No. 19-6659

IN THE
SUPREME COURT OF THE UNITED STATES

In Re: Arturo Rodriguez Ornalez

(Your Name) PETITIONER

-V-

United States of America

RESPONDENT(S)

ON PETITION FOR A WRIT OF PROHIBITION PURSUANT TO THE ALL WRITS ACT 28 U.S.C. 1651, DIRECTED TO ASSOCIATE JUSTICE WITH SUPERVISORY CONTROL OVER THE FIRST CIRCUIT UNDER SUPREME COURT RULE 22-1.

U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

NAME OF COURT THAT LAST RULED ON THE MERITS OF YOUR CASE

PETITIONER FOR A WRIT OF PROHIBITION

ARTURO RODRIGUEZ ORNALEZ, FED. REG. # 68531-097

(Your Name)
FEDERAL CORRECTIONAL INSTITUTION

(Address)

P.O. BOX 3000, ANTHONY NM/TX 88021

(City, state, Zip Code)
N/A

(Phone Number)

CONSTITUTIONAL QUESTION(S) PRESENTED FOR REVIEW

(1)

WHETHER CONSTITUTION AND STATUTORY PROVISIONS AND RULE 11 VIOLATIONS MAY HAVE RENDERED ARTURO RODRIGUEZ ORNALEZ'S SENTENCE AND CONVICTION CONSTITUTIONALLY UNTENABLE.

(2)

WHETHER FAILURE OF ORNALEZ'S COUNSEL TO CHALLENGE THE RATIONALE FOR THE SUPERSEDING INDICTMENT, WITH TWO PROSECUTORS AND NO SIGNATURE OF THE FORMAN IN THE SUBSEQUENT SUPERSEDING INDICTMENTS. ALSO IN HIS ANDERS BRIEF HE MISTATES THE LAW. THE RAMIFICATIONS OF THIS ERROR IS FAR-REACHING, CONSTITUTING INEFFECTIVE ASSISTANCE OF COUNSEL AT BEST, AT WORST, CONSTRUCTIVE DENIAL OF COUNSEL, AT CRITICAL STAGES OF THE PLEA NEGOTIATIONS AND SENTENCING, CONSTITUTING STRUCTURAL ERROR.

LIST OF PARTIES

In Re Arturo Rodriguez Ornelaz

-V-

United States of America

The names of all parties appear in the caption of the case on the cover page. There are no additional parties.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." See, Maryland v. Louisiana, 451 U.S. 725, 737 (1981). Second, the Supreme Court also possesses original jurisdiction for "(all) controversies between the United States and a State." 28 U.S.C. Section 1251 (b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court, for "all actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970); United States v. Louisiana, 339 U.S. 699 (1951); United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeals" and "certiorari" as vehicles for appellate review of the decisions of state and lower federal courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari," the Court has complete discretion to hear the matter.

The Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review virtually eliminated. Now almost all cases come to the Supreme Court by writ of certiorari. Pub. L. No. 100-352, 102 Stat., 662 (1988).

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651(a) IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court and all courts established in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(B) An alternative writ or rule may be issued by a justice (Chief Justice Roberts) to whom an application to a writ of Prohibition is submitted may refer to the Court for determination.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE 11 VIOLATIONS MAY HAVE RENDERED ARTURO RODRIGUEZ ORNALEZ'S PLEA AGREEMENT INVOLUNTARY, UNKNOWING AND UNINTELLIGENTLY MADE.

To be valid, a guilty plea must be made voluntarily and with full knowledge of the consequences. Boykin v. Alabama, 395 U.S. 238 (1969). Stano v. Dugger, 921 F.2d 1125 (11th Cir. 1991), overruled by United States v. Garey, 540 F.3d 1253 (11th Cir. 2008). In Coleman v. Alabama, 827 F.2d 1469 (11th Cir. 1987), the court construed Boykin to require that an accused have information concerning each range of punishment prescribed by the act to which he may be sentenced. In order for a guilty plea to be entered knowingly, and and intelligently made, the defendant must have not only the mental competence to understand and appreciate the nature and consequences of the plea.

Clearly, the record of Arturo Ornales Rodriguez's judicial proceedings, especially form the inception of the plea negotiations to its culmination, that Counsel left him in the dark, with respect to the nitty gritty of the plea, and especially to what punishment he was looking at.

