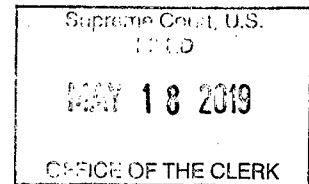


19-5220 ORIGINAL
Case. No. _____

IN THE
UNITED STATES SUPREME COURT



HERNARDO MEDINA-VILLEGAS
Petitioner,

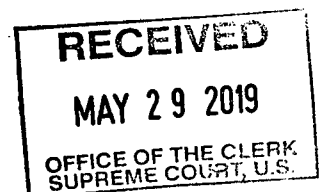
v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITIONER FOR WRIT OF CERTIORARI

Hernardo Medina-Villegas, (Pro-Se)
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IN THE
SUPREME COURT OF THE UNITED STATES

HERNARDO MEDINA-VILLEGAS
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITIONER FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

JURISDICTION

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

QUESTIONS PRESENTED

This Case involves the Trial and Appellate Counsels Performance falling Below an objective Standard of Reasonableness, that prejudice the Petitioner.

1. Did The Trial and Appellate Counsels Performance Fall Below An Objective Standard of Reasonableness; Did The Deficient Performance Prejudice The Defendant?

2. Did Petitioner Conviction and Sentence were Obtained In Violation of his Sixth, Amendments Right of The United State Constitution?

3. Under the Circumstances of the Underlying Case, Can A Reasonable jurist Find the District Court's Assessment of Medina's Constitutional Claims Debatable or Wrong?

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APPENDIX (B) DECISION OF THE District Court

APPENDIX (C) Mandate of the Appeals Court

BACKGROUND

In 2002, a Federal Grand jury Returned a multi-Defendant, Multi-Count Indictment against Medina and others. The Indictment stemmed from the Robbery of an Armored vehicle which resulted in the killing of Gilberto Rodriguez-Cabrera (Rodriguez).

A superseding indictment followed charging: Conspiracy to commit robbery of an armored vehicle, in violation of 18 U.S.C. § 1951(a) (Count One); Aiding and Abetting the use of a firearm in relation to Count One, in violation of 18 U.S.C. § 2, § 924(c)(1)(A) (iii) (Count Two); Aiding and Abetting the robbery of an armored vehicle, in violation of 18 U.S.C. §§ 2, 1951(a) (Count Three); Aiding and Abetting the use of a firearm in relation to Count Three, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A)(ii) (Count Four); Aiding and Abetting a Carjacking, in violation of 18 U.S.C. §§ 2, 2119(1) (Count Five); Aiding and Abetting the use of a firearm in relation to Count Five, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A) (ii) (Count Six); Aiding and Abetting the Robbery of an Armored Vehicle, in violation of 18 U.S.C. §§ 2, 1951(a) (an unrelated Robbery to Count Three) (Count Seven); Aiding and Abetting the use of a firearm in relation to Count Seven, resulting in the murder of a guard in the course of the robbery, in violation of 18 U.S.C. §§ 2, 924(j) (this count was certified for the death penalty) (Count Eight); Aiding and Abetting the use of a firearm in relation to count eight, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A)(ii) (Count Nine).

On March 22, 2005, a Jury Convicted Medina on all Nine Counts as charged in the indictment. Because the case had been certified for the death penalty, the proceeding moved to the penalty phase.

During charging the Jury the District Court Instructed Jurors that they had to unanimously decide on a sentence of death or life without the possibility for

release (LWOP); the court further instructed that if jurors could not reach unanimity on a sentence of death or LWOP, the Court would impose a sentence of LWOP.

The Jurors informed the Court that they could not agree on a sentence of death or LWOP. Consequently, the District Court sentence Medina to a term of LWOP as to count eight and several concurrent and consecutive sentences on the remaining eight counts.

A timely Appeal was filed, The First Circuit Court of Appeal affirmed on Eight of the Counts, and Remanded for Resentencing on the Murder Count. See **United States v. Catalan-Roman**, et al., 585 F.3d 453, 475 (1st Cir. 2009).

On August 18, 2011, the district court's allowing Medina to allocute, re-affirmed its sentence of LWOP. The district court did not provide any reason for adopting the originally imposed sentence of LWOP. Medina timely Appeal was filed. On November 27, 2012, this court affirmed the sentence imposed by the district court. See **United States v. Medina-Villegas**, 700 F.3d 580.

A. Relevant Factual Background.

Hernado Medina-Villegas and co-defendant were tried and convicted on a nine count superseding indictment stemming from the robbery of an armored vehicle which resulted in the unfortunate killing of Gilberto Rodriguez-Carrera. As a result of the guilty verdicts, Petitioner Medina was sentenced to a term of LWOP on count eight (the murder count) and an aggregate fifty-one (51) years consecutive sentence on the remaining eight counts.

