No. 19-6127

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN JUSTIN VILLALONA, Pro-se Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven Justin Villalona, Pro-se Petitioner
Reg. No.: 55457-018
FCI-1, Oakdale., Unit, A-2.
PO BOX 5000
Oakdale, LA 71463

QUESTION(S) PRESENTED

(1) What effect, if any, does a concession made by the U.S. on an ineffective assistance of counsel claim have on the court's ability to ajudicate the merits? Conversely, does the concession render the issue moot?

(2) Does a concession by the U.S. on an ineffective assistance of counsel claim automaticly satisfy the standard under **Slack v. McDaniel**, 529 U.S. 473, 484 (2000), for obtaining a Certificate Appealability?

(3) Should prejudice be presumed when an attorney fails to promptly notify the court of a conflict of interest or a breakdown in communication with his client; in the context of an ineffective assistance of counsel claim?

(4) May the court correct a plain error which affects substantial rights or the public reputation of judicial proceedings at any stage in light of the law of the case doctrine?

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

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

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

[X] reported at 2019 U.S. App. Lexis 6032; 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[ ] is unpublished.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 B to the petition and is

[X] reported at 2018 U.S. Dist. Lexis 143978; 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[ ] is unpublished.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 02/27/2019.

[ ] 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: 07/02/2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

TABLE OF AUTHORITIES CITED

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Steven Justin Villalona, a federal prisoner serving a 180 ... month term of imprisonment appeals pro-se the United States Court of Appeals, for the Eleventh Circuit denial of his request for a Certificate of Appealability (COA), based on the denial of a 28 U. S.C. § 2255 Motion to Vacate by a United States District Court.[1] Should this Court not have access to any part of the record referenced herein, Mr. Villalona will provide the Court with a copy upon request or order.

Backround and Statement of Facts

A Grand Jury charged Petitioner with two counts in a three Count indictment. Crim. Doc. 20. Count one charged the Petitioner with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, and count three charged a possession of a firearm in furtherance of a drug trafficking offense. Id. at 3. The Petitioner was not charged in count 2 which charges possession of cocaine. As a result of being unable to retain private counsel, the district court appointed Mr. Hued as counsel for the Petitioner. Crim. Doc. 6.

On January 10, 2012, pursuant to a written plea agreement under Fed. R. Crim. P. 11(c)(1)(A) with the United States, the Petitioner entered a plea of guilty before Magistrate Judge. Crim. Doc. 38. As part of the agreement, the Petitioner acknowledged that he understood the nature of the offenses, was completely satisfied with the representation and advice from his counsel, and that it was part of the conspiracy that a total of 10 kilograms of cocaine would be purchased

[1]The Petitioner's underlying criminal case is United States v. Villalona, 6:11-cr-375-PGB-TBS-2,and record citations to that case will be in the format "Crim. Doc. ___." Citations to this § 2255 case, Villalona v. United States, 6:14-cv-162-PGB-TBS, are in the format "Civ. Doc. ___."

from an undercover law enforcement officer. Id. 18.

However, during the change of plea hearing, the Petitioner stated that he "didn't know" that the quantity was going to be 10 kilograms of of cocaine involved in the transaction, and sought clarification on not being charged in count two of the indicment, which prompted the following exchange:

> THE COURT: Thank you for clarifying that, Mr. Hued. I didn't go back to check any of that myself on that point, but that's a good point. The -- I understand the indictment reflects a different involvement of the individuals here, the government's view of that anyway and and the grand jury's.

Crim. Doc. 94. at 16, and 29-30. Nonetheless, the Petitioner stated that he understood the sentencing process and the penalties he was facing, and on the same day, the Magistrate issued a report, recommending that the district court accept Petitioner's guilty plea and plea agreement, as the Magistrate found that the Petitioner's guilty plea was "knowledgeable and voluntary and that the offenses charged are supported by an independent basis in fact containing each of the essential element of such offense." Crim. Doc. 50.

