

No. \_\_\_\_\_

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In The  
SUPREME COURT OF THE UNITED STATES

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EZEQUIEL JOEL RODRIGUEZ,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

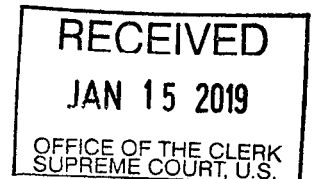
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On Petition for Writ of Certiorari to  
The Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI

Ezequiel Joel Rodriguez  
Pro Se Appellant  
16610-380  
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QUESTIONS PRESENTED

1. Whether It Was Error to deny Rdriquez A Certificate of Appealability, to Pursue His Sixth Amendment Claim on Appeal, Where He Demonstrated Ineffective Assistance of Counsel When His Attorney Failed to Object to The Government's Breach of the Plea Agreement in Failing to Recommend a Reduction of the Offense Level Based Upon Acceptance of Responsibility?
2. Whether It Was Error to Deny Rodriguez a Certificate of Appealability, to Pursue His Sixth Amendment Claim on Appeal, Where He Demonstrated Ineffective Assistance of Counsel When His Attorney Failed to Object to the Government's Breach of the Pleas Agreement in Failing to Ojbect or Challenge the Government's Use of Proffered Information to Obtain the Superceding Indictment.
3. Whether It Was Error to Deny Rodriguez a Certificate of Appealability, to Pursue His Sixth Amendment Claim on Appeal, Where He Demonstrated Ineffective Assistance of Counsel When His Attorney Failed to Object to the Government's Breach of the Proffer and Plea Agreement, in Failing to Object or Challenge the Government's Use of Proffered Information to Enhance or Increase Rodriguez's Sentence.
4. Whether Rodriguez Was Deprived of His Statutory Right to Appeal, Deprived of Due Process of Law Under the Fifth Amendment of the Cosnttitution, and Deprived of His Opportunity to Submit a Merits Brief, Where the Fifth circuit court of Appeals Failed to Accept Appellant's Application for A Certificat of Appealability and Failed to Answer Appellant's Request for Permission to File an Oversized Brief, and Failed to Address any of Appellant's Claims from Case Number 5:13-CR-701-OLG?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Ezequiel Joel Rodriguez, indigent, was the criminal Defendant in the district court, unsuccessful appellant upon direct review, he was the Petitioner upon Habeas Corpus review who filed two 28 U.S.C. § 2255s, which were unsuccessful, and he was the Appellant who filed unsuccessfully two Petitions for a Certificate of Appealability.

Respondent, United States of America, was the plaintiff in the district court and successful appellee in the court of appeals.

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EZEQUIEL JOEL RODRIGUEZ,

Petitioner,

vs.

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Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ezequiel Joel Rodriguez respectfully prays that his Petition for a Writ of Certiorari be granted to review the judgment of the Fifth Circuit.

OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals, which includes the opinion denying the Petition for Certificate of Appealability for case number 17-50957 and the dismissal of case number 17-50969 are included in the Appendix, which is attached.

JURISDICTION

Jurisdiction in the Court of Appeals was invoked pursuant to 28 U.S.C. § 1291. The Fifth Circuit Court of Appeals entered its judgment denying the Petition for Certificate of Appealability on October 12, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The right to the effective assistance of counsel under the Sixth Amendment of the Constitution is implicated in this Petition. U.S. Const. Amend VI.

The Due Process Clause of the Fifth Amendment to the Constitution is implicated in this Petition. U.S. Const. Amend. V.

The Right against self-incrimination, under the Fifth Amendment of the Constitution is implicated in this Petition. U.S. Const. Amend V.

STATEMENT OF THE CASE

It is well-established that prosecutors have broad discretion to make agreements with Defendants, whether those agreements induce a Defendant to proffer or whether it induces the Defendant to plead guilty. Defendants have the right to expect prosecutors to adhere to the agreements made.

Constitutional Due Process requires that prosecutors not only adhere to agreements made within plea agreements, it requires that prosecutors do not use proffered statements to obtain new or additional charges and to obtain and sustain sentencing enhancements.

In addition, the Sixth Amendment of the Constitution requires counsel for Defendants to object to the breach of plea agreements, where prosecutors fail to adhere to the agreement made, or where the prosecutor use proffered statements to obtain new or additional charges or use proffered statements to obtain and sustain sentencing enhancements.

Criminal Defendants and habeas Corpus Petitioners have the constitutional right to seek redress in accord with the Constitution and statutes, where the prosecutor breaches the plea agreement and where counsel fails to challenge the breach.

A Court of Appeals' failure to address and grant relief from these constitutional violations deprives Petitioners of justice, a fair hearing, and what the constitution promises.

This is the predicament Petitioner has been placed in by the Fifth Circuit. It is time to restate the rules and thereby ensure that Petitioners are not being deprived of due process where counsel fails to challenge the Government's breach of the plea agreement.

In like manner, it is well-established that Defendants have a statutory right to appeal decisions made by the district court. But, there is a deprivation of the right to appeal, where any Court of Appeals fails to address an Appellant's claims on appeal.



This is the predicament Petitioner has been placed in by the Fifth Circuit. Petitioner submitted four claims of error, committed by the district court, on appeal, that is requesting a COA, in case number 17-50969. Because he was charged and convicted in two separate cases, in the district court, and filed two separate Section 2255s, Petitioner filed two separate requests for COA. In submitting his two separate COA petitions, Petitioner also moved the Fifth Circuit to either docket and answer his requests separately or to combine his cases and accepting his COA petition as an oversize brief. Yet, the Fifth Circuit failed to answer Petitioner's request, in that it did not answer any of the claims in case number 17-50969 separate from case number 17-50957, nor did it answer any of the claims granting or denying the request for COA. Therefore, Petitioner argues that his statutory right of appeal was stripped from him, by the Fifth Circuit's failure to address the claims made. This is a violation of the Due Process Clause of the Fifth Amendment of the Constitution.

What follows is a short statement of how Petitioner finds himself in his current position.

#### **A. Original Proceedings**

In September 2014, Ezequiel Joel Rodriguez plead guilty to conspiracy to possess with intent to distribute a controlled substance, to-wit methamphetamine, and possession of a firearm by an illegal alien. Rodriguez was sentenced to 420-month term of imprisonment. SA-13-CR-400-OG.

