No. 19-5897

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Carlos Nogales — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

4th Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carlos Nogales
(Your Name)
No. 23884-171

805 North Ave. F
(Address)
Post, TX 79356

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO ARGUE 4th CIRCUIT PRECEDENT REGARDING THE MEANING OF CODE WORDS

WHETHER TESTIMONY FROM AN UNRELIABLE CRIMINAL INFORMANT ON THE GOVERNMENT'S PAYROLL IS SUFFICIENT TO PRESENT TO A FEDERAL COURT AND OBTAIN A WARRANT TO EAVESDROP ON A CITIZEN

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE ATTORNEY FAILED TO BRING UP THE INDICTMENT CHARGED ONE CONSPIRACY WHERE THE EVIDENCE SUGGESTS CONCLUSIVELY SEVERAL CONSPIRACIES BETWEEN THE CRIMINAL INFORMANTS AND DEFENDANTS

WHETHER PETITIONER HAS ANY VIABLE CLAIMS OF INNEFFECTIVE ASSISTANCE AND HAS MADE A SUBSTANTIAL SHOWING OF FOURTH, FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL VIOLATIONS

LIST OF PARTIES

[X] 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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INDEX TO APPENDICES

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 "B" 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☒ is unpublished.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 "C" 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☒ is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts:**

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

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 09-16-2019, and a copy of the order denying rehearing appears at Appendix "A".

[ ] 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).

LETTER DATED 07-18-19, GAVE PETITIONER 60 DAYS TO MAKE CERTAIN CORRECTIONS.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AND STATEMENT OF THE CASE

SEE ATTACHED MOTION ON PAGE NO. 1

III

REASONS FOR GRANTING THE PETITION

The question of whether testimony from an unreliable "Informant" (C.I.) working for the Government or "Sources" on the Government's payroll to deliver information that is unverified and later used to obtain warrants and eavesdrop on U.S. Citizens is very important as it affects people everyday and their Constitutional rights are violated based sometimes on biased, political and even dishonest actions by Government agents.

We can appreciate the parallel of the instant case with the warrants that were obtained against former Trump campaign aides based on flimsy evidence from debriefed informants and used as a justification to listen to the Trump campaign as part of a probe that showed political bias.

Currently, there are no safeguards against this type of action or how law enforcement behaves with this false information sometimes exercising their authority unethically to infringe on the rights of U.S. Citizens.

On the case at hand, not only perjured information from a Criminal Informant was used to obtain a cell phone "Tap Warrant", but later it was alleged by the Government that these conversations were in "code" and used as the factual basis for the conviction.

As the record shows, Defense Attorney did not argue this important issues along with many others and adviced Petitioner to a guilty plea clearly denying Petitioner effective assitance of counsel.

Accordingly, this Honorable Court should grant the petition with instructions to further elaborate on the issues or any relief it deems just.

TABLE OF AUTHORITIES CITED

IN THE SUPREME COURT OF THE UNITED STATES

Carlos Nogales Petitioner V. UNITED STATES OF AMERICA Respondent	No. 18-6849(L) 6:12-cr-00328-JMC-2 6:15-cv-03044-JMC **PETITION FOR A WRIT OF CERTIORARI**

COMES NOW, Carlos Nogales, pro se, and files the above styled motion.

I. LIBERAL CONSTRUCTION

Petitioner requests that this honorable court, construe this pleading liberally and to less standards than formal pleadings drafted by lawyers in light of **Haines v. Kerner**, 404 U.S. 519,520-521, L. Ed. 2d 652, 92 S.Ct. 594 (1972).

II. BACKGROUND

On 01-13-2014, Petitioner plead guilty to conspiracy to possess 5 kilograms or more of cocaine. On 07-29-2014, after two separate sentencing hearings, Petitioner was sentenced to a mandatory ten year sentence. Petitioner filed a motion pursuant to 28 U.S.C. §2255, claiming ineffective assistance of counsel on 07-29-2015. The Government responded on 09-23-2015. Petitioner replied to the Government's response on 11-23-2015.

III. STATEMENT OF THE CASE

The Government makes a number of claims against Petitioner that are unsupported, internally contradictory, contrary to law and against the Constitution of the United States.

Petitioner presents the following issues to the court for review and prays this court remand the case for further proceedings.

