19-6638

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Yannier Arias — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Yannier Arias
(Your Name)

P.O. BOX 1032
(Address)

Coleman, FL 33521
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether conflicting affidavits require an evidentiary hearing for ineffective assistance of counsel.

2. Counsel was ineffective for not objecting to a 2 level enhancement for fleeing and eluding which was an improper argument by the Government at trial and the P.S.I. at sentencing.

3. Counsel was ineffective at sentencing for raising an acceptance of responsibility when Petitioner proceeded to trial.

4. Counsel was ineffective for promising Petitioner an additional 12 month sentence if he rejected 36 month capped plea agreement by proceeding trial.

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:

Yannier Arias

Darlene Calzon Barror Esq.

Roberte Josephina Bodnar U.S.A. Attorney

Honorable Susan Bucklew

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TABLE OF AUTHORITIES CITED

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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 B 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[X] is unpublished.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 A 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[X] is unpublished.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 N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

[ ] reported at N/A; 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 6/27/19.

[ ] 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: 9/4/19, 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 N/A. A copy of that decision appears at Appendix N/A.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment says 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 to the same offense to be twice put in jeopardy of life or limb nor be be deprived of life, liberty, or property without due process of law nor shall private property be taken for public use without just compensation.

The Sixth Amendment says in all prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury wherein the crime shall have been committed which district shall have been previously ascertained 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.

18 U.S.C. § 371, 18 U.S.C. § 1029(a)(1)(3), 18 U.S.C.§ 1029(a)(1) and (b)(2), § 1028(A) and 2.

STATEMENT OF THE CASE

On March 13, 2019, Petitioner was denied his 28 U.S.C. 2255 for Ineffective Assistance of Counsel. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and was denied June 27, 2019. Petitioner filed a motion for reconsideration from the denial of his 28 U.S.C. 2255 by the appellant court. On September 4, 2019, Petitioner's reconsideration was denied and Petitioner now files a Writ of Certiorari challenging his claims for Ineffective Assistance of Counsel.

REASONS FOR GRANTING THE PETITION

Petitioner understands that the U.S. Supreme Court does not have to accept this Writ of Certiorari and chooses the cases it deems relevant to accept. The reason why the U.S. Supreme Court should accept this case is for the following reasons:

Petitioner was not given an Evidentiary hearing when conflicting affidavits, that were nonconclusionary and created a credibility issue, were not given to the Petitioner by the District Court.

Counsel was ineffective for not objecting to a 2 level enhancement for Fleeing and Eluding which was an improper argument by the Government when Petitioner was not convicted of in trial for Fleeing and Eluding.

Counsel promised Petitioner a sentence of twelve (12) months more to the thirty-six (36) month capped plea if Petitioner lost trial which is attorney misconduct that is forbidden by the Honorable Supreme Court.

Counsel was ineffective for raising and Acceptance of Responsibility when Petitioner lost trial and damaged any chance of Petitioner prevailing on any kind of appeal that Petitioner was not eligible for because he lost trial.

These are the reasons why the Honorable Supreme Court should accept this case sothat no other criminal defendant will be subjected to these types of injustices in the lower courts.

ARGUMENT

I. WHETHER CONFLICTING AFFIDAVITS REQUIRE AN EVIDENTIARY HEARING FOR INEFFECTIVE ASSISTANCE OF COUNSEL

When a habeas Petitioner and his Counsel have filed conflicting, non-conclusory affidavits that create a credibility issue for determination, an evidentary hearing is appropriate to determine credibility. (Blackledge vs. Allison 97 S.Ct. 1621 (1977)). "Contested factual issues in a 28 U.S.C. § 2255 cases must be decided on the basis of an evidentary hearing." (quoting Montgomery vs. U.S. 469 F.2d 148, 150 (5th Cir. 1972)) where the Government conceded that an evidentary hearing as to whether Counsel was ineffective in failing to properly advise a Defendant to a constitutional right is required. If Petitioner alleges facts that if true would entitle him to relief then the District Court should order an evidentary hearing and rule on the merits of his claim. (See Aron vs. U.S. 291 F.3d 708, 714-15 (11th Cir. 2002); Holmes vs. U.S. 876 F.2d 1545, 1552 (11th Cir. 1989)). Under 28 U.S.C. § 2255, unless the Motion and the files and records of the case conclusively show that a Defendant is entitled to no relief, "the Court shall grant a prompt hearing there on, to determine the issues and make findings of fact and conclusions of law respect thereto.