On April 9, 2015, Ezequiel Joel Rodriguez pled guilty to Count One of the Superseding Indictment, for conspiracy to possess with intent to distribute a controlled substance, to-wit a mixture or substance containing a detectable amount of cocaine. Case No. 5-13-CR-701-FB. On July 24, 2015, Rodriguez was sentenced to serve a 420-month term of imprisonment to run concurrently with the 420-month prison term handed down by the district court in case no. SA-13-Cr-400-OG.

#### **B. Direct Appeal**

Rodriguez did not file a notice of appeal or direct appeal for either case.

### C. Motion to Vacate

In June 2016, Rodriguez filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, as to case no. SA-13-CR-400-OG. Rodriguez submitted several Sixth Amendment ineffective assistance of counsel claims to the district court. The district court denied each of Rodriguez's claims based upon what it perceived as a waiver of Rodriguez's right to challenge the sentence imposed in exchange for concessions made by the Government.

On August 15, 2016, Rodriguez filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, as to case no. 5-13-CR-701-FB. Rodriguez submitted several Sixth Amendment ineffective assistance of counsel claims and several claims of Prosecutorial misconduct. The district court denied Rodriguez's Section 2255, determining that his plea of guilty was knowing and voluntary, and therefore all of his pre-conviction issues presented in his § 2255 motion were waived pursuant to his guilty plea. In addition, the district court determined that Rodriguez's waived claims were without merit. Doc. 159, pgs. 3 & 5.

The district court denied Rodriguez a Certificate for Appealability as to both cases. Doc. 159, pgs. 7 & 10.

### D. Appeal or Request for Certificate of Appealability

Rodriguez filed a timely notice of appeal, as to both cases, from the order(s) denying his Section 2255 motion(s), thereby seeking to obtain a Certificate of Appealability. In addition, Rodriguez filed a motion asking the Fifth Circuit to accept both motions for COAs separately, or to combine them allowing Rodriguez to submit an oversize brief. The Fifth Circuit Court of Appeals docketed Rodriguez's case(s) under case number(s) 17-50957 & 17-50969 respectively. Subsequently, the Fifth Circuit dismissed case number 17-50969 as erroneously docketed.

The Fifth Circuit Court of Appeals denied Rodriguez's request for a Certificate of Appealability as to case number 17-50957 without any consideration to the request to file two (2) COA motions or one oversize motion, and without addressing any of the claims presented in case number 17-50969. See Doc# 00514680416.

The Order denying the request for COA in case no. 17-50957 was issued on October 12, 2018.

REASONS FOR GRANTING THE PETITION

1. WHETHER IT WAS ERROR TO DENY RODRIGUEZ A CERTIFICATE OF APPEALABILITY, TO PURSUE HIS SIXTH AMENDMENT CLAIM ON APPEAL, WHERE HE DEMONSTRATED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE GOVERNMENT'S BREACH OF THE PLEA AGREEMENT IN FAILING TO RECOMMEND A REDUCTION OF THE OFFENSE LEVEL BASED UPON ACCEPTANCE OF RESPONSIBILITY?

In criminal case no. 5:13-CR0400-1, appellate case no. 17-50957, the Government and Petitioner Rodriguez made an agreement and signed a plea agreement which required the Government to recommend that the offense level be reduced by 3 levels for acceptance of responsibility under U.S.S.G. § 3E1.1. The Government breached the plea agreement during the sentencing phase of this case, where it not only failed to recommend the 3-point reduction for acceptance, but where it argued for an obstruction of justice enhancement. Therefore, Rodriguez's right to due process was violated. Counsel for Rodriguez provided ineffective assistance of counsel, violating Rodriguez's Sixth Amendment Rights, where he failed to object to the Government's violation or breach of the plea agreement.

A. Requirement to Adhere to A Contract

Plea bargains are essentially contracts. When the consideration for a contract fails—that is, when one of the exchanged promises is not kept—the court does not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; the court says that the contract was broken. The party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely; but that is not the same as saying the contract was never validly concluded. When a defendant agrees to a plea bargain, the government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, that is, to withdraw his plea. But rescission is not the only possible remedy; in Santobello, the United States Supreme Court allowed for a resentencing at which the government would fully comply with the agreement—in effect, specific performance of the contract. In any case, it is entirely clear that a breach does not cause the guilty plea, when entered, to have been

unknowing or involuntary. It is precisely because the plea was knowing and voluntary (and hence valid) that the government is obligated to uphold its side of the bargain. Puckett v. United States, 556 US 129, 129 S. Ct. 1423, 173 L Ed 2d 266 (2009).

It is clear and without question that the government agreed to recommend a reduction in the base offense level, that is a minus-3 points, for acceptance of responsibility. It is equally clear and without question that the government not only failed to make the required recommendation, but argued against any reduction when it argued for an obstruction of justice enhancement during sentencing.

#### B. Ineffective Assistance of Counsel

Effective assistance of counsel claims are analyzed under the well-recognized two prong analysis laid out by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984): "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or [sentence]...has two components. First, the defendant must show that counsel's performance was deficient...Second, the defendant must show that the deficient performance prejudiced the defense.

In the present case, counsel's performance fell below an objective standard of reasonableness where he failed to object to the government's breach of the plea agreement. Counsel represented Rodriguez during the plea negotiations and even recommended that Rodriguez accept the plea offer of the government. Therefore, counsel knew or should have reasonably known that the government agreed to and was required to recommend a 3-point reduction for acceptance of responsibility. Reasonable, professional a counsel, that is effective counsel would have objected to the government's breach of the plea when it argued for an obstruction of justice enhancement, thereby arguing against a minus-3 point reduction of the base offense level. Counsel's deficient performance prejudiced Rodriguez because his substantial rights were affected. The record is devoid of any indication that but for counsel's deficient performance the sentence in this case would have been the same.

### C. The District Court's Erroneous Denial of Petitioner's Claim

In denying Petitioner's claim that counsel provided ineffective assistance of counsel where he failed to object to the breach of the plea agreement by the government, the district court failed to address Rodriguez's ineffective assistance of counsel claim, but determined that Rodriguez waived this claim by signing the plea agreement, pleading guilty, and by making an agreement with the government for a 420-month term of imprisonment. See Doc. 159, pg. 7.