Petitioner a minority business owner, owned and operated a night club in the Greenville S.C. area since 2004. The Government in its effort to arrest Petitioner had at least half a dozen Criminal Informants offering Petitioner drugs and guns for many months as it tried to make a case against Petitioner. This approach by the government reeks of entrapment and fails to establish a conspiracy as the evidence suggests. When the government deprives a person of life, liberty or property, it is required to use fundamentally fair processes.

Petitioner tried to establish his "actual innocence" as is clearly visible from his conduct at the sentencing hearing of July 29, 2014, and the District Court itself concedes on Page 5, bottom footnotes of Order and Opinion to the denial of Petitioner's §2255: "At Petitioner's July 29, 2014 sentencing hearing, Defendant attempted to state his innocence and rescind his guilty plea," This statement is clear and convincing evidence that the plea was entered unknowingly, not well-informed and involuntary.

Under Fed. R. Crim. P. 11(b)(3) a court must determine there is factual basis before accepting the guilty plea. A guilty plea based on facts that fail to support a conviction seriously affects the fairness of judicial proceedings, See, e.g., U.S. v. Palmer, 456 F. 3d 484 (5th Cir. 2006)

To date, the Criminal Informants remain anonymous and their testimony was used by the Government to maintain that Petitioner was a distributor of illegal drugs even when there was no witnesses to support this allegations. The government in ECF 723 cannot point out to one co-defendant who conspired with Petitioner to distribute 5 Kgs or more of cocaine. (See also ECF 591,594).

ECF- Refers to Electronic Court Filing or Docket No.

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO ARGUE 4th CIRCUIT PRECEDENT REGARDING THE MEANING OF CODE WORDS

The Government in its response dated 09-23-2015, (ECF 723) to Petitioner's §2255 motion states,

> "The primary evidence on which the Government relied to establish Nogales conspired to distribute more than 5 kilograms of cocaine occurred on July 7th and 8th 2011. On these dates, Nogales had a recorded conversation(s) with a confidential source working for the Government in which he discussed with the source the possibility of transporting cocaine using a car Nogales' had with a hidden compartment that could store up to 14 kilograms of cocaine." (See G.R. Pg 2 ¶3)

The independent P.S.R. paragraph No. 51 also states in part,

> "On July 8, 2011, the CS and Nogalez spoke on the phone two times. The phone calls were recorded and monitored... During the second call on the same day, the CS **used coded phrases** and advised Nogales that he/she had just spoken with the 'ex'".

According to the Government, the critical parts of this conversation or factual basis for the conviction were allegedly in code. Petitioner avers that the characterization of this recordings on 07-07-2011 and 07-08-2011, are incorrect. The Government alleges that Petitioner is discussing plans which involves a purchase and shipment of cocaine using unverified "coded words" in spanish.

The alleged conversation by the Government is in fact about a car.

The Criminal Informant tried very hard to involve Petitioner about a plan or scheme to transport drugs. Petitioner says nothing about the plan and the car gets sold to some else. This is inconsistant with the alleged conspiracy. Petitioner at no point agrees to be involved in this transaction.

G.R.- refers to ECF 723

The Government in its translation of this conversation claims to be in "coded spanish" but fails to present evidence to support this claim. An independent translation by Defense Attorney would have shown the Government's allegations of code to be false.

The failure to obtain a translation of a conversation the Government claims to be its' primary evidence, despite repeated requests from Petitioner, fell below an objective standard of reasonableness as measured by prevailing professional norms under Strickland. Attorney had no realistic outline of the conversation or what evidentary strenghts the Government held. Attorney did not assess this conversation between the Criminal Informant and concluded there was a strong case against Petitioner.

Attorney informed Petitioner that he never reviewed the recording during a visit at the Spartanburg County Jail. Attorney even wrote a note on top of the P.S.R. Page No. 15 where he circled and noted "Never Heard recording". (See Appendix "G")

(BLANK)

Even if Petitioner would have had this alleged conversation with this Criminal Informant and a conspiracy could be established between a Defendant and a Criminal Informant, and Petitioner does not concede that he did, allegations by the Government of the meaning of "code words" may not be sufficient to support a given drug amount or even drug activity as laid out by the 4th Circuit Court of Appeals. See, e.g., United States v. Johnson, 617F.3d 286, 293 (4th Cir. 2010) (an officer's interpretation of wiretapped phone calls based on his "credentials and training, not his observations fromthe surveillance" did not qualify him to offer lay testimony).

