

No. 19-6527

ORIGINAL

Supreme Court, U.S.  
FILED

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OFFICE OF THE CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES**

RUBEN PATRICK VALDES — PETITIONER  
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

**PETITION FOR WRIT OF CERTIORARI**

RUBEN PATRICK VALDES

(Your Name)

FEDERAL CORRECTION INSTITUTION  
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(Address)

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(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

1. WAS TRIAL COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO INVESTIGATE, FACT-CHECK, AND OBJECT TO ERRONEOUS INCLUSION OF JUVENILE PRIORS DURING CRIMINAL HISTORY GUIDELINE CALCULATION?
2. DO THE MERITS OF PETITIONER'S CLAIM WARRANT RELIEF UNDER UNITED STATES V. OLANO, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508; MOLINA-MARTINEZ V. UNITED STATES, 578 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1338, 194 L. Ed. 2d 444; ROSALES-MIRELES V. UNITED STATES, U.S. LEXIS 3690, No. 16-9493 S. Ct. (2018); and MASSARO V. UNITED STATES, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003)?
3. DID THE DISTRICT COURT COMMIT PLAIN ERROR WHEN IT IMPOSED A SENTENCE USING AN INCORRECT GUIDELINE RANGE RELYING ON A MISCALCULATION OF CRIMINAL HISTORY POINTS?
4. DID THE COURTS BELOW ABUSE THEIR DISCRETION IN DENYING PETITIONER'S 28 U.S.C. §2255 MOTION AND REQUEST FOR CERTIFICATE OF APPEALABILITY?
5. DID THE COURT OF APPEALS ERR IN AFFIRMING THE DENIAL OF PETITIONER'S 28 U.S.C. §2255 MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE WHERE DISTRICT COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO RESOLVE FACTUAL DISPUTES?

## **LIST OF PARTIES**

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

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

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### STATUTES AND RULES

### OTHER

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

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[X] is unpublished.

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

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] 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 July 30, 2019.

No petition for rehearing was timely filed in my case.

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

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

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

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

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

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

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

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

I. The Fifth Amendment of the United States Constitution provides:  
"No person shall be... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

II. The Sixth Amendment of the United States Constitution provides:  
"In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation...and to have the assistance of counsel for his defence."

III. The statutes involved and under review are:  
Title 28 U.S.C § 2255 (a) which states in pertinent part:  
A prisoner in custody under sentence of a court established by Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

Title 28 U.S.C. § 2255 (f)(4) which states in pertinent part:  
A 1-year period of limitation shall apply to a motion under this section. The limitation shall run from the latest of--  
(4) the date on which facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

## **STATEMENT OF THE CASE**

On November 9, 2018, the United States District Court for the Western District of Texas, El Paso Division, dismissed without prejudice Petitioner's motion pursuant to 28 U.S.C. § 2255. The court ruled it lacked subject-matter jurisdiction to consider Petitioner's motion because the motion was second or successive and he failed to seek and receive the issuance of a Certificate of Appealability from the Fifth Circuit Court of Appeals. [see Appendix B]

Petitioner Valdes subsequently filed a request for Certificate of Appealability. On July 30, 2019, the Fifth Circuit Court of Appeals denied the request holding that Petitioner Valdes could have raised his claim that counsel was ineffective for failing to adequately challenge the computation of his criminal history at the time he filed his initial § 2255 motion.[see Appendix A]

Petitioner Valdes raised one issue in the second § 2255 motion claiming "Trial Counsel Failed To Investigate And Object To Material Factual Errors In The Presentence Investigation Report's Criminal History Which Resulted In A Greater Sentence And A Violation Of The U.S. Constitution's Sixth Amendment Right To Effective assistance Of Counsel." [ see Appendix C]

## REASONS FOR GRANTING THE PETITION

### I

THE FIFTH CIRCUIT COURT OF APPEALS COMMITTED PLAIN ERROR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON PROCEDURAL DEFAULT. THIS ISSUE IS DEBATEABLE AMONG JURISTS OF REASON AS THE ERROR AFFECTED PETITIONER'S SUBSTANTIAL RIGHTS AND SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY, AND PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.

#### A. Plain Error/Ineffective Assistance of Counsel

Being that a judge does not conduct factual and legal investigations, but instead decides on the basis of facts and arguments pro and con adduced by the parties, it is reasonably understandable how an error in the calculation of the guideline range goes unnoticed by the court. Rosales-Mireles v. United States, 585 U.S. \_\_\_, 138 S. Ct. 1897, 201 L. Ed. 2d. 376 (2018) Even so, ultimately the District Court is responsible for ensuring the guideline range it considers is correct. ID. On appeal, such errors not raised in the District Court may be remedied under Federal Rules Of Criminal Procedure 52(b), provided that, as established in United States v. Olano, 507 U.S. 275, 113 S. Ct. 1770, 123 L. Ed. 2d. 508: (1) the error was not intentionally relinquished or abandoned, (2) the error is plain and (3) the error affected the defendant's substantial rights. Rosales-Mireles, (quoting Molina-Martinez v. United States, 578 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1338, 194 L. Ed. 2d. 444. If those conditions are met the Court of Appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. ID., at \_\_\_, 136 S. Ct. 1338, 194 L. Ed. 2d. 444. (dictum)

