19-5523

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Manuel Maldonado **Aguilar**-Petitioner, Pro se,

v.

UNITED STATES Of America-Respondent.

ON PETITION FOR WRIT OF CERTITIORARI TO PETITION FOR A

WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Manuel Maldonado Aguilar 26463009
Federal Correctional Institution
1900 Simler Avenue
Big Spring, TX 79720

QUESTION PRESENTED

1. Was petitioner's initial § 2255 Motion denied on the merit, for not demostrating or proving deficient performance or prejudice?

2. Was it legal for the district court to deny petitioner's refiled initial § 2255 Motion as a successive § 2255 Motion, without the authorization from the court of appeals, and the previous § 2255 Motion addressed the merits of each claims?

3. Was the district court's procedural ruling legal to deny petitioner's (1) Motion for reconsideration for his § 2255 Motion, (2) COA, and (3) to not answer the disqualification of the district judge?

4. Was it legally a contradiction when the district court first said we deny petitioner's refiled § 2255 as a successive and secondly the district court denied petitioner's request for Reconsideration with the COA?

5. Was it legal for the court of appeals to affirm the district court's procedural ruling by sidestepping the COA stage, and without petitioner's filing a COA brief?

6. Was petitioner's case decide on the merits?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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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

The opinion of the United States Court of appeals appears at Appendix J to the petition.

The opinion of the United States district court appears at Appendix F, and H to the petition.

JURISDICTION

For cases from **federal court:**

The date on which the United States Court of Appeals decided my case was on

The date on which the United States District Court of Arkansas decided my case was on

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

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED
(Rule 14(1)(f)

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,"

Amendment V

"... nor be deprived of life, liberty, or property, without due process of law;..."

Amendment VI

"... be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner's initial § 2255 Motion was denied on August 19, 2016, for unable to prove deficient performance or prejudice on ground one and two, the remaining grounds for other reason, and also denied COA.

On April 11, 2017 the United States Court of Appeals for the Eighth Circuit Denied COA.

This Court denied Writ of Certiorari on October 2, 2017 and rehearing on January 8, 2018.

On July 23, 2018 petitioner refiled a petition for a Writ of Habeas Corpus under this Court's decision in **Stewart v. Martinez-Villarreal,** 523 US 637, 188 S Ct 1618, 140 L Ed 2d 249 (1998)

On November 14, 2018 the district court denied the motion as a successive § 2255 and that the previous § 2255 Motion "...addressed the merits of each of his claims."

On November 29, 2018 petitioner put in a Motion for Reconsideration, for a Disqualification of Justice, Judge, or Magistrate Pursuant to 28 U.S.C.S. § 455, and for a COA.

On December 7, 2018 the district court denied petitioner's reconsideration under Civil Rule 59(e) and denied the COA. The court did not address the disqualification.

On May 9, 2018 The court of appeals summarily affirmed the district court's ruling and granted the in forma pauperis, without addressing the COA stage.

CONCISE ARGUMENT AMPLIFYING THE REASON FOR ALLOWANCE OF THE WRIT
(Rule 14(1)(h)(i)-(vi))

THE DISTRICT COURT ERRED BY SAYING THAT PETITIONER'S INITIAL § 2255 MOTION ADDRESSED THE MERITS AND FOR THAT REASON THE COURT DENIED THE REFILED § 2255 MOTION AS A SUCCESSIVE AND UNAUTHORIZED FROM THE COURT OF APPEALS

> The district court's reply to petitioner's refiled § 2255 Motion as: "He, however, argues that this habeas petition is not successive because the order on his previous petition did not reach the merits. Doc. No. 240 at 28 notwithstanding his argument, the previous order addressed the merits of each of his claims. See Doc. No. 222." (See CR Doc. 242 or Appendix F).

Petitoner will demonstrate that his previous petition was not denied on the merits.

Petitioner demonstrated that his initial § 2255 Motion was not denied on the merits (CR Doc. 240 p. 28-30 or Appendix E) because the court and the U.S Attorney did not demonstrate with evidence that there was no merits to suppress petitioner's arrest, protective sweep, consent to search, and the agents' names and statements that were not presented to the magistrate in the affiant's affidavit.

