No. 18-6623

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS COSME — PETITIONER
(Your Name)

vs.

THE UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CARLOS COSME # 21484-298
(Your Name)

FCI SAFORD, P.O. BOX 9000
(Address)

Safford, Arizona -85548
(City, State, Zip Code)

(Prisoner-Institution)
(Phone Number)

QUESTION(S) PRESENTED

Question # 1:

Did the District Court Commit Error in Applying the Standard of review for Motions to Withdraw a Plea Agreement as to an Issue of a Question of the Effective Assistance of Counsel in a Violation of the Sixth Amendment Rights Guaranteed as to the Advice of said Counsel in deciding Whether to Accept or Reject the Government's Offer, in a Proceeding pursuant to 28 U.S.C. § 2255 ?

Question # 2:

Did the District Court error in failing to hold an Evidentiary Hearing for Further development of the Facts in Explanation in a Proceeding Pursuant to 28 U.S.C. § 2255 as to the Violation of the Right to the Effective Assistance of Counsel, as Opposed to a Proceeding on an Ambiguous Record of a Hearing Held on a Prior Motion to Withdraw a Plea Agreement under Rule 11 ?

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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FEDERAL CASES CONT'D **PAGE NUMBER**

STATE CASES CITED:

FEDERAL STATUTES CITED:

STATE LAW CODES **PAGE NUMBER**

OTHER AUTHORITIES CITED:

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 # 1 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[X] is unpublished.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 # 5 to the petition and is

[X] reported at 2017 U.S. Dist. LEXIS 5035; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.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 4, 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

Article in amendment VI, of the Constitution of the United States; i.e., ..." [The Right], 'to have the Assistance of Counsel for his defence." The Sixth Amendment;

(See Appendix # 8)

28 U.S.C. § 2255;

(See Appendix # 9)

28 U.S.C. § 2255(b);

(See id. App. # 9)

STATEMENT OF THE CASE

Comes Now, CARLOS COSME, acting pro se, hereinafter referred to as **" Petitioner,"** as to the denial of a motion for collateral relief pursuant to **28 U.S.C. § 2255,** as to the claim of the violation of rights guaranteed by and through the **Constitution of the United States, Article in amendment VI, (i.e. The Sixth Amendment)** right to the " effective Assistance of Counsel. "

Too the refusal to grant a certificate of appealability **("COA")** pursuant to **28 U.S.C. § 2253,** taken from the **United States Court of Appeals for the Ninth Circuit. (See Appendix # 1)**

Therewith, as this Petitioner is properly before this Honorable Supreme Court, [he] respectfully requests that this Honorable Court **GRANT** certiorari as to the questions presented and/or **Grant, Vacate or remand ("GVR")** this cause to the **United States District Court for the Southern District of California, for** whatever hearing's this Honorable Court so direct.

This based upon the factual basis herein presented, that;

As Petitioner was arrested in connection with what is now commonly known as the **FERNANDO SANCHEZ ORGANIZATION ("FSO")** and held pending indictment to which was in fact issued on **December 22, 2011,** in the United States District Court for the Southern District of California in criminal case no. **10CR3044-05-WQH.**

This charging this Petitioner, and " others " in one count of a second superseding indictment with conspiring to conduct enterprise affairs through a pattern of racketeering activity, in violation of **18 U.S.C. § 1962(d)** and in count two, with conspiring to distribute cocaine, marijuana and methamphetamine, in violation of **Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), 841-(b)(1)A)(vii), 841(b)(1)(A)(viii) and 846.**

That as this Petitioner was in fact a " Mexican National," and a Mexican law enforcement official in the country of Mexico, he spoke absolutely zero English, and had not been apprised of the American Criminal Justice system, he was appointed counsel, one [he] will refer to in this petition as Mr. - Levine.

The record will reveal that, Mr. Levine did not speak any of the Spanish language, thus he was accompanied by a Spanish speaking interpreter.

As Petitioner was willing, to submit himself to the charges and accept responsibility for his actions, he was presented with a " written plea agreement," between him and the U.S. Government in the case. (ie. the Prosecution) the factual basis to which states as recounted in these section 2255 proceedings below;

> Defendant has fully discussed the facts of this case with defense counsel. Defendant has committed each of the elements of the crime and admits that there is a factual basis for this guilty plea. Defendant stipulates and agrees that the facts set forth in the numbered paragraphs below occurred. Defendant also stipulates and agrees that if this case were to proceed to trial, the Government could prove the following facts beyond a reasonable doubt by competent admissible evidence:
>
> 1. Between the time period of November 2008 and July 22, 2010, Defendant Carlos Cosme entered into an agreement with **other individuals** named in the above-noted charge to participate in the affairs of the fernando Sanchez Organization (the **"FSO"**) an "association-in-fact" enterprise as defined in Title 18, United States Code Section 1961(4). defendant Carlos Cosme agreed **that a member of the FSO would commit** at least two racketeering acts.
>
> 2. During the time period noted above, members of the FSO engaged in a pattern of racketeering activity, to include the commission of the following, kidnapping, murder; conspiracy to commit murder; attempted murder; kidnapping; conspiracy to kidnapping; attempted kidnapping; robbery; conspiracy to commit robbery; attempted robbery; importation of a controlled substance into the United States from Mexico; distribution of controlled substances, money laundering and conspiracy to to launder money. The FSO's Pattern of racketeering activity affected interstate and foreign commerce. During the time period relevant to this **guilty plea**, the FSO operated in the Southern District of California and elsewhere.

3. Pursuant to his agreement to participate in the affairs of the FSO, defendant Carlos Cosme **was aware that the FSO's racketerring** activity included the commission of the crimes specified above in the preceding paragraph, including the crimes of: (a) conspiracy to import and distribute **over 50 grams** of pure methamphetamine; and (b) conspiracy to commit murder.

4. The FSO constitutes an ongoing organization whose members function as a continuing unit for the common purpose of achieving the objectives of the FSO, which include: (a) enriching the members of the FSO through, among other things, the importation and distribution of illegal narcotics in the United States, committing robberies the kidnapping of individuals in the United States and Mexico, and "taxing" individuals involved within the geographical areas controlled by the enterprise, to include Tijuana, Mexico, and areas of San Diego, California; (b) keeping rival traffickers, potential informants, witnesses against the FSO, law enforcement, the media, and the Public-at-large in fear of the FSO, and in fear of it's members and it's associates through threats of violence and violence; (c) preserving, protecting, and expanding power of the FSO through the use of intimidation, violence, threats of violence, assaults and murders;(d) preserving the continuity of membership in the FSO by FSO's illegal activities wishing to leave the FSO with violence assault and murder; and (e) preserving the ongoing viability of the FSO by assaulting law enforcement officers attempting to arrest the FSO members, bribing public officials to secure release of arrested FSO members and making payments to public officials in order to gain access to confidential law enforcement information adverse to the interest of the FSO.

5. In furtherance of [his] agreement to participate in the affairs of the FSO, defendant Carlos Cosme committed numerous racketeering offenses, including: (a) **conspiracy to import and distribute more than 50 grams (actual) of methamphetamine and (b) conspiracy to commit murder.**

6. Given his personal participation in the affairs of the FSO, defendant Carlos Cosme **knew that members of the FSO would,** during the time frame of the above-noted conspiracy, **import and distribute more than 50 grams of actual methamphetamine.** Further, defendant Carlos Cosme personally performed **overt acts in furtherance of a conspiracy to commit murder,** including the recruitment of codefendant Jose Ortega Nuno to run a " hit squad " on behalf of Defendant Cosme.

7. In furtherance of his agreement to participate in the affairs of the FSO, during February 2010, Defendant Cosme arranged to sell to a confidential informant ("CI") 2 pounds of methamphetamine in Tijuana, Mexico.

