

19-5505 ORIGINAL

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

Supreme Court, U.S.  
FILED

JUN 04 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE HERNANDEZ CARBAJAL — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES FOURTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSE HERNANDEZ CARBAJAL  
(Your Name)

Reg No. 20418-057

(Address) P.O. Drawer 55030

McRae Helena, GA 31055

(City, State, Zip Code)

N/A

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

- I. Whether Petitioner's Sixth Amendment Rights to the Effective Assistance of Counsel Was Violated in the Follow?
  - a) When Counsel Failed to file a Notice of Appeal.
  - b) Failing to Object the PSR under 2L1.2(b)(1).
  - c) Misadvising Petitioner that if he Plea Guilty at arraignment, he would receive the benefit of the "Fast Track program."
  - d) Failing to Challenge Petitioner's Sentence based on the unwarranted
  
- II. Whether the District Court Failed to Grant The Petitioner An Evidentiary Hearing For The Development of Revelant Facts Relating To Petitioner's Sixth Amendment Of Law Violation Claims?

## LIST OF PARTIES

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

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

For cases from **federal courts**:

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 30, 2019.

No petition for rehearing was timely filed in my case.

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

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

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

For cases from **state courts**:

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

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

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

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

IN THE SUPREME COURT OF THE UNITED STATES

NO. \_\_\_\_\_

JOSE HERNANDEZ CARBAJAL,

Appellant/Petitioner,

USCA No.18-7534

Vs.

**USDC Civil No. 017-CV-01057-TDS-LPAD**

USDC Criminal No.1:00-CR-00297-TDS-1

UNITED STATES OF AMERICA,  
Appellee/Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

Jose Hernandez Carbajal, (hereinafter “Petitioner”), acting pro se, and do hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. In support thereof, Petitioner shows unto the Supreme Court as follow:

**JURISDICTION**

The Court of appeals entered its judgment as mandate on April 30, 2019. See (Appendix #1). This Court has jurisdiction under **28 U.S.C. § 1254(1)**.

## **CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED**

This case involves a federal criminal defendant's constitutional Rights under the  
The Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to... have the  
assistance of counsel for his defense.

This case also involves the application of **28 § 2253(c)**, which states:

1. Unless a circuit justice or judge issues a certificate of appealability, an appeal  
may not be taken to the court of appeals from:
  - A) The final order in a habeas corpus proceeding in which the detention  
complained of arises out of process issued by a state court; or
  - B) The final order in a proceeding under § 2255
- 2) A certificate of appealability may issue under paragraph (1) only if the applicant  
has made a substantial showing of the denial of a constitutional right.

## STATEMENT OF THE CASE

After a timely guilty plea to count one and two of the indictment, which charges Reentry of deported alien felon (CT1) in violation of title **8 U.S.C. § 1326(A) (B)(2)** and Distributed cocaine (CT2) in violation of title **21:841(A)(1) & (B)(1)(C)**. The Petitioner appeared for sentencing in the District Court of North Carolina, before the Honorable Judge Bullock JR., the United States District Judge sentenced a Petitioner to a term of 78 months imprisonment as to count one and two and 3 years of supervised release.

Hernandez-Carbajal filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in May of 2016. (Dkt# 30). In that motion, he raised one issue, shortly after Hernandez-Carbajal filed a Supplemental arguments, (Dkt#48), he raised four issues namely that his defense attorney rendered ineffective assistance of counsel by failing to file a notice of appeal; 2) failing to object to the PSR on the basis that under 2L1.2 (b)(1), Petitioner should had received a 12- level enhancement, rather than the 16- level enhancement, because no criminal history points were added under chapter four for the conviction which triggered the enhancement; 3)Petitioner’s counsel was ineffective for misadvising Petitioner that if he pleaded guilty at arraignment, the Petitioner would receive the benefit of the “Fast-Track program”; and 4) Petitioner’s Counsel was ineffective for failing to challenge Petitioner’s sentence based on the unwarranted disparities between other defendants of similar records found guilty of similar offenses.