In addition pursuant to Fed. R. Civ. P. 12(b)(3) with some measure of deference the courts when parties submit conflicting affidavits, the Court in the absence of an evidentary hearing is inclined to give greater weight to a Defendant's version of

the jurisdictional facts and to construe such facts in light most favorable to a Defendant. To this perspective the Honorable Court of Appeals are mindful that a District Court decision not to allow any testimony at an evidentary hearing could conceivably undermine the notion that this is a pre-deprivation of procedural due process and that the Government has dealt with Defendants unfairly by not holding an evidentary hearing. See Incs vs. Echostar Commons Corp 265 F.3d 1193 (11th Cir.)2001) holding that an evidentary hearing was required before a District Court could reject evidence as not credible or choose between two plausible interpretations of the evidence submitted such as conflicting affidavits.

Petitioner's case in point, Petitioner states on his 28 U.S.C. § 2255 that Counsel was ineffective for allowing Petitioner to go to trial when the evidence was so overwhelming against the Petitioner. Petitioner does not speak any English whatsoever. Counsel advised and promised Petitioner that if he lost trial that Petitioner would only receive an extra year sentence from the capped 36 month plea agreement. Counsel for Petitioner writes an affidavit stating that she had no communication issues with Petitioner and even wrote letters in Spanish with Petitioner's signature. Yet the Government showed no evidence that Counsel encouraged the Petitioner to plead guilty. In these communication emails from Petitioner to his Counsel, Petitioner states that he was advised by Counsel to go to trial because the maximum sentence Petitioner could receive was only a year more than the capped 36 month plea that was offered which is a promise and forbidden by

The Supreme Court. Therefore Counsel was ineffective for promising the Defendant he would only receive 1 year more sentence from the capped 36 month plea if he lost trial. Counsel's response to Petitioner was that if he was dissatisfied with Counsel's performance to file a 28 U.S.C. § 2255. Petitioner is not stating any communication issues between Counsel and Petitioner. Petitioner is stating that Counsel promised him or advised Petitioner that he would only receive 1 year more sentence than the capped 36 month plea. No competent Counsel would have advised a client knowing that they faced a 10 year maximum sentence and a consecutive sentence that was mandatory by law. In addition Counsel through Petitioner's criminal history points could have made an educated legal inquiry of Petitioner's Guideline range which is done every day in the Federal Justice System. (See Kenon vs. U.S. 722 Fed. Appx. 978 (11th Cir. 2018); Chandler vs. U.S. 218 F.3d 1305, 1315 (11th Cir. 2000) where Counsel was ineffective because no competent counsel would have taken the action that counsel did take). No competent Counsel would have allowed Petitioner to go to trial with the overwhelming evidence stacked against him. Counsel has a constitutional duty not to allow Petitioner to proceed to trial, if the evidence is overwhelming and it was not in the best interest of the client. Counsel never encouraged Petitioner to pled guilty because Petitioner would have took the 36 month capped plea if Counsel would have advised Petitioner that he could receive the statutory maximum if he lost trial. Followed by a consecutive sentence. The statutory maximum for counts Two through Six, Eleven, and Twelve through Fifteen. The statutory

maximum is 10 years followed by a consecutive sentence of two years for Count Three and Seven. This makes absolutely no sense for Petitioner to go to trial unless there was a promise made by Counsel. 36 months or a possible 12 years is a nonbrainer when evidence is so overwhelming against any criminal defendant. Therefore Counsel's affidavit is conflicting to Petitioner's and an evidentary hearing is required to determine credibility determinations of conflicting affidavits. Petitioner's Due Process was violated in these proceedings and the evidence shows realistically that the outcome of these proceedings would have been different but for Counsel's ineffectiveness by promising Petitioner he would only receive a 1-year or more sentence from the 36 month capped plea and by allowing Petitioner to proceed to trial. Therefore Counsel's performance fell below the objective standard of reasonableness which prejudiced Petitioner in these proceedings. Strickland vs. Washington 466 U.S. 668-687 (1984); Cronic vs. U.S. 466 U.S. 648 (1984); Hill vs. Lockhart 474 U.S. 48-52 (1985); Padilla vs. Kentucky 130 S.Ct. 1476 (2010); Lafleur vs. Cooper 132 S.Ct. 1376 (2012); Missouri vs. Frye 132 S.Ct. 1396 (2012); Cuyler vs. Sullivan 446 U.S. 335 (1980); Florida vs. Nixon 543 U.S. 175. Therefore Petitioner requests that the Honorable Court grant a remand based on Ineffective Assitance of Counsel where Counsel promised Petitioner if he lost trial he would only receive a 1-year higher sentence from the 36 month capped plea. Petitioner is requesting an evidentary hearing and a new trial based on Ineffective Assistance of Counsel.

II. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO A 2-LEVEL ENHANCEMENT FOR FLEEING AND ELUDING WHICH WAS AN IMPROPER ARGUMENT BY THE GOVERNMENT OF TRIAL AND THE P.S.I. AT SENTENCING

Sentencing is a part of the trial process Direct Appeal is also a part of this process where the Sixth Amendment of the United States still applies to all defendants. Any mistakes or errors by Counsel at any of these stages that deprives Due Process of Law counts for Ineffective Assistance of Counsel.

According to Nelson vs. Colorado 137 S.Ct. 1249-1259 (2017): acquitted, dismissed, uncharged conduct, unrelated crimes cannot be used for relevant conduct. At sentencing Federal Judges consider relevant conduct for purpposes of calculating the guidelines which may include uncharged conduct, otherwise inadmissible at trial evidence and even acquitted conduct. In Nelson vs. Colorado (supra), the Supreme Court held that once a conviction was erased for any reason, the presumption of their innocence was restored. (See Johnson vs. Mississipi 486 U.S. 578, 585 (1988)). After a conviction has been reversed or dismissed, he must be presumed innocent of that charge. The reasoning in Nelson clearly reaches further than just precluding acquitted conduct, it entails that a defendant may not be penalized for dismissed or even uncharged conduct that entails that any facts that could constitute elements of a separate offense from the offense conviction may not be considered for purposes of sentencing. This is so if, as has been emphasized in Nelson.

The presumption of innocence is to be given weight or put differently, a state may not engage in an end-run around the Constitution by characterizing at sentencing acquitted, dismissed, or uncharged conduct that are actually elements of a separate offense as mere sentencing factors. The principle of Nelson is that only facts arising out of a final conviction which may not be construed as elements of acquitted, dismissed, or uncharged crimes may be considered at sentencing. This is not inconsistent with 18 U.S.C. § 3661 which provides that no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for purposes of imposing an appropriate sentence. This violates the Eighth Amendment of the United States Constitution for cruel and unusual punishment while Nelson dealt with the denial of remuneration to the acquitted defendant in Montery terms how much more so should it be applicable to the deprivation of one's liberty under a sentence of incarceration.

In Petitioner's case in point, the probation office on page 15 of the P.S.I. gave Petitioner a 2 level enhancement for obstruction of justice. The language states that the defendant fled from law enforcement in the course of the offense, yet Petitioner was never found guilty for fleeing and eluding at trial. Pursant to Nelson vs. Colorado (Supra) acquitted, dismissed, uncharged conduct, or crimes, may not be considered for sentencing purposes. The Supreme Court held that

once a conviction was erased for any reason the presumption of innocence is restored unless the Defendant should be re-tried. Counsel for Petitioner at sentencing or the Appeal Stages did not argue this 2-level enhancement. Instead argued a frivilious acceptance of responsibility reduction when Petitioner lost trial. Therefore Counsel performance fell below the objective standard of reasonableness and prejudiced the Petitioner. But for counsel's ineffectiveness, these proceedings would have been different and cost Petitioner a lower sentencing guidelines and sentence. Strickland vs. Washington 466 U.S. 668, 687 (1984); Hill vs. Lockhart 474 U.S. 48-52 (1985); Padilla vs. Kentucky 130 S.Ct. 1476 (2010); Lafleur vs. Cooper 132 S.Ct. 1376 (2012); Missouri vs. Frye 132 S.Ct. 1396 (2012); Cuyler vs. Sullivan 446 U.S. 335 (1980); Florida vs. Nixon 543 U.S. 175 .

Therefore Petitioner requests that the Honorable Court grant a remand for all of the above stated reasons to allow these new issues to be raised and incorporated.