Additionally, this primary evidence or factual basis by the Government of the conversation with the Criminal Informant, could not have been admissable under either application of Fed. R. Evid. 701, as the agents doing the translation in the state of California did not have personal knowledge of the case, or under Fed. R. Evid. 702, on vagueness and lack of reliable methodology. See, e.g., United States v. Peoples 2250 F. 3d 630 (8th Cir. 2000).

Failure to conduct an adequate or reasonable investigation prior to advising Petitioner to accept a plea is deficient performance by Defense Attorney. In Strickland, the Supreme Court recognized that "counsel has a duty to make reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary".

This failure by Attorney cannot be couched in strategic terms as a translation could always have been discarted. How can Attorney competently advise Petitioner to plead guilty without examining the primary evidence?

The issue of whether counsel's failure to raise this issue and 4th Circuit precedent under **Johnson**, defies logic. What is troubling about the District's Court denial of Petitioner's §2255 motion is that both a violation by counsel's performance and prejudice were clearly stated but the court did not address the issue. (See, ECF 748)

It is respectfully submitted that where counsel omits without legitimate strategic purpose a significant and obvious issue his performance is deficient. **Mason v. Hanks**, 97 F.3d 887, 893 (7th Cir. 1996) Indeed, there appear to be categories of counsel's omissions that no strategic reason can cure. See, **Towns v. Smith**, 2003 WL 21488333 (E.D. Mich. 2003); aff'd. 395 F.3d 251 (7th Cir.2005) (failure of trial counsel to interview witness and failure of appellate counsel to raise issue could not be deemed strategic). Nonetheless, a petitioner can establish constitutionally deficient assistance of counsel if counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker". **Clark v. Stinson**, 214 F.3d 315 322 (2nd Cir. 2000) (See, ECF 748)

Here, there is no obvious strategic reason for counsel to have omitted the "coded phrases" issue from the start of case. Counsel did not file or even made one objection to the government's case despite the lack of evidence or argue about the alleged conspiracy with the Criminal Informant. Even an objective assessment of counsel reveals the inadequacy of representation and cannot be deemed strategic or reasonable. On the contrary, it demonstrates that counsel omitted a significant and obvious issue relating to "coded words" under 4th Circuit precedent. See, **Johnson**, supra. Counsel never even made an effort to listen to the recordings as he noted on top of PSR Pg. 15 in his own hand writting "NEVER HEARD RECORDING". (See Appendix "G")

IV ARGUMENT

WHETHER PETITIONER ENTERED A WELL-INFORMED, VOLUNTARY AND KNOWING PLEA DESPITE A SUBSTANTIAL SHOWING OF FOURTH, FIFTH AND SIXTH AMENDMENT VIOLATIONS

Under 4th Circuit precedent, prior to trial, "an accused is entitled to rely upon his counsel to make an independent examination of the facts circumstances, pleadings and laws involved and to offer his informed opinion as to what plea should be entered" See, **Jones v. Cunningham,** 313 F. 2d 353 (4th Cir. 1963). The Supreme Court has also ruled that ineffective counsel constitutes advising a client of an incorrect legal rule and prejudice is presumed when an opportunity for a more favorable result was lost. See, **Laffler v. Cooper,** 132 S. Ct. 1376 (2012). The same principle holds here, as failure to provide accurate legal advice pertaining to a conspiracy constitutes deficient performance by Defense Attorney and pleading was clearly prejudicial and unknowingly.

The first prong of the **Strickland** test is satisfied when counsel fails to provide accurate advice to a client on the ramnifications of accepting or rejecting a plea, **Padilla v Kentucky,** 559 US 356 (2010) Such misinformation or incomplete information reveals counsel's expertise to be below the level of that expected legal community. 559 U.S. at 366

The second prong of the test is satisfied once a defendant demonstrates "that but for the ineffective advice of counsel there is a reasonable probability that the result would have been different. In Petitioner's case, he would have insisted on going to trial and plead not guilty.

