

No: 20-5250

**In the  
Supreme Court of the United States**

**ORIGINAL**

OSCAR ARMANDO AVILA-JAIMES,

*Petitioner,*

vs.

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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## **QUESTIONS PRESENTED FOR REVIEW**

1. Should a writ of certiorari be granted since the Fifth 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.
2. Should a writ of certiorari be granted to determine if an audio recording that is not part of the court file from a District Court's Magistrate hearing suffice to support this court's standard in *Strickland v. Washington*, 466 U.S. 668 (1984) or is more needed on the record.
3. Does an attorney's lies to the court during change of plea hearing, that are not part of the court file, per-se, be relied upon by to support a *Strickland v. Washington*, 466 U.S. 668 (1984) decision or is more needed on the record.
4. In light of this Court's decision in *Andrus v. Texas*, 140 S. Ct. 1875 (2020), did counsel fail to prepare for Avila-James sentencing hearing.

**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 United States Court of Appeals for the Fifth Circuit and the United States District, Western District of Texas.

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

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**PETITION FOR WRIT OF CERTIORARI**

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Oscar Armando Avila-Jaimes, 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 Fifth Circuit, entered in the above-entitled cause.

## **OPINION BELOW**

The opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision entered on April 14, 2020, in *United States v. Avila-Jaimes*, 801 F. App'x 301 (5th Cir. 2020) and is reprinted in the separate Appendix A to this Petition.

The denial of Petitioner's Title 28 U.S.C. § 2255 in the Western District of Texas, under *Avila-Jaimes v. United States*, 2018 U.S. Dist. LEXIS 169978 (W.D. Tex. Sep. 28, 2018) was entered on October 2, 2018, and is reprinted as Appendix B to this Petition.

## **STATEMENT OF JURISDICTION**

The Judgment of the Court of Appeals was entered on April 14, 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

On October 7, 2014, Avila-Jaimes was charged in a multi-count indictment out of the Western District of Texas – Austin Division with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

On March 4, 2015, Avila-Jaimes unknowingly, pled guilty to Counts One and Two of a Superseding Information. Among other provisions, Avila-Jaimes’s plea agreement contained a waiver of his right to appeal; an agreement not to file a collateral attack on his conviction or sentence, except for claims of ineffective assistance of counsel or prosecutorial misconduct; and an agreement under Fed. R. Crim. P. 11(c)(1)(C) that his prison sentence would not exceed 240 months for both counts. The Court accepted Avila-Jaimes’ guilty plea on March 4, 2015. (Doc. 471-479).<sup>1</sup> On June 2, 2015, the United States Probation Officer issued the Initial Presentence Report (“PSI”). The PSI calculated a total offense level of 38, and a criminal history category of I, for a Guideline range of imprisonment of 235–293 months. Avila-Jaimes submitted objections to the Presentence Report’s determination on the base offense level and the role of a leader/organizer in the offense. On June 2, 2015, the Probation Department issued an addendum to the

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<sup>1</sup> *United States v. Aviles-Jaimes*, No. A-14-CR-300-SS-1, USDC WDTX.

Presentence Report, summarizing and responding to the objections. Before sentencing on June 8, 2015, Avila-Jaimes's counsel filed a motion to withdraw. (Doc. 647). The motion was denied on June 9, 2015. (Doc. 660). At sentencing on June 11, 2015, the Court addressed the evidence, overruled the objections, and sentenced Avila-Jaimes to concurrent terms of 240 months imprisonment for Count 1, and 120 months imprisonment for Count 2.

An appeal ensued addressing the conviction and sentence, including the validity of his guilty plea and appeal waiver, ineffective assistance of counsel, and the four-point enhancement imposed by the district court under U.S.S.G §3B1.1(a). This court affirmed. *United States v. Avila-Jaimes*, 681 F. App'x 373 (5th Cir. 2017).<sup>2</sup> On May 24, 2018, Avila-Jaimes through counsel, filed his 28 U.S.C. § 2255 motion to vacate sentence. (Doc. 978). The motion asserted several plausible avenues for relief, along with supporting affidavits' and exhibits.

