

19-6600

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 20 19

ORIGINAL

BARRY LERNARD DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondant.

Supreme Court, U.S.
FILED
OCT 25 2019
OFFICE OF THE CLERK

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIFICATE

*

Barry Lernard Davis

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Petitioner is a layman at law, therefore as a Pro/Se Litigant he invokes the excusable error analysis of Haines v. Kerner, 404 U.S. 519 (1972).

QUESTIONS PRESENTED FOR REVIEW

- 1, Where petitioner attacked evidence; State's Certified Motion to Dismiss allegation in his PSR, of R.D., to his 2255 Motion, and argued his evidence in his COA brief, did the Courts below abuse there discretion when denying Petitioner's sentencing issue without addressing sentencing evidence fully litigating his claim ?
- 2, Is the lower Courts being bias, and prejudice, preventing Petitioner from presenting his evidence he putforth attached to his 2255 Motion, and 60(b) 1-6 Motion ?
- 3, Where the Fifth Circuit Court of Appeals barred Petitioner from litigating his sentencing claim, when the Fifth Circuit Court, requested evidnece, does being barred work a manifest injustice ?
- 4, In (United States v. Davis) (No.10-20794)(5th Cir. December 12, 2011), Petitioner's first direct appeal the Fifth circuit Court of Appeals ruled, that it was Petitioner's burden to provided evidence to overcome the presumption of reliability in the PSR, whereby, petitioner has attempted to present sentencing evidence, and the Court's failed to review the evidence is the Fifth Circuit conflicting with it own ruling ?
- 5, Where the Fifth Circuit Court denied petitioner's 60(b) Motion and failed to even cite Rule 4 and Rule 5, and Petitioner's sentencing evidence state's certified motion allegation in his PSR, in the Fifth Circuit Court ; conflicting with Gonazalez v. Crosby, 545 U.S.524 June 23, 2002 ?
- 6, Should the PSR, be used to enhance sentences offense levels with out sufficient evidence ?

7, Is there a defect in the integrity of petitioner's sentencing proceedings; where the fifth circuit Court and the district Court, mistake, overlooked, petitioner's sentencing evidence his Affidavits and State's Certified Motion to dismiss allegation in his PSR ?

8, Is the lower Courts in compliance with Rule governing 2255 and 60(b) 1-6 proceedings ?

9, Has Petitioner demonstrated a substantial showing to be granted a COA, and to overcome the PSR's allegations with his Affidavit, and, State's Certified Motion to Dismiss allegation in his PSR ?

10, Did the Courts below commit revesable err denying Petitioner's 60 (b)1-6, Motion without conducting an evidentiary hearing to resolve the factual disputes ?

PARTIES TO THE PROCEEDINGS

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Rule 4,5, Governing 2255 proceedings

Petitioner, Barry Lernard Davis, prays that this Honorable Court will issue a writ of certiorari to review the judgment and opinion of the United States of Court of Appeals for the Fifth Circuit, entered in the above proceeding on August 22, 2019.

I.

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original judgment of conviction of Petitioner was appealed to the United States Court of Appeal for the Fifth Circuit, which affirmed Davis's conviction. And vacated his sentence in part, and remanded for resentencing in accordance with this opinion attached hereto as Appendix "1".

The original judgment of conviction of Petitioner's was appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the conviction and sentence in an unpublished opinion attached hereto as Appendix "2."

The report and recommendation of the United States Magistrate Judge for the Southern District of Texas Houston Division on Petitioner's 2255 motion is unpublished and attached hereto as Appendix "3."

The opinion and order of the United States District Court for the Southern District of Texas adopting the United States Magistrate Judge's report and recommendation is unpublished and attached hereto as Appendix "4."

The opinion of the United States Court of Appeal for the Fifth Circuit is unpublished and is attached hereto as Appendix "5."

The oponion of the United States Court of Appeals for the Fifth Circuit is unpublished and is attached hereto as Appendix "6."

The order of the United States District Court For the Southern District of Texas is attached hereto as Appendix "7."

The opinion of the United States Court Of Appeals for the Fifth Circuit is unpublished and is attached hereto as Appendix "8."

The order of the State of Texas, 177 District Court County Criminal Court at Law Harris County, Texas Houston Division, is attached hereto as Appendix "9."

The oreder of Harris County, Texas Motion to Dismiss is attached hereto as Appendix"10."

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JURISDICTIONAL STAEMENT-

The judgment of the United States of Appeals for the Fifth Circuit was enterd on August 8, 2019. The jurisdiction of this Court is invoked under U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution provide " 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."
2. The Six Amendment of the United States Constitution provide " In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation, and to have assistance of counsel for his defence."