The district court said petitioner was unable to prove deficient performance or prejudice, when they also did not prove that the attorney was not deficient or prejudice by demonstrating with facts that the attorneys' (1) strategic decision, (2) frivolous, (3) DEA Group Supervisor Morman was given consent to search, and (4) that it was acknowledged at the suppression hearing that the sweep was valid, was not proven by the court as saying: it was proven by other circuits that it was valid and not in violation.

In prtitioner's initial § 2255 application (Appendix A) for ground one; and ground one and three in the memorandum that deals with lacking probable cause to arrest. In (CR Doc. 222 or Appendix B) the district court ruled that: "The decision not to investigate Abbott's Affidavit and to waive Maldonado's probable cause hearing were strategic, and strategic decisions do not rise to the level of ineffective assistance of counsel."

Here the district court relied on **Strickland,** 466 US at 689 and when you read 466 US at 690 strategic choices made after less than complete investigation are

reasonable and for the district court to say: "...decision not to investigate..." constitute definciency performance.

Petitioner did demonstrate but not in detail that his attorney was ineffective to not argue that there was no probable cause to arrest, but petitioner had facts that shows his arrest was illegal using case laws.

Petitioner does not agree with district court's ruling that the attorney's strategic choice by not investigating the agent's affidavit did not amount to ineffective assistance. **See Green v. Nelson,** 595 F.3d 1245, 1249(11th Cir. 2010) Stating that: "A failure to file a motion to suppress that is based on a lack of knowledge of the state of the evidence due to counsel's misunderstanding or ignorance of the law or failure to conduct adequate investigation can satisfy Strickland's deficiency prog."

For the lack of Knowledge of the attorneys not to have petitioner's arrest suppress cause in innocent person to be convicted. If the illegal arrest have been suppress there would not have been any evidence to use against petitioner because of the illegal arrest that cause the fruit of the poisonous tree and for that reason the attorneys' cause prejudice for petitioner's innocent. See CR Doc. 240 p. 41-44 or Appendix E) what would the government do without the probable cause to arrest.

Now for the second argument in CR Doc.222 or Appendix B, the court and the government also did not demonstrate how petitioner's arguments were frivolous, all the court said was: "Maldonado's lawyers had no basis to argue that these witnesses could not testify at the hearing."

Petitioner demonstrate to the court by using **United States ex rel. Pugh v. Pate,** 401 F.2d 6, 6,8 (7th Cir.1968) and **United States v. Hove,** 848 F2d 137,140 (quoting **United v. Leon,** 468 U.S. 897,923 (1984). In Hove the officers cannot cure the affidavit with later testimony and in Pugh the court said:"... that someone must take the responsibility for the facts alleged, giving rise to the probable cause..." and for other reasons. See also **United States v. Acosta, 501 F.2d 1330, 1334**(5th Cir. 1974) Where new information, either newly discovered or remembered, cannot be used.

For the agents to testify at the suppression hearing cause damage to

petitioner's proof that he was not part of the drug conspiracy. The magistrate judge credit the testimony of the officers without any corroboration. If an officer can be credited on their testimony they can fabricate a false allegation because there would be no evidence that they were a part of the investigation. That is exactly what happen at petitioner's suppression hearing. (See CR Doc. 240 p.50-53 or Appendix E)

The court and the district attorney did not prove otherwise that petitioner's argument is frivolous by using other circuit decision that the agents' testimonies were not illegal. (See CR Doc. 222 p. 3-4 or Appendix B)

Now for the third argument (CR Doc. 222 p. 4 or Appendix E) the court made was that petitioner signed: (1) consent to search form, (2) that it was acknowledged the the sweep was valid, and (3) the petitioner signed a Miranda waiver. And that the motion was denied at the suppression hearing.

The district court and the U.S. Attorney did not demonstrate that the attorneys' were not ineffective at the suppression hearing.

The attorneys' were lacking knowledge to argue that the protective sweep was done in violation of the Fourth Amendment. (See Appendix and CR Doc. 240 p. 34-38, and p. 44-47, or Appendix C) Petitioner did demonstrated that there was meritorious grounds for suppression issue for the protective sweep and consent to search.

