No. 20-_____

In The

Supreme Court of the United States

LUIS XADIEL CRUZ VAZQUEZ,

***Petitioner*,**

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition presents published comments by the First Circuit Court of Appeal which cause the reasonable person to question the neutrality and fairness of the court's denial of Petitioner's Motion for Certificate of Appealability (COA). The unsettling comments by the First Circuit can be found in its prior published opinion, affirming Petitioner's conviction and sentence on direct appeal, where the court prominently noted Petitioner's exercise of his Sixth Amendment right to a jury trial:

> Blood is often thicker than water…. ***Unlike dozens of others who entered guilty pleas*** … Ayala [Petitioner's co-defendant and brother] and Cruz ***hunkered down and stood trial together***. They were both convicted, and each received a life sentence.

United States v. Angel Ayala Vazquez and Luis X Cruz Vazquez, 751 F.3d 1, 6 (1st Cir. 2014), emphasis added. Explicitly, the First Circuit found it necessary to underscore Petitioner's rejection of a plea agreement and election to exercise his absolute right to trial, unconditionally assured by *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

Therefore, this petition respectfully asks that this Court exercise its supervisory power to provide guidance to lower courts in the application of the standard for issuance of a certificate of appealability and the unquestioned right to protection against any hint of punitive judicial retaliation for exercising the right to trial.

With this as backdrop, the questions for review are:

1. In refusing to issue a COA, did the First Circuit apply a novel, harsher standard requiring Petitioner to prove actual intent by conflicted counsel to harm another client, thereby denying Cruz Vazquez his Fifth Amendment right to due process and his Sixth Amendment right to the effective assistance of conflict-free counsel in violation of *Wheat v. United States*, 486 U.S. 153 (1988); *Mickens v. Taylor*, 535 U.S. 162 (2002); and, *United States v. DeCologero,* 530 F.3d 36, 77 (1st Cir.2008)?

2. Did the First Circuit depart from precedent when it ignored that Cruz Vazquez was denied effective assistance of counsel, where his counsel abandoned a readily-available multiple conspiracy defense, failed to challenge the sufficiency of the evidence, and then conceded guilt, instead of invoking the "supermarket" multiple conspiracy defense recognized in *United States v. Dellosantos*, 649 F.3d 109, 121 (1st Cir. 2011)?

3. Waving off the Fifth Amendment's due process clause, did the First Circuit ignore this Court's precedent by blessing the district court's open bias in summarily denying Cruz Vazquez's well-grounded, critical *Brady* [1] requests, where unchallenged facts in the 2255 demonstrated a palpable pattern of *Brady* violations by the government's Puerto Rico office?

4. Did the First Circuit's refusal to issue a certificate of appealability unconstitutionally permit a prejudicial denial of Cruz Vazquez's right to effective assistance at sentencing, where even the Government admitted that trial counsel waived the issue when it totally "failed to provide evidence to support [a] sentencing disparity contention prior to or at sentencing" in a case where the district court imposed a life sentence?

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[1] [*Brady v. Maryland*, 373 U.S. 83 (1963).]

PARTIES TO THE PROCEEDING

Petitioner Luis Xadiel Cruz Vazquez was one of many co-defendants in the district and appellate court proceedings, along with his brother and co-defendant Angel Ayala Vazquez. Respondent United States of America was the plaintiff in the district court proceedings and appellee in the court of appeals proceedings on direct appeal.

RELATED CASES

- *USA v. Angel Ayala Vazquez and Luis X Cruz Vazquez,* 751 F.3d 1, 4 (1st Cir. 2014), DC No. ***11CR045-PG***.

- *USA v. Luis Xadiel Cruz Vazquez, et al,* USDC Puerto Rico Nos. 15CV283(PG); 09CR0173-PG and ***11CR045-PG***.

- *USA v. Carlos Raymundi-Hernandez, Rocky Martinez-Negron, a/k/a Rocky, and Javanni Varestin-Cruz,* 1st Circuit 16-2490, 17-1081, 17-1092 18-1076, 17-1314, and 18-1528; DC No. ***11-0045-PG***.

- *USA v. Elvin Torres Estrada,* 1st Cir. No. 19-1485; USDC No. 17CV1373-(PG), 09CR0173-PG and ***11CR045-PG***.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Cruz Vazquez, respectfully prays this Court issue a *Writ of Certiorari* to review the order entered on July 21, 2020 by the First Circuit Court of Appeal, denying *en banc* hearing on Cruz Vazquez's request for a certificate of appealability on his 2255.

