No: 19-8633

In the
Supreme Court of the United States

WEYLIN O. RODRIGUEZ,

Petitioner,

vs.

ORIGINAL

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A writ of certiorari be granted since the Eleventh Circuit's decision in not remanding to the lower court was contrary to precedent of this court which required an evidentiary hearing according to Title 28 U.S.C. § 2255.

A writ of certiorari should be granted in light of the Supreme Court's decision in Hill v. Lockhart, 474 U.S. 52 (1985).

This court's decision in *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003) required that a COA should have been granted.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the Unite States Court of Appeals for the Eleventh Circuit, the Honorable Scriven, M, District Judge, Middle District of Florida, Tampa Division.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Weylin O. Rodriguez, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, is unpublished *Rodriguez v. United States, No.* 19-10335-B, 2020 U.S. App. LEXIS 4641 (11th Cir. Feb. 12, 2020) is reprinted in the separate Appendix A to this Petition.

The denial of Petitioner's Title 28 U.S.C. § 2255 in the District Court, Middle District of Florida, Tampa Division under *Rodriguez v. United States,* 8:16-cv-798 was entered on December 7, 2018, and is reprinted as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on February 12, 2020.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1654(a) and 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same

> offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Id. Fifth Amendment U.S. Constitution

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> Unless the motion 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 States attorney, grant a prompt hearing thereon, determine the

> issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE CASE

In April 2012, Rodriguez was indicted on one count of conspiring to engage in sex trafficking, in violation of 18 U.S.C. § 1591(a)(1), (a)(2) (2018) and 1594(c) (Count One); four counts of sex trafficking, in violation of 18 U.S.C. §§ 1591(a)(1) and (a)(2) and 2 (Counts Two, Four, Five, and Six); two counts of using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, the offenses charged in Counts Two and Counts Six, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Counts Three and Seven); one count of transporting a minor for prostitution, in violation of 18 U.S.C. §§ 2423(a) and 2 (Count Eight); one count of coercing an individual to travel in interstate commerce to engage in prostitution, in violation of 18 U.S.C. §§ 2422(a) and 2 (Count Nine); and one count of possessing a firearm after having

been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (Count Ten). (Cr.D/E 35).[1]

Rodriguez pled not guilty, proceeded to trial, and was convicted on all counts, except count three. (Cr.D/E 165). He was sentenced to concurrent terms of life imprisonment on Counts One, Two, Four, Five, Six, and Eight; 240 months' imprisonment on Count Nine; and 120 months' imprisonment on Count Ten, all followed by a consecutive term of 60 months' imprisonment on Count Seven. (Cr.D/E 194). Rodriguez proceeded on appeal, however, on January 15, 2015, the Eleventh Circuit Court appeals affirmed the sentence and conviction. *United States v. Rodriguez,* 589 F. App'x 513 (11th Cir. 2015). Rodriguez proceeded via a Title 28 U.S.C. § 2255 alleging several instances of ineffective assistance of counsel, however, the lower court denied the petition without an evidentiary hearing. (Cv.D/E 22). On appeal from that denial, the United States Court of Appeals for the Eleventh Circuit refused to grant a certificate of appealability. This appeal ensued.

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[1] "Cr" and "Cv" refer to the criminal and civil docket sheets in the United States District Court, Middle District of Florida, Tampa Division.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

1. A writ of certiorari be granted since the Eleventh Circuit's decision in not remanding to the lower court was contrary to precedent of this court which required an evidentiary hearing according to Title 28 U.S.C. § 2255.

In the original 2255, Rodriguez raised that counsel rendered ineffective assistance when he failed to advise him of the plea negotiations with the Government. The plea agreement would have mitigated the impact of the case Rodriguez. (CV. D/E 1-1, Aff'd at 9). In the relevant sections, Rodriguez in his affidavit stated in relevant part:

> "3. That defense counsel made no attempt to obtain a plea agreement even though I advised them that I would be open to such an agreement;
>
> 4. That defense counsel, other than immediately before the Court hearings, met with me only on two times."

Id. (CV. D/E 1-1, Aff'd at 9).

