No._____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN RODRIGUEZ

Petitioner

v.

UNITED STATES,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns petitioner's claim that he was misled concerning the sentencing consequences of his guilty plea to a conspiracy charge.

The question presented is, was the petitioner entitled to an evidentiary hearing on his motion to vacate his plea when (1) his plea agreement stated that his federal sentence could run concurrently with the "undischarged" portion of his state sentence (2) his counsel told him that the sentences would run concurrently and, at that time, petitioner had served about 15 months of his 56 month state sentence (3) the only credit he received against his federal sentence was 63 days?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Juan Rodriguez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of Rodriguez's motion to vacate or set aside his sentence pursuant to 18 U.S.C. § 2255 in an unpublished memorandum decision. App. 1. [1] The district court decision is unreported. App. 5.

JURISDICTION

The final judgment of the Court of Appeals was entered on December 26, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In pertinent part, the Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right . . ."to have "the assistance of counsel" for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

28 U.S.C. § 2255(b) provides, in pertinent part, that "unless [a motion to vacate the judgment] and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United

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[1] "App." refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit simultaneously with the Appellant's Opening Brief on Appeal. "CR" refers to the docket number of the Court of Appeals docket and "DCR" refers to the docket number of the federal district court docket.

States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

STATEMENT OF THE CASE

1. The Los Angeles County Case

On January 24, 2012, in Los Angeles County Superior Court, Rodriguez was convicted of one count of possession of methamphetamine and one count of possession of methamphetamine for the purpose of sale (Cal. Health & Saf. Code §§ 11378 and 11379). He was sentenced to one day in jail and 36 months of supervised probation. ER 5. On May 19, 2014, probation was revoked and Rodriguez was sentenced to a term of 56 months in state prison. ER 6. On July 13, 2014, he was taken into custody to begin serving the state court sentence. ER 23.

2. The Federal Case

On August 2, 2013, Rodriguez was charged by indictment in the Federal District Court for the Central District of California with one count of conspiracy to distribute at least 50 grams of methamphetamine, in violation of 21 U.S.C. § 846. ER 39. The charge was based on the same incident that formed the basis for his convictions in Los Angeles County Superior Court. ER 5-6.

Rodriguez was transferred to federal custody by a writ issued on August 12, 2014. On September 4, 2014, he entered a guilty plea to the charged offense pursuant to a plea agreement. On August 6, 2015, the district court sentenced Rodriguez to the ten year mandatory minimum term. ER 6. The district court also ordered that the federal sentence was to run concurrent with "any undischarged term of imprisonment" arising from the Los Angeles County case. ER 6, 10. Rodriguez did not appeal the judgment or sentence. ER 6.

3. Rodriguez's Motion to Vacate or Set Aside His Sentence Pursuant to 28 U.S.C. § 2255

On August 11, 2016, Rodriguez filed a motion to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255. ER 47. On October 28, 2016, the government filed its opposition. On March 31, 2017, Rodriguez filed his reply. On September 5, 2017, the district court denied the motion. ER 47-48.

On November 1, 2017, Rodriguez filed a notice of appeal. ER 3. On May 31, 2018, this Court issued a certificate of appealability. ER 1.

STATEMENT OF FACTS

A. The Charged Incident

The following summary of the incident that formed the basis for both the state and federal prosecutions is derived from the indictment and the pre-sentence memoranda filed in the district court.

The indictment alleged that in the days leading up to January 31, 2011, Rodriguez and three co-defendants, Guillermo Ruiz, Willie Lopez, and Miguel Calderon, agreed that Ruiz and Lopez would sell Calderon a pound of methamphetamine that was intended for further distribution. On that date, Calderon drove Rodriguez and another co-conspirator to Lopez's home, where Lopez gave a package of methamphetamine to Rodriguez and Calderon.

As Calderon and Rodriguez drove away, Rodriguez put the package, which contained about 440 grams of methamphetamine, in his pants leg. ER 39-43.

