

19-6123

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

Supreme Court, U.S.  
FILED

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IN THE  
SUPREME COURT OF THE UNITED STATES

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CASTOR QUINTAIRES GONZALEZ,

Petitioner,

-VS-

UNITED STATES OF AMERICA,

Respondent.

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals for the Eleventh Circuit  
(USCA Nos. 00-13879-CC and 00-13880-CC)

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PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

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**QUESTION PRESENTED**

DOES THE FIFTH AMENDMENT COMPEL A COURT OF APPEALS TO REMEDY ITS INADVERTENT AFFIRMANCE OF UNRECOGNIZED STRUCTURAL ERROR THAT WAS APPARENT FROM THE RECORD ITSELF — SINCE THE INVALID JUDGMENT OF THE DISTRICT COURT RESTORED TO THE DEFENDANT THE PRESUMPTION OF INNOCENCE TANTAMOUNT TO ACTUAL INNOCENCE?

### LIST OF PARTIES

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

### CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court **Rule 29.6**, Petitioner hereby provides notice that there is no corporation associated with this case, so that there is no parent or publicly held company owning 10% or more of the corporations stock.

### LIST OF PROCEEDINGS

Pursuant to Supreme Court **Rule 14**, Petitioner hereby advises that the following proceedings are related to the instant petition, beginning with the most recent:

1. Motion to Recall the Mandate and Reinstate the Appeal, Eleventh Circuit Court of Appeals. Appeal Nos. 00-13879-CC and 00-13880-CC Denied on May 16, 2019. SEE: Appendix A (Order); Appendix B (Mot. to Recall the Mandate and Reinstate the Appeal).
2. Appeal, Eleventh Circuit Court of Appeals, Appeal Nos. 00-13879-CC and 00-13880-CC Denied August 17, 2001. SEE: Appendix C (Opinion). This was an appeal from a §2255 motion where the District Court GRANTED a COA.
3. 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence, Civil Case Nos. 98-CV-6922 (S.D. Fla.) and 98-CV-6923 (S.D. Fla.). The motions were filed on August 28, 1998 and ultimately denied on February 29, 2000. Certificate of Appealability ("COA") granted on May 22, 2000.

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### DECISIONS BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner Gonzalez's Motion to Recall the Mandate and Reinstate the Appeal appears at Appendix A, and is unpublished.

### STATEMENT OF JURISDICTION <sup>1/</sup>

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner Gonzalez's Motion to Recall the Mandate and Reinstate the Appeal was filed on **MAY 16, 2019**. SEE: Appendix A

The instant petition is timely filed because it was filed within 90 days of the Eleventh Circuit Court of Appeals's Order denying the Petitioner's Motion to Recall the Mandate and Reinstate the Appeal. The Eleventh Circuit's Order was filed on **MAY 16, 2019** and Petitioner timely mailed the instant Petition for a Writ of Certiorari and adjunct pleadings on **AUGUST 13, 2019** by placing these documents into the internal mail system at his institution for processing in the U.S. Postal Mail by prison staff, and sufficient First-Class postage was affixed thereon, and properly addressed. SEE: PROOF OF SERVICE and AFFIDAVIT OF MAILING submitted herewith.

This Honorable Court has jurisdiction to entertain this cause pursuant to 28 U.S.C. §1254(1).

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<sup>1/</sup> Gonzalez, proceeding pro se, respectfully requests the Court to liberally construe his pleadings so as to best achieve substantial justice. SEE: HAINES v. KERNER, 404 U.S. 519, 520-521 (1972); TANNENBAUM v. UNITED STATES, 148 F.3d 1262, 1263 (11th Cir. 1998).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, which state:

### AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."(emphasis added).

### AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to 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 defense."(emphasis added).

## STATEMENT OF THE CASE

### A.) Nature of the Case.

This case involves important constitutional questions in relation to a criminal defendant's fundamental rights to due process and the assistance of counsel, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.



Petitioner Gonzalez respectfully asks this Court to decide whether the Due Process Clause of the Fifth Amendment compels a court of appeals to utilize a remedy of last resort when it is demonstrated from the record that the Court inadvertently affirmed a presumptively void and invalid judgment of the District Court that was the product of apparent but previously unrecognized structural error. Because an invalid judgment of the District Court restores to a criminal defendant the presumption of innocence that is tantamount to actual innocence, Petitioner submits that a court of appeals is compelled by the Fifth Amendment constitutional obligation and duty to prevent a manifest miscarriage of justice. A court of appeals's constitutional obligation and duty to remedy a miscarriage of justice is submitted to remain as compelling today as it would have been if recognized initially.