At a minimum this court is respectfully urged to order an evidentiary hearing to determine whether counsel's failures to raise the issues stated was error or unsuccessful strategy. **Carrier v Hutto** 724 F.2d 396, 403 (4th Cir 1983 on reh'g 754 F2d 520 (4th Cir 1985) judgment rev'd 477 US 478 106 S Ct 2639 91 L Ed 2d 397 (1986) (case remanded to district court to determine whether failure of appellate counsel to raise Brady issue amounted to unsuccessful strategy)

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE ATTORNEY FAILED TO BRING UP THE INDICTMENT CHARGED ONE CONSPIRACY WHERE THE EVIDENCE SUGGESTS CONCLUSIVELY SEVERAL BETWEEN THE CI'S AND THE DEFENDANTS

Where the conspiracy involves a defendant and a government informer, there can be no conspiracy because it takes two to conspire and the government informer is not a true conspirator. See, **U.S. v. Martino**, 648 F.2d 367, 405 (5th Cir. 1981).

The factual basis or response to Petitioner's §2255 motion (ECF 723) by the government does not point out to even one witness who is not a Criminal Informant and entered into an agreement with Petitioner or had a meaningful interaction about the alleged conspiracy. The evidence suggests individual conspiracies between Petitioner and the Criminal Informant, or co-defendants and the Criminal Informants. The Supreme Court has also ruled that an informant cannot be the center of a larger conspiracy, and the government's allegations are ruled out by the hub-spokes theory laid out in, **Kotteakos v. U.S.** 328 U.S. 750, 754-55, 90 L. Ed. (1946)

It is undisputed that no actual narcotics were ever transacted or found between this Criminal Informants and Petitioner. The government alleges to be a number or recordings in "code" but no transactions. Through the selective editing of the coded recordings the government suppositions about words that may or may not be drugs cannot and should not be used as proof of drug activity or drug quantities as laid out Johnson, see supra. The government undertakes controlled purchases of drugs all the time. It is not credible that they could not buy or sell narcotics from an alleged willing participant in the alleged transaction. The record clearly reveals these facts during Petitioner's sentencing where he states " I never provided any drugs, I never went along with the deals" given his belief that he was factually innocent. (See also, ECF 808, footnotes)

In sum, Petitioner was alleged to be the head of a drug conspiracy yet none of his alleged co-conspirators who cooperated with the Government testified as to any actual drug activity in concert with him. The Government in its effort tried to establish a conspiracy with at least half a dozen Criminal informants for many months. In the face of this evidence the government fails to prove a conspiracy.

In its entirety, as the Government itself concedes, these Criminal Informants were incredible and their declarations or testimony does not presume another codefendant acting in furtherance of a conspiracy. CO1, whose testimony was used to obtain a warrant, also commited perjury.

> PSR Page#13, ¶44 (bottom)-""According to the Assistant U.S. Attorney in this case, CO1's information is not credible..."
>
> PSR Page 13, ¶42 (bottom)- "numerous confidential sources of information related that Carlos Nogalez was a multi-kilogram distributor..." "Upon consultation with the U.S. Attorney in this case, The Government cannot prove by preponderance of the evidence the Defendant's involvement..."
>
> PSR Page 13, ¶43 (bottom)- "CS3 had a conversation with Nogalez in an unsuccessful attempt to purchase ounce quantities of cocaine..."

Petitioner was denied effective assistance of counsel because counsel failed to request an evidentiary hearing and compel the government to prove, by a preponderance of the evidence, that an adequate factual basis existed to establish the alleged conspiracy.

Petitioner's lack of access to resources especially not being able to attain the transcripts of these conversations and Attorney not making an effort to provide one even when it was the factual basis for the conviction, supports inefficient representation by Attorney and as a result, Petitioner's guilty plea was not entered voluntarily and knowingly.

WHETHER TESTIMONY FROM AN UNRELIABLE CRIMINAL INFORMANT ON THE GOVERNMENT'S PAYROLL IS SUFFICIENT TO PRESENT TO A FEDERAL COURT AND OBTAIN A WARRANT TO EAVESDROP ON A CITIZEN

The affidavit for obtaining the warrants to tap Petitioner's phone refer to uncorroborated and false statements by the "CO1" (supra) Informant. This act by the Government undermines the 4th Amendment particularity and specifity requirements of probable cause. The affidavit also refers to warrantless GPS tracking devices that had been placed on Petitioner's vehicles, in particular a Dodge Durango that Petitioner owned. The U.S. Supreme Court has ruled that, "instalation of global positioning system (GPS) device on Defendant's vehicle, and its use of that device to monitor the vehicle's movements constituted a'search'" or Fourth Amendment violation. See, e.g., United States v. Jones, 565 U.S. 400 (2011) Even if the trackers were installed before U.S. V. Jones was decided, the Government knew it was being reviewed on Certiorari and should have seeked a warrant by the court. The perjury and GPS argument would have made the warrant application moot as the exclusionary rule applies to "evidence obtained during illegal police conduct" as well as "evidence that is the indirect product of illegal activity".