On August 20th, 2014, Transcript of Jury Trial-Volume One p. 127. Vannatta ≤127. stated: "A. Yes we did, I exited my vehicle. I believe it was Detective Lott from LRPD and another LRPD officer was present. We moved toward the people that were in the front yard with our weapons drawn. We ordered them to get down on the ground. They did comply. Other..." (See Pro se Appellant Brief--application for COA, filed on October 3rd, 2016 p. 6 (16-3666) or Appendix M, and see CR Doc. 215 p. 6-7 or Appendix A)

The officers testified that the consent to search was freely given. Petitioner argue that the consent was not freely and voluntarily given because he was in a coercive atmosphere during the alleged signing of the consent to search form and petitioner did informed his attorney that he did not sign a consent to search form at his house, but sign alot of papers at the police station.

See Suppression Hearing Transcript of February 29th, 2012 p.24-25 or Appendix L. That states: "A. I remember it because I instructed the handcuffs to be remove so that he could read and sign the consent to search form.
Q. That's another issue that I have. The form that you said that he signed, are you positive that he signed at the home (sic) and not at the DEA office?
A. He signed this form in my presence at the DEA office. I never returned back to the DEA office after that night. I went home.

The DEA agent Moreman just said petitioner sign the consent to search form at the house and later on says he sign it at DEA's office. With this evidence the consent to search form was in contradiction of where it was signed, and it also prove that the officer was coached for his testimony.

There is also evidence that petitioner was hand cuffed at the time of the alleged signing of the consent form.

Testimony which was in direct contradiction to the officer's alleged testimony is extremely improbable, that proves the attorney was ineffective. These arguments were demonstrate to the court of appeals for COA.

In petitioner's initial § 2255 application (Appendix A) for ground three and ground Four in the memorandum that deals with protective sweep and consent to search.

Petitioner did proved that he did not give permission for the officers to enter his house and there was no exigent circumstance to do protective sweep. And the consent to search was not freely and voluntary given. Petitioner argued that: (1) the entrance to his house, (2) protective sweep, and (3) consent to search were all tainted by the illegal arrest.

In petitioner's arguments he used: Nueslein v. District of Colombia, Kick v. Lousiana, United States v. Mcphearson, and United States v. Fox.

In **Nueslein v. District of Colombia** , 115 F.2d 690,693 (D.C. Cir. 1940) states that: "The IVth and Vth Amendments relate to different issues, but cases can present facts which make the considerations behind these Amendments overlap. 6 The officers violated the security of the defendant under the IVth by unlawfully coming into his home and placing him in custody."

In Kirk v. Louisiana, 536 U.S. 635,638, 153 L.Ed.2d 599,603, 122 S. Ct. 2458 states that: "As Payton makes plain, police officers need either a warrant or probable cause plus exigent circumstance in order to make a lawful entry into a home. The Court of Appeals' ruling to the contrary, and consequent failure to asses whether exigent circumstances were present in this case, Violated Payton.'"

In **United States v. McPhearson, 469 F.3d 518,522-23 (6th Cir. 2006)** states: "My reading of this affidavit indicates that it is a bare-bones affidavit. It doesn't offer any indication that drugs or drug paraphernalia were inside the house. or that the officer had any reason to believe that they were inside the house.

Perhaps if the affidavit had said that based on this officer's experience in drug law enforcement, drug dealers often keep paraphernalia in there home, and one with 6.9 grams of crack cocaine likely had it for resale, and I, therefore, think there's somethig in the house--but none of that's here. It's a bare-bones affidavit; thereforem it's judgment that the Leon good-faith exception does not apply. The defendant's motion to suppress is, therefore, granted."

In **United States v. Fox, 600 F.3d 1253,1257 (10th Cir. 2010)** states: "Fox argues that although the encounter was initially consensual when Ms. Chiles stoped her car and asked what was going on, it soon became a seizure. Specifically, he contends that when Officer Osterdyk entered Ms. Chiles' car and directed her to drive to a nearby parking lot, Ms. Chiles was seized under the Fourth Amendment. We agree."

Petitioner argues that his illegal arrest lead to the "Fruit of the Poisonous Tree,'" that tainted the protective sweep and consent to search.

Also there is no evidence of exigent circumstance and attenuation for the protective sweep and no attenuation for the consent to search.

For Attorney Monterrey and Tellez not to demonstrate to the court at the Suppression Hearing with the above cases or similar cases to prove that their representation amounted to incompetence or ineffective under prevailing professional norms.

For the deficient preformance of the attorneys, petitioner lost his right to prove that he is innocent and for that reason it cause prejudice to petitoner to be locked up.