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> ... Defendant Cosme knew that the methamphetamine would thereafter be imported into the United States from Mexico. Once 1 3/4 ponds (1/4 pound was seized at the boarder by U.S. law enforcement officials) of the methamphetamine (758 grams of actual methamphetamine) had been successfully imported into the United States, the CI paid defendant Cosme for the methamphetamine.

(See Criminal Case Number 3:10-cr-3044-WQH-5, at Docket # 1703, pg. 5-8)

Embedded therein, further, there was specific Guidelines applications that the parties agreed to, including concessions for the acceptance of responsibility pursuant to the **United States Sentencing Guidelines ("USSG'S")** at **USSG § 3E1.1(a), and (b).**

This document was explained to this Petitioner, again, with the use of an " interpreter." With the explanation thereof, Petitioner did in fact accept the government's offer, and endorse the written document contract/ plea agreement.

However, upon being taken to a colloquy, on **May 25, 2012,** Petitioner appeared before the district court a a change of plea hearing to plead guilty to counts 1 and 2 of the second superseding indictment as to said plea agreement. Petitioner was now accompanied by a **" court- certified Spanish language-interpreter, "** and his attorney, Mr. Levine.

During this proceeding the following transaction occurred:
Therein the court examined this Petitioner, asking the following questions: (among others)

THE COURT: And do you also agree that you committed the racketeering act of conspiracy to commit murder ?

This is when Petitioner's attorney interjected and answered for him.

MR. LEVINE: Your Honor, [he] agrees that the Government could prove that.

THE COURT: Well, it says here **in the agreement** this is in furtherance of his agreement to participate in the affairs of the FSO, defendant Carlose Cosme committed numerous racketeering acts, including conspiracy to import

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...and distribute more than 50 grams of actual methamphetamine; and B **conspiracy to commit murder.**

Do you agree, sir, that is what you did ?

This is when Petitioner's attorney again responded to the question for him and stated:

MR. LEVINE: Again, Your Honor, he does agree that the Government could prove that he did that.

(DKT. # 1921, Court Transcript, pg. 12)

In the face of this conundrum the court went further to examine this Petitioner as to the factual basis of this issue where it cited:

THE COURT: Further do [you] agree that you personally performed numerous [overt acts] in furtherance of a conspiracy to commit murder, including the recruitment of co-defendant Jose Ortega Nuno to run a hit squad on behalf of you ? **Do you want me to ask it again ?**

This is where the Petitioner repeated;

MR. COSME: Yes, Your Honor.

The court then continued;

THE COURT: This is on page 8 of your plea agreement, paragraph 6, lines 3 through 11. Given your personal participation in the affairs of the FSO, defendant Cosme **knew that members of the FSO would during the time** frame above noted conspiracy import and distribute more than 50 grams of methamphetamine.

Further, defendant Carlos Cosme personally performed overt acts in furtherance of **a conspiracy to commit murder,** including the recruitment of co-defendant Jose Ortega Nuno to run a hit squad on behalf of defendant Cosme.

Do you agree that statement is true ? Do you accept that as part of your factual basis, sir, that statement ?

This is when this Petitioner answered " on his own, " and shocked the entire proceeding, when he stated:

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MR. COSME: It wasn't like that- yes Your Honor. Yes, Your Honor.

(id. DKT. # 1921, pp. 14-15)

The court having some difficulty with this answering, needed to clarify, obviously there being some sort of discrepancy where it stated:

THE COURT: Let me read it again, and make sure that I have an answer that is clear. The court went on to ask the question again, it was only then that the Petitioner answered; " **yes, Your Honor.** "

in the face of this confusing plea colloquy, the court therewith entered a "**knowing and intelligent plea of guilt.**" **(id. pg. 45)**

Therewith, on **October 5, 2012,** Petitioner filed a motion to withdraw his plea of guilty and request for new counsel. **(DKT. # 1868)**

The court granted [Petitioner's] request for new counsel and provided counsel the opportunity to meet with the defendant and decide whether or not to pursue the motion to withdraw on the plea.

On **January 25, 2013,** Petitioner filed a second motion to withdraw the plea of guilty. **(DKT. # 1906)**

The court therewith held an evidentiary hearing at which prior counsel and this Petitioner testified in open court. Petitioner testified that the factual allegation of conspiracy to commit murder, including the recruitment of Co-Defendant Jose Ortega Nuno to run a " Hit squad " actually **took him by surprise. (This in open court) (DKT. # 1935 at p. 13)**

Petitioner testified that when he answered " **it wasn't like that** " to the Judge's questions and in response to the ultimate, he felt a " **blow from behind,**" delivered by his counsel and he felt as though he had to say guilty. **Id.**

Petitioner testified that, " **it was his understanding [from his counsel]** that he was pleading guilty, only " to the sale of the methamphetamine and the RICO. " **id. at 16**

It was at this time that again, Petitioner unequivocally clarified in this " open court oath " when asked that: " Did you agree at any time to plead guilty to forming a hit squad as alleged in the plea agreement with co-defendant Antonio Nuno," ? Petitioner stated: " **no I wasn't in agreement." (id.)**

At this hearing Mr. Levine (Attorney) was present and testified as to the matter, and stated that " **[he] went through the plea agreement with [Petitioner] via a Spanish speaking interpreter) and to which Petitioner did initial at the bottom of each page."**Further that he went over the co-defendant Jose Nuno's plea agreement with him that had virtually identical language.

The " Spanish speaking interpreter " was not called forward to testify in the matter.

On April 19, 2013, **the court entered an order denying the motion to withdraw** the guilty plea finding that the defendant " signed a plea agreement, " **[and] " swore in open court** that he committed the facts stated in the plea agreement," and actually committed the crime charged. The court found the factual basis for the plea and expressly accepted the plea of guilty. This stating, thus, the " [defendant] did not show a ' fair and just reason ' for requesting withdraw of his plea of guilty. **(DKT. # 1940, pp. 18-19)(App.# 7)**

On **June 18, 2013,** the court granted the government's motion to find Petitioner in material breach of the plea agreement by motioning to withdraw his plea, and thus, was relieved of it's obligations to recommend a sentence of 235 months. **(DKT. # 1983)**

On **June 28, 2013,** the district court held a sentencing hearing, where not only did it refuse to apply the departure from the base offense level calculation for the acceptance of responsibility under **USSG §§ 3E1.1(a) and (b),**

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... but also, applied an obstruction of justice enhancement pursuant to **USSG § 3C1.1,** and thus was essentially deprived of the benefit of the bargain and lost the concessions and fair considerations of the plea of guilt of **5 base offense level points** (Acceptance of responsibility = 3 levels under **USSG § 3E1-.1(a) and (b), and obstruction of Justice = 2 levels under USSG § 3C1.1)** he was then sentenced to **262 months** in custody to be followed by 5 years of Supervised release on each count to be ran concurrently. **(DKT. # 1993)**

Therewith, on **July 2, 2013,** Petitioner filed a notice of appeal to the Court of Appeals for the Ninth Circuit, in **U.S. Court of Appeals No. 13-50297.**

Therein, the Ninth Circuit delineated the standard for review on the denial of a motion to withdraw a guilty plea was for abuse of discretion. Citing, **United States V. Garcia, 401 F. 3d. 1008, 1011 (9th Cir. 2005)** See - **United States V. Cosme, 588 Fed. Appx. 604, 605 (9th Cir. 2014)(Appx.**

It went further, citing **Fed.R.Crim.P. 11(d)(2)(B),** " A Defendant may withdraw a guilty plea after it's **acceptance** but before sentencing if the defendant shows a "fair and just reason for requesting a withdraw." **Id.** It cited against that backdrop that, " The District Court found that there was no basis for any of "Cosme's] proffered " fair and just reasons " for withdrawing his plea. And the district court's factual findings were not " illogical, implausible, or without support in inferences that may be drawn from the facts in the record." Citing it's own decision in **United States V. Hinkson, 585 F.3d. 1247, 1263 (9th Cir. 2009)**

Therefore, the district court did not abuse it's discretion in denying [Petitioner's] motion. Id.