As such, these recorded conversations between the Criminal Informant and Petitioner are a clear case of the fruit of the poison tree doctrine and also the cornerstone of the Government's case against Petitioner as it was the factual basis for the conviction. Further the government was already tracking Petitioner's movements by pining his cell phone without a warrant.

Under the assertions by Petitioner counsel should at least be ordered by the court to answer to factual allegations submitted herein. Blackledge v Allison 431 US 63 (1977) (court should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge)

In a case largely built on the false testimony of Criminal Informants as the government states on PSR page No. 13, ¶44 ("According to the Assistant U.S. Attorney in this case, CO1's information is not credible") and where no money was ever transacted or found and at no point Petitioner ever bought or sold drugs to anybody in this investigation nor agents ever seize any drugs or money from Petitioner during or after the investigation, the evidence presented by the government fails to meet the necessary threshold for conviction or to tap Petitioner's phone. (Warrant application refers to CO1's statements)

On the basis of counsel's unreasonable misunderstanding of federal criminal procedure and by failing to understand the Fourth Amendment protections against unreasonable searches and the mechanism established by Congress that it rquires presenting a magistrate judge with "specific and articulable facts" to demonstrate the data is "relevant and material to an ongoing criminal investigation", counsel offered ineffective representation and Petitioner's plea was involuntary and not well-informed.

For these reasons, as demonstrated, under Fourth Amendment violations by the government and by failure of the district court to come to the conclusion that this factors represent counsel's ineffectiveness this court is urged to review de novo and determine whether Petitioner's guilty plea was informed and voluntary.

The Supreme Court has also ruled that where an issue of fact is presented "the only admissible procedure" is to issue the writ, have the Petitioner produced and hold a hearing at which evidence is taken by examining witnesses or receiving their depositions "to determine the facts of the case by hearing the testimony and arguments". See **Walker v Johnston** 312 US 275 85 LED 830 (1941)

Denial For Discovery And Expansion of Record

Petitioner filed a Motion for Discovery and Expansion of Record pursuant to Rule 7 of §2255 proceedings back in May 3, 2017. He addressed the aforementioned issues concerning 4th Amendment violations in it. The motion was denied, then Petitioner filed a motion for Reconsideration which was also denied. Petitioner appealed the decision and 4th Circuit incorporated it into the same appeal. Accordingly, he addresses the same in the instant motion.

The Supreme Court has concluded that "Good Cause" for discovery has been shown "where specific allegations before the court show reason to believe that the Petitioner may, if the facts are fully developed, be able to demonstrate the he is... entitled to relief". See, e.g., Bracy v. Gamley, 520 U.S. 899 908-909,117 S, Ct 1793, 1799, 138 L. Ed 97 (1997)

Suppression of exculpatory evidence or knowing use of perjured testimony violate due process and these claims may also be raised in a §2255 motion. Rule 6 of the Rules Governing §2255 cases, prescribing discovery procedures in federal habeas corpus cases, is meant to be consistant with Harris v. Nelson 394 U.S. 286 22 L Ed 2d 281,89 S Ct 1082 (1969), as stated by the Supreme Court. Petitioner case is similar to Harris v. Nelson which was reversed and remanded by the U.S. Supreme Court and authorized interrogatories for the purpose of obtaining evidence from affiants where affidavits admitted in evidence are based solely on the statements of unreliable informants. In the instant case, CO1 perjured testimony was used to tap phone.

Petitioner requested inter alia, the transcript and recording of the conversations with the Criminal Informant which the Government claims to be the factual basis and the affidavit for the warrant to tap Petitioner's phone which led to the recordings.

The Supreme Court has also ruled that a federal prisoner's claim that he was convicted on evidence obtained in unconstitutional search and seizure was cognizable in postconviction proceedings under 28 USCS §2255. As aforementioned, instalation of warrantless GPS on Petitioner's vehicles (see affidavit to obtain warrant) and the use of perjured testimony from CO1, amply demonstrates unconstitutional violations. See, **Kaufman v. U.S.** 394 US 217, 22L Ed 2d 227, 89 S Ct 1068.

