

18-8316

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

NOV 08 2018

OFFICE OF THE CLERK

RICARDO GUERRERO, Petitioner,

UNITED STATES OF AMERICA , Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICARDO GUERRERO,
PRO SE

P.O. BOX 1000
USP-Allenwood
WhiteDeer, PA 17887

ORIGINAL

RECEIVED
FEB - 4 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

THE PROVISIONS OF THE HABEAS CORPUS STATUTE AT RULE 5(b), MANDATES ANSWER TO ALLEGATIONS PRESENTED THE GOVERNMENT'S FAILURE TO ADDRESS THE ISSUE ALLOWS THE DISTRICT COURT TO CIRCUMVENT THE PETITIONER'S RIGHT TO EVIDENTIARY HEARINGS FOR FACTS IN DISPUTE IN A MATTER OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THE ARGUMENT HAS NOT BEEN ADDRESSED BY THE COURT EITHER.

TRIAL COUNSEL MISREPRESENTED THE LAW WITH REGARD TO APPOINTMENTS OF EXPERT SERVICES FOR A CLIENT RETAINED AS RESULT OF CRIMINAL JUSTICE ACT APPOINTMENT, THEREBY BY VESTING THE CLIENT WITH THE SUBSTANTIVE AND PROCEDURAL RIGHTS PROVISIONED BY THE TERMS OF THE STATUTE. MOREOVER, TRIAL COUNSEL PREVENTED THE PETITONER'S REVIEW OF § 3500(b) MATERIALS POST TESTIMONY OF WITNESS CARMEN SANCHEZ.

TABLE OF CONTENTS

QUESTION(s) PRESENTED	.....	_____
TABLE OF CONTENTS	.....	_____
INDEX TO APPENDIX	.....	_____
TABLE OF CASES AND AUTHORITIES [STATUTES AND RULES]	...	_____
OPINION BELOW	.....	_____
JURISDICTION	.....	_____
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	.....	_____
PROCEDURAL HISTORY	.....	_____
STATEMENT OF FACTS	.....	_____
REASONS FOR GRANTING THE PETITION	.....	_____

Trial counsel's acts and omissions to act resulted in the waiver and forfeiture of petitioner's fundamental due process rights to application of the mandated provisions of two statutes, i.e., 18 U.S.C. § 3006A(e), and 18 U.S.C. § 3500(b), as well as the rights provisioned by Fed.R.Crim.P. 16(a)(1)(c) and (E). Moreover, trial counsel, failed to initiate the Compulsory Process Clause of the Sixth Amendment, in failing to move the district court for order/subpoena, of original A.U.S.A., who brokered the safety valve deal for the witness, Carmen Sanchez. The reliability of the trial process must be questioned as a proximate cause of the ineffective assistance of trial counsel.

Pro se litigant's rights to application of all mandatory provisions of 28 U.S.C. § 2255 statute, were violated by District Court's failure to address constitutional claims presented.

INDEX TO APPENDIX

A	1-2 pg	Opinion of Fifth Circuit Court of Appeals	.....	_____
B	1 pg	Judgment	.....	_____
C	1-2 pg	Mandate	.....	_____
D	1-19 pg	Original § 2255 Motion filed 6/15/16	.....	_____
E	1-13 pg	Petitioner's Reply To Government 11/4/16	.....	_____
F	1-16 pg	Government's Initial Response 11/8/16	.....	_____
G	1-41 pg	Government's Required Supplemental Brief 7/26/17 ..	.....	_____
H	1-45 pg	Guerrero's Petition For C.O.A. in Accord With Fed.R.App.P. Rule 22(b)&(b)(2) 10/16/17 .....	.....	_____
I	1-13 pg	Guerrero's Motion In Accord With Rule 35(b)(A) ..	.....	_____
J	1 pg	Court's Initial Order To Government To Respond ...	.....	_____
K	1 pg	Court's Docket Sheet To Identify Second Order To A.U.S.A., For Filing Supplemental Response ...	.....	_____
L	1 pg	Guerrero's Exhibit C-1, Court's Findings Filed Aug.3,2017 [@ page 16]	... ..	_____
M	1 pg	Guerrero's Exhibit C-2 Court's Findings Filed Aug.3,2017 [@ page 17]	... ..	_____
N	1 pg	Guerrero's Exhibit C-3 A.U.S.A.' Response Filed July 26, 2017 [@ page 19 brief]	... ..	_____