Defense counsel's pre-sentence report argued that, at most, Rodriguez was acting as a "mule" when he handled the methamphetamine and that he had not otherwise participated in the

conspiracy offense. District Court Docket No. 129, pp. 6-7. The government's sentencing memorandum states that Rodriguez, in furtherance of the conspiracy, received a pound of methamphetamine, which was approximately 99% pure, and hid it in his clothing as he and his co-conspirators drove away from the methamphetamine distributer, co-defendant Willie Lopez." District Court Docket No. 107, p. 2.

B. Rodriguez's Post Conviction Claim That His Guilty Plea Was Not Knowing and Voluntary Because He Was Misinformed As To How His Federal Sentence Would Run Concurrently With His State Sentence

On August 11, 2016, Rodriguez filed a pro se motion to vacate or set aside his sentence under 28 U.S.C. § 2255. District Court Docket No. 1. The motion presented two claims: (1) Rodriguez's guilty plea was not knowing, voluntary or intelligent, because he was misled as to how his federal sentence would run concurrently with his state sentence and (2) his sentence was the result of prejudicial prosecutorial delay and violates the Double Jeopardy Clause of the Fifth Amendment. District Court Docket No. 1.

In support of his claim that his guilty plea was involuntary, Rodriguez stated that he was initially arrested by California state authorities on January 31, 2011, and prosecuted in the Los Angeles County Superior Court for possession and transportation for sale of methamphetamine (Cal. Health & Safety Code §§ 11378 and 11379) in *People v. Rodriguez*, Los Angeles Superior Court Case No. VA118509 for the same conduct that formed the basis for his conspiracy conviction in this case. District Court Docket No. 1, pp. 3-5.

1. Rodriguez Alleges That His Defense Attorney Advised Him Incorrectly That His Federal Sentence Would Run Concurrent With His State Sentence Based on the Same Acts

Rodriguez asserts that he was advised by his federal counsel, Mr. George Mgdesyan, that "any sentence imposed as a result of the [federal] guilty plea would run concurrent with the state sentence [Rodriguez] was serving because it involved the same acts." District Court Docket No. 1, p. 5. Rodriguez's pro se motion also argued that the government stipulated in its plea agreement that his federal sentence would run concurrent with his state sentence. Id.

Prior to his federal district court sentencing, Rodriguez's defense counsel submitted a sentencing memorandum requesting that the federal sentence run concurrently with Rodriguez's state sentence pursuant to U.S.S.G. 5G1.3 (c) and 18 U.S.C. § 3585. ER 19-23. Defense counsel argued that the best way to effectuate a concurrent sentence under the circumstances was for the district court to order that Rodriguez's sentence had commenced on July 13, 2014, the date that Rodriguez began serving his state sentence for the identical conduct that was the basis for the federal prosecution. ER 23.

2. Rodriguez Alleges That The Plea Agreement is Misleading Where It States That the Prosecutor Will Not Oppose His Request for Concurrent Time for the Undischarged Portion of His State Sentence Because Under Bureau of Prison Rules, He Cannot Receive Any Credit Against His Federal Sentence For Time Served on a State Sentence

Rodriguez's plea agreement states that the government agreed "not to oppose defendant's request that any sentence imposed by the Court run concurrently to any undischarged portion of the 56-month sentence defendant is currently serving on a probation violation in the Superior Court of the State of California, County of Los Angeles, Case No. VA118509, imposed on July 3, 2014." ER 26.

The government's sentencing memorandum states that it would not oppose Rodriguez's request that his federal sentence run concurrently with only the undischarged portion of his state sentence. ER 18. (emphasis in original.) The government's memorandum also indicated that Rodriguez's plea agreement specified that the "length of the undischarged portion of defendant's state sentence to be calculated by the Bureau of Prisons." ER 18.

In fact, the plea agreement did not include any statement that the length of the undischarged portion of the state sentence would be calculated by the Bureau of Prisons. ER 24-38.