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<sup>2</sup> The issue of ineffective assistance of counsel was not addressed on appeal as the Fifth Circuit determined the matter to be premature:

"An ineffective assistance of counsel claim cannot be litigated on direct appeal unless it was previously presented to the district court. *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014). This court considers such claims only in "rare cases in which the record allows a reviewing court to fairly evaluate the merits of the claim." *Id.* (internal quotations and citation omitted). The record here is too undeveloped to permit review of counsel's performance. Avila-Jaimes's ineffective assistance of counsel claim is therefore denied without prejudice to collateral review. *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987)." *Id.* . *Avila-Jaimes*, 681 F. App'x at 377.

Specifically, Avila-Jaimes alleged that he received ineffective assistance of counsel because trial counsel did not “adequately apprise [him] as to the effects of his guilty plea” (Doc. 978, at 4) and that his sentence violated the Eighth Amendment because it is disproportionate to both his crime and his codefendants' sentences. (Doc. 978 at 4-5). A request for an evidentiary hearing was also requested. (Doc. 978 at 13). The Government responded alleging that counsel was not ineffective since Avila-Jaimes could not show that counsel's performance was deficient and that Avila-Jaimes understood his waiver of the constitutional rights, alleging that under *Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621 (1977), “substantial deference should be given to statements on the record.” (Doc. 984, at 8).

### **1. Court recordings establish other facts.**

A troubling review of the “recordings” from the change of plea hearing, shows otherwise. Regarding the Eighth Amendment argument, the government argued the same had been waived as per the terms of the plea agreement. (Doc. 984, at 12). After Avila-Jaimes filed his reply, (Doc. 987), the District Court denied the § 2255 without the benefit of an evidentiary hearing. (Doc. 987). Thereafter the Fifth Circuit denied the request for a certificate of appealability.

## **REASONS FOR GRANTING THE WRIT**

### **THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH 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 Fifth 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.**

The District Court denied Avila-Jaimes’s motion on the premise that he could not “produce any evidence that his counsel or anyone else, advised or promised him he could plead guilty and then contest his factual guilt.” (Doc. at 987 at 6). The record establishes otherwise. After a colloquy with the Assistant U.S. Attorney, enumerating the two charges to which Avila-Jaimes would be pleading to, Avila-Jaimes, interjected as making it clear that his Mr. Martinez had not fully informed him of the nature and consequences of his plea and had misinformed the Court regarding whether he understood the rights he was waiving:

The Court: All right. And then, in the 300 case, Mr. Avila-Jaimes is pleading to two charges.

Mr. Guess: Yes, your Honor.

The Court: In the superseding information.

Mr. Guess: That is correct.

The Court: All right. And those charges are possession with intent to distribute cocaine.

Mr. Guess: And money laundering.

The Court: And money laundering.

Mr. Gonzalez: He had a question, your Honor.

The Court: Okay. Mr. Avila.

Defendant Avila: Yeah. I don't know why I'm being charged with drugs and one for money laundering.

The Court: That you should probably talk to your attorney about.

Mr. Martinez: Okay. I think we do need to talk, Judge.

*Id.* (Doc. 980-6, at 13).

The statements show that at the change of plea hearing, Avila-Jaimes was not aware of the repercussions of his decision to plead guilty. This argument, within itself, required an evidentiary hearing to address what Avila-Jaimes understood at that stage. A plea may be involuntary either because the accused does not understand the nature of the constitutional protections he is waiving, see, e.g., *Johnson v. Zerbst*, 58 S. Ct. 1019, 1023 (1938), or because he has such an incomplete understanding of the charges that his plea cannot stand as an intelligent admission of guilt without adequate notice of the nature of the charge against him, or proof that he understood the charges, the guilty plea cannot be voluntary in the latter sense. *Smith v. O'Grady*, 312 U.S. 329 (1941). Neither was the issue resolved by the court's short recess to allow Avila-Jaimes an opportunity to discuss the matter with counsel. The Court allowed Avila-Jaimes and counsel an opportunity to "talk over" the change of plea procedures, however, no solid confirmation on Avila-Jaimes's behalf could be reached. The record is clear that Avila-Jaimes did not grasp the understanding of the proceedings before the court:

The Court: Mr. Martinez, let me interrupt for a moment.