TABLE OF CASES

<u>Barnard v Henderson,</u>	514 Fed 744,746 (5th Cir. 1979)
<u>Brady v Maryland,</u>	373 US 83,87 (1963)
<u>Charles v Stephen,</u>	736 F3d 380,389 (5th Cir.2013)
<u>Clisby v Jones,</u>	960 F2d 925,930-936 (5th Cir 1992)
<u>Escamilla v Stephens,</u>	749 F3d 380,393 (5th Cir. 2014)
<u>Ky Dept of Corr. v Thompson,</u>	490 US 454,463 (1989)
<u>Napue v Illinois,</u>	360 US 264,269 (1959)
<u>Rhode v United States,</u>	583 F3d 1289, 1291 (11th Cir.
<u>Ridgely v Fema,</u>	512 F3d 727, 735,36 (5th Cir.2008)
<u>Rompila v Beard,</u>	545 US 374, 381 (2005)
<u>Sears v Upton,</u>	561 US 945,955 (2010)
<u>Strickler v Green,</u>	527 US 263,281 (1999)
<u>Taylor v Illinois,</u>	484 US 400, 410 (1988)
<u>United States v Butler,</u>	988 F2d 537,543 (5th Cir. 1993)
<u>United States v Cervantes,</u>	132 F3d 1106,1110 (5th Cir. 1998)
<u>United States v Franks,</u>	397 Fed Appx. 95,100 (5th Cir.2010)
<u>United States v Rodriguez,</u>	496 221,225 (2d Cir. 2006)

STATUTES AND RULES

18 U.S.C. § 3006A(e)	.....
18 U.S.C. § 3500(b)	.....
18 U.S.C. § 3553(f)(5)	.....
21 U.S.C. § 841(b)	.....
21 U.S.C. § 851	.....
28 U.S.C. § 2255	.....
RULES FOR § 2255 4(b)	.....
§ 2255 5(b)	.....
FED.R.CRIM.P. 16(a)(1)(c) & (E)	.....

NO.
IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Ricardo Guerrero, respectfully prays this Honorable Court will issue a writ of certiorari to review opinion of the United States Court of Appeals for the Fifth Circuit, issued on 8/14/18, affirming the Petitioner's judgment and sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit for which review is sought is United States v. Ricardo Guerrero, No. 17-40989.

The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in the Appendix to this petition as Appendix A. The judgment is reproduced as Appendix B. The mandate is reproduced as Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Texas, Corpus Christi, Division, was issued on August 3, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS PRESENTED

The Sixth Amendment violations are advanced as a proximate cause of the ineffective assistance of trial counsel, during trial and pretrial proceedings.

The Fifth Amendment due process violations occurred by means of trial counsel's failure to address the district court with regard to appointment's of select expert services required for the presentation of an adequate defense, in accord with mandatory provisions of 18 U.S.C. § 3006A(e). Furthermore, the petitioner's due process rights regarding the provisions of 18 U.S.C. § 3500(b), were violated by defense counsels failure to challenge the district court's stand that the petitioner, Guerrero would not be permitted to review the 3500(b) materials of the witness Carmen Sanchez.

In addition to the due process violations above, attorney for the defense misrepresented the law regarding right to appointments of independent expert services, i.e., appointment of an independent laboratory expert for drug / substance analysis, in a controlled substance case, contrary to the provisions Rule 16(a)(1)(c) and (E), of the Federal Rules of Criminal Procedure.

Trial counsel, waived and forfeit, petitioner Guerrero's Sixth Amendment rights to Compulsory Process, in failing to serve notice on District Court of need to subpoena the original A.U.S.A., whom worked on the Sanchez, original plea deal under 18 U.S.C. § 3553(f)(5).

PROCEDURAL HISTORY

DOCUMENT NO.

[470]	Trial began	3/10/14
[499]	Jury Verdict	3/18/14
[635]	Sentence Imposed	6/5/14
[651]	Notice of Appeal Filed	6/10/14
[652]	Judgment Entered	6/10/14
[751]	Notice of Attorney Appearance Phillip Gallagher, Appointed via CJA	8/11/14
[]	Direct Appeal Denied	8/11/14
[925]	§ 2255 Motion Filed	(entered) 6/20/16
[927]	Order For Respondent To Answer [A.U.S.A.]	6/27/16
[946]	Order For Grant of Time Extension	8/29/16
[978]	Movant's Reply Brief In Accord With Rule 5(e)	11/4/16
[979]	A.U.S.A.'s Memorandum In Response To § 2255 Motion	11/8/16
[1001]	ORDER FOR GOVERNMENT TO FILE FURTHER RESPONSE TO § 2255 MOTION	6/12/17
[1003]	Motion For Extension Of Time For Supplemental Filing	7/12/17
[1005]	Memorandum In Opposition by A.U.S.A.	7/26/17
[1006]	Judge's Order Denying § 2255 Motion	8/3/17
[1009]	Clerk's Appeal Papers Filed as to Guerrero	9/21/17
[1018]	Filed In Accord With Rule 22(b) & (b)(2)	10/25/17
[1024]	Fifth Circuit's Sua Sponte Grant Reinstate Appeal Order Denying The COA	10/25/17
	Petitioner Moves For En Banc Hearing R. 35(b)(A)	6/7/18
	Rehearing En Banc Denied [CASE 40989]	7/30/18
		8/14/18