Rodriguez's § 2255 motion asserts that the district court was in fact without authority to run *any* portion of his state sentence concurrent with his federal sentence. He argues that, after his sentencing hearing, he learned that the Bureau of Prisons has exclusive authority to award custody credit and: (1) the BOP is required to begin a prisoner's sentence after sentencing occurs and (2) it is prohibited from awarding credit against a federal sentence for time spent serving a state court sentence in a state institution. 18 U.S.C. § 3585 (b). District Court Docket No. 1, p. 7.

Rodriguez's petition also asserts that the Bureau of Prisons was without authority to award Rodriguez any credits for his federal sentence for days that were served to satisfy his state sentence. Accordingly, his current release date is February 19, 2024. *Id* at pp. 7-8.

C. The Government's Response

In the government's opposition to Rodriguez's § 2255 motion, it argued that at the time of Rodriguez's federal sentencing hearing, he had already served 15 months of his state sentence. District Court Docket No. 8, p. 5. The government argued that Rodriguez had asserted for the

first time in his § 2255 motion that he should have received credit for the 15 months previously served on a state court sentence for the same incident. District Court Docket No. 8, p. 6.

The government's opposition does not acknowledge Rodriguez's district court sentencing memorandum where defense counsel explicitly requested that Rodriguez receive credit against his federal sentence for all of the time Rodriguez had served in state prison for the same conduct. ER 19-23.

The government's opposition recognized that U.S.S.G. § 5G1.3(b)(1) provides that where defendant has served time for a state sentence that "resulted from another offense that is relevant conduct" to the offense resulting in the subsequent federal sentence, that the Court "shall adjust" the federal sentence by subtracting from the federal sentence the time served of the state sentence. District Court Docket No. 8, p. 6.

The government argued that the Guideline on that topic is in conflict with 21 U.S.C. § 841 (b)(1)(A), which required that Rodriguez be sentenced to a mandatory minimum term of 120 months in prison. District Court Docket No. 8, p. 6-7, citing *United States v. Cruz*, 595 F.3d 744, 745 (7th Cir. 2010). Accordingly, the government argued that Rodriguez was not entitled to credit against his federal prison term for the time he spent in state prison for the same conduct and that he had received the benefit of his plea agreement. Id.

D. The District Court's Decision

On September 27, 2016, the district court denied Rodriguez's § 2255 motion in a memorandum opinion and order. ER 5. The district court found that Rodriguez had presented no evidence that he was misinformed as to whether his federal sentence would run concurrent with his state sentence. ER 7-8. The district court reasoned that the written plea agreement clearly

states that the prosecution agreed not to oppose Rodriguez's request that his federal sentence run concurrently with "any ***undischarged portion"*** of his state sentence. 1 ER 6 (emphasis in original).

The district court also reasoned that when it declined to give Rodriguez credit for the 15 months he had already served in state prison and ordered that the federal sentence should run concurrent with any "undischarged" term of imprisonment remaining on the state sentence, it "imposed exactly the terms contemplated by the plea agreement." 1 ER 8. Accordingly, the district court found that Rodriguez had not established that his plea was involuntary or that his counsel was ineffective. 1 ER 8.

The district court decision does not address Rodriguez's allegation that the Bureau of Prisons was prohibited from awarding him any credit against his federal sentence for time served concurrently on the state sentence. The district court also denied Rodriguez's request for an evidentiary hearing, on grounds that he had failed to raise any disputed facts that required resolution at an evidentiary hearing. I ER 9.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINIONS BELOW ARE IN CONFLICT WITH THIS COURT'S DECISION IN *BLACKLEDGE V. ALLISON* AND THE PUBLISHED DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS CONCERNING THE RIGHT TO AN EVIDENTIARY HEARING ON A MOTION TO VACATE, SET ASIDE OR CORRECT A SENTENCE PURSUANT TO 28 U.S.C. § 2255

This Court should grant certiorari because the decisions below are in conflict with this Court's precedents concerning the right to an evidentiary hearing on a motion to vacate, set aside or correct a sentence pursuant to 28 U.S.C. § 2255 .