The district court's determination was erroneous because Rodriguez did not waive his right to challenge counsel's representation upon habeas review. In fact, he and the government agreed that his right to challenge the effective assistance of counsel was preserved. Moreover, the Government's breach made void the plea agreement.

### D. Certificate of Appealability Standard of Review

The certificate of appealability (COA) inquiry is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims.

### E. The Fifth Circuit's Erroneous Determination

In requesting a Certificate of Appealability, Rodriguez alleged that the district court erred in determining that he waived his right to challenge his counsel's representation by signing the plea agreement, pleading guilty, and by making an agreement with the government for a 420-month term of imprisonment. In addition, Rodriguez argued that the district court erred by failing to conduct an evidentiary hearing on these contested issues of fact. Lastly, Rodriguez argued that jurists of reason could debate or disagree with the district court's determinations or that this issue as presented is adequate to deserve encouragement to proceed further.

In denying Rodriguez's request for a COA, the Fifth Circuit Court of Appeals

determined that Rodriguez failed to make the requisite showing, that is a substantial showing of the denial of a constitutional right. The Fifth Circuit made this ruling without determining how Rodriguez failed to make the required requisite showing.

The Fifth Circuit's determination that Rodriguez did not make a substantial showing of the denial of a constitutional right is erroneous because Rodriguez clearly showed: (1) that his Fifth Amendment Right to Due process was violated where the Government breached the plea agreement in failing to recommend a 3-point reduction in the base offense level for acceptance of responsibility; (2) Counsel made no object, challenge, or mention of the Government's requirement to recommend the minus-3 reduction; (3) the district court erroneously ruled that Rodriguez waived his right to raise any claim of ineffective assistance of counsel; and (4) an evidentiary hearing was required where there were contested issues of fact.

The government alleged in its reply to Rodriguez's Section 2255 that it did not advocate against the acceptance of responsibility reduction, while Rodriguez claimed that the government did infact advocate against the reduction by advocating for an obstruction of justice enhancement. This contested issue of fact, required an evidentiary hearing, thereby a COA should have issued because the district court failed to conduct any evidentiary hearing. This in itself meets the requirements of a requisite showing, because jurists of reason would find detable the district court's determinations without first conducting an evidentiary hearing that is required under Section 2255. In addition, Rodriguez's showing that the government failed to recommend the reduction for acceptance of responsibility, and the showing that counsel did not challenge this breach of plea, satisfies the requirement to make a substantial showing of the denial of a constitutional right.

**F. This Question is Exceedingly Important**

Although the right of a Defendant to require the Government to adhere to specific performance of a plea agreement and the right to the effective assistance of counsel are issues that have been previously litigated on numerous occasions,

these questions continue to be exceedingly important, as they strict to the heart of the constitution, Due Process, The Sixth Amendment, and fundamental fairness. It is essential for this High Court to continue to reinforce and restate a Defendant's right to Due Process, that is the right to expect the government to adhere to its obligations in the contracts it makes with Defendants. To allow the government to fail to adhere to its promises, and thereby act inconsistently with the defendant's reasonable understanding if the plea agreement, strips this defendant and any defendant of his Due process right. This High Court must not allow one lower court to erroneously allow the government to get away with failing to strictly adhere to the plea agreement, because this will encourage and open the door for all prosecutors to obtain plea agreements that they will not and have no intention of adhering to. In addition, there is the danger that all lower courts will adopt this district court's error and the Fifth Circuit's error, leaving Defendants with no expectation of adherance to the agreements made with prosecutors. This will lead to a breakdown in the entire criminal justice system, as more than 90% of federal cases are decided based upon plea agreements.

In like manner, it is essential for this High court to restate, reinforce, and make clear a Defendant's right to the effective assistance of counsel not only during plea negoitations, but at each stage of the proceedings where these agreements made must be adhered to. A failure to protect this defendant, will result in the government failing to adhere to its promises in other cases, maybe in all cases, and will strip defendants of the Sixth Amendment right to the effective assistance of counsel.

This claim is exceedingly important, because the entire fabric of the constitutional right to the effective assistance of counsel, where plea agreements are concerned, is at risk of being destoryed. Where there is a crack in the Damn, there is risk that the entire Damn will break, destroying everything in its path. A failure of this Court to take up this /important issue, will leave a crack that will lead to a breaking of the entire criminal justice system and the right to effective assistance of counsel.

#### G. Remedy

Petitioner Rodriguez humbly moves this Honorable Court to grant his request for a Writ of Certiorari, remanding his case back to the Fifth Circuit Court of Appeals, as he has met his burden to make a substantial showing of the denial of a constitutional right, as required for a Certificate of Appealability.

Rodriguez has shown that his right to Due Process under the Fifth Amendment has been violated where the government breached the plea agreement in not only failing to recommend the minus-3 point reduction for acceptance of responsibility, but where it advocated for an obstruction of justice enhancement.

Rodriguez has shown that his right to the effective assistance of counsel as provided by the Sixth Amendment, was violated where counsel failed to challenge the government's breach of the plea agreement.

Rodriguez has shown that jurist of reason could debate or agree that the district court's determination that Rodriguez waived his right to raise a claim of ineffective assistance of counsel was erroneous. Thereby the denial of his request for COA should be overturned by this Court and a COA issued.

2. WHETHER IT WAS ERROR TO DENY RODRIGUEZ A CERTIFICATE OF APPEALABILITY, TO PURSUE HIS SIXTH AMENDMENT CLAIM ON APPEAL, WHERE HE DOMONSTRATED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE GOVERNMENT'S BREACH OF THE PLEA AGREEMENT IN FAILING TO OBJECT OR CHALLENGE THE GOVERNMENT'S USE OF PROFFERED INFORMATION TO OBTAIN THE SUPERCEDING INDICTMENT.

In criminal case no. 5:13-CR-0400-1, appellate case no. 17-50957, the Government and Petitioner Rodriguez made an agreement that the Government would not use any information obtained from the Defendant against him to obtain additional charges or to prosecute him, in exchange for his cooperation and a reduction of his sentence. The Government breached the plea agreement and proffer agreement by using the proffered or protected information to obtain the superceding indictment and additional charges in this case. Therefore, Rodriguez's right to due process was violated.

In addition, counsel for Rodriguez provided ineffective assistance of counsel, violating his Sixth Amendment Rights, where he failed to object or



put for any challenge to the Government's violation of the proffer agreement and plea agreement.