OPINION BELOW

On April 2, 2020, the Court of Appeals for the First Circuit issued its Memorandum Opinion (*Memorandum Opinion*) affirming the District Court's denial of Petitioner's 2255 and refusal to grant a Certificate of Appealability.

Significantly, in its very brief Order, the First Circuit ruled on *only 2 of the 6* issues raised by Cruz Vazquez. And, on a critical, *uncontested*, conflicted appellate counsel issue, the lower court held:

> After a thorough review of the record of the petitioner's submission, we deny the request for a certificate of appealability ("COA"). Petitioner has failed to explain how any of counsel's choices about which arguments to pursue or forgo on appeal were a "manifestation of divided loyalties."

Memorandum Opinion, page 1. App. 1.

In this holding, the First Circuit's opinion demonstrated that it ignored the substantial *new* record provided by Cruz Vazquez, previously absent from his direct appeal. The uncontested record demonstrated that

conflicted counsel had concurrently represented one of the Government's key witnesses and cooperators who had stated that this was but one single broad conspiracy, headed by Cruz Vazquez's brother and co-defendant, Angel Ayala Vazquez. This act by the lower court was a major departure from precedent and arbitrarily imposed a unique standard of proof on Cruz Vazquez, conflicting with *Wheat v. United States,* 486 U.S. 387, 405 (1984). This unique ruling also unfairly expanded the First Circuit's own precedent in *United States v. DeCologero*, 530 F.3d 36, 77 (1st Cir. 2008).

Citing *DeCologero*, the First Circuit held, *inter alia*, that Petitioner:

> [H]as failed to explain how any of counsel's choices about which arguments to pursue or forgo on appeal were a "manifestation of divided loyalties" [citation omitted]. Therefore, he has failed to show a debatable claim that counsel's concurrent representations 'adversely affect[ed] counsel's performance.'" [citations omitted] Petitioner does not attempt to explain how a single-conspiracy argument would have advantaged counsel's other clients or why counsel's loyalty to his other clients would have deterred him from challenging the single-conspiracy theory on appeal. He also does not explain how conceding the sufficiency of the evidence on the drug conspiracy count would have advantaged counsel's other clients or why counsel's loyalty to them would have deterred him from challenging the sufficiency of the evidence. It is not enough to point to a concession or omission on appeal; instead, counsel must explain how that concession or omission would have been driven by

> counsel's loyalties to his other clients. In the absence of such a showing, there is no debatable claim that counsel's multiple representations deprived the petitioner of a constitutional right.

App. 1. The robust briefing and record presented by Petitioner to the First Circuit belies the *non-sequitur* conclusion that he had not met the *DeCologero* standard; he met and exceeded it.

On July 21, 2020, the First Circuit issued its Order denying rehearing and rehearing *en banc*. App. 3.

JURISDICTION

On April 2, 2020, the First Circuit entered its *Memorandum Opinion* affirming the District Court's denial of Petitioner's 2255 and refusal to issue a Certificate of Appealability. Then, on July 21, 2020, the court issued its order denying the *en banc* rehearing. Therefore, jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1254(1) and 1651(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Fifth Amendment:

"No person shall ... be deprived of life, liberty or property without due process of law…."

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence [sic]."

INTRODUCTION AND STATEMENT OF THE CASE

Cruz Vazquez filed a 28 USC Section 2255 Petition in the district court in Puerto Rico raising six separate and distinct issues which were robustly supported by what even the Government described as an "extensive memorandum." The elaborate, non-conclusory facts presented in the 2255 by Cruz Vazquez visibly gave rise to critical factual disputes and required either admissions or opposing sworn declarations from the Government. In the 2255, there were also several disputed critical facts before the district court mandating an evidentiary hearing.

The Government immediately went on to request several extensions of time within which to file its response and opposition, noting that it needed ample time because Cruz Vazquez had filed "an extensive memorandum in support of a petition."[2]

After several extensions of time, graciously granted by the district court, the Government finally filed a response and opposition consisting of *unsupported* claims and arguments, *devoid of any sworn declarations*. Therefore, the Government's response and opposition left several dispositive critical facts *unchallenged*. The Government, however, added admissions relative to one of the central issues raised by Cruz Vazquez –

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[2] *Government's First Request for Enlargement of Time,* page 1, Exhibit A of Opening Brief.

that his appellate counsel had contemporaneously also represented one of the key Government witnesses against him. And that cooperating witness also happened to maintain that the conspiracy charged against Cruz Vazquez and his co-defendants was ***a single overall conspiracy headed by the same drug trafficking organization*** – Petitioner's brother Ayala Vazquez, the government witness's brother, and others.