STATEMENT OF FACTS

Guerrero was initially indicted with 21 other people and charged by indictment with Counts 1 and Count 10.

Guerrero was then charged by superseding indictment with: Count One ..conspiring to possess with intent to distribute more than one kilogram of heroin, more than 500 grams of methamphetamine, and more than five kilograms of cocaine.

Count Three ..conspiring to commit money laundering; and Count Five .. possessing firearms after having been convicted of a felony.

The jury convicted Guerrero on all counts. United States v Guerrero, 603 F.App'x 328,329 (5th Cir.2015). Because Guerrero, had two prior convictions for felony drug offenses, he was subject to "enhanced penalty provisions of 21 U.S.C. §§ 841(b) and 851" which mandates a sentence of life as to Count One.

Guerrero was sentenced to consecutive terms of 240 months and 120 months on Counts Three and Five.

REASONS TO GRANT

Guerrero respectfully attests that attorney John Gilmore, was appointed by a court of competent jurisdiction, in concert with the Criminal Justice Act ("CJA").

As a proximate cause of attorney Gilmore's acts and omissions to act in compliance with fundamental due process rights provisioned by the Fifth Amendment's Due Process Clause. Guerrero's procedural and substantive rights attached to 18 U.S.C. § 3006A(e) and 18 U.S.C. § 3500(b) as well as Fed.R.Crim.P. 16 (a)(1)(c) & (E), were waived and forfeit.

Furthermore attorney Gilmore breached the duty of counsel as guaranteed by the Sixth Amendment, by means of misrepresentations of law related to the appointment of expert services. Further, attorney Gilmore fabricated facts related to the court's posture associated with motions to the Court for appointments of various expert services. This together with distortion and falsifications bearing upon the district court's stance on Guerrero's actual review of § 3500(b) materials post Carmen Sanchez's testimony at

Guerrero respectfully submits that during the course of the trial proceedings Guerrero, repeatedly though unsuccessfully urged attorney Gilmore, to motion the Court in accord with 18 U.S.C. § 3006A(e), for ex parte proceeding to obtain approval for commissioning select expert services, for preparation of the defense.

Guerrero respectfully states that attorney Gilmore persistently evaded addressing Guerrero's requested motions for appointments of expert services in open court, in compliance with the statute. Attorney Gilmore's recurrent justification was that during the Court's recess periods, the presentation would be served.

During a session of the proceedings below the Court made a record and addressed the fact that the government would be presenting six (6), drug related lab experts, in its case.

In the course of the evening recess, while at the holdover facility Guerrero, was informed that in accordance with due process considerations defense had an absolute right to employment of an independent laboratory expert, in a controlled substance case.

Guerrero respectfully provides: " the Fifth Circuit has stated that [f]undamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of examine a piece of critical evidence whose nature is subject to varying expert opinion." Barnard v Henderson, 514 F2d 744,746 (5th Cir. 1978). see also United States v Butler, 988 F2d 537,543 (5th Cir. 1993)

Guerrero further suggests: " In cases involving a controlled substance a concomitant part of examination or inspectfion [is] the right of the accused to have an independent chemical analysis performed on the seized substance." United States v Gaultney, 606 F2d 540,545 (1979).

Guerrero respectfully says attorney Gilmore's errors were so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment.

Guerrero respectfully submits on the morning after he became aware that he had a right to a hearing with regard to appointment of expert services, when the defense's cause would justify such appointment, particularly having bearing on an independent lab expert, to perform chemical analysis, and review weight of alleged substance.

Guerrero put forward this notion to attorney Gilmore, prior to the Court's opening of the days proceedings, in short " that the defense had a right to appointment of expert services when needed for presentation of the defense.

Attorney Gilmore's response was very deliberate in the articulation of his words he spoke slowly and precisely " No you have no right to appointment of expert witnesses" and "the judge won't hear any such motion." For this record attorney Gilmore's response was demeaning as if he were speaking to a hearing impaired child or a dog.