A. Requirement to Adhere to A Contract or Proffer Agreement

Written and verbal Proffer Agreements are essentially contracts. On occasion defendants will provide incriminating information to the Government during plea negotiation session before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Rules of Evidence. Defendants have a reasonable expectation that all statements made by him prior to and after the signing of a written proffer agreement cannot be used against him to obtain additional charges. See U.S.S.G. 1B1.8. Commentary Note 3.

It is clear and without question that the Government and Petitioner Rodriguez entered a proffer agreement, that is a verbal agreement and eventually a written agreement.

Upon being arrested in April 18, 2013, Rodriguez was offered the opportunity to "help himself" or to proffer. Rodriguez began to cooperate since May 8, 2013, with the AUSA, SAPD agents, and DHS agents. Rodriguez gave up the name of his supplier for the methamphetamines he possessed. It was at this point that Rodriguez knew he had entered into a verbal proffer agreement with the government, and it was this information that the Government used to obtain the superceding indictment. In addition, on June 5, 2013, the Government and Rodriguez entered into a written proffer agreement, making official the verbal agreement. And on September 16, 2014, the Government and Rodriguez entered a plea agreement with an addendum of cooperation. See Docs# 82 and 86, case no. SA-13-cr-400-OLG.

It is equally clear that the Government used the information obtained through Rodriguez's proffer to obtain a superceding indictment and additional charges, thereby violating the Proffer agreement and violating Rodriguez's rights to Due Process and the Right Against Self-Incrimination, under the Fifth Amendment.

## B. Ineffective Assistance of Counsel

In Petitioner Rodriguez's case, counsel's performance fell below the objective stand of reasonableness, set forth in Strickland, where counsel failed to object to the Superseding Indictment, and the use of proffered information to obtain the Superseding Indictment and Additional Charges contained in the Superseding Indictment.

While counsel was not present for the initial proffer on April 18, 2013, that is the day of Petitioner's arrest, counsel was present and counsel of record who negotiated the verbal proffer agreement on May 08, 2013, written proffer agreement on June 05, 2013, and plea agreement on September 16, 2014. Counsel was made aware of Petitioner's agreement to provide information and the information provided on the day of his arrest. Therefore, counsel knew or should have reasonably known that there was a proffer agreement in place and that the Superseding Indictment and additional charges violated said agreement and Petitioner's rights to due process and protection against self incrimination.

Counsel's deficient performance prejudiced Rodriguez because his substantial rights were affected. Not only was he subjected to additional and more severe charges, he was subjected to and received a longer prison sentence, solely because of counsel's failure to challenge or object to the Government's breach of the Proffer and Plea agreements.

## C. The District Court's Erroneous Denial of Petitioner's Claim

Rodriguez alleged, in his Section 2255 (see pg. 24) that counsel provided ineffective assistance of counsel where he failed to challenge or object to the Government's breach of the "Proffer Agreement." The district court denied Petitioner's claim without conducting any evidentiary hearing. See Doc. 159. The district court determined that Rodriguez waived his claim of ineffective assistance of counsel, where counsel failed to challenge or object to the Government's breach of the proffer agreement, because he signed the plea agreement. Id. pg. 7. The district court's failure to conduct an evidentiary hearing was erroneous, where contested issues of fact were raised by the Government and Petitioner. See Section 2255(b); and United States v. Hughes, 635 F.2d 449, 451 (5th Cir. Unit B 1981). The district court's ruling was clearly erroneous.

D. Fifth Circuit's Erroneous Denial of Request for a COA

In requesting a Certificate of Appealability, Rodriguez alleged that the district court erred in determining that he waived his right to challenge counsel's representation, and the denial of his claim without conducting any evidentiary hearing. Rodriguez argued that jurists of reason would agree or debate that an evidentiary hearing should have been conducted by the district court where the Government's position and Appellant's position were in contrast of one another. See SA-13-0400-OG, pg. 14.

Petitioner avered an evidentiary hearing was required so that the district court could determine whether the information used to obtain the additional charges and superceding indictment came from post arrest confessions made by Petitioner and information obtained or given by co-conspirators or cooperating witnesses, or whether the information used to obtain the additional charges and superceding indictment came from statements first made by the Petitioner, then confirmed by co-conspirators and cooperating witnesses, statements of which Petitioner was protected from the use of to obtain additional charges. See Id.

In denying Rodriguez's request for a COA, the Fifth Circuit Court of Appeals determined that Rodriguez failed to make the requisite showing, that is a substantial showing of the denial of a constitutional right. The Fifth Circuit made this ruling without determining or explaining how Rodriguez failed to make the required requisite showing.

The Fifth Circuit's determination that Rodriguez did not make a substantial showing of the denial of a constitutional right is erroneous because Rodriguez clearly showed: (1) that his Fifth Amendment Rights to due process and protection against self-incrimination were violated where the Government used proffered statements to obtain a superceding indictment and additional charges; (2) Counsel made no objections or challenges to the use of proffered statements to obtain a superceding indictment or additional charges, thereby amounting to ineffective assistance of counsel; (3) the district court erroneously ruled that Rodriguez waived his right to raise any claim of ineffective assistance of counsel; and (4) an evidentiary hearing was required where there were contested issues of fact.

Because Petitioner clearly showed that he was denied or deprived of a constitutional right, the Fifth Circuit erred in denying the request for a COA.

E. This Question is Exceedingly Important

Although the right of a Defendant to have a reasonable expectation that the Government will be required to adhere to a proffer agreement and plea agreement, and the right to the effective assistance of counsel, are issues that have been previously litigated on numerous occasions, these questions continue to be exceedingly important, as they strick to the heart of the constitution, Due Process, Sixth Amendment, and Fundamental Fairness. It is essential for this High court to continue to reinforce and restate a Defendant's right to Due Process and his right against self-incrimination, that is a right to expect the Government not to use proffered statements against him to obtain additional charges. To allow the Government to get away with this breach and violation of the Fifth Amendment, would crack the foundation of the criminal justice system, which is the Constitution. This High Court must not allow one lower court to fail to uphold this most basic constitutional right. If it does, no Defendant would be safe from prosecutors breaching proffer and plea agreements. The Government's verbal and written agreements would mean nothing, as prosecutors would intentionally offer these agreements, knowing in advance that they will not adhere to them.

