No. _____

In The
Supreme Court of the United States

FRANCISCO RODRIGUEZ-CASTRO,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred in holding that Rodriguez's erroneous sentence enhancement as a career offender, which increased his sentence from 135 months to 262 months, was not a miscarriage of justice entitling him to post-conviction relief, given that Rodriguez incorrectly filed a motion pursuant to 28 U.S.S. § 2255 instead of a petition for certiorari after having his request for counsel denied?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceedings below were Petitioner Francisco Rodriguez-Castro and the United States of America. The United States is the Respondent before this Court.

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The unpublished opinion of the Court of Appeals for the Fifth Circuit in United States v. Francisco Rodriguez-Castro, No. 17-50989, (5th Cir., June 4, 2020), is attached hereto Appendix at A1.

JURISDICTION

The United States District Court was granted exclusive original jurisdiction over this case by 18 U.S.C. § 3231.

Appeal was made from the final judgment of the District Court to the Fifth Circuit Court of Appeals under 28 U.S.C. § 1291.

The jurisdiction of this Court to grant certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

The United States is a party to be served, and the undersigned states that service has been made on the Solicitor General of the United States, Room 5614, Dept. of Justice, 950 Pennsylvania Ave NW, Washington DC 20530-0001, pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fifth Amendment due process provision (Appendix page A22)

28 U.S.C. § 2255 (Appendix at A22)

U.S.S.G. § 4B1.1 (Appendix at A24)

STATEMENT OF THE CASE

Petitioner Francisco Rodriguez-Castro ("Rodriguez") was charged with possession of controlled substance with intent to distribute pursuant to 21 U.S.C. § 841. Rodriguez pleaded guilty, and was sentenced on June 8, 2015. His adjusted offense level under the sentencing guidelines (but for the career offender enhancement) gave a range of 135 to 168 months. However, the court instead sentenced him as a career offender with a range of 262 to 327 months. Rodriguez received a sentence of 262 months and 5 years supervised release.

Rodriguez was sentenced as a career offender under § 4B1.1 of the Sentencing Guidelines, in part because he had a prior Texas conviction that was used as a predicate controlled substance offense. Shortly after his appeal was dismissed on an *Anders* motion, the Fifth Circuit changed the law based on *Mathis v. United States,* 136 S.Ct. 2243 (June 23, 2016). The Texas conviction is no longer a predicate offense. The effect of the change is large. Were Rodriguez to be re-sentenced today, his range would be 135 to 168 months, much less than the 262 month sentence he received under the prior law.

Rodriguez appealed his sentence to the Fifth Circuit. His attorney filed an *Anders* brief, and the Fifth Circuit granted the motion to dismiss appeal on April 20, 2016. Rodriguez had until July 18, 2016 to file petition for writ of certiorari, but did not do so.

Instead Rodriguez filed a pro se motion under 28 U.S.C. § 2255 to challenge his career criminal status, invoking *Johnson v. United States*, 135 S.Ct. 2551 (2015), on June 8, 2016. Rodriguez moved the

district court to appoint counsel to assist him in his *Johnson* based claims; the court denied the motion. (Appendix at A20) Through retained counsel, Rodriguez filed an amended § 2255 petition on February 24, 2017. The district court denied relief, and denied certificate of appealability, on October 26, 2017. (Appendix at A7).

The Fifth Circuit granted the certificate of appealability, but affirmed the judgment of the District Court on June 4, 2020. (Appendix at A1). The Fifth Circuit agreed that if Rodriguez had kept his direct appeal alive by applying for certiorari instead of filing a § 2255, he would have prevailed in his challenge to career offender status. Nevertheless, the Fifth Circuit held that §2255 could only provide relief if there was a miscarriage of justice. It held that a sentence increase from 135 to 262 months was not a miscarriage of justice, even though Rodriguez had asked the court for counsel to help him continue his challenge to career offender status.