Rodriguez' was adamant that he wanted counsel to secure an agreement to mitigate his exposure. In response (as expected), the Government secured an affidavit from defense counsel, Federal Public Defender A. Fitzgerald Hall, contradicting the allegations raised by Rodriguez. Each affidavit contradicted each other. The allegations were antagonistic to each other. That is all the court had before it when

it decided this case. Counsel's Affidavit (which reads more as a Government response), contradicting the allegations made by Rodriguez. Counsel's affidavit offered nothing more on the actual merits of Rodriguez's position. There were no additional statements opposition, merely a direct attack on each allegation raised by Rodriguez. A closer reading of counsel's affidavit supported Rodriguez's position. Hall's affidavit alleges exactly what Rodriguez presented, that a plea offer was made and he was not privy to the facts ... "In any event, in this case, ***the Government offered Mr. Rodriguez a plea to one human trafficking charge, in violation of Title 18 U.S.C. § 1591 and to knowingly using and carrying a firearm during in relation to and in furtherance of crimes of violence charges, in violation of 18 U.S.C. § 924(c) charges."*** *Id.* (CV. D/E 9-1 at 5). Aso, in direct contradiction to Rodriguez's affidavit, counsel stated, "***Mr. Rodriguez rejected the Government's offer and proceeded to trial."*** *Id.* (CV. D/E 9-1 at 5). That is as far as the contradiction of Rodriguez's and the Government's response to each party's affidavit reach. Rodriguez was in fact open to a plea agreement. (CV. D/E 1-1, Aff'd at 9). Counsel stated otherwise, without more. All the District

Court was left with were two affidavits contradicting each other. Although the court determined that no evidence exists, "To support Rodriguez's allegations that counsel failed to negotiate a plea in his behalf" ... (CV. D/E 22 at 11), there is similarly, nothing to support counsel's affidavit. The court's reasoning of "no existing evidence" should have been applied to both parties. The Court's reasoning that the Government was under no obligation to extend a plea offer to Rodriguez, has no bearing in these proceedings. What was in question and not addressed was that an offer was made, not just conveyed to Rodriguez. (CV. D/E 22 at 11). A hearing was required under well-established law. That singular error reached the level of ineffectiveness according to this court's prior precedent. *Kimmelman v. Morrison*, 477 U.S. 365, 385-387, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986) ("a single, serious error may support a claim of ineffective assistance of counsel"); *Williams v. Taylor,* 120 S.Ct. 1495, 1512-16, 146 L.Ed.2d 389 (2000). This court's *Morrison* and *Taylor* decisions were overlooked.

The contradiction in counsel's affidavit placed the Court on notice that a plea offer was extended and Rodriguez, (according to Hall) rejected. This creates an issue of material fact that required a hearing.

(CV. D/E 9-1 at 5). The record was inconclusive as to which party is believable. Since counsel's affidavit and Rodriguez' affidavit vary so vastly, and since the Court's decision contradicts all the parties affidavits, a doubt as to which party was believed exists that required a hearing. *United States v. Witherspoon*, 231 F.3d 923 (4th Cir. 2000) (petitioner is entitled to an evidentiary hearing when the motion presented a claim merits relief and it is unclear whether counsel's affidavit disputes defendant's allegations); *Taylor v. United States,* 287 F.3d 658 (7th Cir. 2002). It appears that the Eleventh Circuit does not follow the decision from the Fourth in *Freidman v. United States*, 588 F.2d 1010 (5th Cir. 1979) ("is not sound to say that, in every conflict between a prisoner and a lawyer, the lawyer must be believed."); *Riolo v. United States*, No. 18-11096, 2019 U.S. App. LEXIS 24465, at *15 (11th Cir. Aug. 16, 2019) ("[t]he point is that we do not know, nor does the District Court know, whether [Mr. Riolo's] allegations are indeed true and whether, as a consequence, he was unconstitutionally deprived of reasonably effective assistance of counsel."); *Williams v. United States*, 660 F. App'x 847, 850 (11th Cir. 2016) ("we have held that

contested fact issues in [§] 2255 cases cannot be resolved based on affidavits.")

Even if Rodriguez might have been untruthful in the past, it does not relieve the district court of the requirement to hold an evidentiary hearing. *Id. Williams*. "The fact that the record indicates Williams may have been untruthful with respect to his other claims does not render an evidentiary hearing unnecessary. That Williams may have been untruthful as to other matters does not definitively prove that he was untruthful as to the issue at hand." emphasis added.

Furthermore, irrespective of the Government's belief whether Rodriguez's case was "the worst it had ever seen" or their position as to what they believe that Rodriguez's case represents should have a bearing on the plea agreement allegation. What was not considered is that a plea offer was made, Rodriguez was not advised of the offer, and the Court did not address the conflicting affidavits before denying the 2255. On this claim alone, a substantial showing of a denial of a constitutional right (the right to be informed of the Government's offer) was violated. *Buck v. Davis*, 580 U.S.___, 137 S.Ct. 759, 773–75 (2017) (reiterating governing standard for issuance of COA); *Tennard v.*

Dretke, 542 U.S. 274, 282–83 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003); Slack, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)); see also *Sorto v. Davis*, 672 F. App'x 342, 346 (5th Cir. 2016) (defendant must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"); see also *Rosales v. Dretke*, 133 F. App'x 135, 137 (5th Cir. 2005) (any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination); *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997).