Arturo Ornales Rodriguez was not reasonably informed about his legal options and the alternatives that were available to him. A plea may be involuntary wither because the accused, like Arturo Ornales Rodriguez does not understand the nature of the constitutional protections that he is waiving or because the accused has such an incomplete understanding of the charge that his plea cannot stand ad an intelligent admission of guilt. Gaddy v. linahan, 780 F.2d 935 (11th Cir. 1986).

A guilty plea is not knowing and voluntary made when the defendant has been misinformed about the critical elements of the charged offense, even when the misinformation is the result of the court's erroneous interpretation of a criminal statute, and even if the interpretation as correct at the time the plea was entered. United States v. Brown, 117 F.3d 471 (11th Cir. 1997).

Even if the law was not clear at the time it was entered , the attorney had the duty to inform the defendant that the law was not clear., rather than advising him incorrectly that there was no chance of any additional confinement after the criminal sentence was served. Bauder v. Department of Corrections, State of Florida, 619 F.3d 1272 (11th Cir. 2010). In the case at bar, for the reasons adopted by the Supreme Court in Kimbrough, 552 U.S. 85, and the mitigation set forth in his moving papers, the court should have imposed a non-guideline sentence of time served.

This revelation itself rendered the indictment constructively amended. Because there was a fatal variance between what the indictment alleged and the proof at trial or what the plea agreement revealed, by reason of the sexual assault on him while in custody under a no-bail in his particular case.

The Supreme Court considered whether the government is required to provide Brady or Giglio information to the defendant before a plea is entered in United States v. Ruiz, 536 U.S. 622 (2002). In the Southern District of California, a defendant is sometimes given the opportunity to enter a "fast track " guilty plea. Pursuant to his program, the government will furnish Brady information to the defendant, but will not provide Giglio material (impeachment information about its witnesses does not taint the guilty plea or violate Due Process Clause). The Court held (reversing the Ninth Circuit) if the entry of the guilty pleas is otherwise free and voluntary, the government's decision to withhold impeaching information about its witnesses does not taint the guilty plea or violate Due process Clause.

The fact that a defendant enters a guilty plea and states at the time of the plea that is given freely and voluntarily does not necessarily preclude the defendant from subsequently challenging the voluntariness of the plea. Blackledge v. Allison, 431 U.S. 63 (1977). In Martin v. Kemp, 760 F.2d 1244 (11th Cir. 1985), for example, the defendant entered a guilty plea and acknowledged that it was freely and voluntarily entered with no duress. In a collateral attack, however, he offered evidence that the state threatened to prosecute his wife if he did not plead guilty.

Thus, the defendant is entitled to an evidentiary hearing on this claim. A defendant's claim that the indictment failed to charge a legitimate offense is jurisdictional and is not waived upon pleading guilty. United states v. Sac, 632 F.3d 1203 (11th Cir. 2011). Thus a guilty plea does not waive the right of an accused to challenge the constitutionality of the statute under which he or she is convicted. If a defendant believes he or she is entering a conditional guilty plea pursuant to Fed. R. Crim. P. 11(a)(2), but for some reason the appellate issue has not been preserved properly, then the plea has not been entered voluntarily and knowingly. United states v. Pierre, 120 F.3d 1153 (11th Cir. 1997).

Arturo Ornales-Rodriguez further avers that Rule 11 of the Federal Rules of Criminal procedure was also violated in his judicial proceedings. The court has identified three core objectives of Fed. RE., Crim.. P. 11. Those are ensuring that the guilty plea if free of coercion, ensuring that the defendant understands

STATEMENT OF CASE

Arturo Rodriguez Ornalez and Armando Meras Chavez ere charged at Boston, Chelsea and elsewhere in the District of Massachusetts, and elsewhere. The government's allegations the defendants did knowingly and intentionally combine, conspire, confederate, and agree, with each other and with other persons known and unknown to the Grand Jury;

(a) to conduct and attempt t o conduct one or more financial transactions affecting interstate commerce, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, and which in fact, involved the proceeds of a specified unlawful activity, that is, the sale and distribution of narcotics and dangerous drugs, with the intent to promote the carrying on such specified unlawful activity, knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, in violation of Title 18, United states Code, Sections 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i); and;