As explained herein, Petitioner Gonzalez filed a Motion to Recall the Mandate and Reinstate the Appeal in the Eleventh Circuit Court of Appeals. SEE: Appendix B. Gonzalez submitted pertinent portions of the record and pertinent authorities in support which demonstrated that the Court of Appeals failed to recognize apparent instances of structural error. Gonzalez demonstrated that the District Court's judgment was the product of structural error because he was deprived of his Sixth Amendment right to the effective assistance of counsel when counsel was laboring under a conflict of interest in representing multiple co-defendants, that conflicted counsel and the government AUSA deliberately withheld the conflict circumstances from the District Court, and that conflicted counsel and the government AUSA being permitted to select substitute counsel deprived Gonzalez of his right to select counsel of his choice without the District Court having ever informed

him of his rights amidst a conflict circumstance, including the right to have an opportunity to select counsel of his choice. Because the erroneous deprivations of the fundamental Sixth Amendment right to counsel have long been held to constitute structural error that invalidates the judgment, Petitioner Gonzalez argued to the Eleventh Circuit that he retains the presumption of innocence tantamount to actual innocence so as to warrant the utilization of a remedy of last resort to prevent a manifest miscarriage of justice as recognized in CALDERON v. THOMPSON, 523 U.S. 538, 557-558 (1998)(recognizing that recall of the mandate is appropriate to avoid a miscarriage of justice, as well as a circumstance calling into question the very legitimacy of the judgment). Petitioner Gonzalez now asks this Court to decide whether a court of appeals is compelled by the Fifth Amendment to remedy a previously unrecognized but apparent structural error in the criminal proceedings.

This case is compelling because the Supreme Court has not previously decided whether the Fifth Amendment Due Process Clause compels a court of appeals to remedy an apparent but unrecognized structural error at the time of direct review. Without guidance from this Court there exists an unacceptable risk that the fundamental guarantees of the Fifth and Sixth Amendments, including the basic protections they mandate in the criminal process, will have never been realized in some cases. The Eleventh Circuit's denial of Petitioner's Motion to Recall the Mandate represents an unacceptable departure from the usual course and principles of judicial proceedings as this Court's decisions dictate a different outcome in Petitioner's case. As such, this case raises significant questions of federal law and issues of importance beyond the particular facts and parties involved, that touch

closely the fair administration of justice. Criminal defendants and other litigants have a reasonable expectation that the due process protections afforded them by the Constitution and this Court's precedents will be abided by and enforced. Moreover, both the public and criminal defendants alike have a substantial interest in the congruent and consistent application of this Court's precedents, establishing federal law, amongst our domestic courts. Based upon the points and authorities set forth herein, Petitioner Gonzalez respectfully beseeches this Honorable Court to grant certiorari review and vacate the prior judgment.

**B.) Salient Summary of Background Facts<sup>2/</sup>**

Petitioner Gonzalez's troubles began on February 6, 1996, when he was arrested in connection with a drug trafficking conspiracy. SEE: UNITED STATES v. CASTOR QUINTAIRES GONZALEZ, Criminal Case No. 96-CR-6021 (S.D. Fla.). Also alleged to have occurred in the Southern District of Florida, Gonzalez was subsequently charged with conspiracy to commit income tax fraud in Criminal Case No. 96-CR-6093 (S.D. Fla.). Both cases were then consolidated for disposition. CF. Appendix B (Mot. to Recall, at 4-5).

On July 31, 1996, Gonzalez elected to accept a proffered plea agreement. Gonzalez understood upon advisement of his counsel that the agreement required him to plead guilty to COUNT 1 and 16 in Case No. 96-CR-6021 (S.D. Fla.) and corresponded to charges of a Continuing Criminal Enterprise ("CCE"), 21 U.S.C. §848, and conspiracy to launder money, 18 U.S.C. §371,

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<sup>2/</sup> For the sake of brevity, Petitioner Gonzalez would incorporate here as if fully set forth, the background facts and procedural history contained in his Motion to Recall the Mandate and Reinstate the Appeal submitted herewith. SEE: Appendix B, at 4-17.

respectively. Gonzalez additionally pled guilty to the information in the consolidated Criminal Case No. 96-CR-6093 (S.D. Fla.), involving the conspiracy to commit income tax fraud. Gonzalez was advised by his counsel that he would have to surrender all of his assets and that he would be subject to a 20-year mandatory minimum penalty, which is what he should expect to receive. Gonzalez voluntarily surrendered millions of dollars.

However, the entire deal began to unravel when the Probation officer, in preparing the Presentence Investigation Report ("PSR"), notified the attorneys and the Court advising that Gonzalez faced a mandatory minimum LIFE sentence as a result of the plea agreement — establishing that the Court and the attorneys had proceeded under the mistaken impression that the 21 U.S.C. §848(a) CCE in COUNT 1 carried only a 20-year mandatory minimum. Abruptly, on October 3, 1996, defense counsel filed an unsworn Motion to Withdraw the Guilty Plea as defendant had been misadvised and the plea agreement could not be fulfilled. On October 16, 1996, counsel then filed a subsequent Emergency Motion to Continue the Sentencing Hearing, and on October 23, 1996 he filed a Motion to Withdraw from representation, explaining for the first time to the Court that he had a conflict of interest because he had been simultaneously representing at least 4 of Gonzalez's co-defendants. On November 1, 1996, the Government filed its own Motion to Disqualify Defense Counsel based on the apparent conflict of defense counsel. Significantly, this was the very first time that defense counsel and the Government ever informed the District Court that the conflict had existed all along. CF. Appendix B (Mot. to Recall, at 6-7).