Rule 4 (b) governing 2255 proceeding provides:

Initial Consideration by judge. The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceeding the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the U.S. Attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Rule 5 The Answer Reply

(b) Content. The answer must address the allegations in the motion. In addition it must state whether the moving party has used any other federal remedies including any prior post conviction motion under these rules or any previous rules, and whether the moving party received and evidentiary hearing.

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IV.

STATEMENT OF THE CASE

On July 8, 2009, a Federal Grand Jury in the Southern District of Texas, Houston Division, returned a three (3) Count Indictment charging Bessie Lernard Davis ("Davis") in count 1 with Sex Trafficking of Children in violation of 18 U.S.C. § 1591(a). Count 2 alleged Transportation of Minors with Intent to Engage in Criminal Sexual Activity in violation of 18 U.S.C. § 2423(a). Count 3 alleged Coercion and Enticement in violation of 18 U.S.C. See Doc. 1

On March 22, 2010, jury trial commenced. See Doc. 51.

On March 24, 2010, a jury found Davis guilty on all three Counts of the Indictment. See Doc. 58.

On November 12, 2010, Davis was sentenced to 405 month imprisonment as to Count 1&2, and 240 month imprisonment as to Count 3, to run concurrently, Supervised Release for Life on all Counts, no fine and a mandatory Special Assessment Fee of \$300.

On November 18, 2010, Davis timely filed a Notice of Appeals.

On December 12, 2011, the Fifth Circuit court vacated remanded his case back to the district court for resentencing. See Doc. 105-1.

On April 20, 2012, Davis was resentenced to 327 month confinement, Supervised Release for Life, no fine or restitution, and a \$ 300 mandatory assessment fee. See Doc.122.

On April 26, 2012, an Amended Judgment was issued in the district court reflecting Davis' new sentence. See Doc. 124.

On May 3, 2012, Davis filed a timely Notice of Appeal. See Doc.126. Davis appealed from the amended sentence. On May 3, 2013, the Fifth Circuit Court issued an unpublished opinion affirming the amended sentence. On May 3, The Supreme Court of the United States subsequently denied certiorari on October 7, 2013. United States v. Davis, 544 Fed. Appx.344.denied,134 S.Ct.327(2013).

On June 9, 2014, Davis filed his Motion under U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and Memorandum of Law in Support("2255 Motion"). See Docs. 163 & 164.

On September 28, 2015, the district court denied his § 2255 Motion. See Doc. 182.

On November 25, 2015, Davis filed a timely Notice of Appeal.

On February 24, 2017, the Fifth Circuit Court Denied his COA.

On May 11, 2017 , the Fifth Circuit Court Denied his Rehearing Enbanc. On October 2, 2017, the Supreme Court denied petition for writ of certiorari.

On September 24, 2018, the district court denied Davis's §0(b) motion.

On August 22, 2019, the Fifth Circuit denied Davis's (COA),

A. COURSE OF PROCEEDINGS IN THE SECTION 60(b) 1-6 CASE BEFORE THIS COURT.

On November 5, 2018, Petitioner filed a 60(b) 1-6 motion challenging the constitutionality of the conviction, which asserts that: (1) The government and the court, failed to reply, address evidence attached to Petitioner's 2255, States Certified copy of two dismissals (2) Rule 6 the judge should have granted Petitioner Discovery, so petitioner could have better challenged his conviction (3) Petitioner requested to expand the record, so that his evidence could be made part of the record and further litigated. Petitioner requested an evidentiary hearing because of the factual disputes because petitioner submitted Affidavit, and attached evidence that the courts refused to litigate, answer, address Appendix 9 and 10.

On the 24th day of September, 2018 United States District Court denied Petitioner's 60(b) 1-6 motion. Appendix 7

On the 22nd day of August, 2019 the United States Court of Appeals for the Fifth Circuit denied petitioner's (COA). Appendix 8

EXISTENCE OF JURISDICTION BELOW

Petitioner was indicted and convicted in the United States District court for Southern District of Texas Houston Division, for sex trafficking of children 1591(a), Transporting of minor with Intent to engage in Criminal Sexual Activity 18 U.S.C. 2423 and alleged Coercion and enticement. A timely appeal to the United States Court of Appeals for the Fifth Circuit Court was filed.

VII.