The same appellate lawyer who represented Petitioner on direct appeal also represented the Government's critical witness who had represented that this was but a single, overall conspiracy. Making it evident that to even raise a multiple conspiracy argument on appeal for Petitioner would necessarily involve contradictory conduct to appellate counsel's other client, a cooperating Government witness.

In his 2255 and later in his appeal, Cruz Vazquez expressly raised six separate issues, fully briefed *and developed*. Those issues were:

1. Mr. Cruz Vazquez was deprived of his Fifth Amendment right to due process and his Sixth Amendment right to the effective assistance of conflict-free counsel on direct appeal because multiple conflicts of interest infected appellate counsel in violation of *Wheat v. United States*, 486 U.S. 153 (1988); *Mickens v. Taylor*, 535 U.S. 162 (2002); and, *Evitts v. Lucey*, 469 U.S. 387, 405 (1984);

2. Mr. Cruz Vazquez was also provided ineffective assistance of appellate counsel when counsel failed to advocate for a multiple conspiracy defense by not challenging on appeal the sufficiency of the evidence for the alleged single conspiracy;

3. Appellate counsel provided ineffective assistance for his

unauthorized admission on appeal of Mr. Cruz Vazquez's guilt to the "single conspiracy" drug trafficking Count and to a "management role" in it;

4. Mr. Cruz Vazquez's trial counsel provided ineffective assistance when he inexplicably failed to investigate, prepare and present a multiple-conspiracy defense based upon the well-known precedent in *United States v. Dellosantos*, 649 F.3d 109, 121 (1st Cir. 2011);

5. The Government deprived Mr. Cruz Vazquez of his rights to due process and effective assistance of counsel by the intentional and willful withholding of *Brady v. Maryland*, 373 U.S. 83 (1963) exculpatory and impeaching material and introduction of false testimony at trial;
6. Mr. Cruz Vazquez was deprived of the effective assistance of counsel at sentencing and on appeal because here, as even the Government argued, trial counsel "failed to provide evidence to support the sentencing disparity contention prior to or at sentencing" and that the disparity argument "should be deemed waived."

Yet, despite Petitioner's six separate issues having been fully briefed and developed in his "request for a COA", the First Circuit incredibly wrote on page 2 of its parsimonious Order denying the certificate of appealability: "To the extent the petitioner seeks to advance any of the other claims from his 28 USC § 2255 motion, ***the claims are waived for failure to develop them in his request for COA***." Emphasis added. Explicitly, the First Circuit failed to even notice the *four additional issues* fully developed by Petitioner ***at pages 11-14 of his*** "request for a COA," and simply left them ignored.

These actions by the First Circuit violated this Court's precedent in *Buck v. Davis,*137 S.Ct. 759, 773 (2017), which held of a COA – "the ***only*** question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims ***or*** that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Quoting *Miller-El* v. *Cockrell*, 537 U. S. 322, 336 (2003) (state case involving a *Batson* issue under *a stricter 2254 AEDPA standard*, but finding that a COA should have been issued), emphasis added.

Plainly, the First Circuit expressly considered and ruled upon ***only*** issues 1 and 2, in Petitioner's Motion for a COA, leaving unreviewed Petitioner's well developed issues 3-6, which were: 3) IAC because of appellate counsel's unauthorized concession of guilt on the single conspiracy conviction; 4) IAC for failure to even consider a challenge on the sufficiency of evidence on the conspiracy conviction based upon *United States v. Dellosantos*, 649 F.3d 109, 121 (1st Cir. 2011); 5) the fully briefed and supported issue of the district court's biased failure to even consider the demonstrated pattern of *Brady v. Maryland*, 373 U.S. 83 (1963) violations by the Puerto Rico U.S. Attorney's Office; and, 6) IAC at sentencing for failure by counsel to provide any mitigating information or proportionality evidence; this issue was expressly noted by the First Circuit and admitted by the Government who then argued that the sentencing issues had been "waived." Were, the waiver of a sentencing issue by the admitted failure of counsel to have presented mitigating

sentencing evidence would be *a priori* presumed to have negatively affected a Petitioner.