In like manner, it is essential for this High Court to restate, reinforce, and make clear a Defendant's right to the effective assistance of counsel not only during proffer agreements, but at each stage of the proceedings. This Court must continue to show that a violation of the right to the effective assistance of counsel cannot and will not be tolerated.

This claim is exceedingly important, because the entire fabric of the constitutional right to the effective assistance of counsel, is at risk of being destroyed.

F. Remedy

Petitioner Rodriguez humbly moves this Honorable court to grant his request for a Writ of Certiorari, remanding his case back to the Fifth Circuit Court of

Appeals, as he has met his burden to make a substantial showing of the denial of a constitutional right, as required for a Certificate of Appealability to issue.

Rodriguez has shown that his right to Due Process under the Fifth Amendment has been violated where the Government breached the proffer and plea agreement in using proffered information to obtain a Superseding indictment and additional charges.

Rodriguez has shown that jurist of reason could debate or agree that the district court's determination that Rodriguez waived his right to raise a claim of ineffective assistance of counsel was erroneous. Therefore, the denial of his request for a COA should be overturned by this court and a COA issued.

3. WHETHER IT WAS ERROR TO DENY RODRIGUEZ A CERTIFICATE OF APPEALABILITY, TO PURSUE HIS SIXTH AMENDMENT CLAIM ON APPEAL, WHERE HE DEMONSTRATED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE GOVERNMENT'S BREACH OF THE PROFFER AND PLEA AGREEMENT, IN FAILING TO OBJECT OR CHALLENGE THE GOVERNMENT'S USE OF PROFFERED INFORMATION TO ENHANCE OR INCREASE RODRIGUEZ'S SENTENCE:

In criminal case no. 5:13-CR-0400-1, appellate case no. 17-50957, the Government and Petitioner Rodriguez made an agreement that the Government would not use any information obtained from the Defendant against him to obtain and sustain sentencing enhancements in exchange for his cooperation and a reduction in his sentence.

The Government breached the proffer and plea agreement by using the proffered or protected statements to obtain and sustain sentencing enhancements and an increased sentence for Petitioner. Therefore, Rodriguez's right to due process was violated.

In addition, counsel for Rodriguez provided ineffective assistance of counsel, violating his Sixth Amendment Rights, where counsel failed to object to or challenge the Government's violation of the proffer and plea agreement in its use of proffered statements to obtain and sustain an increased sentence.

A. Requirement to Adhere to A Contract or Proffer Agreement

Written and verbal Proffer Agreements are essentially contracts. On occasion Defendants will provide incriminating information to the Government during plea negotiation sessions before a cooperation agreement has been reached. In the event that no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Rules of Evidence. U.S.S.G. 1B1.8. Commentary Note 3.

It is clear and without question that the Government and Petitioner Rodriguez entered a proffer agreement, that is a verbal agreement and eventually a written agreement. See Claim 2 herein, and Docs# 82 and 86, case no. SA-13-CR-0400-OLG.

It is equally clear that the Government used information obtained through Rodriguez's proffer to obtain and sustain sentencing enhancements and a longer sentence, thereby violating the Proffer and Plea agreements and violating Rodriguez's rights to Due Process and protection against Self-Incrimination, under the Fifth Amendment.

B. Ineffective Assistance of Counsel

In Petitioner Rodriguez's case, counsel's performance fell below the objective standard of reasonableness, as set forth in Strickland, where counsel failed to object to the use of proffered information to obtain and sustain sentencing enhancements and a longer sentence.

Counsel was the counsel of record at the time that the Government and Petitioner reached the Proffer and Plea agreements. He infact negotiated these agreements. Counsel, was also, counsel of record during and through the preparation of the PSIR and sentencing. Counsel knew what information was obtained from the Government through proffer and what information the Government obtained on its own. Yet, counsel failed or refused to challenge the PSIR and the Government for using proffered information to obtain and sustain sentencing enhancements and a longer sentence.

Counsel's deficient performance prejudiced Petitioner Rodriguez because he actually received a longer sentence, but for counsel's failure to object to the use of proffered information for sentencing purposes.

C. The District Court's Erroneous Denial of Petitioner's Claim

Rodriguez alleged, in his Section 2255, that counsel provided ineffective assitance of counsel where he failed to challenge or object to the Government's breach of the "Proffer and Plea Agreements." Rodriguez, specifically alleged that the government used proffered statements to obtain and sustain enhancements for relevant conduct (drug approximation), leadership role, and the importation of drugs, yet counsel failed to object or challenge this breach.

The district court denied Petitioner's claim without conducting any evidentiary hearing, determining that Rodriguez waived his claim of ineffective assistance of counsel because he signed the plea agreement and pled guilty. Doc. 159. pg. 7.

The district court clearly erred in failing to conduct an evidentiary hearing, because Rodriguez has clearly proved: (1) there was a proffer agreement (See Government's Response Chapter IV and Doc# 87, 88 case SA-13-CR-00701-OLG); (2) the Government used evidence or proffered statements to obtain and sustain sentencing enhancements; (3) Counsel failed to object or challenge the Government's breach.

D. Fifth Circuit's Erroneous Denial of Request for a COA

In requesting a Certificate of Appealability, Rodriguez alleged that the district court erred in determining that he waived his right to challenge counsel's representation, and the denial of his claim without conducting any evidentiary hearing. Rodriguez argued that jurists of reason would agree or debate that an evidentiary hearing should have been conducted by the district court where the Government's position was that Rodriguez was not fully forthcoming or told untruths in his proffers, but Rodriguez alleged that he was truthful and forthcoming, and that the Government had the right to pursue a perjury prosecution if it believed that he lied, but it did not have the right to withdraw the agreement and use proffered statements to obtain and sustain any sentencing enhancements. It was Rodriguez's position that it was the Government's burden to prove that the information used, came from an independent source, and not bald assertions. Kastigar v. United States, 406 U.S. 441, 460, 92 S. Ct. 1653, 1665, 32 L. Ed. 2d 212, 226.(1972). The Government failed to meet its burden to prove the the information used, came from a different source or was obtained independently prior to Rodriguez's proffer or that the information used was not part of the information given by Petitioner.

In denying Rodriguez's request for a COA, the Fifth Circuit Court of Appeals determined that Rodriguez failed to make the requisite showing, that is a substantial showing of the denial of a constitutional right. The Fifth Circuit made this ruling without determining or explaining how Rodriguez failed to make the required requisite showing.