REASON FOR GRANTING THE WRIT

B. THE COURT OF APPEALS HAD DECIDED A FEDERAL
QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISION
OF THIS COURT.

1. The Fifth Circuit Panel Opinion denying Petitioner's, 60(b) 60(b) 1-6 Motion, stated in part " Davis contends the he is entilted to discovery, enpansion of the recored, and an evidentiary hearing." The fifth Circuit Court's ~~now~~ that Petitioner, "has not mage the requisite showing." Unfortunitly, the Fifth Circuit Court of Appeal; mistake overlooked, or simply falied to litigate, accepted, address, responde to evidence, they stated "Davis's burdened to produce evidence." Petitoner attached State Certified Motion, allegation in his PSR, to his 2255, motion, and 60(b) motion, and argued that he attached evidence in his (COA). The Courts failures to address is a defect in the intergritty of the procceding. An incomplete recored went before the lower court, in which this conviction is in violation of due process and in direct conflict with the decisions ~~of~~ of this Court and ~~the~~ Petitioner did make a substantial showing in his COA.
2. Thw Fifth Circuit Panel Opinion erred dening Petitioner's COA, because its decision is in direct conflict with this Court's decision in ~~G~~Gonzalez, 545 U.S. 24, infra..Apprendi United States v. Booker,125. S.Ct. 738, 160 L.Ed. 2d 621 (2005).

3. The ~~rule~~ involved and under review governing 28 U.S.C. 2255 proceedings in the United States Courts of Appeals; and United states District Court.

Rule (5)(b) . The ~~ans~~ and reply

(b) Contents. The Answer must address the allegations in the ~~enti~~ motion. In addition it must state whether the moving party has used any other federal remedies including ~~an~~ any previous rules, and whether the moving party received an evidentiary hearing.

4. The statutes under which Petitioner sought habeas corpus relief under was Rule 60(b) 1-6

(a) Correction Base on Clerical Mistake; Oversight and Omission.

The Court may correct a clerical mistake or a mistake arising from oversight or omission whenever oneis found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been dockeyed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate courts.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDIN

On motions and just terms, the court may relieve a party or its legal representation from a final judgement, order, or proceeding for the folowing reason:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospective is no longer equitable; or
- (6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1)(2)(3) no more than a year after the entry of the judgment or order the date of the proceeding.

(2) **Effect on Finality.** The motion does not affect the judgment's or suspend operation.

(d) **OTHER POWERS TO GRANT RELIEF.** This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
- (3) set aside a judgment for fraud on the court.

4B1.5 (B)(1) enhancement reads as followed:

- (a) In any case in which the defendants' instant conviction is a covered sex crime 4B1.1 (career offender does not apply, and the defendant committed the instant offense of [conviction] subsequent to sustaining at least one sex offense)[conviction]]).

The record reveals that the lower Courts, failed, three (3), ~~and~~ separate time to full litgate, State Cerified Motion to dissmiss allegation in Peittioner's PSR, A Five (5) level enhancement. At resentencing counsel, admitted into the recored, evidence, State Certified Motion to Dismiss, Petitoner attached the evidence to his 2255, and 60(b)1-6 Motion, and (COA Motion.

3. The Fifth Circuit Court erred in dening Petitionepr's 60(b), Motion where the district court failed to conduct an evidentiary hearing to resolve the factual dispute, which is true, warrants habeas relief and the record did " conclusively show" that he could not establish facts warranting relief inder 60(b) 1-6, which entitled Petitioner to a hearing.

Petitioner respectfully urges that all aspects of the Circuit Court decision are erroneous and at a variance with this Court's decision as explained in the argument below.

VII.

ARGUMENTS AMPLIFYING REASON FOR WRITT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS THAT PETITIONER DID NOT MAKE THE REQUISITE SHOWING

There is a defect in Petitioners' sentencing proceedings, because the lower Corts failed to address Petitioner's sentencing evidence. At sentencing the district court improperly enhanced Petitioners' five (5) offense levels alleging Petitioner engaaged in a pattern of activity involving prohibited sexual conduct under U.S.S.G 4B1.5(B)(1). The PSR writer based this conclusion on dismissed State Case where Petitioner allegedly had sexual relation with R.D. THe evidence is insuffucuent to show that Petitioner engaged in a

pattern of activity involving prohibited sexual conduct. There is only one minor alleged in the Indictment and for which Petitioner was convicted and there is no evidence that he engaged in prohibited sexual conduct with a minor on at least two separate occasions.