The First Circuit failed to even note that Petitioner's Sixth issue was an uncontested abandonment by trial counsel of Petitioner's right to the effective assistance of counsel at sentencing. The lower court, therefore, sanctioned a fundamental violation of Petitioner's right under the Sixth Amendment to meaningful representation by counsel at one of the most critical stages of a case – sentencing. *Mempa v. Rhay,* 389 U.S. 128 (1967) and *Glover v. United States,* 531 U.S. 198, 203-04 (2001). Instead of even noting this issue, the First Circuit simply ***and inaccurately*** noted "To the extent the petitioner seeks to advance any of the other claims from his 28 USC § 2255 motion, ***the claims are waived for failure to develop them in his request for COA***." Emphasis added. Petitioner had briefed the sentencing issue at page 12 of his Motion for a COA, in the context of the other 5 issues briefed at pages 10-13, and the Government argued that counsel waived it for failure to advocate.

REASON FOR ALLOWANCE OF THE WRIT

1. **A Certificate of Appealability was Compelled by the Record**.

This case presents facts that show a need for this Court to provide guidance to lower courts on the parameters of determining the granting or denial of a COA. In *Buck v. Davis,*137 S.Ct. 759, 773 (2017), quoting

Miller-El v. Cockrell, 537 U.S. 322, 338 (2003), this Court held:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." [citation omitted] This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." [citation omitted] "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."

Moreover, Title 28 United States Code Section 2253(c) provides that a COA may issue where "the applicant has made a substantial showing of the denial of a constitutional right." *28 U.S.C. §2253(c)* (1996). In order to make a "substantial showing," a petitioner seeking a COA must show ***either*** that: (1) the issues are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, ***or*** (3) the questions are "adequate to deserve encouragement to proceed further." *Barefoot v. Estelle,* 453 U.S. 880, 893 n. 4, (1983), emphasis added.

This Court has established that the "debatable among jurists of reason" inquiry is ***a very low barrier*** to the issuance of a COA. *Miller-El,* at 338. In fact, a claim can be considered "debatable" *even if* every

reasonable jurist would agree that the petitioner will not prevail. *Id.* The petitioner must, however, prove "something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.* (internal quotations omitted). Undeniably, Cruz Vazquez established that his detailed facts and fully developed issues were most definitely far beyond "something more than the absence of frivolity or the existence of mere good faith on [Petitioner's] part." It bears repeating here that even the Government described Petitioner's 2255 as "an extensive memorandum in support of a petition."

Indeed, in *Miller-El,* Justice Scalia in his concurring, cautionary opinion, explicitly disagreed with the Petitioner on the merits but nevertheless specifically noted –"[M]y conclusion that ***there is room for debate*** as to the merits of petitioner's *Batson* claim is far removed from a judgment that the state's explanations for its peremptory strikes were implausible." *Miller-El,* at 354, emphasis added. Justice Scalia captured the essence of the standard for issuing a COA – even where a judge/justice disagrees with the merits presented by a petitioner, a COA must issue where there is *intellectually-honest* debate on the issue. *A fortiori,* this should be self-evident where the First Circuit had already noted several key failures/shortcomings by conflicted appellate counsel on direct appeal. *See below,* at Section 3.

2. ***Petitioner Established a Concurrent Representation Conflict and Manifestation of Divided Loyalties.***

The lead issue raised by Petitioner was a multi-layered conflict of interest infecting appellate counsel. This harmful conflict was in that unique area of law where, as the First Circuit was mandated to accept, a Petitioner is not required to show *Strickland* prejudice. *See generally, Mickens v. Taylor,* 535 U.S. 162 (2002) and *Strickland v. Washington,* 466 U.S. 668, 687 (1984), and, *United States v. Burgos-Chapparro,* 309 F.3d 50, 52 (1st Cir. 2002).

In the "extensive memorandum" supporting his issues, Cruz Vazquez provided a plethora of specific, detailed facts, making the required "substantial showing" [3] for issuance of a Certificate of Appealability (COA). This substantial showing was that conflicted appellate counsel had denied Cruz Vazquez his constitutional rights to due process and the effective assistance of counsel on several issues ***fully detailed and supported*** in the petition in his Exhibit B, *Points & Authorities in Support of Petition for a Writ of Habeas Corpus*; and, Exhibit C, *Petitioner's Reply/Traverse to Government's Untimely Response/Reply*. Cruz Vazquez provided all supporting materials to the First Circuit.

