

Appellant's counsel stated that he was going to file a recusal motion. This was based on counsel's belief that the Court was "jury shopping." (Exhibit E was §2255 motion at 5-6). The Court gave counsel two weeks to file the motion. Id., 13. Counsel failed to file this motion.

This issue was raised on direct appeal. In the opinion denying relief, the Fifth Circuit stated that the District Court had given the parties two weeks to file any additional motions. "None of the Appellants filed a motion for recusal or other written objections to the transfer order." (Exhibit A from §2255 motion at 6). This, Appellant argued in his §2255 motion, is an instance of ineffective assistance of counsel, whereby his counsel failed to file the motion for recusal and whereby his counsel failed to file other written objections to the transfer order. (§2255 motion at 34-36; traverse at 2-3).

Appellant submits that a COA should be granted because another Court could resolve this issue in a different manner by claiming the District Court was "jury shopping" and counsel was ineffective for failing to file a recusal motion after the District Court gave him two weeks to do so. See e.g., **United States v. Garza**, 593 F.3d 385 (5th Cir. 2010).

C. COUNSEL WAS INEFFECTIVE FOR FAILING TO NEGOTIATE A PLEA AFTER THE MISTRIAL

After the mistrial in this case, Appellant wanted to enter into a plea bargain. (See §2255 Motion, Exhibit F). This did not happen because counsel did not contact the Appellant between the time of the mistrial and the start of the second trial. The reason counsel did not contact his client was because of the fee arrangement. Counsel was waiting for the Appellant's family to give him more money for the second trial. When that money did not come quickly enough, counsel moved to withdraw as Appellant's representation. (See Exhibit G from §2255 Motion). When counsel received his payment, he withdrew the motion to withdraw. Id. Appellant finally met with his counsel on the morning of the trial when the new jury was being selected. There was no time to consult with his counsel because, by this point, his counsel was busy picking a jury. As such, counsel did not make a reasonable investigation or reach a reasonable decision that makes particular investigations unnecessary. **Strickland v. Washington**, 466 U.S. 668, 691 (1984). He did not consult with his client or contact the prosecutor to discuss a plea bargain, resulting in the Appellant receiving ineffective assistance. See **Hawkman v. Parratt**, 661 F.2d 1161 (8th Cir. 1981) (Holding that while there is no duty to initiate plea negotiations, the failure to do so may be deficient under the circumstances of a particular case).

The District Court denied this issue by claiming, "[p]etitioner does not, however, claim that a plea offer was ever made by the government." (Opinion and Order at 6).

It was not possible for a plea offer to be made because counsel did not contact his client or the Government between the time of the mistrial and the start of the new trial. The hinderance was the fee arrangement. As stated earlier, counsel was waiting for Appellant's family to give him more money for

the second trial. When that money did not come quickly enough, counsel moved to withdraw from representing Appellant. (See Exhibit G from §2255 motion). When counsel finally received his payment, the motion to withdraw was withdrawn. Id. Appellant finally saw his counsel on the morning of the trial when the jury was being selected. There was no time to consult with his counsel at this point because counsel was busy picking the jury.

This issue required an evidentiary hearing. Where the Court is confronted with an evidentiary conflict, a judge must hold an evidentiary hearing. Taylor v. United States, 287 F.3d 658, 660 (7th Cir. 2002). A prisoner who files a motion under Section 2255 challenging a federal conviction is entitled to "a prompt hearing" at which the District Court is to "determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. §2255. The hearing is mandatory "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Fontaine v. United States, 411 U.S. 213, 215 (1973) (citation omitted). Additionally, the burden "for establishing an entitlement to an evidentiary hearing is relatively light." Smith v. United States, 348 F.3d 545, 551 (6th Cir. 2003) (citing Turner v. United States, 183 F.3d 474, 477 (6th Cir. 1999)). The Government has even conceded in its response to the Appellant's §2255 motion that an expansion of the record was required in this case. (See Gov. Response at 81).

Based on the above, this Court should grant a certificate of appealability because another Court could resolve this in a different manner.

D. COUNSEL WAS INEFFECTIVE WHEN HE GAVE APPELLANT INCORRECT INFORMATION REGARDING AN OPEN PLEA

Appellant argued in his §2255 motion that his counsel gave him incorrect information regarding an open plea, and that if he had been given correct

information he would have entered a plea of guilty to the indictment. (§2255 motion at 39-42; traverse at 5-6).[6/]

The District Court denied this issue by claiming Appellant provided no evidentiary support that there was a miscalculation of his guidelines. (Opinion and Order at 6-7). This is incorrect.