REASON FOR GRANTING THE WRIT

> The Fifth Circuit erred in holding that Rodriguez's erroneous sentence enhancement as a career offender, which increased his sentence from 135 months to 262 months, was not a miscarriage of justice entitling him to post-conviction relief, given that Rodriguez incorrectly filed a motion pursuant to 28 U.S.S. § 2255 instead of a petition for certiorari after having his request for counsel denied.

This Court has stated that eligibility for § 2255 relief should be based on all circumstances present in the case. *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (determining it was "unnecessary to consider whether § 2255 relief would be available if a violation of Rule 11 occurred in the context of other aggravating circumstances"); *Hill v. United States*, 368 U.S. 424, 429 (1962) ("Whether § 2255 relief would be available if a violation of Rule 32(a) occurred *in the context of other aggravating circumstances* is a question we . . . do not consider." (emphasis added)).

Petitioner received a 262 sentence instead of a 135 month sentence due to his career offender status. If he were sentenced in 2017 or today, and not in 2015 as he was, he would not be a career offender. Had he filed a petition for certiorari on direct appeal instead of filing a § 2255, he would not be a career offender. He timely asked the Court to appoint him an attorney so he could properly fight his career offender status, which was denied. Taken together as a total of aggravating circumstances, this

is a miscarriage of justice. A re-sentencing is a proper remedy under § 2255, and the Fifth Circuit was wrong to deny it.

Career offender designation under the Sentencing Guidelines has been in constant flux. Not surprisingly, federal prisoners seek to obtain the retroactive benefits of changes in the law, as the career offender sentences are often much harsher. At present, the current state of the law is that challenges to post-*Booker* career offender sentences are not generally cognizable on collateral review. *See generally United States v. Foote*, 784 F.3d 931 (4th Cir. 2015), cert. denied 135 S.Ct. 2850.

Rodriguez was convicted of a controlled substance offense after plea of guilty. He had two prior offenses which were also categorized as controlled substance offenses resulting in a significantly higher sentence as a career offender under U.S.S.G. § 4B.1. One of those convictions was for the Texas offense of possession with intent to deliver. Today that Texas conviction cannot be the basis of career offender status, following the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243, 195 L. Ed. 2D 604 (2016) and the Fifth Circuit's subsequent decision in *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016) which applied *Mathis* to the use of Texas convictions for possession with the intent to deliver.

While it may be correct that *Mathis* generally did not announce a new rule of law, *Mathis* as applied through *Hinkle* did announce a new rule specific to the treatment of the Texas drug statute.

Rodriguez did not object at the time of sentencing. He did not brief it on direct appeal – his appellate attorney filed an *Anders* brief. *Mathis* was

decided at a time when Rodriguez could still have filed a petition for writ of certiorari. Had Rodriguez briefed this point on direct appeal, even by bringing it in a petition for writ of certiorari, the point of error concerning career offender status would have been sustained as plain error. *United States v. Zuniga*, 860 F.3 276, 285 (5th Cir. 2017), *United States v. Conley*, 137 S.Ct. 153 (2016). Instead, he filed a § 2255 motion and asked for the district court to appoint him an attorney.

Section 2255 motions may raise only constitutional errors and other injuries that could not have been raised on direct appeal that will result in a miscarriage of justice if left unaddressed. This is a situation where a miscarriage of justice would take place. The miscarriage of justice finds its beginnings in the convoluted history of the Fifth Circuit's jurisprudence governing the Guidelines' application of the Texas statute for possession of controlled substance with intent to deliver.

At one point, the Fifth Circuit held that Texas convictions for possession with intent to deliver did not constitute a "controlled substance" offense that triggered the enhanced penalties for career offender under § 4B1.1. *United States v. Gonzales*, 484 F.3d 712 (5th Cir. 2007); *See also United States v. Lozoya*, 232 Fed. Appx. 431 (5th Cir. 2007) (district court use of Texas conviction as a controlled substance offense is plain error).