The Fifth Circuit's determination that Rodríguez did not make a substantial showing of the denial of a constitutional right is erroneous because Rodríguez clearly showed: (1) that his Fifth Amendment Rights to due process and protection against self-incrimination was violated where the Government used proffered statements to obtain and sustain sentencing enhancements; (2) Counsel made no objection or challenges to the use of proffered statements to obtain and sustain the sentencing enhancements, thereby amounting to ineffective assistance of counsel; (3) the district court erroneously ruled that Rodríguez waived his right to raise any claim of ineffective assistance of counsel because he pled guilty and signed the plea agreement; and (4) an evidentiary hearing was required where there were contested issues of fact.

Because Petitioner Rodríguez has clearly shown that he was denied or deprived of his constitutional rights to Due Process, the right against self-incrimination, and the right to the effective assistance of counsel, the Fifth Circuit's denial of Petitioner's request for a Certificate of Appealability was erroneous.

#### **E. This Question is Exceedingly Important**

Although the right of a Defendant to have a reasonable expectation that the Government will be required to adhere to proffer and plea agreements, and the right to the effective assistance of counsel, are issues that have been previously litigated, these questions continue to be exceedingly important, as they strick to the heart of the Constitution, Due Process, Sixth Amendment, Fundamental Fairness, and the Interest of Justice.

In addition, prosecutors continued attempt to stretch and cross the bounds of fairness as well as the legal rights of Defendants, make it exceedingly important for this High Court to continue to reaffirm the rights of Defendants and thereby all citizens of this great Country. Also, the continued failure of lawyers to provide representation within an objective standard of reasonableness, due to inexperience, being overworked, or simply a refusal to do what the constitution requires, demands that this Court continue to reaffirm a defendants, and thereby every citizen's, right to the effective assistance of counsel.

It is essential for this High Court to hold the Government to its agreements, not



allowing one Defendant to be deprived of his right to be protected from self-incrimination, due to the Government's knowing and intelligent subversion of said right. The interest of justice and fundamental fairness requires this High Court to take up this issue, and reject the Government's excuses and the lower court's failure to protect the Defendant, and all Defendants and citizens of this Great Nation.

It is equally essential for this Court to reinforce the Sixth Amendment right to the effective assistance of counsel, ensuring that attorneys going forward adhere to the Sixth Amendment and this Court's requirement that they perform within the objective standard of reasonableness, and not sleep on the job.

This claim is exceedingly important, because if attorneys' are allowed to provide this type of ineffective representation, which amounts to no representation at all, the entire fabric of the constitutional right to the effective assistance of counsel will be destroyed. Defendants will have no right to counsel.

#### F. Remedy

Petitioner Rodriguez humbly moves this Honorable Court to grant his request for a Writ of Certiorari, remanding his case back to the Fifth Circuit Court of Appeals, as he has met his burden to make a substantial showing of the denial of a Constitutional Right, as required for a Certificate of Appealability to issue.

Rodriguez has shown that his right to Due Process under the Fifth Amendment has been violated where the Government breached the proffer and plea agreement in using proffered information to obtain and sustain sentencing enhancements.

Rodriguez has shown that jurist of reason could or would debate or agree that the district court's determination that Rodriguez waived his right to a claim of ineffective assistance of counsel was erroneous. Therefore, the denial of his request for a COA should be reversed and a COA issued.

4. WHETHER RODRIGUEZ WAS DEPRIVED OF HIS STATUTORY RIGHT TO APPEAL, DEPRIVED OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION, AND DEPRIVED OF HIS OPPORTUNITY TO SUBMIT A MERITS BRIEF, WHERE THE FIFTH CIRCUIT COURT OF APPEALS FAILED TO ACCEPT APPELLANT'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND FAILED TO ANSWER TO ANSWER APPELLANT'S REQUEST FOR PERMISSION TO FILE AN OVERSIZED BRIEF, AND FAILED TO ADDRESS ANY OF APPELLANT'S CLAIMS FROM CASE NUMBER 5:13-CR-701-OLG?

Petitioner filed two separate 28 U.S.C. § 2255s with the district court. One under case number 5:13-CR-0400-1, and the other under case number 5:13-CR-701-OLG. In denying Petitioner's Section 2255s, the district court consolidated the cases, but addressed all claims contained in both Section 2255s separately. See Doc# 159.

On Appeal from the denial of his Section 2255s, Petitioner filed two separate notices of appeal. The Fifth Circuit docketed each separately. The first, as it relates to case no. 5:13-Cr-0400-1, under appeal case no. 17-50957, and the second, as it relates to case no. 5:13-CR-701-OLG, under appeal case no. 17-50969. Later, the Fifth Circuit Court of Appeals closed case number 17-50969, stating that it was erroneously docketed as a duplicate appeal. See Appendix A3.

Subsequently, Petitioner filed two separate Applications for a Certificate of Appealability, one as it relates to case no. 5:13-CR-0400-1 and the other as it relates to case no. 5:13-CR-701-OLG. In addition, Petitioner submitted a motion to the Fifth Circuit Court of Appeals moving the Court to allow him to submit two COA Applications, or in the alternative to combine both briefs and give the Petitioner leave to submit an oversize brief. See Appendix A4.

In response, the Fifth Circuit acknowledged that it received Rodriguez's request to submit two (2) COA motions or one oversized motion as to 17-50957 and 17-50969. See Appendix A4. The clerk of the Fifth Circuit of Appeals, went on to determine that it would take no action on Rodriguez's motion, as it was unnecessary, and stated that his motion for COA and brief in support were filed and submitted to the Court for review. Id.

In taking no action on Rodriguez's motion requesting leave to submit an oversized brief, the Fifth Circuit Court of Appeals deprived Rodriguez of his Statutory Right to Appeal, deprived him of his opportunity to submit a merits brief, and deprived him of his right to Due Process of Law under the Fifth Amendment

of the Constitution, where the Court failed to consider or decide any of the claims submitted in his Second motion for Certificate of Appealability or the oversized brief.