The government thereafter moved to dismiss his petition by arguing that Hernandez-Carbajal’s motion should be denied based on the statute of limitations in 28 U.S.C. § 2255(f).” Hernandez-Carbajal shortly after filed a reply. On March of 2018. Thereafter, the Magistrate Judge file a report and recommendation arguing that Hernandez-Carbajal’s amended motion fails as a matter of law to its

untimeliness.” Therefore, the district court subsequently issued a Memorandum Opinion and Final Order dismissing the Petition and denying a certificate of appealability on December 11, 2019. (Dkt#60, 61). The district court found that Hernandez-Carbajal claims is baseless. Hernandez-Carbajal thereafter filed a notice of appeal on December 19, 2018. (Dkt# 62).

The Court of appeals entered its judgment as mandate on April 30, 2019. See (Appendix #1).

## **REASON FOR GRANTING THE PETITION**

### **1. The Petition Should Be Granted Because Hernandez-Carbajal’s Sixth Amendment Right to the Effective Assistance of Counsel Was Violated When Defense Counsel Failed to file a Direct Appeal.**

In this case Hernandez-Carbajal’s claim for relief stemmed from his attorney complete failure to file a Notice to appeal. In fact, Hernandez-Carbajal alleged that his attorney failed to file a Notice to appeal, to prevail on an ineffective assistance of counsel claim, a petitioner must meet the **Strickland** standard; specifically, a petitioner must show both deficient performance by counsel and prejudice. **Strickland v. Washington**, 466 U.S. 668, 687, 104 Sc.D. 2052, 80 L.Ed.2d 674(1984). “Surmounting **Strickland**’s high bar is never an easy task.” **Padilla v. Kentucky**, 559 U.S. 356, 130 S. Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). A party raising an ineffective assistance of counsel claim in a § 2255 Petition holds the burden of proving his or claims. **Pough v. United States**, 442 F.3d 959. 964 (6<sup>th</sup> Cir. 2006) Petitioner must “sustain [] his contentions by a preponderance of the evidence. “ **Pough**, 442 F.3d at. 964. The Strickland’s test applies to claims that

counsel was constitutionally ineffective for failing to file a notice of appeal. **Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).**”[A] Lawyer who disregard specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. “*Id.* This is because filing an appeal is a ministerial task, and a lawyer’s failure to do so, at the request of his or her client, reflects inattention to the defendant’s wishes rather than a strategic decision. *Id.* Accordingly, because the record is devoid that, Hernandez-Carbajal specifically asked his counsel to appeal his sentence through request. However, counsel failed to pursue the endeavor. Thus, counsel’s failure to appeal therefore constitutes constitutionally deficient performance. This conduct “mandates a presumption of prejudice because the adversary process itself has been rendered presumptively unreliable. “ **Roe, 528 U.S. at 471, 120 S. Ct. 1029.** Therefore, Hernandez-Carbajal’s certiorari Petition should be **GRANTED** on the aforementioned issue.

**2. The Petition Should Be Granted Because Hernandez Carbajal’s Amended §2255 Meritorious And Timely Because The Petitioner’s Transfer To State Custody And Counsel’s Glaring And Deliberate Abandonment Constitutes Extraordinary Circumstances Warranting Equitable Tolling Allows The Claims To Proceed Under The Doctrine Of “Equitable Tolling.”**

In this case Hernandez-Carbajal’s claim for relief stemmed from his attorney complete failure to communicate with him, despite various pleas from Petitioner that his attorney respond to his letter, but it never happened. Because, after the sentence was imposed, a Habeas Corpus ad Prosequendum was executed to Petitioner, thus, he was transferred to state custody [DO#16]. His transfer to State custody had made it more difficult for him to file a timely § 2255 motion, which satisfies the required showing of “extraordinary circumstances.” Cf. **Munchinski v. Wilson, 694**

counsel was constitutionally ineffective for failing to file a notice of appeal. **Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).**”[A] Lawyer who disregard specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. “*Id.* This is because filing an appeal is a ministerial task, and a lawyer’s failure to do so, at the request of his or her client, reflects inattention to the defendant’s wishes rather than a strategic decision. *Id.* Accordingly, because the record is devoid that, Hernandez-Carbajal specifically asked his counsel to appeal his sentence through request. However, counsel failed to pursue the endeavor. Thus, counsel’s failure to appeal therefore constitutes constitutionally deficient performance. This conduct “mandates a presumption of prejudice because the adversary process itself has been rendered presumptively unreliable. “ **Roe, 528 U.S. at 471, 120 S. Ct. 1029.** Therefore, Hernandez-Carbajal’s certiorari Petition should be **GRANTED** on the aforementioned issue.