Also and pertinently, that as to the waiver provision in this plea agreement/contract, this Petitioner, " knowingly and voluntarily waived his rights" to appeal or collateral attack this sentence. " **Id.**

In the face of this decision and the fact that Petitioner was/is serving what turns out to be approximately 22 years of imprisonment, based upon a contract that he signed as he was/is appearantly confused as to a substantive element embedded in such as to a dispute that he had/has with his attorney, he sought collateral relief pursuant to **28 U.S.C. § 2255.**

On June 24, 2015, Petitioner, with the assistance of a fellow prisoner filed a request to the district court for the appointment of counsel, for as is universally known in this action that Petitioner did not read or write in the English language. **(DKT. # 2144)**

On September 1, 2015, the district court entered an order appointing counsel to represent Petitioner with the preparation of motions for habeas corpus relief. **(DKT. # 2235)**

However, as to the fact that Petitioner did not receive any correspondence from this appointed counsel, he moved for diligent preservation and again with the assistance of a fellow prisoner filed an Application form pursuant to **28 U.S.C. § 2255,** to which was too sworn under the penalty of perjury. **(DKT. # 2283) (This on March 14, 2016 a full 6 months later to appointment)**

On April 27, 2016, the district court ordered the defendant and appointed counsel notify the court in writing within 45 days of this order whether Petitioner would proceed representing himself or proceed through appointed counsel. **(DKT. # 2286)**

On may 25, 2016, Petitioner notified the court in writing that he wished to proceed through appointed counsel. **(DKT. # 2290)**

On August 09, 2016, this appointed counsel, one **GERARDO A. GONZALEZ 101 West Broadway, Suite 1950, San Diego, California 92101,** filed a motion pursuant to **28 U.S.C.§ 2255** (without the required form application) on Petitioner's behalf. **(DKT. # 2301)**

Therewith, the Form Application (Sworn to under the penalty of perjury) was deemed moot. **(DKT. # 2283)**

In this collateral prosecution pursuant to section 2255, the attorney for this Petitioner cited essentially the issue that the record itsèlf demonstrates that [Petitioner] received ineffective assistance of counsel during the plea negotiations phase, and the execution of the written plea agreement with the Government, as evidenced in the change of plea hearing held on May **25, - 2012,** which the court accepted his change of plea to guilty, ...and that, "due to [his] ineffective assistance of counsel, [Petitioner's] plea agreement was not knowing or voluntary. **(id. DKT. # 2301, pg. 5)**

Other than the record itself, the attorney did not submit any sworn testimony as to the Petitioner's understandings or conversations that he had with his original attorney. And other than the original Application form, that the court denied as moot, there was no sworn testimony in support to the claims presented. **(id.)**

However, as stated upon the record, at the original record (i.e. the Motion to withdraw) there was a letter attached thereto at EXHIBIT A **from Someone acting** on Petitioner's behalf stating:

> Your client Carlos Cosme asked me to interpret this letter to him.
>
> There are several issues that he feels were not clarified as to his " plea Agreement."
>
> he is under the clear impression that you never informed him as to the act that he had contracted co/Defendant Jose Antonio Ortega Nuno to ...

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...operate or supervise a "hit squad" in Tijuana. This was never mentioned as part of his plea agreement he signed, or at least to his understanding.

He feels totally betrayed as to this issue in particular, otherwise he **would have taken this to trial.**

Carlos Cosme asked you clearly as to this issue and you told him this ' plea agreement' only had to do with the drug issue (the methamphetamine).

He wishes you to visit him along with Mrs. Esther Sardina and Coral Ramirez Irales investigator and translator respectively to clarify this tremendous **misunderstanding.**

He plead to this in front of Honorable William Hayes but under extreme pressure after he was asked by the Judge twice, and upon him being hesitant and or not affirmative in his response, you pinched him in the side and told him to say " yes " "guilty, ' he felt totally intimidated.

Please do come and see him before he takes other measures.

He also says that he told you ' not to sell him out.'
Now he feels that you have done so.

(See id. DKT. # 1868 at 8)

At **EXHIBIT B** attached to the motion to withdraw the plea was an undated **letter addressed to " Mr. Judge William Q. Hayes " from Carlos Cosme explaining** his relationship with Jose Ortega Nuno and stating in part **" I NEVER RECRUITED ANTONIO ORTEGA WITH THE PLAN/ GOAL TO CARRY OUT ANY MURDERS."**

(id. at 13)

At **EXHIBIT C** attached to the motion for withdraw is a letter dated **June 6, 2012,** which stated in part:

I Carlos Come and completely convinced that the plea agreement that I signed was for the sale of methamphetamine, which is what you told me, and not for any other charge much less one to recruit Antonio Ortega and conspire to murder... I tried giving an explanation to the Judge but I felt very intimidated and the Judge observed that I was not answering anything regarding the the accusation of Antonio Ortega and that is when you (Donald L. Levine) lightly hit me or patted me in the back and I felt so intimidated and under extreme pressure for the action you took upon me and because of this reason is why I plead guilty.

(id. at 15)

The motion to withdraw the plea attached a Declaration of [Petitioner] which stated: " At my entry of plea, on May 25, 2012, when I hesitated in response to Judge Hayes' questioning me about operating and/or supervising a "hit squad," my attorney accosted me, punching me in the side. I felt totally initimidated... and that's why I said guilty."

(See id. at 6)

Coupled with this " record, " there was factual allegations therewith embedded inside of the general argument and conversation of the section 2255 brief. It was therewith, that Petitioner had made a claim that under the test set forth by the Supreme Court in **Hill V. Lockhart, 474 U.S. 52, 56 (1985) and Strickland V. Washington, 466 U.S. 668, 694 (1984)** that absent the counselor's " advice " in this matter, which appearantly there was none, there was confusion or down right deception, Petitioner would not have plead guilty and would have elected to proceed to trial by jury on the issue.

The counselor also cited to the most recent companion cases regarding the matter in **Missouri V. Frye, 566 U.S. ___, 132 S.Ct. 1399, 1406, 182 L.Ed. 2d. 379 (2012), and Lafler V. Cooper, ___U.S.___, 132 S.Ct. 1376, 1387, 182 L.Ed.-2d. 398 (2012)**

Therewith all of the Ninth Circuit's decisions regarding the matter. **(id.-DKT. # 2301, pg.'s 5-10)**

However, this appointed counselor did not request an evidentairy hearing, and call forth the only person that could definitively explain what it was conveyed to this Petitioner in the private conversations when Counsel (Levine) purportedly explained the elements and terms of the plea agreement signed. This for clearly there was some sort of misunderstanding, or language barrier, not just a " buyer's remorse issue."

On November 7, 2016, the government filed it's response and opposition to the 2255 motion. **(DKT. # 2315)**

This in a 6 page document simply calling the court to grant summary judgement. This recognizing the before mentioned that there was no other facts that have become prevalent and simply " rebranded ' the identical assertions he made when seeking to withdraw his guilty plea in an ineffective assistance of counsel claim. **(id. pg. 1)**

As a matter of fact there was identical language in the motion,at pg. 7 of the motion and lines 13-23 in the withdraw motion. **(id. pg. 2)**

It then pointed to the " factual determinations " regarding each of the claims claimed to be reasserted by in Petitioner's motion. **(id. 3)**

it cited as did the court in the evidentiary hearing that, the attorney testified, that it is " his practice to review the plea agreement thouroghly **with an interpreter and a Spanish Speaking defendant "** and that he did in fact do this with Petitioner. " **(id. 4)**

It cited therewith that he may not seek to relitigate claims previously rejected on appeal, citing this Court's decision in **Foster V. Chapman, 136 S.-Ct. 1737, 1758 (2016)** and recognized also that Petitioner " **did not seek to supplement the record in any way," nor did he ask "for an evidentiary hearing." (id. 5, n. 2)**

Unbeknownst to Petitioner, appointed counsel did not make a reply to this opposition and the record stood bald in the against these premise.