Under *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977), a district court may only summarily dismiss a petition for a writ of habeas corpus if the allegations are incredible or frivolous. Moreover, under published Ninth Circuit decisions and 28 U.S.C. § 2255, the moving party is entitled to an evidentiary hearing when the motion, files and records in his case do not "conclusively show" that he is not entitled to relief. 28 U.S.C. § 2255 (b); *Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994).

In this case, Rodriguez asserts that his trial counsel told him that his federal sentence would run concurrent with his state sentence because the federal and state convictions are based on the same facts. His claim is corroborated by defense counsel's sentencing memorandum, which argues that the district court could run the two sentences concurrently by ordering that Rodriguez's federal sentence began on the date he began serving his prison term for a state conviction based on the same conduct. Rodriguez's claim is also corroborated by the written plea agreement, which states that the government would not oppose his request to run the undischarged portion of his state sentence concurrent with his federal sentence.

The law is arguably unsettled as to whether a prisoner who is serving a mandatory minimum term pursuant to 21 U.S.C. § 841(b)(1)(a) may receive credit for time served in a state institution for an offense based on the same conduct under U.S.S.G. 5G1.3(b)(1). As a result, Rodriguez's allegation that his defense attorney misadvised him as to whether his federal sentence would run concurrently with his state sentence for a conviction based on the same incident is credible.

Rodriguez also alleges that the government misled him when it stipulated in the plea agreement, and the district court agreed, that he could receive credit against his federal sentence for any undischarged portion of his state sentence.

Rodriguez alleges that the Bureau of Prisons cannot award him any credit for the time served on his state sentence, because its own rules prohibit it from awarding "double" credit toward a federal sentence for time credited to a state sentence. Because there are disputed issues of fact, this case should have been remanded to the district court for an evidentiary hearing.

The Ninth Circuit's memorandum decision holds that the district court did not abuse its discretion when it failed to hold an evidentiary hearing because the claim could be conclusively decided on the paper record. App. 5. The Court of Appeal's holding on that point is contrary to the record, its own published precedent and *Blackledge's* holding that a post conviction petition may be summarily dismissed only when the claims are patently false or frivolous. Because Rodriguez's claim that he was misled was not patently frivolous or false, an evidentiary hearing was required.

The Court of Appeal's holding that Rodriguez was not entitled to an evidentiary was contrary to its own published decisions *in Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990) and *United States v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir. 1988). The decision in this case reasons that Rodriguez's claims are contrary to other statements in the record, including the plea colloquy. However, when the prisoner's allegations conflict with other evidence in the record, the district court must hold an evidentiary hearing unless the issues and the credibility of any conflicting statements can be "conclusively decided" without a hearing. *Espinoza*, 866 F.2d 1067, 1069 (9th Cir. 1988).Because the memorandum decision in this case in this case is in

conflict with *Blackledge* and published Circuit precedent as to the right to an evidentiary hearing, this Court should grant certiorari to provide guidance to the lower courts.

ARGUMENT

I. This Court Should Reverse the District Court Order Denying Rodriguez's Motion and Remand This Case For An Evidentiary Hearing

A. The Constitutionally Protected Right to Effective Assistance of Counsel in Connection With a Guilty Plea

In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "deficient performance" and "prejudice." *See Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir.2011) (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. 2052); *see also Tilcock v. Budge*, 538 F.3d 1138, 1146 (9th Cir. 2008).

"Deficient performance" means representation that "fell below an objective standard of reasonableness," *Stanley*, 633 F.3d at 862 (*citing Strickland* 466 U.S. at 688, 104 S.Ct. 2052), and which fell below professional norms prevailing at the time of trial. *See Chaidez v. United States*, 568 U.S. 342, 347 (2013) *citing Strickland* 466 U.S. at 687–88, 104 S.Ct. 2052.

To show deficient performance, the defendant must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland* at 690. Further, the defendant must identify the acts or omissions of counsel that are alleged to have been professionally unreasonable. *Strickland*, 466 U.S. at 688–89. The court must then "determine whether, in light of all the circumstances," counsel's acts or omissions were "outside the range of professionally competent assistance." *Strickland*, 466 U.S. at 689.