The PSR writer claims in his Addendum that pursuant to the PSR 6 that Petitioner engaged in sexual conduct with R.D., a 16 year old female on at least two occasion. These frivolous allegations were never proven or even brought to any court of law. In fact, the State dismissed the case against Petitioner because of lack of evidence and because of R.D.'s lack of credibility. Obviously, the State authorities did not believe R.D.'s statements or they would not have dismissed the case against her and Petitioner. Further, Petitioner did not know that R.D. was a minor. Infact, R.D. states that she told Petitioner that she was 18 years old when they met. Further, that he asked here again if she was actually 18 and there is not response by R.D. infact the PSR. See 6 when question by Houston Police Officer. Petitioner states that R.D. told him that she was 19 years old and that she was lying if she claimed to have sex with him. See PSR 7. This enhancement was imposed without any evidence other than the allegations of RD. which are not credible or reliable. ThePSR writer did not personally interview R.D. he merly took undocumented and uncorroborated statements from a dead case file. As such, Petitioner sentence should be vacated and remanded to the lower courts for resentencing without the five (5) offence level enhancement. This reduction would have sinificant effect on Petitioner's sentence. See Apprendi v. New Jersey, 147 LEd. 2d 435 (2000).

VIII.
ARGUMENTS AMPLIFYING REASON FOR WRIT

I. THE COURT OF APPEALS ERRED AFFIRMING THE SENTENCING CONVICTION ON THE BASIS THAT DAVIS HAS NOT MADE THE REQUISITE SHOWING WHEN THE FIFTH CIRCUIT COURTS FAILED TO ADDRESS PETITIONER'S SENTENCING EVIDENCE.

This issue was also raised and reviewed in Petitioner's previous appeals. The fifth circuit court held that Davis had not provided evidence to demonstrate that the PSR's allegations are baseless or that lack of evidence was reason why the charges against him regarding his alleged conduct with RD were dismissed. At sentencing, Counsel admitted into evidence and into the record a Certified Copy of the States's Motion to Dismiss. As such, there is now evidence in the record to overcome the presumption that the PSR was accurate and reliable. Petitioner has shown that the district court and the fifth circuit court has affected the proceedings. There is a defect in the integrity of the sentencing and federal habeas corpus proceedings. See Gonzalez v. Crosby, 545 U.S. 524, 162 LEd 2d 480, 125 SCt. 2641 June 23, 2005, in relying on the PSR when applying the five-level enhancement under U.S.S.G. 4B1.5(b) (1), his claim for relief should be granted.

Without the (5) level enhancement under U.S.S.G 4B1.5 PSR 61, Davis's Total Offense Level would be 30 instead of 35. The PSR found Petitioner to be in Criminal History Category V. Accordingly, a Total Offense Level of 30 in Criminal History Category V yield a guideline range of 151- 188 months imprisonment. Therefore, Davis' sentence should be vacated and his case remanded for resentencing without the five (5) offense level enhancement. Harbison v. Bell, 556 U.S. 173 L.E.d.2d 347 (2009), Cooter & Gell v. Hartmart Corp., US 384, 405, 110 S.Ct., 2447, 2461, 110 L.Ed. 359 (1990)

In the Fifth Circuit's Court of Appeals first opinion the Cort held that the enhancemnt 4B1.5(b)(1) should stand. Davis (no.1020794) (5th Cir. December 12, 2011) Petitioner's first direct appeals allso held that "it was Dais's burden to provided evidence to demonstrate that the PSR's allegation are baseless or that lack evidence was the reason why the charges against him reguaring his alleged conduct with RD was dismissed.

In Petitioner's second direct appeal(United States v. Davis) (No. 12-20302) (5th Cir. May 3, 2013), the Fifth Circuit Court of Appeals, ruled that Petitioner Davis was barred from relutigating that issue in the district court. A direct confict with it's own opinion.

In Monroe v. Thigpen, 932 F.2d 1437 (5th Cir. June 10, 1991) The fifth Circuit Court reversed the judgment and remanded the cause. The court held that plaintiff Inmate was entitled to have false information expunged from his prison record, becase defendant prole officials reliance on it, when they knew it was false, was flagrant abuse of discretion.

In direect conflict with Petitioner's case ruling, the PSR in petitioner's case is inaccurate. This case is of national importane, and need the Supreme Court to exercise it's suprior power than vacate this sentence and remand for a new trail.

SAME CONSIDERATION COMPEL FINDING
THAT PETITIONER'S CLAIM VIOLATES
DUE PROCESS AND RESULTS IN A
MANIFEST INJUSTICE.