In the instant matter, the Fifth Circuit Court of Appeals denied authorization of a Certificate Of Appealability (COA) ruling that "Valdes could have raised his claim that counsel was ineffective for failing to

## REASONS FOR GRANTING THE PETITION

adequately challenge the computation of his criminal history at the time he filed his initial §2255 motion." [Appendix A] Conversely, Ground One of the §2255 motion that the District Court construed as second or successive was more specifically that trial counsel failed to investigate and object to material factual errors, [Appendix C] factual errors that would have been discovered prior to sentencing only as a result of said investigation. Mr. Gandara challenged the computation of Valdes' criminal history to no avail because he objected for the wrong reasons. It would be redundant and frivolous for Valdes to seek relief solely on the basis that his counsel failed to object when the record clearly demonstrates otherwise.

A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Green, 882 F. 2d 999, 1003 (5th Cir. 1989) Valdes specifically claimed that counsel rendered ineffective assistance by failing to investigate and fact-check the accuracy of certain criminal history offenses and subsequent guideline calculations. The presentence report (PSR) erroneously recorded the dates of arrest and assessed three criminal history points. [Appendix D] Initially during the sentencing proceedings Mr. Gandara made an objection to the scoring of the prior burglary convictions for the purpose of consolidation. He argued they should be considered related, "part of the same scheme", and that the District Court should follow the State Court's method of sentencing by consolidating the offenses in paragraphs 83 and 84. The District Court determined that an intervening arrest had occurred and Mr. Gandara concurred contravening his duty to investigate the exact nature and aspect of every factor that could have potentially increased the defendant's time in prison. The objection was overruled.

Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest [i.e., the defendant is

## REASONS FOR GRANTING THE PETITION

arrested for the first offense prior to committing the second offense](United States Sentencing Guideline Manual, Chapter 4, §4A1.2, Application Note 3). Such was not the case in this instance. In fact a search of El Paso Police Department arrest records for the dates in question yielded no results.

A cursory review of the PSR gives way to the misinterpretation that Valdes was arrested on 10-26-87 and again on 12-04-87, and finally on 01-04-88. Such was not the case. Valdes concedes that there were in fact three separate arrests, however, the sequence and dates of arrest are not accurate as documented in the PSR. To state it plainly the arrests for the first offense and the second offense occurred after the arrest for the third offense. The correct arrest dates for the burglary offenses listed in the PSR's criminal history in paragraph 83 should be 02-11-88 and 03-03-88 respectively. (Note the coinciding date of plea and sentencing(08-29-88)). To be clear, Valdes was never arrested on 10-26-87 nor was he arrested on 12-04-87 as the PSR indicates.

The error of the United States Probation Office in listing an offense date as an arrest date was compounded by Mr. Gandara's omission which violated Mr. Valdes' substantial rights and affected the outcome of the proceedings. Mr. Gandara's objection to the separate scoring of the two prior burglaries would not have cured the fundamental error of reclassifying a date of offense as a date of arrest resulting in the miscalculation of three additional points. The guideline range was scored at offense level 35, criminal history category 5 (11 points), resulting in a guideline range of 262 to 327 months. Valdes received 327 months imprisonment. The corrected guideline range is an offense level of 35, criminal history 4 (8 points), resulting in a guideline range of 235 to 293 months. At the time Valdes was sentenced the United States Sentencing Guidelines were mandatory and would have resulted in a minimum reduction of 34 months, assuming he received the high end.

In Molina-Martinez v. United States, 578 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1338, 194 L. Ed. 2d 444, this court recognized that "[w]hen a defendant is

## REASONS FOR GRANTING THE PETITION

sentenced under an incorrect guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 578 U.S., at \_\_\_, 136 S. Ct. 1338, 194 L. Ed. 2d 244. In other words, an error resulting in a higher range than the guidelines provide usually establishes a reasonable probability that the defendant will serve a prison sentence that is more than "necessary" to fulfill the purposes of incarceration. 18 U.S.C. §3553 (a); Tapia v. United States, 564 U.S. 325, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (2011). "To a prisoner", this prospect of additional "time behind bars is not some theoretical or mathematical concept." Barber v. Thomas, 560 U.S. 474, 504, 130 S. Ct. 2499, 177 L. Ed. 2d 1 (2010) (Kennedy, J., dissenting). "[A]ny amount of actual jail time" is significant, Glover v. United States, 531 U.S. 198, 203, 121 S. Ct. 696, 148, L. Ed. 2d 604 (2001), and "ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration." United States v. Jenkins, 854 F. 3d 181, 192 (CA2 2017).

The possibility of additional jail time warrants serious consideration in a determination of whether to exercise discretion under Rule 52(b). It is crucial in maintaining public perception of fairness and integrity in the justice system. The risk of unnecessary depravation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain guidelines error because of the role the District Court plays in calculating the range and the relative ease of correcting the error. Guidelines miscalculations ultimately result from judicial error. Glover, 531 U.S., at 204, 121 S. Ct. 696, 148 L. Ed. 2d 604; see also Peugh v. United States, 569 U.S., at 537, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013); Rosales-Mireles v. United States, U.S., LEXIS 3690, No. 16-9493, S. Ct. (2018) (quotations, alterations, and punctuation in original)).