Petitioner Medina contends that his conviction and sentence were obtained in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

QUESTION I

DID THE TRIAL AND APPELLATE COUNSELS PERFORMANCE FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS; DID THE DEFICIENT PERFORMANCE PREJUDICE THE PETITIONER?

Petitioner Argued that both his Trial and Appellate Counsel Performance was Ineffective when both counsels failure to recognize the structural error which deficient and prejudicial to the Petitioner defense. The two part test for Constitutionally Ineffective Assistance of Counsel was set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052 (1984); See also **Smullen v. United States**, 94 F.3d 20, 23 (1st Cir. 1996); **Knight v. United States**, 37 F.3d 774. The Petitioner must show that Counsel's representation fell below an objective standard of reasonableness, and that the deficient performance prejudiced his defense. **Owens v. United States**, 483 F. 3d 48, 63 (1st Cir. 2007) (quoting **Strickland v. Washington**, 466 U.S. at 687-88, 104 S.Ct. 2052).

a. Strickland's Deficient Performance Prong.

During the pretrial proceedings, the government charged a multi-count superseding indictment which included, *inter alia*, a capital offense (count eight)(the murder charge), and its lesser-included counterpart (count nine) (Aiding and Abetting the use of a firearm in relation to count eight). A cursory review of the indictment would have revealed that count nine was a lesser-included offense of count eight and thus, violated the Double Jeopardy Clause.

Petitioner counsel's failure to recognize the error and move to dismiss or strike the same was deficient and highly prejudicial to the defendant's case. [J]udicial scrutiny of counsel's performance must be highly deferential, and

every effort [should] be made to eliminate the distorting effects of hindsight. **Argencourt v. United States**, 78 F.3d 14, 16 (1st Cir. 1996) (quoting **Strickland v. Washington**, 466 U.S. at 689, 104 S.Ct. 2052) (quotation marks omitted); see also, **United States v. Valerio**, 676 F.3d 237, 246 (1st Cir. 2012); **United States v. Rodriguez**, 675 F.3d 48, 56 (1st Cir. 2012). "The test includes the strong presumption that both counsels conduct falls within the wide range of reasonable professional assistance." **Smullen v. United States**, 94 F.3d at 23 (quoting **Strickland**, 466 U.S. at 690). Here, even the most rigid test of highly deferential scrutiny of counsels performance would fail to overcome **Strickland's** two-prong test. Here, the district and Appellate courts ruling fails to address Petitioner's central question of whether trial and appellate counsels failure to recognize the structural error was deficient and prejudicial to the defense. Thus, preventing Petitioner to show cause and prejudice on the structural error claim that charging, trying, and allowing the jury to deliberate on the capital offense and its lesser-included counterpart affected the framework in which the trial was allowed to proceed.

The Error Was Structural In Nature

"A structural error is a defect affecting the framework in which the trial proceeds, rather than simply an error in the trial process itself." **Arizona v. Fulmante**, 499 U.S. 279, 113 L.Ed 2d 302, 111 S.Ct. 1246 (1991). By overcharging the Petitioner, the government (the indictment's authors) knew that they were charging the capital offense (count eight) and its lesser-included counterpart (count nine) and would be exposing Petitioner to receive dual punishments for what amounted to the same offense conduct.

In fact, that is exactly what happened in this case. Following guilty

verdicts on both the capital offense and its lesser-included counterpart, Petitioner was sentenced to a term of Life With out Parole on count-eight, and to a consecutive thirty (30) year sentence on count nine. That the government conceded that count nine violated the double jeopardy clause; that the district court vacated the sentence and judgement as to count nine; does not cure the manifest injustice that occurred in allowing the case to proceed and be put to the jury for deliberations, fully aware that counts eight and nine violated the double jeopardy clause; the conduct was egregious and affected "the framework in which the trial [proceeded], rather than simply an error in the trial process itself." **Arizona v. Fulminate**, 499 U.S. at 310, 111 S.Ct. 1246.

To simply suggest that vacating the sentence and judgment cures the structural error is contrary to the Sixth Amendment and Supreme Court precedent.

The Supreme Court rejects the argument that the Sixth Amendment rights can be disregarded so long as the trial is, on a whole, fair. Structural error requires that the the verdict be vacated and that a new trial be granted, without analysis whether the error can be treated as harmless. **United States v. Fuentes**, 2013 U.S. Dict. Lexis 115459 (2013); **United States v. Padilla**, 415 F.3d 211 (1st Cir. 2005). "Unlike garden-variety trial error, a structural error transcends the criminal process by depriving a defendant of those basic protections [without which] a criminal trial cannot reasonably serve its function as a vehicle for determination of guilt of innocence and on criminal punishment may be regarded as fundamentally fair." **Rose v. Clark**, 478 U.S. 570, 577-78, 92 L.Ed 2d 460, 106 S.Ct. 1310 (1986) (citations omitted).

b. Strickland's Prejudice Prong.