Appellant was convicted of drug offenses and money laundering. The Presentence Investigation Report (PSR) began calculating his guidelines range by grouping the convictions together under USSG Section 3D1.2(c). It did so because Appellant's drug convictions were "the underlying offense[s] from which the laundered funds were derived." **USSG Section 2S1.1 cmt. n.6.** The PSR then used Section 2S1.1, the money laundering guidelines, to determine the base offense level. It added 2 levels under Section 2S1.1(b)(2)(B) because Appellant was convicted for money laundering under 18 U.S.C. § 1956. It decided that Appellant's offense level on the drug convictions was 38, added a 4 level increase for being a manager, leader, or supervisor under § 3B1.1(a), and a 2 level increase under § 2D1.1(b)(1) for a firearm. This made the total 46. (See Presentence Report).[7/] The problem with this calculation is the District Court misapplied the guidelines by using Appellant's conduct in the underlying drug conspiracy to impose a role enhancement and gun bump when calculating his adjusted level for money laundering under USSG § 2S1.1(a)(1). In other words, when the court calculated Appellant's offense level under § 2S1.1(a)(1), it could base a role enhancement and gun bump on his conduct in the money laundering charge, but not on his conduct in the underlying drug conspiracy. See **United States v. Salgado, 745 F.3d 1135 (11th Cir. 2014).**

6/ The instant argument is intertwined with Argument E.
7/ Federal prisoners are prohibited from possessing their PSRs. Appellant is requesting this Court to order the Government to supply a copy of the PSR to this Court for review of this matter

The proper calculation for Appellant's drug conspiracy was level 38 for the drug amount, a 4 level increase for leadership, and a 2 level increase for the gun bump. This made the total 44. The money laundering guidelines should have been 38 plus a 2 level increase under § 2S1.1(b)(2)(B), for a total of 40.

As appellant explained in his §2255 motion, the correct calculation was important because if Appellant had entered a plea of guilty to the indictment and had received a three-level reduction for acceptance of responsibility, his guidelines sentencing range would have been 324-405 months (based on Criminal History Category 1). Appellant would have agreed to this sentence. (See Exhibit F from §2255 motion). Moreover, Appellant would now be able to move the Court for a further reduction under Amendment 782 of the Guidelines, making his new guideline range 262-327 months. He lost this opportunity because his counsel gave him incorrect advice regarding his sentencing exposure. Thus, counsel provided ineffective assistance regarding an open plea.

The District Court's opinion states that it would be error if Appellant was assessed a 4 level enhancement for his role in the money laundering counts but he has failed to provide any evidentiary support for the claim. (Opinion at 7).

A simple calculation, as Appellant has provided, establishes this error. The District Court should have held an evidentiary hearing and brought in the probation officer who prepared the PSR. This would have established that the calculation was incorrect. This case conflicts with **United States v. Salgado, 745 F.3d 1135 (11th Cir. 2014)**, and, for that reason, the Supreme Court should grant a COA.

E. APPELLANT HAD INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Lastly, Appellant argued that his counsel was ineffective at sentencing for failing to object to this miscalculation of the guidelines as argued supra. Appellant's drug conspiracy offense level was 38, with a 4 level increase for leadership, and a two level increase for the gun bump. The total was 44. Counsel should have objected to the level 46 for the money laundering offense. See **United States v. Salgado**, 745 F.3d 1135 (11th Cir. 2014). This was important because the Sentencing Commission in Amendment 782 revised the Drug Quantity Table in the USSG § 2D1.1 by lowering the base offense levels for the respective drug quantity ranges by two points. Level 38 now requires 450 kilograms or more of cocaine. Appellant would be able to move to be resentenced under 18 U.S.C. § 3582(c)(2) based on Amendment 782. Level 42 would provide a guidelines range of 360 months - Life. Appellant would be entitled to request a 30 year sentence. Therefore, counsel provided ineffective assistance at sentencing, which resulted in prejudice therefrom.

Because this issue is debatable among jurists of reason, this Court should grant a COA.

CONCLUSION

Based on all of the above, this Court should grant a COA as to all the issues raised in Appellant's § 2255 motion. Counsel should also be appointed.

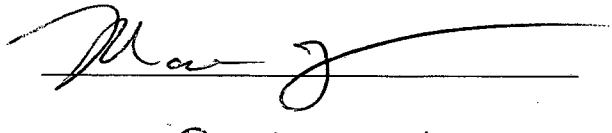
Respectfully Submitted,

Mariano Alvarez #94625-179
Pro Se
FCI Beaumont Medium
P.O. Box 26040
Beaumont, TX 77720

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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