(b) to transport, transmit and transfer, and attempt to transport, transmit and transfer a monetary instrument and funds form a place in t he United States to a place outsize of the United States, that is, Mexico, that the intention to promote the carrying on of specified unlawful activity, that is the sale and distribution of narcotics and dangerous drugs, and knowing that the monetary instrument and funds involved in the transportation, transmission, and transfer, and the attempted transportation, transmission, and transfer, represented the proceeds of some from of unlawful activity and that such transportation, transmission, and transfer was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control or t he proceeds of such specified unlawful activity, in violation of Title 18, United States Code, Sect ions 1956(a)(2)(A) and 1956(a)(2)(B)(i).

All in violation of Title 18, United States Code, Section 1956(h).

REASONS FOR GRANTING

It is settled, that a decision of the Supreme Court of the United States, based solely upon its construction of Rule 11 of the Federal Rules of Criminal Procedure, with regard to the acceptance of a guilty plea, is made pursuant to the Supreme Court's Supervisory Power over the lower courts. See e.g. Arizona v. California, 373 U.S. 546 (1963); Wisconsin v. pelican Ins. Co. 127 U.S. 265, 300 (1888); Kennedy v. Denison, 65 U.S. (24 How) 66, 98 (1860).

As a logically corollary of this Supreme Court Supervisory Power, Petitioner Arturo Ornales Rodriguez seeks a grant of the Writ of Prohibition for two primary reasons, and directs his application utilizing Supreme Court Rule 22-1 to the Associate Justice with Supervisory Control over the Fifth Circuit Court of Appeals. Rule 22-1 states in pertinent part the following;

> "1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned, if an individual Justice has the authority to grant the relief sought."

Petitioner Arturo Ornales Rodriguez invokes Eule 22-1 of the Supreme Court Rules, seeking leave of the Associate Justice with Supervisory Control over the First Circuit to address what ostensibly appears to be an abuse of discretion by the district court, by undermining the powers granted it by Congress unde 28 U.S.C. 3231, leading to the possible loss of its subject matter jurisdiction to entertain the case, and the further rubber-stamping of these errors by the Court of Appeals for the First Circuit by its refusal to entertain these eggregious constitutional violations, by reason of twice not having enough Circuit Judges polled for review.

In point of fact, "the Circuit Judges were polled" and none felt compelled to vote for a rehearing. Arturo ornales Rodriguez as a consequence is without other means to rederess the thinly disguised res judicata, he has been thrust in. Thus, the action he seeks by application for the Writ of Prohbition by invoking Rule 22-1, is judicial in nature, for which irreparable prejudice and harm would be averted. See, 208 S.W. 835, 839.

Perioner therefore seels leave of this Honorable Court and the Associate Justice in charge of the First Circuit to direct the Unirted States Court of Appeals for the First Circuit to rule on petitioner's Petition for rehearing with suggestions for Rehearting En Banc, so that further litigation should p[roceed on its merits.

Arturo Ornelaz avers that in his challenge that the court lacks subject matter jurisdiction, he contends the burden of proof falls on the party (district court) claiming jurisdiction, and the showing must be made by a preponderance of the evidence. See McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 56 S.Ct. 78, 80 L.Ed 1135 (1936)(must allege facts supporting subject matter jurisdiction). Vantage Trailers v. Beall Corp., 567 F.3d 745, 748 (5th Cir. 2009)(must show subject matter jurisdiction by preponderance of the evidence). Courts must examine two facets of subject matter jurisdiction;

(1) whether the allegations are sufficient to support a finding of subject matter jurisdiction (facial validity), and;

(2) whether the facts supporting subject matter jurisdiction are accurate (factual validity). When faced with a factual challenge (as here) over the subject matter, the court may move beyond the allegations of the complaint and consider relevant evidence, including affidavits and testimony. Id.

Motions to dismiss for lack of subject matter jurisdiction fall into two general categories;

A facial attack and a factual attack. A facial attack is a challenge to the sufficiency of the pleading itself. On such a motion, the court must take the material allegations of the petition as true and construed in the light most favorable to the non-moving party. A factual attack, as Arturo Ornelaz does here, is not a challenge on the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction.