On November 4, 1996, the District Court held a "Status Conference" hearing to address, inter alia, the conflict of interest situation and

the pending motions of the attorneys related thereto. The transcript excerpt of this hearing is appended to the Motion to Recall the Mandate as attachment B. The transcript reveals that the government and defense counsel deliberately withheld from the District Court the fact that defense counsel had been simultaneously representing multiple cooperating co-defendants and was now forced to admit it when the unanticipated potential of a trial began to occur in Gonzalez's case. The District Court sternly rebuffed the actions of defense counsel and the Government AUSA. CF. Appendix B (Mot. to Recall, at 8-10). At this hearing defense counsel and the Government AUSA advised the District Court that they had a replacement counsel chosen, attorney Richard Diaz, who was present. Defense counsel selected attorney Diaz as replacement counsel — and the Government AUSA advised the District Court that it would be willing to release seized assets of Mr. Gonzalez to pay for this particular attorney. Significantly, at no point was Gonzalez ever informed of his rights amidst a conflict circumstance, nor is it evidenced in any manner that Gonzalez understood his right to have a fair opportunity to personally select his counsel of choice. Instead, the record reveals that the District Court just went ahead and accepted the suggestion of the attorneys. CF. Appendix B (Mot. to Recall, at 8-10). CF ALSO: attachment B appended to the Motion to Recall the Mandate, which is a "Status Conference" that occurred the next day, November 5, 1996, and shows the District Court's final acceptance of attorney Diaz. This transcript continues to show that Gonzalez was never informed of his rights, including his right to personally choose his counsel.

With the representation of attorney Diaz, Gonzalez ultimately pled guilty rather than proceed to trial. Diaz negotiated a plea agreement that

resulted in Gonzalez receiving a mandatory LIFE sentence to the same §848 CCE charge under COUNT 1 that was contained in the initial plea agreement. The Diaz plea agreement, however, included the requirement that Gonzalez agree to waive his right to appeal the sentence imposed. Notably, Diaz had never attempted to negotiate another plea agreement with the Government after he became replacement counsel. On September 11, 1997, the District Court imposed a mandatory LIFE sentence. CF. Appendix B (Mot. to Recall, at 11).

On August 28, 1998, Mr. Gonzalez filed a pro se 28 U.S.C. §2255 motion. Civil Case Nos. 98-CV-6922 (S.D. Fla.) and 98-CV-6923 (S.D. Fla.). The separate case numbers are representative of the consolidated criminal cases. In the §2255 motion Gonzalez argued, inter alia, that he had been deprived of his Sixth Amendment right to counsel because his attorney had labored under a conflict of interest in representing multiple cooperating co-defendants, that the conflict had been deliberately withheld from him and the District Court, and that the District Court had erroneously neglected to hold a required conflict hearing to inquire and inform him of his rights amidst a conflict circumstance. Gonzalez further urged in his §2255 motion that because he was unaware of his rights and had been given no fair opportunity to select his counsel of choice, he was denied his fundamental Sixth Amendment right to counsel. Gonzalez explained that replacement counsel Diaz had been hand-picked by conflicted counsel and then approved by the Government, with the District Court merely agreeing with their decisions. After a complete briefing, the District Court denied and dismissed the §2255 motion on February 29, 2000. However, on May 22, 2000, the District Court granted Gonzalez a Certificate of Appealability. CF. Appendix B (Mot. to Recall, at 12-13).

Mr. Gonzalez subsequently argued on appeal to the Eleventh Circuit Court of Appeals, inter alia, that the District Court's denial of his Section 2255 motion and an evidentiary hearing was clearly erroneous because: "A" Defense counsel had an actual conflict of interest; and "B" The conflict of interest as a result of counsel's multiple joint representation adversely affected his representation and prejudice must be presumed. Appeal Nos. 00-13879 and 00-13880. Gonzalez had additionally argued that the filing of the Motion to Withdraw the Guilty Plea by conflicted counsel warranted an evidentiary hearing because it would entitle Gonzalez to Section 2255 relief. Following a full briefing by the parties, the Eleventh Circuit AFFIRMED the District Court's judgment on August 17, 2000. UNITED STATES v. CASTOR QUINTAIRES GONZALEZ, 273 F.3d 1110, 2001 U.S. App. LEXIS 29495 (11th Cir. 2001)(unpublished). The Eleventh Circuit panel held that, assuming that joint representation constituted an actual conflict of interest, "Gonzalez advances no allegations purporting to establish that this conflict had a meaningful adverse affect." (Opinion, at 4). Notably, throughout the opinion the Court focused entirely upon whether the conflict had a "meaningful adverse affect" on Gonzalez, rather than on counsel's representation. CF. Appendix B (Mot. to Recall, at 13-15).