Mr. Martinez: Pardon me, Judge. Yes.

The Court: Do you think you'll need to talk to him a while longer?

Mr. Martinez: Probably just a minute or two more. I think we're kind of getting to the crux.

*Id.* (Doc. 980-6, at 16-17).

Even after the confusion on Avila-Jaimes' ability to understand the importance of his waiver, did the Court revisit the matter, it only assumed that the issue was resolved, although the record established to the contrary. When the Court reviewed the specifics of the charges and events to which Avila-Jaimes was pleading guilty, it once again became clear that he did not fully understand the proceedings. After reviewing the details of Counts 1 and 2 of the superseding information, Avila-Jaimes stated that he was pleading guilty, "but that [it] needs to be clear that I'm accepting but I have right to fight for against what I'm charged with. (Doc. 980-6, at 37). When the court reviewed the waivers of Avila-Jaimes plea, the clearness of his misunderstanding was further emphasized:

The Court: And then, finally, Mr. Avila, you've seemed a little hesitant here. And you did take a break during the proceeding to talk further with your attorney. It's an important decision to plead guilty. And so, I want to make sure that you're comfortable with your decision and that you're making your decision to plead guilty freely and this is what you want to do.

Defendant Avila: Yes. Like I said before, I have signed the agreement because it includes a clause where I have a right to contest those things.

*Id.* (Doc. 980-6, at 42).

The unfamiliarity with the English language and the translator's improper translations caused Avila-Jaimes to provide an unintelligent plea. These facts required an evidentiary hearing and now require a writ of certiorari. The fact that no hearing was granted, warrants the granting of a COA as the preliminary inquiry into the matter. This 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. *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003) (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 as "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 this Court must only agree that based on the record, Avila-Jaimes was entitled to have the case proceed further, not that he will be victorious on the merits of his claim. Even if the District Court has denied all the claims without an evidentiary, (an error in this case) the Fifth Court 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. denied* (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 a district court has denied it as to all issues but also to expand COA to include additional issues when a district court has granted COA as to some but not all issues.) This is especially beneficial to Avila-Jaimes since the recordings from the change of plea hearing, show supporting evidence to his claim that was not been addressed by the District Court.

**2. A writ of certiorari should be granted to determine if an audio recording that is not part of the court file from a District Court's Magistrate hearing suffice to support this court's standard in *Strickland v. Washington*, 466 U.S. 668 (1984) or is more needed on the record.**

Recordings of the change of plea hearings taken before Magistrate Judges is normal protocol. Avila-Jaimes's contemporaneous Spanish statements to the Court and instructions to his attorney, will reach the same conclusion: Either Avila-Jaimes did not understand the terms and consequences of the plea, or, more ominously, counsel purposefully misled him as to the terms of the plea agreement. In any event, the "knowingly" requirement of voluntariness stipulated by this Court in *Blackledge*, 431 U.S. 63, 97 S. Ct. 1621 was never met. Avila-Jaimes was misled into self-incriminating himself. On five different occasions, as recent as minute 10 and as late as minute 47 of a 49 minute hearing, Avila-Jaimes repeatedly made it clear he never accepted guilt and that he is only entering into the plea agreement because he had been guaranteed by counsel that he has reserved the right to challenge the charges in their entirety. The recording of his contemporaneous comments to counsel shows this amply clear. Moreover, when Avila-Jaimes is finally cross-examined by the Magistrate Judge, he only does so after consulting with counsel and having counsel tell him to say he is "guilty" (counsel's coaching is audible) and proceeding further, reassuring him that his plea ("no te va a afectar") will not affect you. Counsel amplifies the scope of his deception by not only preempting the court interpreter on repeated occasions to

make sure that it is his version of the plea will appear on the record but by blatantly misinterpreting/lying to the court regarding the content of a key exchange with Avila-Jaimes. Counsel maliciously exploited the language limitations of both his client and the court in this regard. One can only surmise that to force the spurious plea to become the controlling part of the record. This claim warrants a writ of certiorari and a remand.