The Supreme Court has recognized the constitutional right to effective assistance of counsel in connection with plea bargains. *Hill v. Lockhart,* 474 U.S. 52 (1985); *Missouri v. Frye*, 566 U.S. 134, 140-145 (2012); *Lafler v. Cooper*, 566 U.S. 156, 169-171(2012).

In *Lafler*, the Court held that trial counsel was prejudicially ineffective when he advised the petitioner to reject a plea bargain offer and go to trial. *Lafler*, 566 U.S. at 174. In *Frye*, the Supreme Court recognized trial counsel's constitutional duty to convey the terms of plea offers to a client. *Frye*, 566 U.S. at 150-151. The Court emphasized that the Sixth Amendment does not protect only the right to a fair trial. It also requires effective assistance of counsel during the plea bargaining process. *Id* at 1386. The right extends to any stage where "proper functioning of the adversarial process" is necessary to a just result. *Id* at 1388.

B. A Guilty Plea Must Be Knowing, Voluntary and Intelligent

Under the Due Process clause of the United States Constitution, a valid guilty plea must be knowing, voluntary and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); *Henderson v. Morgan*, 426 U.S. 637, 644-45(1976). A guilty plea must be the result of an intelligent choice and a defendant must have had a "full awareness of the relevant circumstances." *Brady v. United States* 397 U.S. 742, 755 (1970). A valid a guilty plea "... cannot be the result of threats, misrepresentations, or improper promises." *United States v. Anderson*, 993 F.2d 1435, 1437 (9th Cir.1993).

C. The District Court's Duty To Conduct An Evidentiary Hearing

Pursuant to 28 U.S.C. § 2255, a person convicted of a criminal offense is entitled to an evidentiary hearing on his motion to vacate a sentence unless the motion, files and records of a case "conclusively show" that he is not entitled to relief. 28 U.S.C. § 2255 (b); *Frazer*, at 781 *see*

also Blackledge v. Allison, 431 U.S. 63, 75-76 (1977)(a district court may summarily dismiss a petition for a writ of habeas corpus if the allegations are incredible or frivolous).

On review of the district court's decision not to conduct an evidentiary hearing, this Court must accept, for the purpose of initial review, that the prisoner's allegations are true. *Frazer*, at p. 781. The Court must then decide whether the allegations, if proved, would entitle the prisoner to the relief he seeks. *Id citing United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir.1980).

When the motion is based on facts outside of the record, an evidentiary hearing is required. *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990); *United States v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir. 1988). When the prisoner's allegations conflict with other evidence in the record, the district court must also hold an evidentiary hearing unless the issues and the credibility of any conflicting statements can be "conclusively decided" without a hearing. *Espinoza*, at p. 1069.

D. The District Court Should Have Conducted An Evidentiary Hearing Concerning the Merits of Rodriguez's Claim That His Guilty Plea Was Involuntary Because He Was Misadvised As To How His Federal Sentence Would Run Concurrently With His State Sentence

This Court should remand this case for an evidentiary hearing, because the district court erroneously decided the merits of Rodriguez's § 2255 motion without conducting a hearing as to disputed facts that are outside the record. The district court should have conducted an evidentiary hearing as to Rodriguez's assertions that (1) his guilty plea was involuntary because his trial counsel, Mr. George Mgdesyan, advised him inaccurately that his federal sentence would run concurrently with his state sentence for an offense based on the same facts; (2) his guilty plea was also involuntary because he was misled by the plea agreement and the district court order indicating that his federal sentence would run concurrent with any undischarged portion of his

state sentence and (3) the Bureau of Prisons is precluded from awarding Rodriguez any credit against his federal sentence for the time credited to his state sentence.

When the government filed its opposition to Rodriguez's § 2255 petition, it asserted that the material facts concerning Rodriguez's plea agreement are undisputed. District Court Docket No. 8, p. 3. However, the facts concerning Rodriguez's conversations with his defense attorney concerning how his federal sentence would run concurrent with his state sentence are not fully developed in the existing record. The government's opposition did not include a declaration of defense counsel concerning what advice counsel gave to Rodriguez about how his federal sentence would or would not run concurrent to his state sentence for a crime based on the same facts. District Court Docket No. 8.