The district court misapplied the Sentenceing Guideline and imposed an unreasonable sentence when it added five(5) levels of Petitioners' total offence level computation under U.S.S.G. 4B1.5(B)(1).

The Fifth Circuit Court of Appeals remand order presented questions of law that are reviewed de novo, citing United States v. Carales-Villalta, 617 F.3d 342, 344 (5th Cir. 2010); and United States v. Hamilton, 440 F.3d 693, 697 (5th Cir.2006), among other authorities.

The crux of the governments' argument is that this issue was ruled on at Petitioner's first sentencing hearing, and was affirmed by the Fifth Circuit Cout of Appeals. See United States v. Davis' (No. 10-20794 (5th Cir. December 12, 2011). Thefore, it is subject to the law of the cas doctrine. The government contends that "under the 'law of the case' doctrine, an issue of law or fact decided on appeal may be reexamined either by the district court on remand or by the appellate court on a subsequent appeal."

However, there are three exception to tjis rule: (1) the evidence at a subsequent trail is substantially different; (2) there has been an intervening change of law by a controlling authority, and (3) the earlier decision is clearly erroneous and would work a manifest injustice. See Hamilton, 440 F.3d at 697 (citing United States v. Mathews, 312 F.3d 652,657 (5th Cir. 2002)). Petitioner Davis falls under the third exception under Hamilton. See also Gonzales, 545 U.S. at 524 (June 23, 2005), Rule 60(b) ^{not} attack a defect in the integrity of the federal habeas proceeding.

II THE COURT OF APPEALS ERRED BY DETERMING THAT PETITIONER MAINTAINS THAT THE DISTRICT COURT AND THE COURT OF APPEALS MISCONSTRUED THE FACTS AND LAW WITH RESPECTS TO HIS 2255 MOTION WHICH WAS DENIED ON THE MERITS THE FIFTH CIRCUIT COURT ERRED BY DETERMING THE PETITIONER WAS ENTITLED TO DISCOVERY, EXPANSION OF THE RECORD, AN EVIDENTIARY HEARING, DAVIS, ARHUES THAT THE FIFTH CIRCUIT COURT'S PRIOR DENIAL OF A COA VIOLATED 28 U.S.C. 2253, FEDERAL RULES OF APPELLATE PROCEDURAL 22(b) and *buck v. davis*, 137 S. Ct. 759 (2017)

Petitioner asserted, and attached, as evidence in his 2255, as an Order, Appendix 9 and 10, and as a result the lower courts failed to address petitioner's sentencing claim(s). State's Certified Motion to Dismiss the allegation of RD, even in the Fifth Circuit Court's Denial they failed to address, petitioner's evidence.

In the Fifth Circuit's opinion in Petitioner's first appeal, it was held that Davis had not provided evidence to demonstrate that the PSR's allegations are baseless or that lack of evidence was the reason why the charges against him regarding his alleged conduct with RD were dismissed. Therefore, the Fifth Circuit Court held that Davis' enhancement for his " pattern of activity involving prohibited sexual conduct" under U.S.S.G. 4B1.5(b)(1) should stand. See *United States v. Davis*, (No. 10-20794) (5th Cir December 12, 2011). However, at the resentencing hearing, undersigned counsel admitted into the record a Cerified Copy of the State's Motion to Dismiss. As such, Petitioner Davis now has evidence in the record to overcome the presumption that the PSR was accurate and reliable.

As such, without five (5) offense level enhancement under U.S.S.G. 4B1.5(b)(1), Davis's Total Offense Level would be thirty (30) in Criminal History Category V, yield an advisory Guideline range of 151-188 months imprisonment.

At resentencing, the district court again improperly enhanced Petitioner by five (5) offense levels alleging that Petitioner engaged in a " pattern of activity" involving prohibited sexual conduct under U.S.S.G. 4 B1.5(b)(1). The PSR 68 cites Petitioner to be deemed a repeat and dangerous sex offender against minors within the meaning of U.S.S.G. 4B1.5. The PSR writer based this conclusion on a dismissed State case where Davis allegedly had a sexual relationship with R.D. The evidence is insufficient to show that Davis engaged in a pattern of activity involving prohibited sexual conduct. There is only one minor alleged in the Indictment and for which Davis was convicted and there is no evidence that he engaged in prohibited sexual conduct with a minor on at least two separate occasions.