On such a motion, no presumptive truthfulness is applied to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. Nicholas v. All Points Transport Corp. of Michigan Inc., 364 F. Supp. 2d 621, 627 (E.D. Mich. 2005), quoting United States v. Ritchie, 15 F.3d 582, 598 (6th Cir. 1994), cert denied, 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 121 (1994)(emphasis original, citations omitted).

In addition, a court always has jurisdiction to determine its own jurisdiction, over the substance of the controversy.
Arturo Ornelaz avers that the requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of judicial power of the United States' and is "inflexible and without exception." Steel Co. v. Citizens For a Better Environment, 523, 523 U.S. 83, 93, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998). Indeed, the issue concerns the fundamental constitutional question of the allocation of judicial power, between the federal and state governments."Wright & Miller, 13 Fed. Prac. & Proc. Juris. Section 3521 (3d ed), Grupo Dataflux v. Atlas Global group, L.P. 541 U.S., 567, 574-576, 124 S.Ct. 1920, 1926-1927, 158 L.Ed.2d 866 (2004).

A federal court must presume that it does not have subject matter jurisdiction, and the party seeking to invoke its jurisdiction must affirmatively allege facts to support it. Vaden v. Discover Bank, 556 U.S. 49, 129 S.Ct. 1262, 1277-1278, 173 L.Ed.2d 206 (2009). The parties cannot waive subject matter jurisdiction.

No action of the parties can confer subject matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), principles of estoppel do not apply, American Fire and Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, 95L.Ed. 702 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject mater jurisdiction on its own motion. "(T)he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of it own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." Mansfield, C & L. M. R. Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884). Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)(emphasis added).

"Jurisdiction to determine jurisdiction refers to the power of the court to determine whether it has jurisdiction over the parties to and subject matter of a suit. If the jurisdiction of a federal court is questioned, the court has the power, subject to a review, to determine the jurisdictional issue." Enright, Law of Federal Courts Section 16, at 50 (2d ed. 1970). Atl. Las Olas, Inc v. Joyner, 466 F.2d 496, 498 (5th Cir. 1972). Thus, upon a challenge to subject matter jurisdiction, the court has jurisdiction only to the extent of determining the issue of subject matter jurisdiction.

ARTURO ORNELAZ'S INVOCATION OF MURRAY V. CARRIER TO OVERCOME THE PROCEDURAL DEFAULT RULE FOR FAILURE TO ADVANCE HIS CLAIMS ON DIRECT APPEAL.

Arturo Ornelaz avers that "Under the procedural default rule, a defendant generally must advance an available challenge t o a criminal convicting or sentence n direct appeal or else the defendant is barred from presenting that claim in a section 2255 proceeding.' Mackay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011)(internal citation and punctuation omitted).

Arturo Ornelaz contends the procedural default rule "is neither a statutory nor a constitutional requirement, but it is doctrine adhered to by the courts to conserve judicial resources as to respect the law's important interest in the finality of judgments.'"id. (quoting Massaro v. United States, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003)).

Arturo Ornelaz further contends, that there are two exceptions to the procedural default rule that applied to him. He believes he can overcome "application of the procedural default bar by showing cause for not raising the claim of error on direct appeal, because his appellate counsel filed an Anders brief, stating Arturo Ornelaz had no non-frivolous issues, thereby foreclosing all claims. Arturo Ornelaz suffered actual prejudice by this error.

An allegation of ineffective assistance of counsel can be "cause" to excuse procedural default. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). "As a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." United States v. Cosme, 134 F. App'x 391, 392-93 (11th Cir. 2005)(citing Bank of Nova Scotia v. United States, 487 U.S. 250, 254, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988)). "(Dismissal of the indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Id. (citations omitted).

WHETHER FAILURE OF ORNALEZ'S COUNSEL TO CHALLENGE THE RATIONALE FOR THE SUPERSEDING INDICTMENT WITH TWO DIFFERENT PROSECUTORS AND NO SIGNATURE OF THE FOREMAN IN THE SUBSEQUENT SUPERSEDING INDICTMENTS, ALSO IN HIS ANDER'S BRIE, HE MISSTATES THE LAW, THE RAMIFICATIONS OF THIS ERROR IS FAR REACHING. IT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL AT BEST, AT WORST, CONSTRUCTIVE DENIAL OF COUNSEL, AT CRITICAL STAGES OF PLEA NEGOTIATION AND SENTENCING, THAT RISES TO THE LEVEL OF STRUCTURAL ERROR.