Without Petitioner's knowledge, on **January 11, 2017,** the court quickly gave an order in the matter. **(See DKT. # 2333)(App. # 5)**

It therewith detailed a 14 page decision in the matter, recognizing all of the before mentioned. Citing therewith that in the written plea agreement, Petitioner's initial's appear at the bottom right of each page..." **(id. pg. 3)**

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It recognized thereto that the plea agreement stated that" ...the Government will not be obligated to recommend any adjustment of acceptance of responsibility if the defendant **engages in conduct** inconsistent with the acceptance of responsibility including, but not limited to, the following:... 'Materially breaches the plea agreement in any way.'" **Id. at 14 (Plea Agreement)**

The court therewith recapped and relied solely upon the change of plea hearing and record from **May 25, 2012,** to where [Petitioner] stated preliminarily that " **Defendant represented to the court that he had an opportunity to review the plea agreement paragraph by paragraph and line by line with his counsel and that the agreement was 'translated to him' in the Spanish language." (id. Order at 4)**

It cited therewith that at the end of the change of plea hearing that it found that " the defendant has **freely, voluntarily, and competently entered the pleas and that he understands the plea agreement, including the forfeiture provisions; the charges against him and the consequences of the plea; that there is a factual basis for the plea and that the defendant has ' knowingly and intelligently waived his rights.'" (id. at 6, citing DKT. # 1913-1 at 45)**

It too recognized as relevant that at the Withdraw proceeding the Petitioner testified and attempted to explain the issue at hand and affirmatively stated that: " **No, I was not in agreement "(with the Forming a Hit Squad as alleged in the plea agreement with codefendant Antonio Nuno)(id. pg. 6, citing DKT. # 1935 at 13-16)**

It recognized that it thereafter, denied the motion and the government's motion to find a material breach to which the court did in fact grant. **(id. 8)**

The court then proceeded to recap the pleading's as cited herein. In making it's rulings, the court clarified that: " A defendant is entitled to challenge the intelligent, knowing, and voluntary aspects of his plea by demonstrating that the ' **advice** ' he received from counsel did not constitute effective representation." A Ninth Circuit decision in **Lambert V. Blodgett,- 393 F.3d. 943, 979-80 (9th Cir. 2004)(id. 10)**

The court cited as measured to the clearly established Constitutional law by this Court that the [Petitioner] set forth " **three specific factual assertions in support of his claim of ineffective assistance of counsel..." (id.)** That, again, noting that: " **The identical factual issues were litigated as a basis for Defendant's motion to withdraw his plea." (id.)**

It deferred therewith, to the fact of the extensive litigation in the matter and the two day evidentiary hearing that was held. Also the record thereto. **(id. 11-13)**

The court concluded that there are " **no facts asserted in the motion that would support the claim that representation of counsel fell below an objective standard of reasonableness." (id. 13-14)**

It too sua sponte denied a certificate of appealability pursuant to **28 - U.S.C. § 2253(c)(2),** in a conclusory fashion citing:" The Court finds that reasonable jurists could not find Defendant's claim that he was entitled to relief under **28 U.S.C. § 2255** to be debatable. " **(id. 14)**

The court also relieved attorney Gerardo A. Gonzalez from any further representation on the matter. **(id.)**

thus, as to this order and ruling therewith, this attorney must have taken that to be true for he did in fact continue to answer this Petitioner's calls, his secretary as well " after this decision, " and did not think it...

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...prudent to notify this Petitioner that this 2255 motion had been denied. As he continued to periodically make phone calls to this attorney, he continued to advise this Petitioner that the claim was still pending and that he was merely awaiting the disposition of the court. Therefore, he stayed silent. However, Petitioner was informed by another prisoner that after research, he had discovered that the claim was in fact denied and that Petitioner needed to contact counsel immediately. It was at that time that the attorney's secretary had send all of the documentation to Petitioner here at the institution, and Petitioner began to prepare sworn testimony, with documentary evidence appended thereto evidence this matter, and therewith did in fact file a motion pursuant to **Federal Rules of Civl Procedure 60 (b)(1) and (b)(6).(See-DKT. # 2360)**

That as to this attorney's misleading this Petitioner and abandonment, Petitioner has missed the appointed time deadlines with which to file the necessary notice of appeal and the request for certificate of appelability pursuant to **28 U.S.C. § 2253(c)(2) and Federal Rules of Appellate Procedure 22(b). (id. 1-6)**

That this "extraordinary circumstances " warranted the re-opening of the original 2255 judgment and thereafter denying such, so that the time with which to start the appellate process would start anew. **(id. 12)**

On November 6, 2017 the district court found good cause and **GRANTED** the motion and re-opened the judgement and denied again as requested. **(DKT. # 2368) (App. # 4)**

On November 24, 2017, Petitioner did in fact file a notice of appeal and request for permission to brief a request for certificate of appealability. **(DKT. # 2377) (App. # 3)**

On **November 27, 2017,** the district court entered an order that transmitted the Notice of Appeal to the Ninth Circuit Court of Appeals. **(DKT. # 2368)**

On December 4, 2017, the Ninth Circuit issued a Scheduling Order essentially directing that: " A briefing schedule will not be set until the court determines whether a certificate of appealability should issue. " **(See USCA-9th Cir., No. 17-56811, USA V. Carlos Cosme)(App. # 2)**

On December 19, 2017, Petitioner quickly filed a " Letter Motion in Support of Consideration of Request for Certificate of Appealability Pursuant to **28 U.S.C. § 2253(c); and Federal Rules of Appellate Procedure 22(b)(1).** This in a 16 page document making a " showing " as to the denial of a constitutional right and requesting permission to litigate and or remand.

This by basically stating that the " record and files of the case show that there was some kind of confusion in the plea colloquy," and the record shows that there was a clear misunderstanding about whether to accept or reject the written plea agreement, and as was purportedly " explained to this Petitioner by a Spanish Speaking translator," that the district court erred by not calling upon this " translator " to explain the discrepancy between the Petitioner and his attorney. **Id. Citing United States V. Marquez-Huazo, 2014 U.S.-Dist. LEXIS 123654 (D. Idaho Sep. 2, 2014) also United States V. Marquez-Huazo,-2016 U.S. Dist. LEXIS 19365 (D. Idaho Feb. 16, 2016)**

And as the Court made note that there was no " factual basis " presented in the documentation based on the attorney's performance, that it should have called upon this Petitioner to Amend the pleadings and present such. **See Kafo - V. United States, 467 F.3d. 1063, 1070 (7th Cir. 2006).**

on May 5, 2018, the Ninth Circuit denied to issue a certificate of appeal in a one liner, citing that Petitioner has not made a substantial showing-

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...of the denial of a constitutional right. " (id. No. 17-56811, DKT. 2)-(App. # 1)

Petitioner has now taken pause to present this case to this Honorable Court of the Highest degree and seeks to have such GRANT certiorari, for the reasons that it is clear from the " record and files in the case " that, this Petitioner signed the plea agreement/contract by some sort of misunderstanding as to the substantive elements embedded in such to which he did in fact affirmatively make know to the court and to his attorney's the same once he was presented with the plain language of such by a court certified interpreter, as opposed to his attorney's private interpreter's and investigator's done via private advisement.