This court should grant a writ of certiorari remanding the matter to the Eleventh Circuit, remanding for a Certificate of Appealability to allow this specific argument to proceed further.

2. A writ of certiorari should be granted in light of the Supreme Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985).

As the court are aware, *Strickland v. Washington,* 466 US 668 (1984) applies to claims of ineffective assistance of counsel in the plea negotiation process in light of *Hill v. Lockhart*, 474 U.S. 52 (1985). ("The prejudice test in the context of the plea process, focuses on

whether counsel's Constitutionally ineffective performance affected the outcome of the plea process.") *Id.* at 59.

In that respect, all Rodriguez was supposed to present was a reasonable probability that the life sentence he received would have been shorter, thus prejudice attaches. In this case, the Government conceded that a "45 year mandatory sentence" was offered which was substantially lower than the life sentence Rodriguez is serving. (CV. D/E 9 at 11). *Hill* only requires that Rodriguez *demonstrate* that but for counsel's alleged ineffectiveness, he would have chosen not to proceed to trial. A reading of Rodriguez's 2255 meets that requirement. Counsel failed to pursue and advise Rodriguez, of the alleged plea offer, although Rodriguez "advised him that he would be open to such an agreement." *Id.* (CV. D/E 1-1 at 21). All of *Hill's* requirements were met. Now the matter is whether a plea offer would have been accepted (which Rodriguez was "open to such an agreement"), thus since a plea offer was tendered, the issue revolves over the District Court's failure to grant an evidentiary hearing on the contested facts. The Court, mimicking the Government's response (or quite possibly in error), concluded that no evidence existed to support Rodriguez's allegations.

(Dkt. 22 at 11). This statement contradicts the allegations raised in 2255, contradicts the Government's response, and contradicts counsel's affidavit.[2]

This court should grant a writ of certiorari remanding the matter to the Eleventh Circuit, remanding for a Certificate of Appealability to allow this specific argument to proceed further.

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[2] The government in their response noted the same section of the record that Rodriguez supports in his position that the matter was not discussed with him:

> THE COURT: All right.
>
> MR. HALL: For the record, the Government's offer is two 924(c)s and a plea to one of the substantive counts of sex trafficking of a minor. Regardless of scoring the sex trafficking of a minor, the two 924(c)s will start at 30 years in this case and Mr. Rodriguez has declined that.
>
> MS. HARRIS: Your Honor, just to clarify, the Government did not provide a formal offer. The defense counsel asked if there would be a plea offer, what would it be, and that is what he was advised, but no plea agreement has been prepared. We've always been told that he did not want a plea agreement, so no formal offer in writing has been provided to the Defendant.
>
> THE COURT: But you would agree that, at a minimum, those demands would be required in such a plea?
>
> MS. HARRIS: That is correct, and that did expire approximately three weeks ago. (*Id.* . Dkt. 9, at 12)

3. This court's decision in *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003) required that a COA should have been granted.

The Supreme Court's opinion in *Miller-El* made clear that whether to grant a COA is intended to be a *preliminary* inquiry, undertaken before full consideration of the petitioner's claims. *Id.* at 1039 (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); *Id.* at 1040 (noting that "a claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail") (emphasis added); *Id.* at 1042 (noting that "a COA determination is a separate proceeding, one distinct from the underlying merits"); *Id.* at 1046-47 (Scalia, J., concurring) (noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such "full consideration" in the course of the COA inquiry is forbidden by § 2253(c). *Id.* at 1039 ("When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is, in essence, deciding an appeal

without jurisdiction.") *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003).

Here the Eleventh Circuit needed only agree that based on the record, Rodriguez was entitled to have the case proceed further, not that he will be victorious on the merits of his claims. Even if the District Court denied all the claims without an evidentiary, (which was an error in this case) the Eleventh Circuit had the authority to grant the relief and expand upon it. *Valerio v Dir. of the Dep't of Prisons,* 306 F3d 742 (9th Cir. 2002), cert den (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788) (court of appeals not only has the power to grant COA where the district court has denied it as to all issues but also to expand COA to include additional issues when the district court has granted COA as to some but not all issues.) This is especially beneficial to Rodriguez since the records create more doubts than it addresses.

As such, this court must agree that a writ of certiorari should be granted to the Eleventh Circuit, remanding for a Certificate of Appealability to allow this specific argument to proceed further.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Eleventh Circuit and the District Court to address the matters of the issues filed herein.

Done this 8, day of May 2020.

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