STANDARD OF REVIEW AND LEGAL ANALYSIS

The Sixth Amendment right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 McMinn (1970). The benchmark for judging any claim of ineffective assistance of counsel, however, is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 688 (1984); also Boykin v., Wainwright, 737 F.2d 1539, 1542 (11th Cir. 1984).

Because a lawyer is presumed to be competent to assist a defendant, the burden is not on the accused to demonstrate the denial of the effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 658 (1984). Ineffectiveness of counsel may be grounds for vacating conviction if;

(1) counsel's performance fell below an objective standard of reasonable assistance and;

(2) the defendant was prejudiced by the deficient performance. Strickland, 466 U.S. at 687, 694. "There is no reason for a court deciding an ineffective assistance claim...to address both components of the inquiry of the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697.

Thus, if the defendant fails to show that his is prejudiced by the alleged error of counsel, this court may reject the defendant's claim without determining counsel was deficient. See Coulter v. Herring, 60 F.3d 1499, 1504 n.8 (11th Cir.). For performance to be deficient, it must be established that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. "Strickland, 466 U.S. at 690.

In other words, when reviewing counsel's decisions, "the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 131 (11th Cir. 2000)(en banc)(quoting Burger v. Kemp, 483 U.S. 776 (1987), cert denied, 531 U.S. 1204 (2001).

Furthermore, "(t)he burden of persuasion is on a petitioner to prove, by a preponderance of the evidence, that counsel's performance was unreasonable." Id. (citing Strickland, 466 U.S. at 688). The burden of persuasion, though not insurmountable, is a heavy one. See Id. at 1314 (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)).

"Judicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge (the) strong presumption "that counsel's performance was reasonable and the counsel made all significant decisions in the exercise of reasonable professional judgment." Id. (quoting Strickland, 466 U.S. at 689-90). Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy." Id. (quoting Darden v. Wainwright, 477 U.S. 168 (1986).

If the record is incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgment. See Id. at 1314-15 n.15. Thus, the presumption afforded counsel's performance "in no ...that the particular defense lawyer in reality focused on and, then deliberately decided to do or not to do a specific act." Id. Rather, the presumption is "that what the particular defense lawyer did at trial...were acts that some reasonable lawyer might do." Id.

Moreover, "(t)he reasonableness of a counsel's performance is an objective inquiry." Id. at 1315. For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take." Id.

To uphold a lawyer's strategy, a court "need not attempt to divine the lawyer's mental processes underlying the strategy." Id. at 1315 n. 1 6. Finally, "(n)o absolute rules dictate what is reasonable performance for lawyers." Id. at 1317.

Further, counsel does not provide ineffective assistance when frivolous arguments are not raised on appeal. Jones v. Barnes, 463 U.S. 745 (1983); see also United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 1992)(attorney not ineffective for ailing to argue a meritless issue).

American Bar association standards are to be used only as "guides" in reviewing whether an attorney's performance is reasonable, reversing a finding of deficient performance where the lower court treated the ABA standards as "inexorable commands that attorneys must "fully comply with," United States v. Mooney, 497 F.3d 397, 404 (4th Cir. 2007)(counsel in criminal cases are charged with the responsibility of conducting appropriate investigations, both factual and legal, to determine if matters of defense can be developed).

The critical issue is whether, applying prevailing professional norms, trial counsel conducted an objectively reasonable investigation to mitigating evidence. Porter v. McCallum, 558 U.S. 30, 40, 130 S.Ct. 447, 452-53, 175 L.Ed.2d 398 (2009); Kramer v. Kemna, 21 F.3d 305, 309 (8th Cir. 1994)(failure to interview witnesses or discovering mitigating evidence may be a basis for finding ineffective assistance of counsel)," Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1996)(a lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance)."

CONSTRUCTIVE DENIAL OF COUNSEL. - STANDARDS

In United States v. Cronic, 466 U.S. 648, 658-59, 80 L.Ed.2d 757 (1984, the Supreme court held that "presumption of prejudice applied when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing, where counsel is actually or constructively denied during a critical stage of the proceedings, or when there are "various kinds of state interference with counsel's assistance"). In Ornalez's Counsel's 'PREAMBLE' of his Anders Brief, he makes some remarkable remarks which undermines his entire argument that there are no non-frivolous issues in this appeal. The last sentence of this 'Preamble is very telling;

"Considering the Government did not violate the plea agreement
any appeal will be frivolous."