WHEREFORE Petitioner did not make a " knowing and intelligent " acceptance i.e. conscionable acceptance) of the contract, as to the fact that this attorney did not " properly advise " the Petitioner a criminal Defendant of the essential elements of such, and it was clear from the record that the attorney-'s private translators were the only persons that could testify in fact as to what this Petitioner and his attorney understood when he endorsed the written agreement. Thus, the district court erred when it did not call upon such in the Section 2255 proceeding to clarify the record and be able to properly use it's discretion in the matter. See 28 U.S.C. § 2255(b). (App. # 9)

THUS, Petitioner respectfully requests that this Honorable Court GRANT certiorari and Grant, Vacate and Remand ("GVR") this case for the district court to hold an evidentiary hearing or otherwise dispose of the cause as " law-and justice require." See 28 U.S.C. § 2243. (App. # 10)

REASONS FOR GRANTING THE PETITION

Petitioner's claim herein is based on the denial of collateral relief pursuant to 28 U.S.C. § 2255. That, most pertinently, that based upon " the - record and files in the case " the court should have held an evidentiary hearing and called forth the " Spanish speaking interpreter " that Petitioners advisor/ attorney claimed was present when [he] explained the elements of the plea agreement/ contract to Petitioner and he in fact endorsed said written document based on the claimed assertion by Petitioner, that he believed that he was only pleading guilty to the [Controlled substances] elements of the RICO charges in the indictment, not a " conspiracy to commit murder."

I. 28 U.S.C. § 2255:(The Statutory Mechanism for Collateral Relief)

Title 28 of the United States Code Section 2255 provides that:
" A prisoner under a sentence established by an Act of Congress claiming the right to be released on the ground that the sentence imposed is in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or 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." See United States V. Hayman, 342 U.S. 205, 207 n. 1, 72 S.Ct.- 263, 96 L. Ed. 2d. 232 (1952), Hill V. United States, 368 U.S. 424, 428, 82 S.- Ct. 468, 7 L.ed. 2d. 417, reh. denied, 369 U.S. 808, 82 S.Ct. 640, 7 L.ed. - 556 (1962), Sanders V. United States, 373 U.S. 1, 12 n. 6, 83 S.Ct. 1068, 10- L.Ed. 2d. 148 (1963), Davis V. United States, 417 U.S. 333, 344, 94 S.Ct.- 2298, 41 L.Ed. 2d. 109 (1974).

Section 2255 gives a remedy in the sentencing court " exactly commensurate " with that which had previously been available by habeas corpus in the court. See **Kaufman V. United States, 394 U.S. 217, 222, 89 S.Ct. 1068, 22 L.-Ed. 2d. 227 (1969).**

To obtain relief through a 2255 motion,"a [Prisoner] must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the ' **guilty plea** ' or the juries verdict." See **Brecht V. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed. 2d. - 353 (1993).**

In making this " demonstration " Petitioner did in fact present a claim for relief as to his " guilty plea," and the argument therewith that he had received ineffective advice during the plea negotiations process. However, due to the fact that this Petitioner had in fact litigated the claim in the district court on " **a motion to withdraw,**" and in the appellate court on direct review, the record was sufficiently developed so that the district court could make a determination whether [he] had received the " effective assistance of-counsel therewith."

The record being developed he gave an " explanation " for the discrepancy as the record clearly showed that Petitioner had some sort of misunderstanding, in making his decision(s) whether or not to accept such.

That he outright stated that he did not accept the terms of such upon being explained the elements therein at the colloquy pursuant to **Federal Rules of Criminal Procedure 11.**

And this only upon being explained such by the court's certified translator. (Interpreter) See **28 U.S.C. § 1827.** This should have struck in the minds of reasonable jurists to bring forth the " interpreter."

This for, how is it that Petitioner could make the conscionable choice in deciding whether or not to accept the government's offer of settlement in the case as opposed to proceeding to trial by jury ?

II. RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL:

The Sixth Amendment guarantees that;

" In all criminal prosecutions, the accused shall enjoy the right to the effective assistance of Counsel for his Defence. " **U.S. Const. amend. VI. (The Sixth-Amendment) See Powell V. Alabama, 287 U.S. 45, 47, 57 S.Ct. 55, 60, 70 L.ed.-158 (1932).(App.# 8)**

This " right to the assistance of counsel " was thereafter, recognized as the " right to the effective assistance of counsel." **See McMann V. Richardson,-397 U.S. 759, 771 n. 14, 90 S.Ct., 25 L.Ed. 2d. 763 (1970)**

Against this backdrop this Court has made clear that " the **standard** " to establish the violation of the right to the effective assistance of counsel, commonly coined as " **ineffective assistance of counsel,**" the Petitioner **must show (1)** that his counsel's performance was deficient; **and (2)** said deficiency **prejudiced** the Petitioner. **See Strickland V. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d. 674 (1984)**

This " **standard** " was thereafter, coined as the " **Strickland Two-Part - Test,**" and was extended to the context of a plea agreement. (i.e. The validity-of the plea agreement). This, in this Court's decision in **Hill V. Lockhart,-474 U.S. 52, 88, 106 S.Ct. 366, 88 L.Ed. 2d. 203 (1985).**

This by citing: " where a defendant is represented by counsel during the ' **plea process,**' and enters his plea upon the **advice** of counsel, the ' voluntariness ' of the plea depends upon whether counsel's ' **advice** ' was within

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... the range of competence demanded by attorney's in criminal cases. " (quoting McMann, 397 U.S. at 759, 771)

In this context, to establish the " prejudice prong " of the **Two Part - Strickland test, "** a claimant must show **that but for his attorney's alleged mistakes**, he would have withdrawn his guilty plea and would have forgone a trial by jury. **Id. 474 U.S. 52 at 58-60.**

This Court thereafter recognized in speaking of the " plea process " in two recent companion cases in **Lafler V. Cooper, 566 U.S. 156, 132 S.Ct. 1376-182 L.Ed. 2d. 398 (2012), and Missouri V. Frye, 566 U.S. 134, 132 S.Ct. 1399-182 L.Ed. 2d. 379 (2012),** that Defendants have a Sixth Amendment right to the effective assistance of counsel at " all critical stages of the criminal proceedings,' this to which includes not only, " the entry of a guilty plea," but also, " **the plea bargaining process as a whole." Id. Frye, 132 S.Ct. 1399 at 1406.**

That as a criminal defendant has no Constitutional right per se to a plea agreement, See **Wheatherford V. Bursey, 429 U.S. 545, 566, 97 S.Ct. 837, 51 L.-Ed. 2d. 30 (1977),** however, " if a plea bargain has been offered, a defendant has the right to the effective assistance of counsel in considering whether to accept it or not. " **Id. Lafler, 132 S.Ct. at 1387.**

This Court has now and again clarified that the " **advice** " that a defendant receives in this Process is essential to making these decisions, and misadvice may deprive a defendant of an entire judicial proceeding to which he had a right. See **Lee V. United States, 137 S.Ct. 1958, 198 L.Ed. 2d. 476 (2017)** [1]

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n. 1 This Court's decision in Lee was rendered subsequent to the district courts decisions in this matter.

Thus, Counsel's " advice " is essential to the determination whether and counsel was effective or not.