The government's opposition acknowledges that this Circuit has held that a district court may give credit to a defendant for time served in a state case arising from relevant conduct by imposing a sentence below the mandatory minimum term set forth in the Armed Career Criminal Act, 18 U.S.C. §§ 922, 924. Docket No. 8, p. 5, fn. 1. citing *United States v. Drake*, 49 F.3d 1438, 1440 (9th Cir. 1995.)

However, the government argued that *Drake* did not apply in this case because, unlike the ACCA, 21 U.S.C. 841 (b)(1)(A) requires that the defendant be sentenced to a term of imprisonment not less than the 10 year minimum. District Court Docket No. 8, p. 7, fn 1. The district court's memorandum decision did not rule on this issue. ER 5-8.

At minimum, the law is unsettled as to whether Rodriguez could have received credit for the time served in state prison and as to how his federal sentence should have run concurrent with the undischarged portion of his state sentence. *See Setser v. United States,* 566 U.S. 231,

239-40 (2012) (18 U.S.C. § 3584, which refers to "undischarged term of imprisonment," doesn't preclude court from imposing sentence concurrent with anticipated state sentence; *Drake*, *supra*, at p. 1440; *United States v. Brito*, 868 F.3d 875 (9th Cir. 2017)("term of imprisonment," as used in 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10(b)(2)(A) includes time spent in both state and federal custody).

Accordingly, Rodriguez should have been allowed to present at an evidentiary hearing his own testimony and any other available evidence concerning the advice he received from defense counsel about how his federal sentence would run concurrent to his state sentence based on a conviction for the same incident.

This case is comparable to *Espinoza*, where the prisoner argued that his trial lawyer had coerced his guilty plea by promising him that he would receive a "split" sentence of five years incarceration and five years of probation. *Espinoza* at p. 1069. This Court held that, even though the district court had conducted an adequate plea colloquy, it was necessary to conduct an evidentiary hearing when the prisoner's allegations were based on conversations with his counsel that took place off the record. *Espinoza*, at pp. 1069-1070.

This case is also comparable to *Frazer*, *supra*, where the prisoner alleged that his attorney was ineffective for, among other things, threatening that if he continued to insist on going to trial, counsel's performance would be "very unsatisfactory." *Frazer* at 784.

The defendant in *Frazer* also alleged that two deputy United States Marshals had heard counsel's statement and that they told him to get a new lawyer. The prosecutor argued that Frazer's allegations were frivolous. The district court denied the motion, without holding an

evidentiary hearing, on grounds that the allegations were "conclusory" and "unsupported by the facts." *Frazer* at 784.

This Court reversed the district court's order and remanded the case for an evidentiary hearing. *Frazer* at 784. The Court reasoned that the prisoner's allegations were outside the record and that fact "should have signalled the need for an evidentiary hearing." It found that the district court's decision was "manifestly erroneous. " *Id.* Because Rodriguez's allegations about his off the record conversations with his counsel are comparable to those in *Frazer*, the district court order denying Rodriguez's request for an evidentiary hearing should be reversed.

Moreover, the district court should not have denied an evidentiary hearing as to Rodriguez's allegation that the government and the district court also misadvised him when the prosecutor stipulated and the district court ordered that the sentence would run concurrent with any undischarged portion of the state sentence. To prove his claim that he was misadvised on that point, Rodriguez should be allowed to present evidence at a hearing that the Bureau of Prisons will not give him credit against his federal sentence for any time credited to his state prison term.

Finally, the district court should consider evidence regarding the date on which the "undischarged" portion of Rodriguez's state sentence was to be begin to run concurrent with the federal sentence under the plea agreement. Rodriguez agreed to plead guilty to the federal conspiracy charge on August 3, 2014. He entered his guilty plea on September 4, 2014 and he was sentenced almost a year later, on August 6, 2015. ER 5-6.