## REASONS FOR GRANTING THE PETITION

Rosales-Mireles and Valdes are similarly situated where as the District Court in both cases made an error by imposing a sentence based on a mistake made in the presentence investigation report by the Probation Office, which works on behalf of the District Court. Not withstanding the error of the District Court, the outcome would have been different but for counsel's deficient performance, the record does not negate Petitioner Valdes' allegation.

### B. Abuse Of Discretion/Debatable Among Jurists Of Reason

The Fifth Circuit has held that absent unusual circumstances, ineffective assistance of counsel, if shown, is sufficient to establish the cause and prejudice necessary to overcome a procedural default. United States v. Walker, 68 F 3d. 931, 934 (5th Cir. 1995). As to the Circuit Court's determination that Valdes could have raised the issue on his initial habeas motion, he asserts that he could not have discovered the error nor the underlying facts supporting his claim by any exercise of due diligence because he was restricted from access to the documents which held the error by Bureau of Prisons policy. [Appendix F] Even if Valdes could have requested to review his PSR in his central file prior to August 17, 2018 (1) Rosales-Mireles was not good law until June of 2018, and (2) diligence can be shown by prompt action on part of the petitioner as soon as he is in a position to realize that he should act. United States v. Rodriguez, 858 F. 3d 960, 963 (5th Cir. 2017)(quoting Johnson v. United States, 544 U.S. 295 at 308, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005)). Furthermore, "in applying §2255 (f)(4) the important thing is to identify a particular time when...diligence is in order." Rodriguez, 858 F. 3d at 962, (Johnson, 544 U.S. at 308). A showing that the factual or legal basis for a claim was not "reasonably" available can constitute an objective factor external to the defense that impeded a petitioner's effort to comply with a [] procedural rule. Graves v. Cockerell, F. 3d 143, 154 (5th Cir. 2003)(quotation marks, punctuation, and omission added).

## REASONS FOR GRANTING THE PETITION

In another similarly situated case the Supreme Court in its dictum stated "we have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, See Kuhlmann v. Wilson, 477 U.S. 436, 454, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986)(plurality opinion), "abusive" petitions asserting in a second petition claims that could have been raised in a first petition. See McClesky v. Zant, 499 U.S. 467, 495, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)."

Here the Fifth Circuit has invoked res judicata where other circuits have applied the rule of lenity in similar cases. The Eleventh Circuit Court of Appeals held that due process claim that a movant's sentence was based in part on false information in the presentence report is cognizable in §2255 proceedings. Shukwit v. United States, 973 F. 2d 903, 904 (11th Cir. 1992); United States v Riley, 730 Fed. Appx. 175 (4th Cir. 2018)(finding that the COA is broad enough to cover both claims of actual innocence and ineffective assistance of counsel when otherwise procedurally barred; Winston v. Pearson, 683 F. 3d 489 (4th Cir 2012)(concluding that counsel's lack of diligence in pursuing other objections contravened their duty to investigate and make defensible professional decisions qualifying as "informed legal choices"). Counsel's legal strategies do not overcome their failure to be familiar with readily available documents (quoting Elmore v. Ozmint, 661 F. 3d 783 858 (4th Cir. 2011) and Hyman v. Aiken, 824 F. 2d 1405, 1416 (4th Cir. 1987); Tarleton v. Sec'y, Fla. Dept. of Corr., 2019 U.S. App. LEXIS 7316 (11th Cir. 2019)(granting COA after procedural default on claim of ineffective assistance of counsel) See also Smith v. Alibaugh, U.S. App. LEXIS 12759 (10th Cir. 2019).

## REASONS FOR GRANTING THE PETITION

Section §2255 is the primary means by which federal prisoners avail themselves of The Great Writ's protections. See Davis v. United States, 417 U.S. 333, 343, 94 S. Ct. 2298, 41 L. Ed. 2d. 109 (1974). The Supreme Court has made it clear that ineffective assistance of counsel challenges brought under the aegis of §2255 are not themselves susceptible to procedural default. Massaro v. United, 538 U.S. 500, 503-504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). In refusing to issue a Certificate Of Appealability authorizing petitioner Valdes to pursue a remedy under 28 U.S.C. §2255 The Fifth Circuit Court of Appeals overlooked a plain error, essentially the misplacement of one word in the criminal history section of the PSR, letting stand uncorrected an omission inconsistent with the rudimentary demands of fair procedure. Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 478 L. Ed. 417 (1962).

Petitioner Valdes has made a substantial showing of (1) the denial of a substantial right that affected the outcome of the proceedings, (2) affects the integrity and public reputation of judicial proceedings and (3) is debatable among jurists of reason.

Wherefore, based on the above foregoing facts and application of the law, and the arguments and authorities presented herein, the petitioner humbly prays that this honorable court will issue a writ of certiorari and reverse the judgement of The Circuit Court of Appeals.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Barber P. Valdes

Date: 10-24-19