(a) DEFICIENT PERFORMANCE:

Under the " Strickland standard," deficient performance requires a showing that counsel's representation fell below an "objective standard of reasonableness," as measured by " prevailing professional norms." **Strickland, 466 U.S.- at 687-88.**

Therewith,, as cited, counsel has a " critical obligation to ' advise ' the client of the **" advantages and disadvantages "** of entering into a plea agreement. **See Padilla V. Kentucky, 559 U.S.___, 130 S.Ct.___, 176 L.Ed. 2d. 284 (2010(quoting Libretti V. United States, 516 U.S. 29, 50-51, 116 S.Ct. 356 133 L.Ed. 2d. 271 (1995)).**

In making the determinations this Court has also stated that whether a lawyer's performance meets prevailing professional norms, the court must look to the " Standard practices in the relevant area at the time of representation." **See Cullen V. Pinholster, 131 S.Ct. 1388, 1407, 179 L.Ed. 2d. 557 (2011).**

In looking to the standards and practices and " prevailing professional norms,' at the time,'" the **American Bar Associations (ABA) Standards** and the like are " guides " to determining what is " reasonable. " **Id. Strickland, see also Padilla, (quoting Bobby V. Van Hook, 558 U.S. ___, 130 S.Ct. ___, 175 L.-Ed. 2d. 255 (2009)).**

In this instance (i.e. Ineffective assistance of counsel during plea negotiations), the **ABA Standards** asserted as being highly relevant that " a lawyer must communicate with a client about plea offers, and **advise the client** candidly and competently so that the client may make and informed decision. **See ABA Standards for Criminal Justice, Prosecution and Defense Function 4-4.1(a)-**

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...(3d. ed. 1993)(defense counsel obligated to investigate facts relevant to the merits of the case and the penalty in the event of a conviction); id at 4-5.1(a)(" after informing himself or herself fully on the facts and the law defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of a probable outcome.")

Again, this " advice " is essential in advising a Defendant in the " plea bargaining process," in making the decision whether to plead guilty or proceed to trial by jury as is his right.

This most pertinently (as is here) when a written plea agreement has been offered for this Court has too recently held that a " plea agreement (written) amounts to and should be interpreted as a contract, ' under state contract law.'" See Kernan V. Guero, 138 S.Ct. 4, 8, 199 L.Ed. 2d. 236 (2017)(Citing Rickets-V. Adamson, 438 U.S. 1, 5, n. 3 (1987)

This as as a " guilty plea is valid only if entered into ' knowingly and voluntarily and intelligently,' with sufficient awareness of the fact and likely consequences and circumstances." See Bradshaw V. Stumpf, 545 U.S. 175, 182, 125 S.Ct. 2398, 162 L.Ed. 2d. 143 (2005)(quoting Brady V. United States, 397-U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed. 2d. 747 (1970)

This is consistent with the " law of the state of California," concerning " contracts or agreements." See Cal. Civ. Code § 1549, also ACosta V. Astor,-120 Cal. App. 4th 1224, 1230, 13 Cal. Rptr. 3d. 544 (Cal Ct. App. 2004)(" A contract is an agreement to do or not to do a certain thing and gives rise to an obligation or legal duty that is enforceable in action at law.")

Under California law, the essential elements of a contract are: (1) parties capable of contracting, (2) Parties mutual consent, (3) a lawful objective, and (4) sufficient cause or consideration. See Cal. Civ. Code § 1550

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... see also Lopez V. Charles Schwab & Co., Inc., 118 Cal. App. 4th 1224, 1230, 13 Cal. Rptr. 3d. 544 (Cal. Ct. App. 2004)

Here, Petitioner is a Mexican National to whom (at the time) spoke zero English and only spoke Spanish. This is recorded throughout the entire process and was so necessary to have an " interpreter " at every meeting, including the meeting where Petitioner purportedly endorsed the contract/ plea agreement. **(See Evidentiary Hearing on Withdrawl, DKT. # 1953, App. # 7, Pg. 10) (App.# 7)**

As was in fact endorsed by this Petitioner, upon being brought to the colloquy and explained to by a **" certified court interpreter "** as required by statute, Petitioner identified a discrepancy therein that he **" did not in fact agree to. " (Affirmatively)**

As to such, the Court inquired into Petitioner to where it ultimately obtained Petitioners consent, however, thereafter, Petitioner motioned to withdraw and cited therein that it was only after feeling intimidated by his lawyer who " pinched, hit or punched this Petitioner in his side." **(id. pg's 9 & 10)**

The court under the terms and principles set forth in the **Federal Rules of Criminal Procedure 11(d)(2)(B) .." that a Defendant may withdraw a plea of guilty...after the court accepts the plea, but before it imposes sentence, if: the defendant can show a ' fair and just reason requesting withdrawl."** denied this petitioner opportunity to do so. **(see id. at App. 7 pg.'s 12-15)**

It cited the testimony of his counsel and his practice " was to review the plea agreement thoroughly with a Spanish speaking interpreter and did so in this case." **(id. pg. 13)**

And as the document was signed, and somehow stated that the " Defendant-

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.. swore in open court that he committed the facts as stated in the Plea Agreement, and actually committed the crime charged." The court found a factual basis for the plea and explicitly accepted the plea of guilty. The court concluded therewith, that " The [defendant] has not ' shown a fair and just reason for requesting withdrawl of his plea of guilty.'" (id. pg. 15)

This was the factual basis to which was relied upon as well in the section 2255 proceeding here on review. However, and most pertinently, not once was the attorney's interpreter called upon to testify as to what was explained to this Petitioner in the first instance when he purportedly signed the agreement " on each page. "

In the face of this Petitioner stating that he was told that " he was only pleading guilty to drug trafficking, " and his attorney stating that he discussed this plea agreement in it's entirety to this Petitioner via a Spanish speaking interpreter, to which is his standard practice, it seems elementy that it be necessary to call upon this interpreter to testify as to what was explained to this Petitioner when he endorsed the contract for this is the only person to whom can say with any certainty what was transferred.

This for this has been done in other district court's in the Ninth Circuit, See United States V. Marquez-Huazo, 2014 U.S. Dist. LEXIS 123654 (D. Idaho Sep.-2, 2014), and United States V. Marquez-Huazo, 2016 U.S. Dist. LEXIS 19365 (D.-Idaho Feb. 16, 2016)

This by not only calling upon an " evidentiary hearing," as to the language discrepancy, but later to find that " there was no evidence presented (after-the hearing) that there was a problem with the interpretation." Id. Unlike here where the record clearly demonstrates such.

Here as the record is complete, there was/is evidence therein prima facie that there was/is some confusion with the attorney's interpreter, and thus, this Petitioner sought remedy via the medium of collateral review pursuant to 28 U.S.C. § 2255. Therewith, the parties and the court reviewed this claim upon virtually the very same standards for withdraw, instead of the ineffective assistance of counsel under the Sixth Amendment, confusing the two and committing error.

Thus, the question here presented to this Honorable Court in this matter is;

> Did the District Court Commit Error in Applying the standard of Review for Motions to Withdraw a Plea Agreement as to an Issue of a Question of the Effective Assistance of Counsel in Violation of the Sixth Amendment Rights Guaranteed as to the Advice of said Counsel in deciding whether to Accept or reject the Government's offer in a Proceeding pursuant to 28 U.S.C. § 2255 ?

(b) STANDARD OF REVIEW:

This Honorable Court has stated that in a proceeding for withdrawl of a guilty plea, this must be accomplished before sentencing, not after. Furthermore, a trial judge is authorized to grant such a presentence motion if the defendant carries the burden of showing " a fair and just reason " for withdrawl, See United States V. Vonn, 535 U.S. 55, 72, 122 S.Ct. 1043, 152 L.Ed. 2d. (2002) This under the Federal Rules of Criminal Procedure 11 (d)(2)(B), and 32(e) Id. see also United States V. Hyde, 520 U.S. 670, 117 S.Ct. 1630, 137 L.Ed. 2d. 935 (1997)

This being applicable between the " time the plea agreement is accepted and the sentence is imposed." Hyde, 520 U.S. at 678.

This herein was tried and failed to which made the record complete in this case.