On January 23, 2012, the U.S. Probation Officer met with the Petitioner and Mr. Hued to conduct an interview for a Presentence Report ("PSR"). PSR at ¶ 22. There, the Petitioner stated to his counsel and Probation Officer that he planned to hire a new attorney and withdraw his plea. Id. However, in the weeks and months afterward, counsel did not move to withdraw the Petitioner's guilty plea or for a substitution of counsel. Consequently, no objections to the Magistrate's report were filed, and on January 31, 2012, the district court accepted the plea of guilty and deferred acceptance of the plea

agreement until it had the chance to review the PSR. Crim. Doc. 60.

In March 2012, the U.S. Probation Office issued the original PSR in which it recommended,inter alia, that the court hold the Petitioner responsible for 10 kilograms of cocaine. Then on April 5, 2012, the U.S. filed a motion to continue the sentencing hearing which was scheduled for Wensday, April 18. Crim. Doc. 62. There, the U.S. represented that the U.S. Probation and counsel for the Petitioner "advised undersigned that [the Petitioner] intended to withdraw his guilty plea at the sentencing hearing." Id. at 2. The court granted the motion and set the sentencing hearing for May 16, 2012.

On or about April 30, 2012, a position of the parties meeting was held to reslove disputed portions of the PSR. There, the Petitioner's counsel objected to not receiving a 3 level reduction for acceptance of responsibility and to the quantity of drugs the Petitioner was being held responsible for. As a result, the U.S. Probation Officer revised the PSR on May 8, 2012, and noted that:

> Defense counsel asserts that the defendant objects to the drug quantity as he did during the change of plea hearing. Defense counsel did not state what quantity of drugs the defendant should be held accountable for nor did he supply any reasoning for the objection.

PSR Addendum at 1. Furthermore, with respect to acceptance of responsibility, the Probation Officer noted that:

> The defendant pled guilty pursuant to a written Plea Agreement but now wishes to withdraw from his plea. The defendant is denying the facts of the Plea Agreement, specifically the agreement to purchase 10 kilograms of cocaine for distribution, therefore the defendant has not accepted responsibility and a reduction for acceptance of responsibility is not warranted pursuant to USSG § 3E1.

Id. at 2. The U.S. agreed with the position of the U.S. Probation

Officer. Id.

On May 7, 2012, the Petitioner's counsel filed a motion to continue the sentencing and a "determination of counsel." Crim. Doc. 66 and 67. the court held a hearing on those motion on May 10, 2012. Crim. Doc. 69. There, the district informed Mr. Hued that he was still counsel of record until the court received a notice of appearance by newly retained counsel. Crim. Doc. 95, at 2. Also, that because Mr. Hued had filed what the court believed to be the proper objections to the PSR, the court was not going to continue the sentencing. Id. at 3.

On May 12, 2012, the Petitioner's newly retained counsel files a motion to substitute himself as counsel, contingent on a 30-day extension fo the sentencing hearing. Crim. Doc. 71. There, counsel stated that the reason for the continuance was that the Petitioner had "requested [his] advise on the merit of filing a motion to vacate his plea of guilty and [counsel] need[ed] to order the transcripts of the change of plea hearing in order to effectively advise [the Petitioner]." Id. at ¶ 4. The court did not rule on the motion which resulted in Mr. Hued's represention at sentencing and the non-filing of a motion withdraw the guilty plea.

On the eve of sentencing, Mr. Hued moved for an emergency continuance. Crim. Doc. 73. There, Mr. Hued represented that "a review of the transcript of from the change of plea hearing on January 10, 2012, will demonstrate that Mr. Villalona did accept responsibility for his actions and deserves an adjustment for acceptance of responsibility." Id. The district court denied the motion for no apparant reason. Crim. Doc. 74.