Motion to Recall the Mandate and Reinstate the Appeal

In March 2019, Mr. Gonzalez filed a Motion to Recall the Mandate and Reinstate the Appeal. Gonzalez appended to his motion pertinent transcript excerpts. In the motion, Gonzalez explained that the Court had inadvertently affirmed a presumptively void judgment of the District Court because the record itself established that it was the product of apparent structural error. Because the District Court judgment was invalid and void, Gonzalez

argued that he retained the presumption of innocence which was tantamount to actual innocence. Gonzalez urged that the Court of Appeals was compelled to remedy an apparent miscarriage of justice by utilization of even a remedy of last resort based upon the previously unrecognized structural error. Gonzalez explained that the Court of Appeals overlooked pertinent portions of the record — the November 4-5, 1996 "Status Conference" hearing transcript — establishing that the conflict of interest indeed had an "adverse affect" upon counsel's representation because conflicted counsel and the Government AUSA actually admitted to deliberately withholding the conflict circumstance from the District Court throughout the criminal proceedings, including plea negotiations, which was contrary to the attorney's legal and ethical obligations to have promptly and honestly informed the District Court of the apparent conflict. Gonzalez additionally argued that when conflicted counsel filed the Motion to Withdraw the Guilty Plea, this was a "critical stage of the proceedings" in which he was denied the effective assistance of unconflicted counsel, requiring the Court of Appeals to presume prejudice. Finally, Gonzalez urged that these instances of structural error were apparent from the record itself, including the fact that the District Court never informed Gonzalez of his rights amidst a conflict circumstance, including the right to select personally his counsel of choice, so that when conflicted counsel and the Government AUSA chose replacement counsel and suggested it to the District Court Gonzalez was totally unaware of his rights or options to select an attorney of his choice. Gonzalez relied upon the Supreme Court's Sixth Amendment decisions. The Government did not file a response and, on May 16, 2019, the Eleventh Circuit Court of Appeals denied the Motion to Recall the Mandate without comment. **Appendix A.**

The instant Petition for a Writ of Certiorari now follows.



Law and Argument in Support of Granting Certiorari.

QUESTION PRESENTED

DOES THE FIFTH AMENDMENT COMPEL A COURT OF APPEALS TO REMEDY ITS INADVERTENT AFFIRMANCE OF UNRECOGNIZED STRUCTURAL ERROR THAT WAS APPARENT FROM THE RECORD ITSELF — SINCE THE INVALID JUDGMENT OF THE DISTRICT COURT RESTORED TO THE DEFENDANT THE PRESUMPTION OF INNOCENCE TANTAMOUNT TO ACTUAL INNOCENCE?

Petitioner Gonzalez respectfully submits that a synthesis of this Court's precedents establish that the Due Process Clause of the Fifth Amendment compels a court of appeals to recall its mandate in consideration of structural error that is apparent from the record, but was unrecognized at the time of appeal. Because structural error invalidates the judgment of the District Court — restoring to Gonzalez the presumption of innocence tantamount to actual innocence — due process compels the court of appeals to recall its inadvertent affirmance of the invalid judgment in order to prevent a miscarriage of justice.

In reliance upon this Court's decision in CALDERON v. THOMPSON, 523 U.S. 538 (1998), Petitioner Gonzalez filed a Motion to Recall the Mandate and Reinstate the Appeal in the Eleventh Circuit Court of Appeals. SEE: Appendix B . Gonzalez explained to the Eleventh Circuit that recall of the mandate was necessary to prevent a miscarriage of justice because the Court had inadvertently affirmed a District Court judgment that was the product of apparent structural error and therefore invalid and void — restoring to Gonzalez the presumption of innocence which is tantamount to actual innocence. Gonzalez argued that a manifest miscarriage of justice

will be perpetuated if the Eleventh Circuit were to leave the prior judgment undisturbed because, at the affirmance of that Court, he has been subject to the loss of his liberty without any valid conviction and remains factually and legally innocent because of the presumption of innocence.

CF. Appendix B (Mot. to Recall, at 1-4)(Introduction).<sup>3/</sup>

Gonzalez argued in his Motion to Recall the Mandate that the Eleventh Circuit had misapprehended and overlooked pertinent facts in the record when it previously determined that Gonzalez had not demonstrated any "meaningful adverse affect" to substantiate the conflict of interest. Gonzalez explained that the Court had overlooked the significance of a November 4, 1996 "Status Conference" transcript which proved unequivocally an "adverse affect" upon defense counsel's representation. In this transcript both defense counsel and the Government AUSA finally admitted to the District Court that they had deliberately withheld from the District Court the fact that defense counsel had been secretly representing multiple cooperating co-defendants all along, including during plea negotiations. Both defense counsel and the Government AUSA had totally breached their legal and ethical obligations to promptly and honestly inform the District Court of any potential conflict circumstances, and only admitted this when they had no choice since Gonzalez unexpectedly in an unanticipated trial posture. SEE: Appendix B (Mot. to Recall, at 23-43). SEE ALSO: ATTACHMENT B appended to the Mot. to recall (Nov. 4, 1996 "Status Conference" transcript excerpt).