The PSR writer claims in his Addendum that pursuant to the PSR 6 that Petitioner engaged in sexual conduct with R.D., a 16-year old female on at least two occasions. These frivolous allegations were never proven or even brought to any court of law. In fact, the State dismissed the case against Petitioner because of lack of evidence and because of R.D.'s credibility. Obviously, the State authorities did not believe R.D.'s statement or they would not have dismissed the case against Davis. Further, Davis did not know that R.D. was a minor. In fact, R.D. states that she told Davis that she was 18 years old when they met. Further, that he asked her again if she was actually 18 and there is no response by R.D. in the PSR. See PSR 6. when questioned by a Houston Police Department officer, Davis stated that R.D. told him that she was 19 years old and that she was lying if she claimed to have had sex with him See PSR 7. This enhancement was imposed without

any evidence other than the allrgations of R.D. which are not credible or reliable. The PSR writer did personally interview R.D.. He merely took undocumented and uncorroborated statements from a old dismissed case file.

The issue was raised and argued in Petitioners' first direct appeal. In its opinion of Davis' first appeal, the Fifth Circuit Court of Appeals, the Court held that Davis had not provided evidence to demonstrate that the PSR's allegations are baseless or that lack of evidence was the reason why the charges against him regarding his alleged conduct with R.D. were dismissed. At the resentencing hearing, Counsel admitted into evidence and into the record a Certified Copy of the State's Motion to Dismiss. As such, Petitioner now has evidence in the record to overcome the presumption that the PSR was accurate and reliable.

Without the five (5) offense level enhancement under U.S.S.G. 4B1.5(b)(1), Petitioner's Total Offense Level would have been 30 in Criminal Histioiry Category V yield an advisory Guideline range of 151-188 months imprisonment. As such, Petitioner's sentence should be vacated and remanded to the Court of Appeals for resentencing without the five(5) offense-level enhancement under U.S.SG. 4b1.5(b)(1). This reduction would have a significant impact in Peititioners' sentnece. See US v. Beggerly, 524 U.S. 38, 47,118 S.Ct.1862, 141L.E.d, 2d 32 (1998). This Court has stated that " an independant action should be available only to prevent a grave miscarriage of justice." Also U.S. v. Manotas-mejia,824 F.2d 960 (5thCir.1987)

III. THE COURT OF APPEALS ERRED AFFIRMING THE DENIAL OF PETITIONER'S 2255 MOTION WHERE THE DISTRICT COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO RESOLVE THE FACTUAL DISPUTES

Section 2255 provides that "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall...grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respects thereto." 28 U.S.C. 2255 (2000). See, e.g., *Fonaine v. United States*, 411 U.S. 213, 215 (1973) (reversing summary dismissal and remanding for hearing because "motion and files and records of the case [did not] conclusively show that the petitioner is entitled to no relief"); *Sander v. United States*, 373 U.S. 1, 19-1 (1963).

Petitioner's 2255 and COA alleged facts that, if proved, entitle the petitioner to relief. See *Bracey v. Gramley*, 520 U.S. 899 (1997), Petitioner asserts there is evidence in the record, and he attached evidence to his 2255 and COA. Petitioner contends that he is innocent of the charges against him and the sentencing enhancement. Petitioner presents an affidavit detailing the fact he was not RD's pimp and they did not have sexual relations. Thus, petitioner was entitled to an evidentiary hearing. See *United States v. Scott*, 625 F.2d 623, 625 (5th Cir. 1980); *Pitts v. United States*, 763, F.2d at 201; *United States v. Birdwell*, 887 F.2d 643, 645 (5th Cir. 1989) (evidentiary hearing warranted if petition contains "specific factual allegations not directly contradicted in the record").

CONCLUSION

Petitioner Davis, has been deprived of basic fundamental right guaranteed by the Fifth, Fourteenth, and Sixth Amendments of the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities presented herein, Petitioner's sentence was sustained in violation of due process and a manifest injustice. Petitioner was deprived of his sentence with out defect in the integrity of the proceedings. The fifth circuit Court Final Judgment does not comply with Rule 4, and 5, governing 2255 proceeding and affected the integrity of the proceedings. Petitioner prays this Court will issue a writ of certiorari and reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted on this 15 day of *October* 2019.



PRO SE REPRESENTATION

If this Court elects not to address the issues presented in this petition at this time, it is requested that the writ issue and the matter be remanded to the Fifth Circuit Court of Appeals for reconsideration in light of this Court's opinion in *Buck, Gonzalez, Matthews, Hamilton*, all *supra*.

Also in light of Appendix 9, 10, Order of State of Texas. *Sander, Fonaine, Mathews*, all *supra*.

APPENDIX 11, and, 12, supreme court denied of certiorari.