On another note, the proceeding thereafter, took place as to the record, in a proceeding pursuant to **28 U.S.C. § 2255.** This Court has definitively and historically stated that: " **a proceeding under § 2255 is an independent and collateral inquiry into the validity of the conviction."** See United States V.- Hayman, **342 U.S.205, 222, 72 S.Ct. 263, 96 L.ed. 232 (1952)**

These two proceedings are wholly different, to the level that the Ninth Circuit itself has cited that there are " different tests " for a defendant seeking to withdraw a guilty plea ..., and one based upon ineffective assiatnce of counsel. See Torrey V. Estelle, **842 F. 2d. 234, 235-37 (9th Cir. 1988)** The Seventh Circuit has too differentiated between the two. See United States V.- Jansen, **884 F.3d. 649 (7th Cir. 2018)**

Therein the Seventh Circuit delineated that " **[A]** plea, even one that complies with Rule 11, cannot be knowing an voluntary ' **if it resulted from ineffective assistance of counsel.'" Citing** Hurlow V. United States, **726 F.3d. - 958, 968 (7th Cir. 2013) "[We]** apply the ' two part Strickland test to the ineffective assistance of counsel claims in the plea bargain context." **Citing Frye, 566 U.S. at 140. See Id. Jansen, 884 F.3d. at 655.**

The Ninth Circuit therewith cited that, "[in] contrast, (to the Rule 11) we assess a defendant's claim that an attorney's **advice** in the plea context constituted 'ineffective assistance of counsel ' under the test set forth in **Srickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d. 674 (1984), and Hill V. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d. 203 (1985)** See- United States V. Delgado-Ramos, **635 F.3d. 1237, 1240 (9th Cir. 2011)(citing - Torrey, 842 F.2d. at 237.)**

Therefore, it is claimed herewith that in the Section 2255 proceeding when the court merely derived it's factual basis from the Rule 11 proceeding soleley it committed error and should have instead done the more obvious and ordered

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... an evidentiary hearing as to the ambiguity in the record and called forth the " [Attorney's] Spanish Speaking interpreter " to explain what the misunderstanding was between this Petitioner and the attorney when the plea agreement was explained to this Petitioner in the fist instance when he purportedly endorse it. Furthermore, and most importantly " what was the ' advice ' this Petitioner received when accepting the terms of such. For as of right now Petitioner has made affirmative statements that he was not " explained, " thus was not " advised " of the contents therein that he was in fact accepting responsibility for a conspiracy to commit murder element, to which he stated that he believed that he was only pleading guilty to the controlled substance offenses of such.

This too was based upon a further misunderstanding of the government as to an intercepted telephone call from this Petitioner and co-defendant Mr. Nuno. Petitioner attempted therewith to explain what the contents of that phone call was. This where the government agent's overheard this Petitioner speaking in what it perceived to be " coded language " where it was stated by this Petitioner, while he was in the United States calling Mr. Nuno in Mexico. This where he directed him " to **put a knife on someone.** " The government believed this to signify " stabbing and murdering someone." **(id. pg. 15, DKT. # 1906-1, pg. 10)**

However, Petitioner attempted to clarify for the government that, as these two individual's were " corrupt law enforcement official's " from Mexico, they were speaking about what is know technically as a " set up." Or a Pre-text to place someone in jail. Therefore, it would have also been prudent for the government and the Court to call Mr. Nuno to testify as well, to clarify the record. Instead, the court and the government merely used Mr. Nuno's plea agreement to establish him accepting responsibility for the " agreement," that Petitioner must too be guilty. This is not the standard for ineffective assistance of

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This Petitioner's counsel, and this Petitioner making a knowing and intelligent acceptance of a contract/ plea agreement.The Court should have called an evidentiary hearing in this Section 2255 proceeding to make a sound and reasoned decision in this matter to clear up the ambiguity.

This which brings this Petitioner to his second question to this Honorable Court;

> **Did the district court error in failing to hold an evidentiary Hearing for Further Development of the facts in Explanation in A Proceeding Pursuant to 28 U.S.C. § 2255 as to the Violation of the Right to the Effective Assistance of Counsel, as Opposed to a Proceeding on an Ambiguous Record of a Hearing held on a Prior Motion to Withdraw a Plea Agreement under Rule 11 ?**

III. EVIDENTIARY HEARING IN A SECTION 2255 PROCEEDING:

Looking to the statute of jurisdiction in this " habeas like " mechanism available to " federal prisoners " to obtain post-conviction relief from a criminal judgment, the state is clear where it states;

> **" Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law thereto. "**

See 28 U.S.C. § 2255(b).(App. # 9)

After the creation of this equitable statutory mechanism for relief, this Honorable Supreme Court had the opportunity to examine this statute in it's landmark decision to where it spoke clearly that; **" the very purpose of § 2255 is to hold any hearing in the sentencing court because of the inconvenience of transporting court official's and other ' necessary witnesses ' to the district of confinement. "** See United States V. Hayman, 342 U.S. 205, 221, 72 S.Ct. 263, 96 L.ed. 232 (1952).

It cited therewith, that to procure this " hearing " it is therewith commonly understood that the presentment of an affidavit or " sworn testimony is necessary." **Id. Hayman, 342 U.S. at 213 (citing Walker V. Johnston, 312 U.S. 27,-61 S.Ct. 574, 86 L.ed. 830 (1941)(" Walker's application raised material issues of fact holding that the District Court must determine such issues by the taking of evidence, not by ex parte affidavits")**

Therewith, if the affidavit reveals a " factual controversy, " then a hearing thereon would be required. **See Machibroda V. United States, 368 U.S. -487, 495, 25 S.Ct. 510, 7 L.Ed. 2d. 473, 479 (1962), see also Kaufman V. United States, 394 U.S. 217, 226, 89 S.Ct. 1068, 22 L.Ed. 2d. 227 (1969)**

The Ninth Circuit has made this clear in it's precedence that in determining whether a " hearing and finding's and conclusions of law are required," "[t]he standard essentially is whether the movant has " made specific factual allegations that, 'if true, state a claim upon which relief **could be granted.'" See United States V. Withers, 638 F.3d. 1055, 1062 (9th Cir. 2011)(quoting United States V. Schaflander, 743 F.2d. 714, 717 (9th Cir. 1984))**

That, " factual allegations therewith, are submitted in the 'form of assertions made under the penalty of perjury.'" **See United States V. Chacon-Palomares, 208 F.3d. 1157 (9th Cir. 2000)**

The Seventh Circuit as well has made this determination quite clear. That evaluating claims of the " ineffective assistance of counsel," in Section 2255 hearings usually begins with " sworn affidavits." **See Duarte V. United States,-81 F. 3d. 75, 76 (7th Cir. 1996) and Daniels V. United States, 54 F.3d. 290,293-(7th Cir. 1995)**

That, ..." it is a rule of [this Court] that in order for a hearing to be granted, a petition must have been accompanied by a ' detailed and specific affidavit.'" **See Galbraith V. United States, 313 F. 3d. 1009 (7th Cir. 2002)**

Furthermore, where there is a " disputed factual issue therein," this should be resolved by way of a hearing. **See United States V. Wilson, 169 F.3d.-418, 426 (7th Cir. 2004)**

The Ninth Circuit has too made clear that " evidentiary hearings are particularly appropriate when ' claims raise facts which occurred outside the courtroom and off the record." **Id. Chacon-Palomares, 208 F.3d. at 1159 (quoting United States V. Burrows, 872 F. 2d. 915, 917 (9th Cir. 1989); accord Frazer V. - United States, 914 F. 3d. 708, 715 (9th Cir. 1994) and Dogmere V. United States,-914 F.2d. 165, 168 (9th Cir. 1991))**

Here we have a record that is complete and having been used as the basis of support for the claim of the violation of the effective assistance of counsel. However, there are issues therewith, that clearly call for clarification. This as to the fact that, all parties agree that there was a " Spanish speaking interpreter " at all of the private meetings between this Petitioner and his counsel. Most pertinently when the Plea agreement/contract was offered/ accepted, and purportedly endorsed. This to which translated the terms therein, for this Petitioner was a Mexican National who did not speak and English, let alone understand the American laws thereto. This it was imperative that [he] was advised as to the contents and elements therein.