Because Gonzalez was able to prove from the record itself that there was indeed an apparent "adverse affect" upon defense counsel's representation, he argued that he had demonstrated an actual conflict of interest that had violated his Sixth Amendment right to the assistance of counsel untainted

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<sup>3/</sup> CF. Appendix B (Mot. to Recall, at 16-17)(explaining the circumstances under which Gonzalez finally discovered the unrecognized structural errors and thier significance.

by any such conflict. This was in and of itself a structural error. Yet, having established the existence of an actual conflict of interest, Gonzalez then proceeded to argue that he was also denied effective assistance of counsel at a "critical stage" of the proceedings when apparently conflicted counsel filed a Motion to Withdraw the Guilty Plea. SEE: Appendix B (Mot. to Recall, at 43-52). Finally, Gonzalez also argued that he was erroneously denied his Sixth Amendment right to select his counsel of choice because conflicted counsel and the Government AUSA chose a replacement counsel for him and facilitated that specific representation, which the District Court just went along with without ever having informed Gonzalez of his rights amidst a conflict circumstance, including his right and fair opportunity to select counsel of his own choosing. The denial of the opportunity to make the personal selection of counsel was most significant because it occurred after the District Court discovered that the attorneys had been withholding the conflict circumstance all along and the fact that the Government was only willing to release seized assets of Gonzalez to pay for the particular attorney the Government and conflicted counsel had selected, but not giving Gonzalez the opportunity to select any attorney of his choosing with the same released assets (nor advising Gonzalez of his right to do so when assets were made available). SEE: Appendix B (Mot. to Recall, at 52-71). SEE ALSO: Appendix B (Mot. to Recall, at 39-42, 63-68 explaining defective process of the District Court in failing to hold a conflict hearing and inform Gonzalez of his rights); (Mot. to Recall, at 32-36, 36-39 explaining "adverse affect" upon defense counsel and role of the prosecutor). Gonzalez urged the Eleventh Circuit that, the passage of time notwithstanding, the persistence of the constitutional imperative for

the Court to remedy apparent structural error contemplates the use of a remedy of last resort because he is actually innocent as a matter of law and as a matter of fact, but has no available remedy to obtain judicial review and correction of the fundamental defects in his criminal proceedings. Gonzalez urged the Eleventh Circuit that any opposing interests in finality or otherwise must yield to the imperative of a fundamentally unjust and invalid conviction, establishing his actual innocence, which could not be forfeited or defaulted. The judgment of the District Court which the Eleventh Circuit inadvertently affirmed remains as invalid and presumptively void today as it did at the time of the Court's appellate review. On May 16, 2019, the Eleventh Circuit Court of Appeals denied Gonzalez's Motion to Recall the Mandate and Reinstate the Appeal without comment on the merits. SEE: Appendix A (Order).

**A synthesis of Supreme Court precedents supports the utilization of a remedy of last resort to prevent a miscarriage of justice.**

In CALDERON v. THOMPSON, 523 U.S. 538, 549-550 (1998), this Court held that the federal courts of appeals "have an inherent power to recall their mandates" in order to protect the integrity of its process, in exceptional circumstances. Recall of the mandate is a "last resort" that should be exercised in the face of "grave, unforeseen contingencies." Id. One circumstance that permits a court to recall the mandate is to avoid a miscarriage of justice. CALDERON, 523 U.S. at 557-558. CALDERON specifically recognized the utilization of such a remedy when an unforeseen circumstance "call[s] into question the very legitimacy of the judgment." Id. 523

U.S. at 558-559. "Although demanding in all cases, the precise scope of the miscarriage of justice exception depends on the nature of the challenge brought[.]" CALDERON, 523 U.S. at 559. Consistent with all of this Court's decisions interpreting the scope of the miscarriage of justice exception, CALDERON recognized that the exception includes a circumstance "calling into question the very legitimacy of the judgment[,]" and when there is "a strong showing of actual innocence[.]" 523 U.S. at 557 (cit. omit.).

As explained below, the Eleventh Circuit was compelled by the Due Process Clause of the Fifth Amendment to recall its mandate under CALDERON because the pertinent Supreme Court decisions establish that the judgment of the District Court was invalid and void as a product of apparent structural error — restoring to the accused the presumption of innocence which is tantamount to actual innocence for purposes of the miscarriage of justice exception. This constituted a "strong showing of actual innocence" so as to permit a revisiting of the merits of the concluded criminal proceedings under CALDERON, 523 U.S. at 558, calling to question "the very legitimacy of the judgment."