As aforementioned, permitting an agent to give his lay opinion or expert in the conversation with the Criminal Informant when he has not factually investigated the case or presented a reliable "code" methodology contravenes both the letter of evidentiary rules 701, 702 and this court's precedent under Johnson, Supra.

Petitioner sent Attorney at least two letters stating this crucial matters. Despite Petitioner's repeated requests he did not seek a translation. (See Copy of Letter Sent by Petitioner) An independent translation of this alleged transaction would have shown that infact there is no code language in the converstation. The selective quotations of this conversation also provides no insight as to the entire context of the conversation which was in spanish in its entirety or provides no safeguards to ensure that the conversation was not lost or meaningfully altered in the process of the translation from Spanish to English and from "coded" to decoded.

In evaluating counsels performance and the prejudice to Petitioner as a result of counsel's failure to understand Fed. R. Evidence 701 702 and Johnson, it is fair to say that Petitioner's guilty plea was not voluntary, knowingly or well informed and at the very least the "Rule 7 Motion for Discovery and Expansion of Record" should have been granted.

Rule 11 Hearing

Petitioner was in no position to judge the performance of the Attorney. Petitioner is a lay litigant untrained in the art and science of the law. Additionally, the county jail did not have a law library or access to legal resources. Petitioner expressed satisfaction with the performance of Attorney as far as the Rule 11 plea hearing on 01-13-2014, as he was coached by Attorney as to what to say. But for Attorney's ineffective assistanceofof counsel Petitioner would not have plead guilty and insisted on going to trial.

Apparantely, Attorney even failed to object to the P.S.R. as the Government claims on its response to Petitioner's §2255. (See ECF No. 723, Page 2 notes) Attorney never informed Petitioner of this course of action or the tactical motive behind it. Petitioner tried to explain to the court that he did nothing wrong and conceded his personal drug use at a retail level. Petitioner did not understand where the five kilos of cocaine attributed to him were comming from and stated his innocence. As the District Court states, Petitioner was not comfortable with the guilty plea. The claims, while not in correct legal format during his sentencing hearing, speak to Petitioner's belief in his factual innocence. But for Attorney's advice Petitioner would not have pled guilty as indicated by his outbursts in open court. (See Sentencing Transcript 07-29-2014)

The Distric Court is focused on Attorney's effort at sentence mitigation, "the court commented that Petitioner's counsel had done a 'fine job' having negotiated with the Government to decrease Petitioner's guideline range..." (ECF 808, Pg 4) The efforts at sentence mitigation is not at issue on Petitioner's §2255, the issues at hand is that the case was not subject to even basic adversarial testing and as a result a guilty plea was extracted.

Furthermore, the use of overcharging and petitioning for draconian sentences to extract guilty pleas from innocent defendants is a common Government tactic which is morally wrong, does not enhance respect for the law and has been heavily criticized. While the District Court's review of Attorney's performance is defferential, it is not a rubber stamp. Rubber stamping Attorney's performance would completely undermine the intent of the sixth Amendment's guarantee of effective assistance of counsel.

Discriminatory Prosecution

For a selective prosecution claim, a claimant must demosntrate that similarly situated individuals of a different race were not prosecuted. Petitioner addressed this issue back in August 5, 2013 to the District Court in his letter. This court only needs to read P.S.R. ¶38 about Zachary Henderson, an ex-marine who conspired with co-defendant Natali Restrepo, Agents found at Henderson's residence "a canvas bag buried approximately one foot in the ground behind the residence. Located inside the canvas bag were numerous clear bags containing what was later determined by laboratory analysis to be 27.78 grams of methamphetamine, 93.78 grams of cocaine, 2.89 grams of heroin and .27 grams of marijuana". At his other residence the agents ofound and "seized a Beretta Model 21A semiautomatic pistol, a North American Arms NAM 22LR revolver, a Ruger P95 semi-automatic pistol with two magazines, a single barrel sawed off 12 gauge shotgun, approximately 23 rounds of 9 millimeter ammunition, and approximately34 rounds of .22 caliber ammunition" "Agents also located $2576 in U.S. Currency.., Paca Body Armor along with $2910 in U.S. currency in the second bedroom ..." yet Zachary Henderson does not get indicted in the said conspiracy. Further details are in Discovery which Petitioner was not allowed to have and only saw briefly. (See PSR ¶38)