The Eight Circuit held in Robinson v. Black k, 812 F.2d 1084 (8th Cir. 1987) that (Anders Brief that raised issues that supported government instead of defendant was ineffective assistance. Counsel was ineffective when he filed his Anders brief with non-frivolous issues existed for appeal. Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989) United States v. Youla, 241 F.3d 296, 300 (3d Cir. 2001)(counsel who files an Anders brief must satisfy the court that he has thoroughly examined the record in search of appealable issues, and explain why the issues are frivolous).

AN ABUNDANCE OF PLEA AGREEMENT RELATED PREJUDICE WITH RESPECT TO COUNSELS' REPRESENTATION

The most preeminent error of counsel that his assertion that in issue three of his Anders brief that;

"The are no exceptions to the Appeal Waiver."

This assertion by counsel renders Ornalez"s plea agreement itself, involuntary, unintelligently and knowingly made.

The Third Circuit in United States v. Kaufman, 109 F.3d 186, 191 (3d. Cir. 1997), also held that, in the context of a claim that counsel failed to counsel the defendant as to the actual sentence he faces, leading him to execute an unknowing or unintelligent plea agreement, prejudice is demonstrated by showing that the result of the judicial proceeding would have been different.

APPLICABLE LAW TO CLAIMS THAT NEGATES COUNSELS NOTION OF NON-FRIVOLOUS ISSUE.

Generally, claims of ineffective assistance of counsel are analyzed pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on such a claim, Movant must show;

(1) deficient performance-counsel's performance fell below the unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 687-88, 684; see also United States v. Thornton, 23 F.3d 1532, 1533 (9th

Cir. 1994)(per curiam); and United States v. Solomon, 795 F.2d 747, 749 (9th Cir. 1986).

WHAT CONSTITUTES A "REASONABLE PROBABILITY IN THE CONTEXT OF ARTURO RODRIGUEZ ORNALEZ'S JUDICIAL PROCEEDINGS.

The Circuits have all been very vocal on this issue. In Ward v. Dretke, 420 F.3d 479, 487 (5th Cir. 2005), the court held (prejudice inquiry where defendant claims that the outcome of the judicial proceedings would have been different has counsel not made the egregious errors); See also Trottie v. Stephens, 720 F.3d 231, 251 (5th cir. 2013)(materiality exists if there is "a reasonable probability that, had the evidence (Double Jeopardy) been disclosed to the defense, the result of the proceeding would have been different."). The following constitutes the nucleus of several courts' holdings on the subject.

Strickland v. Washington, 466 U.S. 668, 694, 80 L.Ed.2d 674 (1984)(a "reasonable probability sufficient to undermine confidence in the outcome). Nix v. Whiteside, 475 U.S. 157, 175, 89 L.Ed.2d 123 (1986)(reasonable probability standard less demanding than preponderance standard). Porter v. McCollum, 558 U.S. 30, 175 L.Ed.2d 409 (2009)("We do not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding" is a probability sufficient to undermine he outcome of his penalty proceeding."); Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 170, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011)("A reasonable probability " is a probability sufficient to undermine confidence in the outcome."). Ferrara v. United States, 456 F.3d 278, 294 (1st Cir. 2006)(a "reasonable probability" is a probability sufficient to undermine confidence in the outcome); Kiruvan v. Spencer, 631 F.3d 582, 591(1st. Cir. 2011)("reasonable probability" test does not require showing the proceeding would have actually been different); Gonzalez v. united States, 722 F.3d 118, 130 (2d. Cir. 2013)(there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different); Baker v. Barbo, ("reasonable probability" test is not stringent one); United States v. Smith, 497 Fed. App'x 269, 272 (4th Cir. 2012).

CONCLUSION

WHEREFORE, ARTURO RODRIGUEZ ORNALEZ moves the Honorable Associate Justice of the Supreme Court, with Supervisory Control over the First Circuit Court of Appeals, premises permitted, to issue the Writ of Prohibition in the interest of justice.

Date: October 28, 2019.

Respectfully Submitted,

Arturo Rodriguez Ornalez