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**F3d.308, 329-30 (3d Cir 2012); Pabon, 654 F3d at 399-400** (holding that “equitable tolling might be warranted when a non-English speaking petitioner could not comply with AEDPA’s statute of limitations because the prison did not provide access to ADEPA-related materials, translation, or legal assistance in his or her language.”) see **Val Verde v. Stinson, 224 F3d 129 (2d Cir. 2000)**(remanding case to district court for further factual development on extraordinary circumstance where defendant alleged that corrections officer intentionally confiscated his pro-se habeas petition and related legal material shortly before filing deadline).

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) imposes a one-year statute of limitations of filing a §2255 application 28 U.S.C. § 2255(a). This limitations period begins to run on “the date on which the Judgment [becomes] final by the conclusion of direct review or the expiration of the time for seeking such review.” *Id.*

“[R]are and exceptional circumstances” permit the equitable tolling of AEDPA’s one-year statute of limitations. **Gibson v. Klinger, 232 F.3d 799, 808 (10<sup>th</sup> Cir. 2000)** (quotations omitted). To qualify for equitable tolling, a Petitioner must demonstrate “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing.” **Holland v. Florida, 560 U.S.631, 649, 130 S.Ct.2549, 177 L.Ed.2d 130 (2010)** (quotations omitted). “An inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence.” **Yang v. Archuleta, 525 F.3d 925, 928 (10<sup>th</sup> Cir. 2008)** (brackets and quotations omitted).

In the Case at bar, Petitioner was transferred to State custody from June 05, 2001 to March 19, 2015. Petitioner’s sentence was issued on March 08, 2001 and the judgment became final on November 20, 2001. Thus, Petitioner argues that he should be entitled to “equitable tolling” because he faced extraordinary circumstances from

November 20, 2001, until December 22, 2016 because he had been transferred to State custody. Therefore, based on the “extraordinary circumstances” Hernandez-Carbajal’s certiorari Petition should be **GRANTED** on this issue.

### **3. The Court Erred When It Failed To Grant Hernandez-Carbajal An Evidentiary Hearing For The Development Of Relevant Facts Relating To His Sixth Amendment Of Law Violations Claims.**

**Section 2255 states:**

“ Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” **28 U.S.C. § 2255** (emphasis added). In the case at bar, it was an error for the district court to have dismissed Ibarra’s claims without first having conducted an evidentiary hearing, mainly because he “alleges facts that, if true, would entitle him to relief.” **Holmes v. United States, 876 F.2d 1545, 1552 (11<sup>th</sup> Cir. 1989)** (“holding that the district court must hold an evidentiary hearing where court cannot state conclusively that the facts alleged by petitioner, taken as true, would present no ground for relief). Here, because the record sheds no light as to Hernandez-Carbajal’s claim that his defense attorney rendered ineffective assistance of counsel because he “failed to file a notice to appeal”. Thus, it was an abuse of the district court’s discretion to have denied Hernandez-Carbajal the benefit to develop the claim in an open Court hearing. See, e.g., **Schriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L.Ed.2d 836 (2007)** (“when deciding whether to grant a federal habeas petitioner’s request for an

evidentiary hearing, ‘a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief’”). In fact, there was no evidence in the record which could conclusively reveal if his allegations that his attorney failed to file a notice to appeal. Accordingly, because the district court abused its discretion in failing to hold an evidentiary hearing, then Hernandez-Carbajal’s petition for certiorari should be granted, and the Fourth Circuit’s judgment vacated and the case remanded in light of **Wellons v. Hall**, 558 U.S. 220, ---, n.3, 130 S. Ct. 727, 731 n.3, 175 L.Ed.2d 684 (2010).

## CONCLUSION

**THEREFORE**, for all the above stated reasons, Hernandez-Carbajal’s petition for writ of certiorari to the United States court of Appeals for the Fourth Circuit and his motion for leave to proceed in forma pauperis should be **GRANTED**; wherein the judgment should be **VACATED**, and the case remanded to the Fourth Circuit for further development of the record in light of **Wellons v. Hall**, 558 U.S. 220, ---, n. 3, 130 S. Ct. 727, 731 n.3, 175 L.Ed.2d 684 (2010).

Respectfully Submitted,

Jose Hernandez Carbajal Jose

Jose Hernandez Carbajal  
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P.O. Drawer 55030  
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Date: June 04, 2019