The prejudice that resulted here was Petitioner Medina's Appellate Counsel

failure to argue the double jeopardy claim on Appeal foreclosed Petitioner Medina from raising the claim for appellate review. Trial counsel's prejudice occurred when he failed to recognize and object to the duplicitous court.

Moreover, Petitioner Medina has showing that he received ineffective assistance of counsel in that the district court and appellate court both held that count nine violated the double jeopardy clause. Thus, counsels were deficient and Petitioner Medina was prejudiced as a result thereof.

QUESTION II

DID PETITIONER CONVICTION AND SENTENCE WERE OBTAINED IN VIOLATION OF HIS SIXTH, AMENDMENTS RIGHTS OF THE UNITED STATES CONSTITUTION.

Petitioner Medina alleged that this conviction and sentence were obtained in violation of his constitutional rights under the Sixth Amendments to the United States Constitution.

Following the Petitioner, guilty verdicts on both the capital offense and its lesser-included counterpart, Petitioner Medina was sentenced to a term of Lwop on count-eight, and thirty (30) years consecutive on count nine. That the government conceded that count nine violated the double jeopardy clause; that the district court vacated the sentence and judgment as to count nine; does not cure that manifest injustice that occurred in allowing the case to proceed and be put to the jury for deliberations, fully aware that counts eight and nine violated the Double Jeopardy Clause; the conduct was egregious and affected "the framework in which the trial [proceeded], rather than simply an error in the trial process itself. See *Arizona v. Fulminate*, 499 U.S. at 310, 111 S.Ct. 1246. To simply suggest that vacating the sentence and judgment cures the structural error is contrary to the Sixth Amendment and Supreme Court Precedent.

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The government willfully created a "defect affecting the framework in which the trial proceed[ed], rather than created was structural in nature, was prejudicial and it affected the outcome of the proceeding in petitioner Medina case. "**Bruno**, 383 F.3d at 79. That prejudicial resulted in the Petitioner Medina's trial was fundamentally unfair and resulted in a sentence of LWOP on count eight and 51 years consecutive sentence on the remaining counts.

QUESTION III

UNDER THE CIRCUMSTANCES OF THE UNDERLYING CASE, CAN A REASONABLE JURIST FIND THE DISTRICT COURT'S ASSESSMENT OF MEDINA'S CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG ?

Before a Petitioner may Appeal the District Court's dispositive finding, a Certificate of Appealability must must issue. See 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). A Certificate of Appealability may issue only if the applicant has made the substantial showing of the denial of a constitutional right. 28

U.S.C. § 2253(3)(2).

When a court rejects a habeas petitioner on the merits, the substantial showing threshold is met if petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. See **Slack v. McDaniel**, 529 U.S. 473, 484-85 (2000). A petitioner satisfies this standard by demonstrating that...jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. **Miller-El v. Cockrell**, 537 U.S. 322, 327 (2003) (quotation marks omitted).

DISCUSSION

A review of Medina's petitioner and supporting memorandum of law in support of his § 2255 motion clearly provides that Medina has, in fact, made the substantial showing of the denial of several constitutional rights. To the extent that the district court concludes otherwise is belied by the record. That the district court vacated the judgment and sentence on count nine is in itself a prima facie showing that Medina was denied the effective assistance of counsel and was substantially prejudiced as a result thereof.

REASON FOR GRANTING THE PETITION

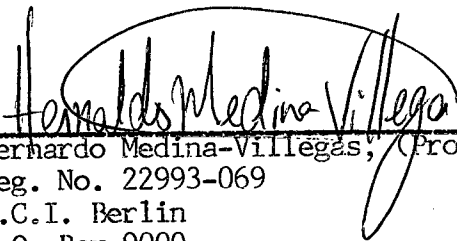
Petitioner was deprived of his right to an effective of assistance of counsel when both the Trial and Appellate Counsel Performance fell below an objective standard of reasonableness, and that deficient performance prejudiced his defense. The two part test for Constitutional Ineffective Assistance of Counsel was set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052 (1984); See also **Smullen v. United States**, 94 F.3d 20, 23 (1st Cir. 1996); **Knight**

v. United States, 37 F.3d 774. The Petitioner show counsel's representation fell below an objective standard of reasonableness, and that prejudiced his defense. See, **Owens v. United States**, 483 F.3d 48, 63 (1st Cir. 2007)(quoting **Strickland v. Washington**, 466 U.S. at 687-88, 104 S.Ct. 2052).

CONCLUSION

The Petitioner for a Writ of Certiorari should be **Granted** in the interest of Justice, Reputation for the Law and Respect for the United States Constitution under Equal Right.

RESPECTFULLY SUBMITTED


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