**The erroneous denial of Gonzalez's fundamental Sixth Amendment right to the effective assistance of counsel and counsel of choice constituted structural error that presumptively voided and invalidated the judgment of the District Court.**

The errors of the District Court that Gonzalez identified in his Motion to Recall the Mandate have been determined by respective Supreme Court decisions to constitute "structural error." First, Gonzalez argued that the Eleventh Circuit had overlooked the significance of a seemingly unimportant "Status Conference" hearing transcript when it concluded in

its 2001 appellate opinion that he had failed to demonstrate any "meaningful adverse affect" to establish an actual conflict of interest. Gonzalez explained that the record established an apparent "adverse affect" upon counsel's representation that was proven in the November 4, 1996 "Status Conference" hearing transcript because defense counsel and the Government AUSA admitted to having deliberately withheld from the District Court that defense counsel had been secretly representing multiple cooperating co-defendants all throughout the criminal proceedings. Gonzalez explained that this was an apparent "adverse affect" upon defense counsel's representation because he chose (in concert with the government) to breach his legal and ethical obligations to promptly and honestly inform the District Court of any potential conflict of interest. The November 4, 1996 transcript further proves that defense counsel and the Government AUSA only admitted this when they were forced to as a result of an unanticipated trial posture of Gonzalez. Since there existed an "adverse affect" upon defense counsel's representation, Gonzalez urged that he had established an actual conflict of interest. SEE: Appendix B (Mot. to Recall, at 23-43). The Supreme Court has identified that the Sixth Amendment right to the effective assistance of counsel is violated when counsel labors under a conflict of interest that adversely affects his representation. SEE: CUYLER v. SULLIVAN, 446 U.S. 335, 350 (1980); MICKENS v. TAYLOR, 535 U.S. 162, 166 (2002); STRICKLAND v. WASHINGTON, 466 U.S. 668, 692 (1984); HOLLOWAY v. ARKANSAS, 435 U.S. 475, 489-490 (1978). CF. Appendix B (Mot. to Recall, at 24-25).

Second, Gonzalez submitted to the Eleventh Circuit that, having established an actual conflict of interest as a result of the "adverse affect"

upon counsel's representation in withholding from the District Court and Gonzalez his simultaneous representation of multiple cooperating co-defendants in violation of his legal and ethical obligations to promptly and honestly inform the District Court of any conflict potential, that he was apparently denied his Sixth Amendment right to the effective assistance of counsel when apparently conflicted counsel filed a Motion to Withdraw the Guilty Plea because this was a "critical stage" of the proceedings. SEE: Appendix B (Mot. to Recall, at 43-52). The Supreme Court has identified that the Sixth Amendment right to the effective assistance of counsel is violated when counsel is denied at a critical stage of the criminal proceedings. SEE: UNITED STATES v. CRONIC, 466 U.S. 648, 659-661 & n. 25, 29 (1984). SEE ALSO: Appendix B (Mot. to Recall, at 45-46)(collecting cases establishing that a Motion to Withdraw the Guilty Plea is a "critical stage" of the proceedings). Gonzalez even explained further that the Government itself was implicated in the denial of effective, unconflicted counsel at this critical stage because it knew and was mutually withholding from the District Court the fact that defense counsel had an apparent conflict of interest that he was withholding all along. SEE: Appendix B (Mot. to Recall, at 36-39, 46)(citing Eleventh Circuit decision vacating conviction due to conflict withheld by counsel and government from the District Court, in UNITED STATES v. MCLAIN, 823 F.2d 1457, 1462-1464 (11th Cir. 1987)).

Third, Gonzalez brought to the attention of the Eleventh Circuit that it had all together failed to recognize that the record itself had contained an apparent denial of his Sixth Amendment right to select counsel of choice when conflicted defense counsel and the Government AUSA urged the District Court to accept the replacement counsel they suggested — and the

District Court just went right ahead and adopted the suggestion without ever informing Gonzalez of his rights amidst a conflict circumstance, including his Sixth Amendment right to personally select counsel of choice to represent him. SEE: Appendix B (Mot. to Recall, at 52-71). SEE ALSO: Appendix B (Mot. to Recall, at 55-58 describing that the District Court deprived Gonzalez of his right to counsel of choice by failing to inform him of his rights amidst a conflict nor gave him any opportunity to select a counsel of his choice once the right was understood; and at 58-71 describing how District Court and actions of counsel and government AUSA withholding conflict prevented District Court from knowing of conflict). The Supreme Court has identified that the Sixth Amendment right to the assistance of counsel encompasses the fundamental right of a criminal defendant who has the means to retain an attorney to choose the counsel he wishes to represent him. SEE: UNITED STATES v. GONZALEZ-LOPEZ, 548 U.S. 140, 144 (2006). SEE ALSO: CHANDLER v. FRETAG, 348 U.S. 3, 9-10 (1954); POWELL v. ALABAMA, 287 U.S. 45, 53 (1932).

**Structural error presumptively voids District Court judgment.**

Each of the foregoing Sixth Amendment deprivations of the fundamental right to the effective assistance of counsel that Gonzalez argued to the Eleventh Circuit in his Motion to Recall the Mandate to be apparent from the record, have been identified by the Supreme Court to constitute structural error. A judgment that is the product of structural error is presumptively void and invalid.

The Supreme Court has explained that the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal proceeding.



Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." ARIZONA v. FULMINATE, 499 U.S. 279, 310 (1991). Structural errors "pervade the entire proceedings," occasioning "consequences that are necessarily unquantifiable and indeterminate[.]" GONZALEZ-LOPEZ, 548 U.S. at 150. The precise effects of structural error is impossible to quantify, GONZALEZ-LOPEZ, 548 U.S. at 149 n. 4, and "unmeasurable," but "without which the criminal process cannot reliably serve its function." SULLIVAN v. LOUISIANA, 508 U.S. 275, 281 (1993). And even assuming they could be assessed, structural error involves "circumstances ... that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." WRIGHT v. VAN PATTEN, 552 U.S. 120, 124 (2008) (quoting CRONIC, 466 U.S. at 658).

Failure to provide the "basic protections" in the criminal proceedings, including unconflicted counsel, effective assistance of counsel at a critical stage of the proceedings, and counsel of choice, results in structural error because when such constitutionally guaranteed safeguards are missing, the criminal process itself is rendered fundamentally unfair and inherently unreliable. SEE: ROSE v. CLARK, 478 U.S. 570, 577-578 (1986); FULMINANTE, 499 U.S. at 309-311. Accordingly, instances of structural error are not subject to harmless error analysis, and prejudice is to be presumed. SEE: CUYLER, 446 U.S. at 349-350; CRONIC, 466 U.S. at 658-659; GONZALEZ-LOPEZ, 548 U.S. at 148, 150-152; SULLIVAN, 508 U.S. at 281-282; HOLLOWAY, 435 U.S. at 487-491. "Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." SEE: NEDER v. UNITED STATES, 527 U.S. 1, 7 (1999); GONZALEZ-LOPEZ, 548 U.S. at

149 n.4 ("An error can count as structural even if the error does not lead to fundamental unfairness in every case."). Structural error is held to require automatic reversal because such error fundamentally undermines the very accuracy and reliability of the criminal proceedings, invalidating the judgment. ROSE, 478 U.S. at 577-578; NEDER, 527 U.S. at 8-9.

The invalid judgment of the District Court restored to Gonzalez the presumption of innocence, which is tantamount to actual innocence.

Gonzalez previously argued to the Eleventh Circuit that an invalid conviction is no conviction at all. Because the District Court judgment was the product of apparent structural error it was invalid and void, requiring the Eleventh Circuit to recall its mandate to prevent a manifest miscarriage of justice since the invalid judgment restored to him the presumption of innocence which is tantamount to actual innocence. Subjecting Gonzalez to a life term of imprisonment without any valid conviction contravenes the Due Process Clause of the Fifth Amendment because he retains the presumption of innocence unless or until he is lawfully convicted and sentenced. CF. Appendix B (Mot. to Recall, at 20-23).

Prior to conviction, the accused is shielded by the presumption of innocence [—] the "bedrock[,] axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." SEE: REED v. ROSS, 468 U.S. 1, 4 (1984) (quoting and citing COFFIN v. UNITED STATES, 156 U.S. 432, 453 (1885)) (emphasis added). CF. ALSO: ESTELLE v. WILLIAMS, 425 U.S. 501, 503 (1976); BETTERMAN v. MONTANA, 136 S.Ct. 1609, 1614 (2016). Recently, the Supreme Court reaffirmed that a void or invalid

judgment restores the presumption of innocence to the accused and is tantamount to actual innocence. In NELSON v. COLORADO, 137 S.Ct. 1249 (2017), the Court held categorically that the presumption of innocence is not distinguishable from actual innocence, striking down the State of Colorado's position that they differed. When the convictions of two defendants were ultimately deemed invalid, the Supreme Court held that the defendants retained the presumption of innocence. "[O]nce those convictions were erased, the presumption of innocence was restored." NELSON, 137 S.Ct. at 1251, 1255 (citing JOHNSON v. MISSISSIPPI, 486 U.S. 578, 585 (1988) (holding that, when an individual's conviction has been invalidated he must be presumed innocent of the charge(s) unless or until the individual is retried). "Because neither petitioner had been validly convicted ... each must be presumed innocent." NELSON, 137 S.Ct. at 1254 (cit. omit.). "Absent [the valid] conviction of a crime, one is presumed innocent." NELSON, 137 S.Ct. at 1252. CF. ALSO: BETTERMAN, 136 S.Ct. at 1618 n. 2 (noting that a valid conviction terminates the presumption of innocence — but that the presumption of innocence is again enjoyed if the conviction is invalid or reversed).<sup>4/</sup>

**Failure to recall the mandate violates due process.**

The Supreme Court has recognized that when the judgment of the District Court is invalid then a court of appeals's affirmance of such a judgment is too. This principle was demonstrated in FREYTAG v. COMMISSIONER OF INTERNAL REVENUE, 501 U.S. 868, 896-897 (1991), and is analogous to the instant cir-

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<sup>4/</sup> Although the factual circumstances between NELSON and Gonzalez's case differ, it is the principle of an invalid judgment restoring the presumption of innocence being the same that matters. NELSON itself makes this much clear by relying upon JOHNSON v. MISSISSIPPI, supra, since NELSON was about restitution while JOHNSON v. MISSISSIPPI pertained to a death penalty matter.