A. Procedural Rules

It is without question that the Supreme Court has determined that the Courts of Appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." See Thomas v. Arn, 474 US 140, 88 L Ed 2d 435, 106 S Ct 466, reh den 474 US 1111, 88 L Ed 2d 933, 106 S Ct 899. This power includes the authority to alter or deviate from the Federal Rules of Appellate Procedure. Yet, the supervisory powers of the Courts of Appeals is NOT without limits. The supervisory powers of the Courts of Appeals does not give them the authority to enact or enforce Local Rules that will deprive any Appellant of his Statutory Right to Appeal. If a Rule is created or enacted in such a way that it does not give the Appellant notice of said rule, the opportunity to comply with said rule, in unambiguous terms, the rule itself or the enforcement or penalty for any failure to follow said rule cannot stand.

It is the Fifth Circuit's Local Rule, see Fifth Circuit Rule 27 (Motions), which allows the Clerk of the Court of Appeals to rule on a motion to extend the length of of a brief. Petitioner Rodriguez can find nothing in this rule or any other procedural rule, as set forth by the Fifth Circuit Court of Appeals, that allows the Clerk to take no action upon a motion for an oversized brief.

In addition, Fifth Circuit Local Rule 32.5, which concerns the Rejection of Briefs and Record Excerpts, clearly states "If all copies of birefs and record excerpts do not conform to 5th Cir. R. 28 and 30 and all provisions of Fed. R. App. P. 32, the clerk will file the briefs and record excerpts, but is authorized to return all nonconforming copies. An extension of 10 days is allowed for resubmission in a conforming format."

- (2) the district court erred in determining that counsel did not provide ineffective assistance of counsel where he failed to challenge the indictment as a violation of Petitioner's right against double jeopardy.
- (3) the district court erred in determining that counsel did not provide ineffective assistance of counsel where counsel used the Court's participation in plea negotiations to coerce Rodriguez into pleading guilty.
- (4) the district court erred in determining that counsel did not provide ineffective assistance of counsel where counsel failed to move for a dismissal of the indictment for violation of Rodriguez's right to a Speedy Trial.

Rodriguez was deprived of his Statutory Right to Appeal, because he was deprived of his right to submit these claims of error to the Court of Appeals. The Fifth Circuit Court of Appeals never considered any of these four claims. In its order denying Rodriguez's request(s) for a Certificate of Appealability, the Court acknowledges Rodriguez submitted two Section 2255s to the district court, it acknowledges case number 5:13-CR-701, but fails to list any of the claims for COA presented by Rodriguez as they pertain to case no. 5:13-CR-701.

The Fifth Circuit in denying the request for COA as it pertains to case no. 5:13-CR-400, lists each of the claims of error by the district court presented by Rodriguez in his request for a COA. Yet, the claims that relate to case no. 5:13-CR-701 are devoid of any mention. The Fifth Circuit simply failed to rule on these claims, because it failed to decide Rodriguez's request that his two separate briefs be joined and considered one oversize motion or brief.

Due Process of the Fifth Amendment to the Constitution, requires that Rodriguez be given the right and opportunity, not only to submit all claims of error by the district court, but to have those claims considered and decided by the Court of Appeals. By failing to review and decide these claims, the Fifth Circuit Court of Appeals deprived Rodriguez of his Statutory Right to Appeal. Not only was Rodriguez deprived of any real or meaningful review, he was deprived of any review at all. Mr. Rodriguez was, therefore, deprived of Due Process of Law.

The Clerk of the Fifth Circuit, closed the case that it docketed under case no. 17-50969, as it related to criminal case no. 5:13-CR-701, as a duplicate case. This determination was erroneous. Rodriguez was indicted under two separate cases. He was found guilty after pleading guilty under two separate cases.

Rodriguez was sentenced twice, under two separate cases and during two separate sentencing hearings. Petitioner did not file any direct appeal as to either case. Rodriguez's filed two separate Section 2255s, and the issues filed were separate and distinct from one another. Lastly, the claims of error by the district court, filed in the motions for COA, were separate and distinct, not duplicate claims of error.

In a desire to consolidate or reduce the size of Rodriguez's case, the Clerk of the Fifth Circuit Court of Appeals, deprived Rodriguez of his right to be heard by the Court of Appeals as to all of his claims, thereby depriving him of his Statutory Right to Appeal, and his constitutional right to Due Process.

Each of the issues or claims of error Rodriguez attempted to present and obtain review of, not only concern the important constitutional right to the effective assistance of counsel, but concerned other constitutional protections, that if allowed to be violated would deprive Rodriguez of his rights under the constitution, and would fail to promote the interest of justice and fundamental fairness.

If the the Fifth Circuit Court of Appeals or any Court of Appeals, is allowed to simply take no action on a motions to file a separate motion for Certificate of Appealability or motion for leave to submit an oversized brief or motion, all appellants will be at risk of having their Statutory Right to Appeal stripped from the, and thereby be deprived of the constitutional right to Due Process.

### C. The Question Presented is Exceedingly Important

The Supreme Court should grant Mr. Rodriguez's request for a Writ of Certiorari, because the question presented herein is exceedingly important. This issue is an important one because the issue goes to the heart of the criminal justice system, Due Process, fundamental fairness, Appellate Procedure, and the Statutory Right to Appeal conferred upon every Citizen and Defendant by Congress. If any Court of Appeals, or any Court for that matter, is allowed to create or adopt Local Rules, then are allowed to change or fail to enforce its own rules, without giving notice to the Appellant, said Appellant is then deprived of his constitutional right to

Due Process and his Statutory Right to Appeal.

Mr. Rodriguez does not question whether or not the Fifth Circuit Court of Appeals retains the power to make Local Rules concerning litigation, neither does he question the Clerk's authority to rule on or decide certain motions.

Mr. Rodriguez's argument herein, the Fifth Circuit does not have the power to create rules or execute rules in a way that will deprive any Appellant of the right to present all of his claims of error by the district court, deprive an Appellant of the Statutory right to appeal by preventing him from presenting all of his claims, or deprive him of Due Process.

In addition, Mr. Rodriguez argues, that once the Fifth Circuit Court of Appeals made a Local Rule that any brief not conforming to its standards would be returned and the Appellant would have 14 days to resubmit said brief in a way which complied with Fifth Circuit Rules and the Federal Rules of Appellate Procedure, it could only change its rules or circumvent those rules in a particular case, such as Mr. Rodriguez's, by notifying Mr. Rodriguez in unambiguous terms as to when his appeal or brief is due, and give him the opportunity to comply. Thomas v. Arn, 474 US 140, 88 L Ed 2d 435, 106 S Ct 466, reh den 474 US 111, 88 L Ed 2d 933, 106 S Ct 899.