At the sentencing hearing, Crim. Doc. 78, the court failed to

inquire if the Petitioner consulted with his attorney the contents of the PSR.[2] However, the Petitioner stated that on January 23, 2012, "during a meeting with the probation officer [he] stated to [his] attorney that his intentions were to withdraw his plea and retain new counsel." Crim. Doc. 96, at 2. Also, Mr. Hued stated that "[it] is difficult to say that I have been effective in terms of communicating with Mr. Villalona. I know that even as of yesterday Mr. Villalona wanted to opportunity to tell the Court that I was ineffective." Id. at 3. Then the Petitioner explained that "[h]ad [Mr. Hued] notified the Court immediately as to my intentions on January 23rd, we would not be here with me requesting to withdraw my plea now, and his new counsel [...] would be on board. Id. at 4. The district court rejected the stipulated quantity of drugs within the plea agreement, see Crim. Doc. 38, at 18, and held that "based on all the information" the court had available, it "does not feel that this defendant knew anything more than the two kilogram deal [...]. So the court is going to hold him responsible for conspiracy to possess with intent to distribute two kilos of cocaine." Id. However, the district court denied the Petitioner's request to withdraw his plea.[3]

On direct appeal, the Petitioner argued, by and through new counsel[4], that the district court erred in denying the request at sentencing to withdraw his guilty plea. United States v. Villalona, 506 F. app'x 902 (11th Cir. 2012). The 11th Circuit concluded that:

> the district court did not abuse its discretion by denying Villalona's request at sentencing to withdraw his guilty plea because Villalona failed to establish a "fair and just reason" for the withdrawal of his plea.

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[2] See Fed. R. Crim. P. 32(i)(1)(A)

[3] See Fed. R. Crim. P. 11(c)(5), (B), and (d)(2)(A).

> Villalona had the close assistance of counsel prior to, and during, his plea hearing, and the exhaustive hearing conducted by the magistrate judge established that his guilty plea was knowing and voluntary. Although the record does indicate that Villalona had formed the intention to withdraw his plea while he retained the absolute right to do so, he failed to act promptly on that intention. Further, because the Magistrate judge conducted an exhaustive Rule 11 hearing that thoroughly probed the knowing and voluntary nature of Villalona's guilty plea, we conclude that the district court did not plainly err, let alone abuse its discretion, be declining to hold an evidentiary hearing on his request for withdrawal.

Crim. Doc. 105, at 6.

The Petitioner then filed a 28 U.S.C. § 2255 Motion to Vacate his conviction, arguing that his counsel was ineffective for failing to file a motion to withdraw the guilty plea before it was accepted by the district court. Civ. Doc. 1 and 2. The U.S. responded in opposition. Civ. Doc. 6. The district court denied the motion because the "Petitioner never expressed an intention to withdraw his plea despite the Court informing him that he had the right to plead not guilty." Civ. Doc. 10, at 6 and 7. The Petitioner appealed, and the 11th Circuit granted a Certificate of Appealability on whether Mr. Villalona was entitled to an evidentiary hearing on his claim that his counsel was ineffective for failing to file a motion to withdraw his guilty plea before the district court accepted the plea. Civ. Doc. 18.

On Appeal, based on the record, the U.S. conceded that the district court abused its discretion when it denied Villalona an evidentiary hearing because his allegations about promptly instructing his trial counsel to file a motion to withdraw, if true, would establish his ineffective assistance claim. Civ. Doc. 19. Accordingly,

[4]It is unknown when Mr. Hued withdrew from the case.

because the "motion and the files and records of the case [failed to] conclusively show that [the Petitioner] is entitled to no relief," see 28 U.S.C. § 2255(b), the 11th Circuit vacated the order that denied Villalona's motion to vacate and remanded for the district court to hold an evidentiary hearing to determine whether the failure [illegible] of counsel to file a motion to withdraw the Petitioner's plea amounted to ineffective assistance. Id.

On August 15, 2018, the district court held a hearing. Civ. Doc. 50. At the outset, the U.S. conceded, "[a]fter reviewing the specific facts of this case and the law on the issues[.]" The district court found the issue to be more nuanced as a result of the Petitioner expressing the desire to retain private counsel. Civ. Doc. 67, at 7. The U.S. was concerned that Mr. Hued had a duty to protect the Petitioner's interest until he was relieved of his duty as counsel. Civ. Doc. 8. The district court appreciated the U.S. concession, but wished "to hear what actually happended." Therefore, Mr. Hued was called to the stand. Id.