**3. Does an attorney's lies to the court during change of plea hearing, that are not part of the court file, *per-se*, be relied upon by to support a *Strickland v. Washington*, 466 U.S. 668 (1984) decision or is more needed on the record.**

The exchange arises out of the government's recitation of the terms of the plea, which clearly contradicted what counsel purported the plea to include. Avila-Jaimes instructs counsel to clarify to the court that he is reserving his right to challenge the charges so that it will become part of the record. Its obvious Avila-Jaimes did not understand the nature nor consequences of a plea agreement he was led into signing. The change of plea recording clarifies he was expressly lied to as to the rights that were being preserved. Even during the 10-minute break, counsel continued to tell Avila that what he was being asked to plead to was a mere formality that would not affect his right to challenge the specific charges of money laundering and drug conspiracy.

The following colloquy occurred at the change of plea:

<u>Original Recording</u>	<u>Translated Version</u>
COP CD at 19:49: Avila-Jaimes to Counsel: "... pero no hablaron en ninguna, en la declaracion de eso que tenemos derecho a pelear todo.	"but they did not speak in any of the statement that we have the right to fight everything"
COP CD at 19:49: Avila-Jaimes to Counsel: "... pero no hablaron en ninguna, en la declaracion de eso que tenemos derecho a pelear todo.	"but they did not speak in any of the statement that we have the right to fight everything"
Change of plea CD at 19:54: Avila-Jaimes to Counsel: "... dijo (el fiscal) que no tengo derecho a pelearlo"	"... the prosecutor said that I have no right to fight."

Counsel would respond to the court under the guise that Avila-Jaimes concerns are being addressed.

Counsel to Court: "Your Honor there was another part to that agreement which basically we reserve the right to contest 'certain issues as to relevant conduct, certain facts, we agree that the government believes that they can prove beyond a reasonable doubt that..." <sup>3</sup>

Avila does not and was not alluding at any time during the hearing and in his comments to counsel to the right to "contest certain issues as to relevant conduct" he is referring at all times, unequivocally, as represented to him by counsel, to the

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<sup>3</sup> Change of plea CD at 19:57.

right to "fight the (actual) charges." He makes it clear on five (5) separate occasions that this is not only his understanding but the only reason why he agreed to the plea deal. So much so, that he goes on to make it clear on two additional occasions that the only reason why he was willing to enter into the plea deal to begin with was that he was allowed to preserve his right to challenge the charges. A conclusion that could never have been reached were it not for Counsel's mistranslations of Avila's statements.

**a. The Change of Plea Recording Shows Avila was misled**

Avila-Jaimes makes it clear to counsel and less than 15 seconds later to the Magistrate Judge, that he does not understand why he is being charged with those two crimes since he is neither guilty of them nor accepting that he committed them.

Avila-Jaimes lacked the requisite understanding even if we were to assume that counsel had at no time actively misled him:

COP CD at 10:43 Avila to Counsel (as AUSA finishes describing Avila charges):  
"Porque dicen de lavado de dinero si yo no he aceptado nada de eso."

COP CD at 10:56 Avila to Magistrate: "... no se por que me estan acusando de drogas y de lavado de dinero? y en el ..."

COP CD at 11:11 Avila to Counsel: "Usted me dijo que

Why do they say money laundering if I have not accepted any of that."