III. COUNSEL WAS INEFFECTIVE AT SENTENCING FOR RAISING AN ACCEPTANCE OF RESPONSIBILITY WHEN PETITIONER PROCEEDED TO TRIAL

Pursuant to the United States Sentencing Guidelines § 3E1.1, a defendant can receive up to 3-level reduction for acceptance of responsibility. Counsel for a defendant must have notified the Government and the Honorable Court of his intention to enter a plea of guilty at sufficiently early point in the process so that the Government may avoid preparing for trial and the Court may

schedule its calendar efficiently. (3E1.1 Application note 6). This adjustment is not intended to apply to a defendant who puts the Government to its burden of proof at trial by denying the essential factual elements of guilt, it convicted, and only then admits guilt and expresses remorse, the 3E1.1 Application Note 2 goes on to say, rare situations, conviction by trial does not automatically preclude a defendant from consideration for such a reduction, but there is a criteria that reads as follows:

1) A reduction may occur where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt.
2) Make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct.

In addition, a defendant cannot qualify for acceptance of responsiblity if the conduct resulted in an enhancement under 3C1.1. for obstruction of justice or impeding the administration of justice which ordiniarily indicates that the defendant has not accepted responsibility for his criminal conduct.

In Petitioner's case in point, the Honorable Court states that Counsel strategically decided to raise acceptance of responsibiliity argument at sentencing which is all part of the trial process. This argument is frivilous therefore Counsel's performance fell below the objective standard of reasonableness and prejudice the Petitioner for the following reasons:

1) Petitioner proceeded to trial and was convicted on all counts.
2) There was no enter of a guilty plea whatsover at any point before trial.
3) Petitioner did not admit factual elements of guilt.
4) Petitioner did not go to trial to assert and preserve any issues.
5) Petitioner did not go to trial to challenge a statute or the applicability of a statute to his conduct.
6) Petitioner was given a 2-level enhancement for obstruction of justice.

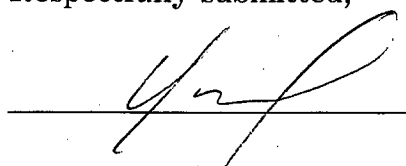
According to Adams vs. Wainwright 709 F.2d 1443, 1445 (11th Cir. 1983), a tactical decision amounts to Ineffective Assistance of counsel if no competent attorney would have chosen to prevent this argument at any part of this trial, or sentencing stages. Counsel for Petitioner argues a frivilous acceptance of responsibility issue when U.S.S.G. forbids an acceptance of responsibility when a defendant goes to trial. Petitioner never met any of the criteria that the U.S.S.G. § 3E1.1. gives the Honorable Court leeway to award Petitioner with this 3-level reduction. This was an unreasonable strategic tactic that Strickland 466 U.S. at 690 forbids. No competent counsel would have made this argument at sentencing when the evidence was overwhelmingly stacked against the Petitioner. Chandler vs. U.S. 218 F.3d 1305, 1315 (11th Cir. 2000); U.S. vs. Kenon 722 Fed. Appx. 978 (11th Cir. 2018). But for Counsel's ineffectiveness, these proceedings would have so much different. In addition Counsel for

Petitioner made Petitioner admit his guilt and gave up all of Petitioner's appellate rights or any chances of Petitioner prevailing on Direct Appeal. The Honorable Court states that Counsel appealed Petitioner's case but in error fails to reach or maintain Counsel's ineffectiveness for allowing Petitioner to give statements of guilt after trial trying to get an acceptance of responsibility. This prejudiced the Petitioner because Petitioner never had a chance whatsoever to prevail on his Direct Appeal which no competent counsel would have done which sabotaged Petitioner's Direct Appeal. That is Attorney Misconduct and Ineffective Assistance of COunsel. Counsel had Petitioner who speaks absolutely no English, sign papers that Petitioner did not understand to cover up her performance that fell below the objective standard after sentencing. Even if it was before sentencing, it still does not change the fact that Counsel was Ineffective. The Honorable Court states that arguments that Counsel presented were unsuccessful and does not render Counsel's representation ineffective on Direct Appeal. This decision is in error because Counsel sabotaged Petitioner's Direct Appeal at the sentencing hearing rendering Counsel ineffective and prejudiced the Petitioner by Counsel's unethical and frivilous argument at sentencing. Therefore Petitioner requests that the Honorable Court grant this remand for all of the above stated reasons where Petitioner can receive a new trial or accept the 36 month capped plea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 10/31/19