But after *United States v. Ford*, 509 F.3d 714 (5th Cir. 2007) the rule in the Fifth Circuit changed: the Texas convictions *could* be used as predicates. In turn, *Ford* itself was reversed as a consequence of *Mathis* in *United States v. Tanksley*, 848 F.3d 347 (5th Cir. January 17, 2017). According to the Fifth

Circuit in *Tanksley*, the *Mathis* opinion was "more than merely illuminating," it resulted in the unequivocal reversal of *Ford*. *Tanksley*, 848 F.3d at 352.

Cases that were on direct appeal when *Tanksley* was decided were affected; appellants added new claims. For example, in *United States v. Zuniga*, 860 F.3d 276 (5th Cir. 2017), the Fifth Circuit considered the same claim as Rodriguez's. Zuniga did not object at sentencing, so Zuniga had to demonstrate plain error. The Fifth Circuit stated that prior to *Mathis*, the claim was "unsettled and at least subject to reasonable dispute." *Zuniga*, 860 F.3d at 285. Therefore, the Fifth Circuit holdings in *Mathis* and *Hinkle* are "intervening court decision[s]" that "provided an important clarification in the law," and the Fifth Circuit's refusal to consider the issue would result in "perpetuating incorrect law." *Id.* *Zuniga* held that this demonstrated plain error.

Another example of how dramatic a change was wrought by *Mathis* and *Hinkle* can be found in the district court's disposition of Rodriguez's claims of ineffective assistance of counsel. Rodriguez's prior attorneys could not be expected to bring a challenge to the career offender sentencing, said the district court, because to do so was "not likely to succeed." (Appendix at A17). What was "not likely to succeed" in 2015 became plain error justifying reversal in 2017. That is not a clarification. That is a substantive change based on an intervening court case.

The same analysis used in the *Zuniga* decision should inform the disposition of Rodriguez's claim. Given that the prior law was unsettled, why should "incorrect law" and "plain error" be perpetuated

upon Rodriguez? *Tanksley* makes it clear that *Mathis* was more than a clarification, it was an "unequivocal" change in the law. Rodriguez had his sentence nearly doubled due the application of the incorrect law.

There is authority that the standard for relief pursuant to § 2255 is more stringent than the plain error standard applied in *Zuniga* and *Conley*. *United States v. Frady*, 456 U.S. 152, 166 (1982). Nevertheless, the plain error discussion in *Zuniga* should inform the court's analysis as to whether or not a miscarriage of justice has occurred.

In the alternative, if the *Mathis* decision changed nothing, but merely clarified existing precedent, Rodriguez should be heard on his claim for denial of effective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). The Government and the district court asserted that *Mathis* was merely a continuation of Supreme Court precedents in *Descamps*, *Shepard*, and *Taylor*. If so, then either of Rodriguez's attorneys (at district court and appellate levels) should have made an objection. His appellate attorney addressed a lengthy and tedious checklist of *Anders* issues in the appellate brief, but included nothing about the § 4B1.1 career criminal sentencing issue. Had either attorney made an objection, Rodriguez would have received relief via the appellate process. The error would have been plain. *United States v. Reyes-Ochoa*, 861 F.3d 582, 587 (5th Cir. 2017); *United States v. Conley*, 644 Fed. Appx 294 (5th Cir. March 23, 2016), *cert. granted in Conley v. United States*, 137 S.Ct. 153 (2017).

Regardless of what appointed counsel may believe when they file an *Anders* brief, appellate

courts must "safeguard against such requests" to withdraw under *Anders*. *Robbins*, at 265. *Anders* requires the appellate court to review the case. The whole purpose of submitting an *Anders* brief as opposed to counsel submitting a statement is to "induce the court to pursue all the more vigorously its own review." *Anders v. California*, 386 U.S. 738, 745 (1967).

The district court found that the state of the law prior to *Mathis* and *Hinkle* was that objection to career offender would have been "not likely to succeed." Again, if the prior law was such that a *Mathis/Hinkle* type argument was so settled then how can it be that *Hinkle* did not significantly change the law and constitute an intervening court decision that deserves retroactivity? But if *Mathis* did not change the law, and only provided clarification, Rodriguez's prior attorneys should have made the argument based on *Descamps v. United States*, 133 S.Ct. 2276 (2013). Had his attorneys done so, Rodriguez would have been situated like the appellants in *Conley* and *Reyes-Ochoa*, and he would be re-sentenced as a non-career offender.