cumstances of Petitioner Gonzalez's case. In FREYTAG, the Court determined that since the District Court judgment was invalid for lack of jurisdiction, then the court of appeals itself lacked jurisdiction. FREYTAG, 501 U.S. at 896-897. FREYTAG made clear that permitting a court of appeals to ignore the basis of the District Court's invalid judgment would serve to give the judgment legitimacy. Id. (citing, e.g., AMERICAN FIRE & CASUALTY CO. v. FINN, 341 U.S. 6, 17-18 (1951)(directing appellate court to remand to the District Court with instructions to vacate judgment); MANSFIELD, C. & L.M.R. CO. v. SWAN, 111 U.S. 379, 382 (1884); CAPRON v. VAN NOORDEN, 2 Cranch 126, 127, 2 L.Ed. 229 (1804)).

Petitioner Gonzalez respectfully urges that the Eleventh Circuit's failure to recall the mandate violates due process because "it offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." SEE: PATTERSON v. NEW YORK, 432 U.S. 197, 202 (1977)(cit. omit.). SEE ALSO: MEDINA v. CALIFORNIA, 505 U.S. 437, 445 (1992)(holding that a procedural limitation "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."). Notably, in NELSON, 137 S.Ct. at 1256 n.9, the Supreme Court held that "the presumption of innocence unquestionably fits [the] bill" of being such a fundamental principle. Because the presumption of innocence is a fundamental and deeply rooted principle under our system of criminal justice, the Due Process Clause of the Fifth Amendment compels a court of appeals to remedy a previously unrecognized structural error, apparent from the record, which renders the District Court judgment void and restored to the accused the presumption of innocence (tantamount to actual innocence). Under MEDINA,

the fundamental nature of the presumption of innocence means that the Eleventh Circuit's inadvertent affirmance of an apparent invalid judgment and subsequent lack of a sufficiently meaningful process to obtain judicial review and correction of previously unrecognized structural error, are subject to proscription under the Due Process Clause. CF. **Appendix B** (Mot. to Recall, at 20-23 & footnote 13).

In Petitioner Gonzalez's case, as comprehensively demonstrated in his Motion to Recall the Mandate and Reinstate the Appeal (**Appendix B**), since the District Court judgment is void and invalid as a result of apparent structural error, the presumption of innocence is restored to him unless and until he is retried in a fundamentally fair and reliable criminal process. Absent a valid conviction, Gonzalez is presumed innocent (which is actual innocence) under the Supreme Court's jurisprudence. This is an extraordinary circumstance because the Eleventh Circuit's prior affirmance inadvertently failed to recognize apparent instances of structural error in the record of the criminal proceedings that necessarily invalidates the judgment of the District Court and restored to Gonzalez the presumption of innocence; which is actual innocence for purposes of the miscarriage of justice exception. Indeed, Mr. Gonzalez remains as actually innocent today as he did at the time of the Eleventh Circuit's initial appellate review because no valid judgment exists. The fundamentally defective nature of Gonzalez's criminal proceedings means that his detention is per se illegal in the absence of a valid conviction, and he retains the presumption of innocence so as to compel the protections of the Due Process Clause to prevent a miscarriage of justice from being perpetuated.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." COFFIN v. UNITED STATES, 156 U.S. 432, 453 (1895) (emphasis added). SEE ALSO: REED, 468 U.S. at 4; ESTELLE, 425 U.S. at 503; NELSON, 137 S.Ct. at 1256 n.9. Accordingly, recall of the mandate and reinstatement of the appeal was necessary in order for the Eleventh Circuit to prevent a miscarriage of justice in Gonzalez's case. The Eleventh Circuit's utilization of a remedy of last resort is appropriate because Gonzalez has no other available means to obtain judicial review or correction of the Eleventh Circuit's inadvertent affirmance of a invalid judgment — and any opposing interests in finality or otherwise must yield to the constitutional imperative to remedy a fundamentally defective criminal process. "To deprive a citizen of his only effective remedy would not only be contrary to the rudimentary demands of justice but destructive of a constitutional guaranty specifically designed to prevent injustice." JOHNSON v. ZERBST, 304 U.S. 458, 467 (1938). CF. CALDERON, 523 U.S. at 558 (recognizing that a court of appeals authority to recall its mandate "accommodates the need to allow courts to remedy actual injustice[.]"). Petitioner Gonzalez's fundamental right to the effective assistance of counsel untainted by conflict, right to have the effective assistance of counsel at all critical stages of the criminal proceedings, and the right to counsel of choice are amongst "the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty [...] and stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." ZERBST, 304 U.S. at 462.

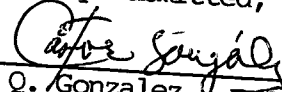
CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner Gonzalez respectfully prays this Honorable Court grants his Petition for a Writ of Certiorari and appoints counsel to represent his interests.

I, CASTOR QUINTAIRES GONZALEZ, declare under the penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is both true and correct.

Dated this 13th day of August, 2019.

Respectfully Submitted,



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