V. GROUNDS FOR RELIEF

1. Failure to test Factual Basis
2. Failure to challenge 4th Amendment violations
3. Permitting interview while under the influence of narcotics at time of arrest
4. Failing to take notes on all interviews
5. Plain error during Rule 11 hearing, since there was no sufficient factual basis
6. Discriminatory Prosecution

It is undisputed that no actual narcotics were ever transacted or found. The Government alleges to be a number of recordings with Criminal Informants in "code" but no transactions. Speech without more is a protected right under the First Amendment. The Government cannot point to one witness who is not a Criminal Informant who had a meaningful interaction with Petitioner. Through selective editing of the aforementioned recordings, the Government suppositions about words that may or may not be drugs cannot and should not be used as proof of drug activity or drug quantities. Failing to examine the Governments primary evidence is severly defficient performance and advising Petitioner to plead guilty is clearly prejudicial, particularly given Petitioner's belief that he was factually innocent as stated by the District Court in the Opinion and Order Page 5 footnotes.

A. Ineffective Counsel

Habeas corpus relief is fully warranted because counsel's unreasonably deficient performance caused Petitioner to plea guilty.

The Constitution guarantees an accused the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984)

The first prong of the **Strickland** test is satisfied when consel fails to provide accurate advice to a client on the ramifications of accepting or rejecting a plea, **Padilla v. Kentucky**, 559 U.S. 356 (2010) Such misinformation, or incomplete information, reveals consel's expertise to be below the level of that expected legal community. 559 U.S.at 366.

The second prong of the test is satisfied once a defendant demonstrates "that but for the ineffective advice of consel there is a reasonable probability that the result would have been different".

As demonstrated hereinafter, the District Court's denial of relief should be vacated by this court on all grounds on the instant motion and this Honorable Court should grant Petitioner a remand to further elaborate on direct appeal as the District Court erred in not acknowledging the facts of the case.

Factual Basis

First, the district court failed to recognize that Attorney was ineffective in failing to review the conversation the Government claims to be its' factual basis. An independent translation would have proved that selective quotations can prove anything, if you have clever searchers looking for them, and the Government's inaccuracies, in the sum of their definitions of code to be fantastic.

Failure to challenge 4th Amendment Violations

Second, the district court failed to recognize that Attorney was ineffective by not challenging the false statements by the Criminal Informants in the affidavit to tap Petitioner's cell phone along with the warrantless GPS trackers that were placed in Petitioner's Dodge Durango. (See Cell Phone Warrant Affidavit)

Permitting interview

Third, the district court failed to recognize that Attorney was ineffective by allowing client to proceed in an interview while intoxicated. Attorney should have advocated the Fifth Amendment of the Constitution instead and proceeded by filing a **Brady** motion to get the facts of the case and seek the evidence against Petitioner. (See Toxicology Report P.S.R. ¶ 113)

Failing to take notes

Fourth, the district court failed to recognize that Attoney was ineffective by not even making the effort of taking notes about the case and at one point even offered to take the stand and state under oath about certain inaccuracies by the Government. (See Sentencing Transcript 07-29-2014)

Plain error

Fifth, the district court failed to recognize the error in taking Petitioner's guilty plea as the factual basis was insufficient to support a conspiracy charge. (See, Plea Hearing Transcript for 01-13-2014)

Discriminatory Prosecution

Sixth, the district court failed to acknowledge Petitioner's letter filed August 5, 2013, on which it clearly stated how similarly situated individuals of a different race were not being prosecuted by the Government, in particular, Zachary Henderson, who is mentioned extensively on Discovery and PSR Paragraph 38. Attorney was aware of this letter as he immediately wrote to Petitioner after almost one year of not having any communication explaining that he "just made the situation even worse".

Investigating unethical or intentional misconduct by the prosecution falls within obligation and responsibility by Defense Attorney.

This is syptomatic of Attorney in not challenging the Government's case even when the issues were glaring.

B. **Prejudice**

It is clear from the Sentencing Hearing of 07-29-2014, where Petitioner in open court states " I never provided any drugs, I never went along with the deals", **that** he was not comfortable with the guilty plea. Under these facts, this court should place "greater weight on Petitioner's in court statements" as the Government itself concedes on Page No. 23 of its response to Petitioner's §2255.