On direct examination, Mr. Hued testified that he was "fired" by the Petitioner and informed of replacement counsel was going to be hired, and that he was going to "withdraw the plea."Id. at 15. Furthermore, Mr. Hued stated that he was trying to "maintain the acceptance of responsibility" so he cancelled the meeting with the Probation Officer on January 23, 2012. Id. Also that his client "lost, like, all faith, all trust in [him]." Id. at 16. Mr. Hued stated that after the January 23rd meeting he did not have any contact with the Petitioner until March 9, 2012, when he learned that the Petitioner was in medical contact isolation. Id. at 18.

On cross examination, Mr. Hued stated that he had drafted a motion to suppress statements and presented it to the Petitioner. Id. at 26. That he could not remember whether the Petitioner sought clarification with respect to the nature of the charges. Id. He stated that he objected to the quantity of drug for which the Petitioner was charged with in the indictment at the change of plea hearing. Id. at 34-35. The district court seemed confused at the relevance of the quantity of drugs, but understood that it was a predicate being laid for the desire to withdraw the plea. Id. Furthermore, the court acknowledged that there was no objections filed to the report and recommendation. Id. at 40. Mr. Hued also stated that he was "worried" about withdrawing the guilty plea, "because [he] had already done a change of plea." Id. at 41. Also, that the Petitioner had already given a proffer, and was in "the wrong position to try to change [the guilty plea...]." Id. at 42. Mr. Hued stated that he was "in a very difficult position, and [he] didn't know what to do going forward." Mr. Hued then stated that the Petitioner never requested to have a different attorney appointed. Id. at 45. Lastly, he stated that he was "well aware that we had many challenges going into that sentencing hearing... and [he] gave voice to them." Id. at 50-51.

Then the Petitioner testified. Id. at 61. The Petitioner stated that he had several discussions with Mr. Hued wherein he was assured that if "this case were to go to trial that [he] is not to worry about the firearm, because it was registered to Mr. Mercedes [...]. Id. at 62. He stated that he was confused about entering a guilty plea, about the elements for Count 3, because he was not charged in count 2 of the indictment. Id. at 63-64. Also, he stated that before

the January 19, 2012, proffer, he asked his counsel if he could withdraw his plea and that his counsel said no because the plea had already been accepted by the court. Id. 66. Then he stated that after the proffer, he was asking different inmates in his unit if he could withdraw his plea, which he found out that he could. Id. 67. And because of that, he became "very upset" at his counsel because of the misadvise. Id. Then he stated that he asked his counsel if he could file the motion to withdraw the guilty plea, to which his counsel stated no. Id. 69.

The district court then recalled Mr. Hued, and Mr. Hued denied that the Petitioner requested counsel to withdraw his plea. Id. at 69, and 87. Furthermore, the Petitioner stated that he could not afford counsel, and for that matter requested the appointment of a different CJA panel attorney. Id. at 72-73. Lastly, the Petitioner stated that he was instructed by his counsel that if he wanted to withdraw his plea, he would have to retain private counsel, and that he started asking different lawyers for advice on the filing of a motion to withdraw the plea, because Mr. Hued did not want to discuss that with the Petitioner. Id. 75-77.

Nevertheless, the district court denied the § 2255 Motion to vacate. Civ. Doc. 53 and 55. (Appendix B). The court found that "on January 23, 2012, Villalona informed Hued that he intended to file a motion to withdraw the plea through new counsel. Moreover, on that day, Villalona fired Hued and never directed Hued to file a motion to withdraw the plea." Id. at 7-8. In that vein, the court found that the Petitioner's counsel's failure to "file a motion to withdraw Villalona's plea did not amount to ineffective assistance. Hued did

do so because Villalona fired him and told him that new counsel would be doing so." Id.

The Petitoner timely filed his notice of appeal. Civ. Doc. 57. Prior to receiving the transcription of the evidentiary hearing, the Petitioner requested that the 11th Circuit Court of Appeals issue a COA on whether the Movant's counsel was ineffective for failing to withdraw his guilty plea. Also, the Petitioner moved in the district court to correct the record, because of omissions within Civ. Doc.67 which was denied. Before an appeal was taken, a Judge from the 11th Circuit denied the Petitioner's request for a COA. (Appendix A). The Petitioner then sought a reconsideration of the denial. The 11th Circuit denied relief and now the Petitioner seeks a writ of certiorari to the Court of Appeals for the 11th Circuit. (Appendix C); See **Hohn v. U.S.**, 524 U.S. 236, 241 (1998)(Supreme Court has jurisdiction to review denial of application for [COA] by circuit judge or appellate panel because application qualifies as "case" under 28 U.S.C. § 1254(1)).