The plea agreement does not specify whether the undischarged state sentence would begin to run concurrently on the date Rodriguez signed the plea agreement, the date of his plea, or the date of his federal sentencing. ER 26. Because the plea agreement and the district court

judgment do not specify the date that the undischarged state sentence would begin to run, they are vague and Rodriguez was misled concerning how his federal sentence would run concurrent with his state sentence. *See Carnine v. United States*, 974 F.2d 924, 929-932 (7th Cir. 1992).

This case is comparable to *Carnine*, where the plea agreement stated that the defendant's term of imprisonment in his federal case was to be served concurrently with the previously imposed sentence in a federal prosecution in another state. After the sentencing hearing, the defendant discovered that the Bureau of Prisons had calculated the start date of his second sentence as the date that sentence was imposed. He filed a § 2255 motion, arguing that he had been misled as to the terms of his plea agreement, because it was vague as to the date that his concurrent sentence would begin to run. *Carnine*, at p. 927.

The Court of Appeals for the Seventh Circuit agreed, and remanded the case for an evidentiary hearing. *Carnine*, at p. 933. The Court held that the term "concurrently" was vague in this context, because both Carnine's interpretation and the government's fit within the accepted definition of "concurrent" as one or more prison terms to be "served simultaneously." *Carnine* at pp. 929-930. Because the start date of the second federal sentence had not be specified in the plea agreement, it was vague as to the precise meaning of "concurrent" terms. *Id* at pp. 928-930.

Because plea agreements must be vague and unambiguous, the Seventh Circuit remanded the case to the district court with instructions to conduct an evidentiary hearing as to the start date of the second federal sentence. *Carnine*, at pp. 930-932.

Here, the government made a similar error in drafting Rodriguez's plea agreement when it specified that it would not oppose his request that his federal sentence run concurrent with any

"undischarged" portion of the state sentence. The plea agreement fails to specify the operative date when the "undischarged" portion of the state sentence would begin to run. ER 26.

One could reasonably believe that the undischarged portion began to run on the date that Rodriguez was sentenced in state court, July 3, 2014, because that the is the only date referenced in the plea agreement. ER 26. Rodriguez could also have reasonably believed his concurrent term began to run when he was remanded into federal custody to enter his plea agreement in the instant case, which was on or after August 12, 2014. ER 6.

In its sentencing memorandum, the government asserted that the start date of the "undischarged" concurrent term was to be calculated by the Bureau of Prisons. ER 18. However, any ambiguity as to the start date for Rodriguez's concurrent sentence should have been construed against the government. *United States v. Santos,* 553 U.S. 507, 514 (2008) (plurality opinion) (rule of lenity requires adopting most "defendant-friendly" of any plausible interpretations).

Under contract law principles, any ambiguities in the written agreement are to be construed against the drafter. *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (government bears "responsibility for any lack of clarity.").

Given all of these circumstances, Rodriguez's allegation that his plea was involuntary, because his defense attorney, the government and the court misadvised him concerning the manner in which his state sentence would run concurrent to his federal sentence should have been the subject of an evidentiary hearing.

In summary, because Rodriguez's claim involves factual allegations that were outside the record, the district court was required to conduct an evidentiary hearing. *Machibroda v. United*

States, 368 U.S. 487, 494-495 (1962); *Marrow v. United States*, 772 F.2d 525, 527 (9th Cir. 1985); *Espinoza*, at p. 1069-1070 ; *Carnine,* at p. 933 (evidentiary hearing necessary as to allegations in § 2255 motion where prisoner alleged he was entitled to concurrent time with prior sentenced imposed in a different federal court and plea agreement was ambiguous as to that issue); *United States v. Gaviria*, 116 F.3d 1498, 1511-1515 (D.C. Cir. 1997)(remanding for evidentiary hearing as to whether trial counsel's erroneous advice concerning sentencing consequences of plea agreement was prejudicial).

Accordingly, the district court abused its discretion when it denied Rodriguez's request for an evidentiary hearing.

CONCLUSION

For the reasons set forth above, this Court should accept certiorari, reverse the decision of the district court and remand this case for an evidentiary hearing.

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Respectfully submitted,

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