Guerrero respectfully avers that attorney Gilmore, did mechanically misrepresent the facts related to the Court's position regarding the appointments of select expert services in the case.

Guerrero respectfully offers on November 4, 2016, Guerrero filed a timely [reply brief], including in accordance with local rule 7.7, supporting material, i.e., affidavit in support of § 2255, by a reliable third party witness, in concurrence with the Fifth Circuit Court's holdings in: United States v Franks, 397 Fed.Appx. 95,100 (5th Cir. 2010) " Movant is entitled to an evidentiary hearing on an issue presented in his § 2255 motion if he can provide "independent indicia of the likely merit of [his] allegations, typically in the form of one or more affidavits from reliable third parties."

United States v Cervantes, 132 F3d 1106,1110 (5th Cir.1998)

"Brady and its progeny require the government to disclose material information that is favorable to the accused, either because its exculpatory or because its impeaching." Strickler v Greene, 527 US 263,281-82 (1999) see also Brady 373 US @87 ("due process obligation to disclose to the defendant evidence favorable to the accused")

Guerrero respectfully attests attorney Gilmore, later informed Guerrero, that he had in fact reviewed all the § 3500(b) material on Sanchez, and there was nothing revealed in those papers to aid the defense. Attorney Gilmore, further made it abundantly clear the Court would not permit Guerrero, to personally review the § 3500(b) materials.

18 U.S.C. § 3500(b) "Jencks Act" in pertinent part:

(b) " After a witness called by the United States has testified on direct examination, the Court shall on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the subject matter as to which the witness has testified. If the entire content of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use."

In the matter of the original A.U.S.A., whom Guerrero, oftentimes urged attorney Gilmore, to ascertain the identity of and have interviewed by a defense investigator.

Elizabeth R.Rabe, A.U.S.A., for the Southern District of Texas, at Laredo, apparently brokered Sanchez's initial plea arrangement.

It should be noted based upon the dubious assertions and allegations testified to by Sanchez, the conditions of agreement with regard to the to the lawful application of 18 U.S.C. § 3553(f)(5), with its compulsory provisions had been breached and consciously disregarded by Sanchez:

As a proximate cause of the fabrications willfully employed by Sanchez, A.U.S.A., Rabe, was left with the appearance of an attorney who engaged in the dereliction of investigation with which her office charged, in the alternative as an officer of the Court, A.U.S.A. Rabe, would have actively and consciously facilitated the misrepresentation of facts corresponding with the mandatory recommendation proffered by the A.U.S.A., to the district Court, endorsing the safety valve, application for Sanchez.

Guerrero respectfully tenders..." Rights protected by the Compulsory Process Clause, of the Sixth Amendment... are dependent entirely on the accused's initiative." Taylor v Illinois, 484 US 400,410 (1988)

Guerrero respectfully states the jury should have had the opportunity to consider A.U.S.A. Rabe's testimony regarding the degree of deceptive and fictitious statements Sanchez was willing to engage in in two separate Court proceedings, in order to receive a time reduction.

Guerrero respectfully offers with regard to attorney Gilmore's failure to secure the testimony of that original A.U.S.A., consider the Fifth Circuit in Escamilla v Stephens, 749 F3d 380,393 (5th Cir. 2014) "Generally, counsel's strategic decisions are afforded deference so long as they are based on counsel's professional judgment"

Strickland, 466 US @680. However, if a purportedly tactical decision is not preceded by a reasonable investigation, then it is not sufficiently informed and not entitled to the deference typically afforded counsel's choices. Sears v Upton, 561 US 945 (2010).

"Applying Strickland, Wiggins, and Rompilla, we have explained that, "[i]n investigating potential mitigating evidence, counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary."

Charles v Stephens, 736 F3d 380, 389 (5th Cir. 2013)" Thus under a Strickland analysis, trial counsel must not ignore pertinent avenues of investigation, or even a single, particularly promising investigation lead. @ 390-91.

Guerrero respectfully presents, 18 U.S.C. § 3553 in pertinent parts:

..." The Court, in determining the particular sentence to be imposed, shall consider - (1) the nature and circumstances of the offense and the history and characteristics of the defendant.

(f) Limitation on applicability of statutory minimums in certain cases.

The Court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of Title 28 without regard to any statutory minimum sentence, the Court finds at sentencing, after the government has been afforded the opportunity to make recommendation that:

(1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.

(4) The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the controlled substance act.

(5) Not later than the time of sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan...

United States Sentencing Guidelines § 5C1.2 In pertinent part:

" defendant needs to be a limited actor who did not lead or supervise others, or profit substantially from his activity, the least culpable participant."