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant this petition, because by doing so, this Court protects the reputation of the Court, Bar, law, and the United States. Furthermore, granting this petition will impede the propagation of the notion that justice is only delegated to those who can afford it.

First, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." U.S. Const. amend. VI. "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." **Johnson v. Zerbst**, 304 U.S. 458, 467 (1938). The accused need not affirmatively request counsel for the right to attach. See e.g., **Crawford v. Beto**, 383 F.2d 604, 605 (5th Cir. 1967)(per curiam)(The right to counsel does not depend on a request). A defendant who cannot afford to retain an attorney has an absolute right to have counsel appointed by the court. See **Gideon v. Wainwright**, 372 U.S. 335, 342 (1963)(6th and 14th Amendments require appointment of counsel for indigent defendants in state court); see also, **Zerbst**, 304 U.S. 458, at 463 (6th Amendment requires appointment of counsel for indigent defendants in federal court). Furthermore, federal statutes and rules also provide for the appointment of counsel indigent defendants. See 18 U.S.C. § 3006(a)(2012); also see Fed. R. Crim. P. 44(a)(indigent defendant entitled to appointed counsel from "in-

itial appearance through appeal" unless waived.(Emphasis added by the Petitioner).

Furthermore, if the defendant is entitled to counsel at trial, the failure to provide counsel in most cases results in the automatic reversal of his conviction. See **Wainwright**, 372 U.S. 335, at 339 (rejecting proposition that effect of denial of counsel at trial "is to be tested by an appraisal of the totality of facts in a given case"). In that vein, "[t]he Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."**U.S. v. Cronic**, 466 U.S. 648, 659 n. 25 (1984).

Secondly, here, the basis for the district court's denial of the Petitioner's § 2255 Motion to Vacate that Mr. Hued was not ineffective because the Petitioner "fired" him is refuted by the record. See Civ. Doc. 67, at 10 ("Were you counsel of record for Mr. Steven Justin Villalona in an underlying case in this matter? A. Yes); Also, at 58 (Q. Okay. Are you aware that until the Court relieves you of your duty as counsel that you are to act as counsel? A. Yes. Q. Okay. So did the Court relieve you of [your] duty of counsel at any point throughout the proceeding? A. No.); see also, Crim. Doc. 95, "Well, at this moment we don't have a[n] appearance of counsel in writing, so you're still his attorney until I get that on the record. MR. HUED: Yes, sir. Then I really don't know how to proceed.")

For that matter, the U.S. voiced their "concern [...] that Mr. Hued was attorney of record at the time that he was told on January 23rd" to notify the court of Mr. Villalona desire to withdraw his guilty plea. See Crim. Doc. 96, at 3. (THE DEFENDANT: "Had my counsel notified the Court immediately as to my intentions on January 23rd,

we would not be here with me requesting to withdraw my plea now, and my new counsel Mr. Tim Rodriguez would be on board.").

However, Mr. Hued never filed a motion to withdraw the Petitioner's guilty plea, although Mr. Hued was aware of his client's desire. See Civ. Doc. 67, at 6. (THE COURT: [...] In the government's motion to continue sentencing filed on April 5th, 2012, the [U.S.] stated, in part, that Villalona's counsel, Mr. Hued, had advised the [U.S.] that Villalona intends to move to withdraw his plea at sentencing, [Crim. Doc. 62]."). In **Holloway v. Arkansas**, 435 U.S. 475, 490, (1978), this Court noted that "the mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." The Petitioner's desire to withdraw his plea is a "crucial matter" because it is only he that may decide what plea will be entered. See e.g., **Stano v. Dugger**, 921 F.2d 1125, 1146 (11th Cir. 1991). Also, Mr. Hued failed to notify the court of his client's desire to retain subsitute counsel until 5 days before sentencing, although Mr. Hued knew that "[i]n the weeks and months after his change of plea Mr. Villalona expressed a desire to hire a privately-retained counsel [as well as] a different CJA Panel attorney appointed." Crim. Doc. 66.