Let us suppose that appellate counsel was not ineffective when he failed to brief a *Mathis* type issue before the Fifth Circuit. After all, *Mathis* was not decided until June 23, 2016. The Fifth Circuit had dismissed Rodriguez's brief – on appellate attorney's motion - on April 20, 2016. But Rodriguez did not file a pro se petition for writ of certiorari. He instead filed a pro se § 2255 motion, trying to be heard. It is clear from his original *pro se* § 2255 motion that Rodriguez suspected that *Johnson* and its progeny had SOME effect on the legality of his sentence. (Appendix at A12, Appendix

at A21.). He asked the Court for court appointed counsel and was denied.

Nothing indicates that Rodriguez was aware of his right to petition for certiorari. The failure of the system to provide Rodriguez with an attorney able to either predict *Mathis* based on precedent, or assist him with a petition for certiorari after *Mathis*, deprives Rodriguez of effective assistance of counsel. Surely this is not what the Sixth Amendment countenances: that an uneducated layman's sentence doubles because he filed a motion to correct sentence instead of a writ for petition of certiorari, despite the fact that said man wrote the judge and asked for a court appointed attorney to guide him and make sure he made the correct legal choices.

It is an admittedly rare set of circumstances that constitutes a miscarriage of justice. But the totality of circumstances here, considered together, are just such a rarity. It is not merely that Rodriguez's sentence in 2015 was twice what it would have been in 2017. It is that Rodriguez's appellate counsel withdrew, stating that an appeal was frivolous. The Fifth Circuit then reviewed the record and agreed. Rodriguez timely indicated his desire to continue litigating the issue of his career criminal status, but his procedural choice as a *pro se* litigant was incorrect: he chose to file a § 2255 motion and not a petition for certiorari. Recognizing his own limitations, he asked the district court for counsel, and was denied. The courts have found his complaint to be otherwise valid, and that it constitutes "plain error" and that his sentence is based on "incorrect law."

At any of these turns, had his attorney, or the appellate court, or the district court, made a

different decision, the outcome would have been surely been that Rodriguez's claim would have been heard on the merits, and he would have prevailed even under a plain error standard. On the particular facts of this case, for which there is no exact precedent, Rodriguez has made the rare showing required. Considering all of the circumstances of Rodriguez's case, it would be a miscarriage of justice to deny him a re-sentencing.

The Fifth Circuit takes the position that no sentence constitutes a miscarriage of justice if it is within the statutory range set by Congress. Appendix at A5. There is a disagreement among the Circuits that deserved further guidance from this Court. The Third Circuit recently held that non-procedural sentencing taking place after Booker can never rise to the level of a miscarriage of justice. *United States v. Folk*, 954 F.3d 597 (3rd Cir. 2020). The Sixth Circuit has stated that it is open to reviewing career offender status claims like Rodriguez for miscarriage of justice, but only if there was a profound difference in sentences. *Snider v. United States*, 908 F.3d 183, 191 (6th Cir. 2018). The Fourth Circuit takes a similar position to the Sixth. *United States v. Foote*, 784 F.3d 931, 943 (4th Cir. 2015). Other Circuits have denied relief in opinions marked by dissent concerning the elevation of finality over fairness. *Hawkins v. United States*, 724 F.3d 915, 922 (7th Cir. 2013) (Rovner, J., dissenting); *Sun Bear v. United States*, 644 F.3d 700, 712 (8th Cir. 2011)(Melloy, J., dissenting); *Gilbert v. United States,* 640 F.3d 1293, 1334 (11th Cir. 2011)(Martin, J., dissenting).

Where is the line where finality must give over to fairness? In addition to addressing Petitioner's

situation, the federal courts would benefit from a clarifying decision by this Honorable Court regarding the "miscarriage of justice" standard.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the writ of certiorari be granted, and the case considered on its merits.

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