"I do not know why you are accusing me of drugs and money laundering? and in that one. "

luego, o sea, que se iba a pelear todo, porque yo nunca he aceptado nada de que yo he.."	"You told me later, that is, that you were going to fight everything, because I have never accepted anything that I have..." <sup>4</sup>
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He makes it unequivocally clear to both Counsel and Magistrate that he is not guilty and was entering the plea deal because he had been guaranteed that he would reserve the right to fight any charges. None of these statements were addressed by the District Court before rendering a decision on the § 2255.

**b. Avila-Jaimes enters a plea under the assurance he could challenge all the charges against him.**

Eventually, assured that he can challenge all the aspects of the charges against him, Avila-Jaimes entered his unknowing plea of guilt:

COP CD at 41:13 Avila-Jaimes to Magistrate: "Es culpable pero que quede, bueno que quede claro que yo estoy aceptando porque tengo derecho a pelear lo que se me esta acusando..."

COP CD at 42:27 Counsel to Avila-Jaimes: "si esta bien porque...eso no te va a afectar"<sup>5</sup>

COP CD at 42:37 Counsel to Interpreter: "si señor"

"It is guilty but that it remains, well that it is clear that I am accepting because I have the right to fight what I'm being accused ... "

"Yes its Fine because it will not affect you"

"Yes Sir ...." Counsel answering to inteterpreter that Avila-Jaimes is pleading guilty.

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<sup>4</sup> Avila-Jaimes is cut off by counsel speaking with Magistrate Judge.

<sup>5</sup> " Yes its Fine becuase it will not affect you"

COP CD at 42:45 Avila to Counsel: "(contesto que) si?"	"(what do I answer), yes?"
COP CD at 42:46 Counsel to Avila: "si".	"yes"
COP CD at 43:06 Magistrate to Avila et al: "...and are you pleading guilty to the charges against you because you are guilty and no other reason?	
COP CD at 43:14 Avila-Jaimes to Counsel: "(digo que) si?"	"(what do I answer), yes?"

The record as it clearly stands in Avila-Jaimes native language; he never accepted responsibility for the charged offense since trial counsel misleads him on the ability to challenge the charges.

**4 In light of this Court's decision in *Andrus v. Texas*, 140 S. Ct. 1875 (2020), did counsel fail to prepare for Avila-Jaimes sentencing hearing.**

In *Andrus*, this court held that counsel must make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. See, *Andrus v. Texas*, 140 S. Ct. 1875 (2020). Here the sentencing, as with the plea, was a joint session with numerous co-defendants. A total of sixteen (16) co-defendants were sentenced simultaneously. The Government presented the testimony of DEA Agent Nick Rich who determined that Avila-Jaimes was the “man in charge” based on Title III wiretaps and on his interpretation of the calls, not on substance evidence. There was no “substantive evidence” presented during

the sentencing hearing. The allegations of ineffectiveness were substantial and lack of preparation was evident. This court noted in *Andrus* that to prevail on ineffective assistance of counsel claims, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *Missouri v. Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697; see also *United States v. Stewart*, 207 F.3d 750, 751 (5th Cir. 2000). "The likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), and movant must prove that counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (quoting *Strickland*). Judicial scrutiny of this type of claim must be highly deferential and Avila-Jaimes must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Simply making conclusory allegations of deficient

performance and prejudice is not sufficient to meet the *Strickland* test. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Melanson v. United States*, 2019 U.S. Dist. LEXIS 61522, at \*5-6 (N.D. Tex. Apr. 10, 2019). Avila-Jaimes' § 2255 alleged clear, distinct facts that were supported by the record and recordings, of the case. The pleadings included affidavits, exhibits, and references to the record to show the Avila-Jaimes received ineffective assistance.

As presented by the Court in *Sorto v. Davis*, 672 F. App'x 342, 346 (5th Cir. 2016) (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.'") The original § 2255 petition and all the exhibits support and encourage the matter 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 Fifth Circuit.

Done this 11, day of July 2020



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