Therefore, the Petitioner's claim that his counsel failed to withdraw his guilty plea before it was accepted is in essence a conflict of interest claim which was brought to the court attention. See Crim. Doc. 67. At the hearing on that motion, not only did Mr. Hued fail to present why his client was upset him, as doing so would constitute an admission to malpractice, but the court failed to inquire the same. However, the Petitioner stated that he was upset at "Hued

for providing erroneous information about withdrawing his plea," which led to a proffer meeting with DEA agents. See Appendix B, at 5. When Mr. Hued was asked why was his client upset with him, he stated "I'm sorry. I don't know thr real reason." Civ. Doc. 89-90. Therefore, Mr. Villalona's testimony about being upset at Mr. Hued for providing erroneous advise on withdrawing the guilty plea is uncontradicted. In that vein, the reason Mr. Villalona sought to retain new counsel appears in the record. See Crim. Doc. 71. at 2. ("[T]he defendant has requested undersigned counsel's advice on the merit of filing a motion to vacate his plea of guilty... acceptance of responsibility apparently is at issue in this case.")

With respect to acceptance of responsibility, the manner in the proceedings were conducted resulted in the conviction of a defendant that denied the facts of the indictment at a time when he had an absolute right to a jury trial. See PSR addendum at 2:

> The defendant plead guilty puruant to a written plea Agreemeet but now wishes to withdraw from his plea. the defendant is denying the facts of the Plea Agreement, specifically the agreement to purchase 10 kilograms of cocaine for distribution, therefore the defendant has not accepted responsibility and a reduction for acceptance of responsibility and a reduction for acceptance of responsibility is not warranted pursuant to USSG § 3E1 comment.

On the other hand, Mr. Hued stated that he could not remember if the Petitioner denied the facts of the plea agreement. Civ. Doc. 67. ("I'm sorry. I don't remember."). To credit Mr. Hued's version of the facts over the Petitioner's, when in fact the Petitioner is saying the same thing as the U.S. Probation Officer, is to discredit the U.S. Probation Officer and the U.S., for no other reason than the court can

Just as the Petitioner lost "all faith" in Mr. Hued's ability to advocate his interest, so will the public lose "all faith" in the

courts ability to effectively administer justice, as "[p]otential and actual conflicts of interest **always** bring disrepute upon the bar, the court, and the law." **United States v. Hearst**, 638 F.2d 1190, 1198 (9th Cir. 1980). What is more, is that the U.S., by and through its assistant attorney, conceded that Mr. Hued was ineffective after "reviewing the specific facts of this case and the law on the issues." Civ. Doc. 5. However, the district court rejected the U.S.' concession for no other reason than it can. Id. at 9:

> THE COURT: I'd like to hear what actually happened, because a determination that a lawyer is ineffective is a significant finding and it should only be -- and I appreciate the government's willing to say, you know what, we'll concede the point and we'll go ahead and just try Mr. Villalona and go forward with a jury trial 'cause that's the outcome. If the plea is withdrawn, then we we set a trial date and we go forward. But in the absence -- in the absence of an evidentiary record, it seems that me merely saying, sure, that seems fine. It's a shortcut, you know, it's -- it's an easy resolution. It's not necessarily the correct one. So what I need to hear is what Mr. hued was told, you know, what the instructions were, and what the actions were pursuant to those instructions.

In **Berger v. U.S.**, 295 U.S. 78, 88 (1935), the Court noted that "[t]he U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [s]he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer." The law is that a lawyer shall not "withdraw from employment until he has taken reasonable steps to avoid forseeable prejudice to the rights of his client...." See Model Code of Profes-

sional Conduct DR2-110(a)(2); Rules Regulating the Florida Bar 4-1. 16(b); also Middle District of Florida Local Rule 2.03(b).