But the "extensive memorandum" Petitioner filed in the district court, provided to the First Circuit, and the full record, demonstrate that

[3] 28 USC Section 2253(c).

Cruz Vazquez in fact did "ascertain and explain," ***in various areas***, how the conflicted, concurrent representation of, *inter alios*, one of the principal cooperating co-defendants *against* Cruz Vazquez deprived him of his constitutional rights. Petitioner fully supported this with his Exhibit B, pages 10-16 and 19-28, *provided to the First Circuit*.

Petitioner also demonstrated how the Government inaccurately tried to minimize, without any supporting counterbalancing declaration, the effect of that concurrent conflicted representation by claiming that the representation of Figueroa was merely for "two (2) months and eight (8) days." But the Government failed to dispel the harmful failure by defense counsel to pursue a multiple conspiracy defense because that would have contradicted the testimony of the Government's witnesses, *of conflicted counsel's other client Figueroa*.

Cruz Vazquez included in his 2255, *inter alia,* facts and excerpts from trial transcripts revealing that the conflict of interest resulted in appellate counsel harming Cruz Vazquez in *various ways*. First, by conceding his own client's guilt to the overall "single" drug trafficking conspiracy; Second, by then inconsistently challenging the sufficiency of the evidence *but only* to the related/dependent money laundering counts; and, Third, and critically, in the context of concurrent representation of one of the Government's principal cooperators, *by expressly conceding as true the suspect testimony of the Government's biased*, cooperating witnesses, *including Figueroa*.

The First Circuit's very own findings on direct appeal included:

> *Like his brother,* ***Cruz does not contest the substance of the testimony against him,*** focusing instead upon the inferences to be drawn from the evidence and the purported unfairness of his life sentence.[footnote omitted] ***While Cruz concedes that he was in fact involved in the DTO and that he was an "administrator"*** *at Barbosa and Sierra Linda, he maintains that his participation was "limited" to those two locales and characterizes his role as nothing more than a "third-tier administrator. "*

Cruz Vazquez, 751 F.3d 1, at 4, emphasis added.

On direct appeal, a point in the case when the First Circuit had not yet been informed of the new facts nor of the conflict of interest materially infecting appellate counsel, the court's key observation highlighted one of the critical material harms to Cruz Vazquez – his own conflicted appellate counsel "concede[d] that he was in fact involved in the DTO and that he was an 'administrator' at [a drug distribution center]." A staggering, jaw-dropping breach of loyalty and admission of guilt to the core of the indictment against Cruz Vazquez, to which he had consistently denied guilt and for which he elected to proceeded to trial.

Cruz Vazquez established that his appellate conflicted counsel contemporaneously represented, *inter alios,* no less than one of the Government's principal cooperators *in this case and two co-defendants* in one of the conspiracies for which he stood trial. The undisputed record he *developed* shows that the district court independently knew this fact.

Simultaneously, Cruz Vazquez developed *the very findings of fact by the district court which demonstrated the lack of evidence presented against him at trial*; and which demonstrate the obvious failure by appellate counsel to pursue an insufficiency-of-evidence attack *on the single conspiracy,* not only to the money-laundering conspiracy.

Significantly, the district court, at the end of trial and before closing, asked counsel for their time estimates for each of their closing arguments and noted specifically to Cruz Vazquez's counsel:

> THE COURT: And then time wise, what do we have?
> MR. RUBINO: Maximum 45 minutes for me. (Ayala's counsel).
> ***MR. CEREZO: Same to me. (Cruz Vazquez's counsel).***
> ***THE COURT: You, 45 minutes? (To Cruz Vazquez's counsel).***
> ***MR. CEREZO: Thirty minutes.***
> ***THE COURT: Yours wasn't even touched.***
> MR. CEREZO: Thirty minutes maximum.
>
> Maximum.
>
> THE COURT: [...] I will time you. Once you start, I will let you know.
> MR. CEREZO: Five minutes before.
> THE COURT: Yes, when you have five minutes to go.
> MR. CEREZO: To wrap it up.
> ***THE COURT: You don't have much to say.***

> *MR. CEREZO: I don't. I don't have much to-say. As a matter of fact, you will be surprised how little I have to say.*

Reporter's Trial Transcript, April 25, 2011, 17th-day of trial, pages 6-7, (emphasis supplied). App. 4.