Congress and the Federal Rules of Appellate Procedure requires that an Appellant be given clear notice when his brief does not comply with a Court's Local rules or the Fed. R. App. P. Also, it is the intent of Congress and the Federal Rules of Appellate Procedure that an Appellant be given the opportunity to resubmit his brief when it did not comply with local and federal rules.

It is exceedingly important that this Court protect the right to appeal for this Petitioner and every Petitioner. If this Court refuses to take up this case, it will give not only the Circuit Courts of Appeals, but all Courts, the power to deprive any Defendant, Petitioner, or Appellant of the right to litigation, that is the statutory right to appeal. Every Court would have the power or authority to strip any Petitioner who files a non-conforming brief of his right to appeal his case, by taking no action or by failing to return his brief and

inform him that he has 14 days to resubmit said brief in a manner which complies with all local and federal rules.

Without intervention, by this Court, the statutory right to appeal, the right to litigation, and the right to Due Process will be continuously infringed upon. The right to appeal or seek redress from the Courts of Appeals is an absolute right, it cannot be infringed upon based upon a Circuit Court of Appeals' failure to follow its own Local Rules, failure to follow the Federal Rules of Appellate Procedure, or failure to give due or any notice to an Appellant of a change in rules.

In Mr. Rodriguez's case, the Fifth Circuit simply decided that it would not take action on Petitioner's motion to submit two briefs or his motion to submit an oversize motion or brief, eventhough its own Local Rules required that it return the brief to Appellant and require him to resubmit it in 14 days.

The actions of the Fifth Circuit was more egregious, in Mr. Rodriguez's case, because the Clerk of Courts lead Mr. Rodriguez to believe that all of his briefs and motions in support had been submitted to the Court for review. See Appendix ?? The actions of the Fifth Circuit Court of Appeals, deprived Mr. Rodriguez of the opportunity to obtain the review that Statute and the Constitution confers upon him.

The Supreme Court should take this opportunity to protect the statutory right to appeal, not only for Mr. Rodriguez, but for all litigants. It is exceedingly important to our criminal justice system that litigants' right to appeal and their right to due process is not trampled upon, circumvented, or out-right denied by a failure of any Court to follow its own Local Rules, or by a change in those Rules without any notice to the Litigant. Every Defendant has the right to appeal his conviction, sentence, or denial of Petition for habeas Corpus Relief, without fear that at any moment the right to appeal will be infringed upon because of a Court's failure or refusal to adhere to its own Local Rules or a change in Rule without any notice. No Appellant should fear that his claims will not be heard and considered and decided because a

a Clerk determined he/she would take no action on a motion to file a second motion or motion for a oversize motion or brief.

The Supreme Court has, in past cases, taken the opportunity to acknowledge the power of the courts of appeals to mandate procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the constitution. This is, the Supreme Court has taken the opportunity to acknowledge when and how a Petitioner can lose or waive his right to appeal for failure to comply with scheduling orders, requirements to pay fees, or other procedural rules made by the Court of Appeals. In like manner, the Supreme Court should take the opportunity to protect the statutory right to appeal and ensure that the Due Process Clause of the Fifth Amendment is not trampled upon, by limiting the supervisory powers of the Courts, requiring said Courts to follow the Local Rules they create, or at the least to issue an order, thereby giving notice to the Petitioner, Appellant, or Defendant, when the Court decides to change, deviate from, or disregard its own Local Rules.

The Federal Rules of Appellate Procedure gives Circuit Courts of Appeals the power to shorten or change the time to serve and file briefs, either by local rule or by order in a particular case. Fed.R.App.P. 31. This authority extends to how non-conforming briefs are to be resubmitted or made to conform. The Supreme Court should, by granting Mr. Rodriguez's Petition for Writ of Certiorari, require the Circuit Court of Appeals to issue an order, thereby giving unambiguous notice to each Appellant, when it shortens or lengthens the time for serving or filing briefs, conforming to its rules when a brief does not conform to the Local Rules of said Court, or when the Court deviates from its own Local Rules in a particular case.

In Mr. Rodriguez's case, he has not only been deprived of his statutory rights to submit a merits brief or all of his claims, thereby stripping him of the right to appeal and Due Process, but he has been stripped of all statutory and constitutional rights to seek redress, that is a Writ of Certiorari as to the merits of his case. Mr. Rodriguez cannot herein submit to this Court a Writ



of Certiorari as to the merits of any claim as they pertain to criminal case no. 5:13-CR-701. Mr. Rodriguez is without any ability to challenge the Fifth Circuit's denial of any of his claims, because the Fifth Circuit did not reach any decision as to the merits of the claims presented, said Court determined it would not take any action on the motion for permission or leave to submit an oversized motion or brief, thereby stripping Chappell of redress with this Court.

The question presented, herein, is exceedingly important, because without intervention by the Supreme Court, Court's of Appeals and all other Courts, will have the power to deprive Appellants of the statutory right to submit merit briefs at the appellate level, and merit-based Petitions for a Writ of Certiorari to the Supreme Court, thereby violating the Due Process Clause of the Constitution.

#### D. Remedy

Petitioner Rodriguez humbly moves this Honorable Court to grant his request for a Writ of Certiorari, remand his case to the Fifth Circuit Court of Appeals, with instructions that the Fifth Circuit answer Petitioner's motion to submit two separate motions for Certificate of Appealability or in the alternative answer Petitioner's motion to submit an oversized brief. In the event that the Fifth Circuit denies the request to submit a second COA and denies the request for leave to submit an oversized brief or motion, Petitioner moves this Court to require the Fifth Circuit to re-open Petitioner's case under no. 17-50957 return both briefs and give Petitioner the opportunity to conform his brief with the Local Rules of the Fifth Circuit and the Federal Rules of Appellate Procedure.

#### CONCLUSION

Petitioner Rodriguez humbly moves this Supreme Court of the United States of America to grant each claim as set forth in this Petition for Writ of Certiorari, by granting the relief requested herein, remanding the case back to the Fifth Circuit Court of Appeals, with instructions for that Court

to make determinations based upon the ruling of this Court and its grant of  
Petitioner's Writ of Certiorari.

Respectfully Submitted,



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January 7, 2019