From Petitioner's conduct at the sentencing hearing it is evident that the lay litigant was caugh in a proceeding where no one was advocating for him and did not know how to explain to the court the facts of the case. But for Attorney's ineffective assistance Petitioner would not have plead guilty.

(See Sentencing Transcript 07-29-2018)

In the face of all this evidence it is incredible to believe tha Petitioner would have pled guilty on his own had he known the elements of a conspiracy, U.S. v. Johnson, Fed. R. Evidence 701 and 702, 4th & 5th Amendments and selective prosecution.

CONCLUSION

The Supreme Court has declared that the scope of habeas corpus under 28 USCS § 2255 is not strickly limited by the allegations of the motion.

According to a dictum in **Sanders v U.S.**(1963) 373 US 1,10 L Ed 2d 148, 83 S Ct 1068, the trial judge is not required to limit his decision on the first motion under §2255 to the grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusory, or inartistically expressed but is free to adopt any appropriate means for inquiry into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief and to spread the disposition of all grounds for relief on the files and records of the case.

Petitioner, untrained in the art and science of the law, without a transcript or other record of court proceedings, without access to Discovery since the initial of the case as the government placed a protective order and denied Petitioner to obtain a copy of it (See Exhibit "C") and by counsel's ineffective performance in advicing Petitioner into entering a plea that bars direct review of the case, constrains him from effectively defending himself in the current proceedings and respectfully requests this court's wide latitude in the review of the case at bar.

Under the principles elaborated upon **Martinez v. Ryan**, (2012) 182 LEd 2d 272, 132 S Ct 1309, the Supreme Court observed that "Defendants pursuing their first tier... review are generally ill equiped to represent themselves" quoting **Halbert v. Michigan**, 162 LED 2D 552, 545 (2005)

The court went on to note that "without the help of an attorney, a prisoner will have difficulties vindicating a substantial claim of ineffective assistance of counsel". Moreover, the court noted that when there is no "Appointment of an attorney to assist the prisoner" the difficulties of vindicating substantial claims remain for the simple fact that "claims of ineffective assistance of counsel often require investigative work and an understanding of trial strategy.." Further, the court stated that "prisoner unlearned at law, may not comply with procedural rules or misapprehen the substantive details of federal constitutional law" and "while confined in prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance of counsel which often turns on evidence outside of the trial record".

The court continued its observation noting that "A prisoner's inability to present a claim of error is of particular concern when the claim is one of ineffective assistance of counsel" because "the right of effective counsel is a bedrock principle in this nation's justice system."

What is important to note from the reading of Martinez is the fact that the High court recognizes that pro se litigants such as Petitioner attempting to file his collateral pleading concerning an attorney's misguidance, may often times fall short in such attempt. The fact that Petitioner ~~may~~ may not clearly establish the specifics should not be the bulwark when the law is clearly on his side, see also Sanders, supra.

Accordingly, Petitioner asks this court when evaluating Petitioner's current filing to consider Martinez reasoning as it pertains to his attempts to raise accurate, coherent, and precise claims.

WHETHER PETITIONER HAS ANY VIABLE CLAIMS OF INNEFFECTIVE ASSISTANCE AND HAS MADE A SUBSTANTIAL SHOWING OF FOURTH, FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL VIOLATIONS

The standard for determining when a Certificate of Appealability is warranted was recently explained by the Supreme Court in Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 68 (U.S. 2006). As the Court noted:

> Our opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with §2253 that a COA will issue in some instances where there is certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." Internal citation omitted. While a prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere 'good faith' on his part". We do not require Petitioner to prove, before the issuance of a COA that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. Internal citation omitted.

Petitioner respectfully asserts that he raises factual and legal claims of a constitutional magnitude in arguing that his counsel was ineffective and as a result he he entered into guilty plea unkowingly and involuntary and but for counsel's omissions in arguments A-B he would have insisted on going to trial. Serrano v Fischer 412 F.3d 292 295 (2nd Cir 2005) cert. denied, 126 S. Ct. 1357, 164 L. Ed. 2d 68 (U.S. 2006)

WHEREFORE, the Petitioner respectfully requests that a remand be ordered and a C.O.A. issued by the court of appeals.

Respectfully submitted,

Dated: 07-12-2019

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