If the attorneys were successful to have the: (1) probable cause to arrest, (2) protective sweep, and (3) consent to search, suppressed, there would be no evidence for U.S. Attorney to use against petitioner. See Doc. 240 p. 34-41 and 44-49 or Appendix E. See also **United States v. Shrum,** 908 F.3d 1219 (10th Cir. 2018).

For the fourth argument (CR Doc. 222 p. 4-5 or Appendix B) petitioner argued that the attorney was ineffective because he did not withdraw him self after the first trial and the court said: " This argument is wholly without merit" what petitioner was saying is that if another attorney had done the appeal s/he would had seen or notice a plain error or a violation where the attorney did not preform professional. petitioner see this as ineffective assistance of counsel. A new Attorney could have argued as these arguments before the court.

For the attorney not to withdraw himself from the case, it cause prejudice to petitioner, for losing the plain error review by the court of appeals. See CR Doc. 215 p. 8-9 or Appendix A.

On the sixth argument (CR Doc. 222 p.5 or Appendix B) was dismissed by the court because the issue was raised during both appeals. The argument by the court is not clear, but it does say see **United States v. Aguilar,** 617 F. Appx. 603, 606 (8th Cir.2015) and 743 F.3d 1144, 1148 (8th Cir.2014).

The evidence of the spare tires-disassembly tools, the electronic scales and 46,000 in cash, where suppressed, there would be no beyond reasonabledoubt.

REFILED § 2255 MOTION

For above reasons, it was not legal for the district court to deny petitioner's refiled § 2255 motion as a successive, without authorization from the court of appeals, and that the previous § 2255 motion was denied on the merits.

THE DISTRICT COURT'S PROCEDURAL RULING

Petitioner gave the district court to reconsider their denial of petitioner's refiled § 2255 motion, and asked for a disqualification of the district judge, and asked for a COA.

The district court's procedural ruling was wrong, becuse petitioner's previous § 2255 motion was not dicided on the merit and COA should have been granted. See CR Doc. 244 or Appendix G.

The disqualification of the judge should have been granted because the judge was bias. See CR Doc. 244 p.4 or Appendix G .

DISTRICT COURT'S CONTRADICTION

From the start the district court said petitioner's § 2255 Motion was a successive motion under § 2255(h) and that it was not authoriz from the court of the appeals. (CR Doc. 242 or Appendix F) And then the district court says because Aguilar has not made a substantial showing of denial of a federal constitutional right, a certificate of appealability is denied.

When petitioner ask for a COA the district court should have said they do not have jurisdiction because it is a successive § 2255 Motion, This is why it was a contradiction of the district court's own saying. See CR Doc. 242 Appendix F and or Doc. 245 or Appendix H)

COURT OF APPEAL'S SIDESTEPED THE COA

On December 21, 2018 the district court said they sent the Presentence Investigation Report to the court of Appeals. See CR Doc. 253 or Appendix K. Then on December 19. 2018 the court of Appeals filed Sealed PSI Report. See 18-3699 or Appendix I. Also See court of appeals docket sheet at Appendix I.

> On May 9, 2019 the Court of Appeals for the Eighth Circuit said: "This court reviewed the original file of the United States District Court."

The only docket that was sent or filed with the court of appeals, was the PSI Report and not the § 2255 Motion and why did the court of appeals say that they summarily affirmed the judgment of the district court? The court of appeals side stepped the COA stage, just as it is in **Buck v. Davis**, 137 S. Ct. 759(2017). See Appendix D.

CONCLUSION

Petitioner is demonstrating to this Court that it was a violation of his Fourth, Fifth, and Sixth Amendments.

It was not legal, where the district court said that petitioner was denied on

the merits for his initial § 2255 Motion on his refiled 2255 Motion and for that reason it violated the due process of the Fifth Amendment.

Petitioner has demonstrated to this Court that there was no probable cause for his arrest and no corroborating evidence for the agents to testify at trial and suppression hearing that they were part of arrest and search or petitioner's house. Petitioner was denied his Fourth and Fifth Amendments, because he was denied his Sixth Amendment to effective assistance of counsel, where the attorneys failed to investigate the affiant's affidavit for probable cause and corroborating evidence for the agents testimonys.

Respectfully Submitted on August 5, 2019

/S/ _____

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