Later at the Rule 11 colloquy upon a separate " court interpreter " began to explain what it was that this Petitioner signed, this initiated a slew of objections and what appeared to be this Petitioner's attorney's attempts to cover the matter up by answering for him. After the hearing's held thereafter, no party, nor the court saw fit to call upon the original interpreter to make the definitive clarifications as to what was actually conveyed to this Petitioner in private conversations when the plea was offered and accepted.

Upon the presentment of this section 2255 proceeding by this Petitioner he requested of the court to provide counsel with which to prepare this motion for he did not speak any English, this to which it did in fact grant. **(DKT.# 's 2144 & 2235)**

Upon this Appointed 2255 counsel's failure to contact this Petitioner, he did in fact present, the 2255 Application to which is " sworn to under the penalty of perjury." **(DKT.# 2301)**

However, when the court became confused as to what this Petitioner's decision had become as the result, it inquired and Petitioner requested that he have the assistance of this Counsel. Thereafter, without any contact or any consultation therewith, this Attorney presented this claim on this Petitioner's behalf, " **without an affidavit appended thereto.**" The court thereafter denied the Petitioner's " **Sworn Application,**" as moot. **(See DKT.# 2283)**

Knowing the standards of review to be different, in the Rule 11 and in the 2255 context, in the event that the district court saw that the presentment was lacking in anyway the factual basis for the claim to be made, it should have ordered further development of such via a " sworn affidavit." **See Kafo V. United-States, 467 F.3d. 1063 (7th Cir. 2006)**

However, as this Petitioner did in fact submit the sworn application, the Ninth Circuit (as well as the 7th in the Kafo decision) has stated that the form sworn under the penalty of perjury is sufficient. **See United States V. - Howard, 381 F. 3d. 873, 880, n. 6 (9th Cir. 2004)**

Nevertheless, the " Bare Bones Application " was lacking in the necessary facts with which to support any " off the record conversations," however, and again, if the district court believed that the record was lacking then it

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.. should have ordered the Petitioner to such, or simply held the hearing and called forth the " Spanish speaking interpreter," to come and explain against the record to clarify such.

This for as it stands there is ambiguity in the record, from his attorney's advice, and the court's appointed " certified translator, to which Petitioner affirmatively stated that " **it wasn't like that,"** and then after inquiry, ultimately succumbed to the court's badgering, and thereafter, made affirmative statements to the court in writing and in open court that cited " [Petitioner] believed he was accepting guilt only for the methamphetamine. " (id.**1868-A-C)**

What was " advised to this Petitioner is of the day," and there is only one person that can state with any certainly what was " advised " this Petitioner and that is the " translator. "

Then and only then can it be determined that Petitioner " consented to the agreement," this " knowingly and intelligently. " This for as it stands the Petitioner asserts that the contract was " unconscionable " and is therefore " unenforceable. " **See Poublon V. C.H. Robinson Co., 846 F. 3d. 1251, 1260,-62 (9th Cir. 2016)(Citing California's Contract laws explaining such)**

This Court should exercise it's discretion herewith and **GVR** to the district court to reopen the proceeding and allow for further development of the facts via affidavit's and/ or hold an evidentiary hearing and call forth the attorney's interpreter's to give testimony as to what was this Petitioner's " knowledge and belief " when he accepted the government's written offer only to later reject " one of the elements therein,' of a conspiracy to commit murder.

This would definitively foreclose the claim that he presents of the violation of his right to the effective assistance of counsel during plea negotiat-

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... ions.

Furthermore, as it has been stated that in these type of claims (Ineffective Assistance of Counsel-Sixth Amendment) the Petitioner must also show prejudice. **Id. Strickland, 466 U.S. at 694.** This being that, " there is a reasonable probability that, ' but for counsel's unprofessional errors,'the result of the proceeding would have been different." **Id.**

In the context here, as in this Court's decision in **Hill, " that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have plead guilty and would have insisted on going to trial. " Id.- Hill, 474 U.S. at 59. see also Lee, 137 S.Ct. at 1965.**

Or as in **Lafler V. Cooper,** " the outcome of the plea process would have been different absent competent advice. "**Id. Lafler, 566 U.S. at 163.**

This in " contract terms " is coexistent with " consideration." Here, this Petitioner did in fact agree to plead guilty to the charges against him, and accept responsibility for such. In exchange the consideration he was to receive in " full and fair exchange " was a three level reduction in his calculated sentencing range under the U.S. Sentencing Guidelines **(USSG'S)** under **USSG § 3E1.1(a), and (b). Furthermore, an agreed to maximum** 235 month sentence. Upon his discovery of " one of the elements embedded in the plea agreement (contract)" to which was against his knowing and intelligent acceptance, he affirmatively cited only that he did not accept " that term," and continued in his position as to the acceptance of the charges and the element of a conspiracy to **import**and distribute methamphetamine.

However, therewith, his perceived non-performance, the government moved for material breach of the agreement dissolving only it's obligations and the result was the revocation of the " consideration " of the Three level depar-

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... ture, and instead of recession was allowed by the court to which made the finding of a Knowing and intelligent acceptance, and too applied an upward departure for " Obstruction of Justice," under **USSG § 3C1.1 (Additional Two Levels)** merely for " his affirmative rejection of an element of a ' contract ' that he did not in fact agree."

The court therewith applied a sentence of 262 months and allowed the government to have it's cake (plea agreement) and eat it too. (Without any consideration, including an applied enhancement) all while the Petitioner received no consideration for pleading guilty and could have received the exact same sentence had he went to trial and lost. This Petitioner has been prejudiced to a tune of an additional **27 months of imprisonment.** **See Glover V. United-States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed. 2d. (2001); see also Rosales-Mireles V. United States, No. 16-9493, 2018 U.S. LEXIS 3690 (June 18, 2018)**

The reformation was done without any consideration and this Petitioner, should be able to receive the benefit's for his plea of guilt in this matter, or if the plea was breached, then rescission is in order and this agreement is void.

Remedy for a **Sixth Amendment violation of right to the effective assistance of counsel** should " neutralize the taint. " **Id. Lafler, 132 S.Ct. at 1388 (quoting United States V. Morrison, 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed-2d. 564 (1981)(Internal Citations Omitted)(**" The court's remedy ' **shall** ' put the defendant back into the position he would have been had the Sixth Amendment violation never occurred...")

Here that is the plea bargaining stage with adequate explanation of the terms and conditions thereof by a Certified Spanish Speaking translator so that Petitioner can make the conscious decision whether to accept or reject an offer of the waiver of rights via contract or choose to proceed to trial.

IV. CONCLUSION:

WHEREFORE Petitioner respectfully requests that this Honorable Court exercise it's properly endowed discretion and GRANT certiorari in this case as to the violation of rights Guaranteed by and through the Constitution of the United States at Article in amendment VI, i.e. The Sixth Amendment right to the " effective assistance of counsel " during plea negotiations, and see that as Petitioner was a Mexican National who spoke no English was not properly advised as to the written plea agreement that was offered to him from the government.

That it further grant certiorari as to the issue of the fact that an evidentiary hearing pursuant to 28 U.S.C. § 2255(b) was/is clearly in order for the original Spanish speaking interpreter(s) to be called forward as are the only persons to whom can with any certainty testify to what was explained (" advised") this Petitioner (defendant) when he endorsed the written agreement in the fist instance;

OR exercise it's Supervisory Authority and Grant, Vacate and Remand ("GVR") to the district court with the instructions to hold the clearly called for evidentiary hearing or any other equitable remedy that this Honorable Court see fit as to it's properly endowed authority. See 28 U.S.C. §§ 2243, and 1651 (a). (App. #'s 9-11)

PLEASE TAKE NOTICE: that there is in fact another claim nearly identical to this pending rehearing in this Court. See Chun Hei Lam V. United States, No.-17-8698. However, Mr. Lam proceeded to trial by jury and this case was the result of a plea of guilt, both require evidentiary hearing's with Translator's present. These type of issues were discussed in Lee at ftn. 1, id.