Lastly, although Mr. Hued's withdrawal from the case caused the Petitioner to lose his absolute right to withdraw his guilty plea, the district court found that "Villalona has not shown prejudice. At sentencing, the Court specifically asked Villalona whether he desired to withdraw his pleas if the charges only involved two kilograms of cocaine, and Villalona stated, 'No, sir.'...." Also that "there was not a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," based on the representation at sentencing. See Appendix B[illegible] at 8-9. However, the district court was award that there was a break down in communication and failed to inquire if the petitioner discussed the contents of the PSR with his counsel as required by the Fed. R. Crim. P. 32(i)(1)(A). In **U.S. v. Verderame**, 51 F.3d 249, 252 (11th Cir. 1995), the court held that "[i]mplicit in the right to counsel is the notion of adequate time for counsel to prepare the defense...." Yet, Mr. Villalona never got the opportunity to present his motion to withdraw his plea through counsel which resulted in the plain error standard being used on direct appeal.

In that vein, even though the district court found the Petitioner reponsible for only "2 kilograms," that finding was made only **after** the Petitioner was ajudged to be guilty of 10 kilograms of cocaine. Crim. Doc. 60. cf. Crim. Doc. 96. at 4. Therefore, the court failed to establish a factual basis for the quantity of drugs prior to accepting the Petitioner's guilty plea. See **U.S. v. Culbertson**, 670 F.3d 183, 191-92 (2d Cir. 2012)(failure to establish a factual basis for guilty plea to conspiracy to import 5 kilograms of cocaine

versus 3 kilograms not harmless error because drug quantity significantly impated mandatory minimum sentence.); See 21 U.S.C. § 841(b)(1)(B)(ii)(II). Furthermore, although the Petitioner stated that he understood the penalties at his change of plea hearing, the Magistrate failed to inform the Petitioner the correct minimum mandatory sentence concerning 2 kilograms of cocaine. See Crim. Doc. 94. at 21. Compounding this error, is the fact that Mr. Hued did not file written objections to the PSR and the district court did not attach its rulings on the objections to the PSR. See Fed. R. Crim. P. 32(i)(1)(B); also see, **U.S. v. Saac**, 632 F.3d 1203, 1215 (11th Cir. 2011) (remand required when sentencing court made mere "ministerial" error in failure to attach copy of it ruling on sentencing objections to PSR).

Likewise, the reduction in the drug quantity is a rejection of the stipulated facts contained within the plea agreement, which was never accepted by the district court. See Crim. Doc. 38. at 18. In **U.S. v. Self**, 596 F.3d 245, 250 (5th Cir. 2010), the court concluded that the "rejection of a stipulated sentence constitutes rejection of the entire plea agreement, thereby triggering the mechanisms in Rule 11(c)(5)." (quoting **In re Morgan**, 506 F.3d 705, 709 (9th Cir. 2007). Furthermore, the court reversed Self's conviction and sentence because the failure to inform Self that the entire plea agreement was being rejected, compunded by the court's error in reimposing all of the terms of the plea agreement on Self 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' (qouting **U.S. v. Adams**, 634 F.2d 830, 836 (5th Cir. 1981).

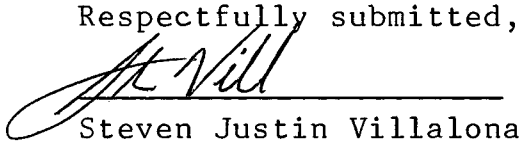
In sum, Mr. Hued's failure to notify the court of a conflict of interest AT ONCE, as required by **Holloway**, 435 U.S. 475, result in

the Petitioner's unjust conviction as well as a garden of plain errors which evaded the court and will "seriously affect the public reputation of judicial proceedings," The U.S.' concession was reasonable, unlike the district court's denial of the § 2255 Motion to Vacate. See Civ. Doc. 52. at 19. ("Although you say you no longer need or want my services, unless I see a new attorney file a notice of appearance **soon** I will have to set this matter for a hearing so the court can make a determination as to how to go forward.")(emphasis added by the Petitioner). cf Crim. Doc. 67; also see Crim. Doc. 71. (The Defendant is in custody and had to rely upon family members to assist in retaining udersigned counsel. Despite the Defendant's desire to retain udersigned counsel over one month ago, the Defendant's family was unable to finalize financial arrangements for the retention of [counsel until May 10, 2012]).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Date: 09/25/2019