Guerrero respectfully provides Guerrero's exhibit 11 this document is taken from A.U.S.A., Jason Smith's brief filed 7/26/17. The government's information discloses that late in 2010, Sanchez began making border crossings carrying drugs. She had made 15 prior trips and was paid \$ 5,000.00 dollars per kilogram of drugs by Guerrero or his wife.

Guerrero respectfully presents Guerrero's exhibits 11 and 12 which have been taken from the district court's findings, filed on 8/3/17. Exhibit 11 reveals Sanchez was prosecuted for possession with intent to distribute methamphetamine and was sentenced to 70 months ... after credit for acceptance of responsibility, minor or mitigating role, and a safety valve. She hoped to obtain a further reduction in her sentence from testifying against Guerrero.

Guerrero respectfully offers exhibit . . . Sanchez had (2) two kilograms of methamphetamine and (2) two kilograms of cocaine strapped to her body on August 20, 2011, when arrested. She testified she had crossed drugs from Mexico into the United States approximately 15 times before she was arrested. Once she got through the international border, she usually took a bus to Robstown, Texas upon arrival in Robstown, she would call Guerrero.

..." The jury's estimate of truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

Napue v Illinois, 360 US 264,269 (1959).

Guerrero respectfully submits the judgment / finding, filed by the Honorable Hayden Head, U.S.D.J., on August 3, 2017, in the case at bar failed to address constitutional violations proffered in the § 2255 motion papers inclusive of the affidavit filed in support.

Further, Guerrero, in a timely reply brief again addressed the misrepresentated law and facts advanced by trial counsel Gilmore, these papers were timely filed on 11/4/16, together with affidavit in support filed by reliable third party witness, during the proceedings below when attorney Gilmore, misrepresented the law and facts, regarding appointment of expert services.

Guerrero respectfully offers Clisby v Jones, 960 F2d 925,930,936 (11th Cir. 1992) en banc, as well as Rhode v United States, 583 F3d 1289, 1291 (11th Cir.) These cases represent authority in support of petitioner's fundamental right to have constitutional violations addressed in accord with the explicit terms of the habeas corpus statute.

Guerrero respectfully suggests ..." An order issued by a Court with jurisdiction over the subject matter ... must be obeyed by the parties until it is reversed by orderly and proper proceedings."

United States v United Mine Workers, 330 US 258,293 (1947)

Guerrero respectfully provides in part Rules Governing Section 2255 proceedings @ rule 4(b) "The judge who receives the motion must promptly examine it ... If the motion is not dismissed, the judge must order the U.S. attorney to file an answer, motion, or other response within a fixed time..."

Guerrero respectfully provides rule 5(b) of the [§ 2255 rules].

(b) Contents: The answer must address the allegations in the motion.

" Courts look for explicitly mandatory language, i.e., specific directives to decisionmaker that if the regulations substantive predicates are present a particular outcome must follow."

Ridgely v Fema, 512 F3d 727,735-36 (5th Cir.2013) (quoting Ky Dept. of Corr. v Thompson, 490 US 454, 463 (1989)

Guerrero respectfully posits that the habeas corpus statute in its lawful application vested Guerrero with substantive and procedural rights to full application of statutes provisions, inclusive of requiring the Court to address allegation lawfully advanced in motion papers, regardless of whether the United States attorney addresses the Constitutional violation stated in the motion papers.

CONCLUSION

The reliability of the trial process must be questioned as a proximate cause of the ineffective assistance of counsel.

Trial counsel misrepresented the law to this client, the facts related to the district court's standing regarding appointments of various expert services and most importantly an investigator.

Guerrero fundamental due process rights to application of two statutes was waived and forfeit by the failure of trial counsel to timely act, i.e., 18 U.S.C. § 3500(b) and § 3006A(e), as well as the rights provisioned under Fed.R.Crim.P. 16(a)(1)(c) & (E). Further trial counsel failed to initiate the Compulsory Process Clause of the Sixth Amendment, in order to subpoena the A.U.S.A., whom brokered the Sanchez, safety valve, 18 U.S.C. § 3553(f)(5), in 2012.

Guerrero respectfully prays that this Honorable Court remand this case back for evidentiary hearing in accord with circuit law as identified in these papers.

VERIFIED DOCUMENT

I, Ricardo Guerrero, certify and attest that all of the foregoing statements made by me are true and correct to the best of my personal knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to the penalty for perjury under (28 U.S.C. § 1746).

BY: Ricardo Guerrero
Ricardo Guerrero