Thus, the new facts presented to the district and appellate courts by Cruz Vazquez in his 2255 were *materially* different than the incomplete, misleading facts that initially made their way on direct appeal. These new facts were never presented to the district court; nor were these new facts provided to the appellate court by conflicted appellate counsel.

3. ***The Issues Presented by Cruz Vazquez for Issuance of the COA Indisputably Satisfied 2253(c).***

In *United States v. Gonzalez-Lopez,* 548 U.S. 140, 151-52 (2006), a case that did not involve a conflict of interest, but the right to retained counsel of choice, this Court noted – " [The Sixth Amendment right to counsel of choice] commands, not that a trial be fair, but that a ***particular guarantee of fairness be provided*** – to wit, that the accused ***be defended*** by the counsel ***he believes*** to be best." *Gonzalez-Lopez* at 146, emphasis added. It is in the expectation of the accused who "believes" that his counsel of his choice is "the best," that the *Gonzalez-Lopez* reasoning enlightens Cruz Vazquez's belief and expectation that his appellate counsel of choice was acting in his best interest. And that

such counsel provided "a particular guarantee of fairness." Sadly, that counsel was deeply conflicted.

Plainly, conflicted counsel for Cruz Vazquez failed at both because he had divided loyalties. And even a general consideration of the six issues raised by Cruz Vazquez, four of which were ignored by the First Circuit, demonstrates that he was denied that "particular guarantee of fairness."

The six issues Cruz Vazquez raised fit squarely within the disjunctive requirements of Section 2253(c). The six issues, noted above, Cruz Vazquez presented and supported with detailed facts, declaration and legal bases.

Each of the issues were indisputably "debatable among jurists of reason." Or, "(2) a court could resolve the issues in a different manner; ***or,*** (3) the questions are 'adequate to deserve encouragement to proceed further.'"

In his Petition, Cruz Vazquez also demonstrated how all issues he raised were affected by the admitted concurrent representation of a co-defendant by his appellate counsel. Each issue, especially the sentencing issue, was directly related to whether appellate counsel's concurrent representation of Jorge Figueroa Agosto, and others, prevented him from challenging the very sufficiency of the evidence *on the single drug conspiracy*. Whether the Government's other cooperating alleged co-conspirators were telling the truth at trial. And whether appellate counsel, also having duties of loyalty to Figueroa Agosto who had pleaded guilty, breached his duty of loyalty to Cruz Vazquez by then admitting

guilt to the drug trafficking conspiracy and even to having an "administrator" role in that "DTO." And then, incomprehensively, arguing mitigation without supporting evidence.

Justice Scalia's findings in *Gonzalez-Lopez* at 146 – "a ***particular guarantee of fairness be provided*** – to wit, that the accused ***be defended*** by the counsel ***he believes*** to be best," about the showing necessary by a defendant are helpful in a conflict of interest area because, while Cruz Vazquez must make the showing required by 2253(c), such a relaxed showing must also be evaluated with the overall structural concerns present in *Gonzalez-Lopez.* Indisputably, for a lawyer to concede a client's guilt by accepting the testimony of his concurrently represented client's presumptively-suspect trial testimony given for the Government, and even admitting an "administrator" role for that client, must certainly also constituter a breach of that "fundamental fairness" of which Justice Scalia wrote.

4. ***Denying the COA, the First Circuit Also Seemingly Forgot its Own Findings on Direct Appeal, Ignoring that Even the Government Admitted that Cruz Vazquez's Counsel Failed to Effectively Advocate at Sentencing and Failed on Direct Appeal.***

In its published opinion affirming Cruz Vazquez conviction and sentence on direct appeal, the First Circuit expressly noted: "Focusing his argument on his codefendants, Cruz ***does not argue*** that his sentence is not in accordance with those given to similar defendants on a national scale. As such, ***any such argument has been waived***." *United*

States v. Angel Ayala Vazquez and Luis X Cruz Vazquez, 751 F.3d 1, at footnote 34 (1st Cir. 2014), emphasis added. Of course, the court referred *to conflicted appellate counsel* for Cruz Vazquez.

Of conflicted appellate counsel, the First Circuit added: "Although the arguments set forth in his brief ***could have been stated with better clarity***, Cruz essentially claims the district court committed a variety of procedural errors with respect to sentencing, and that the life sentence is substantively unreasonable.... Cruz's brief ***has a tendency to combine, rather than separate***, his arguments with respect to procedural and substantive unreasonableness." " *Id.* at 22, emphasis added.

Adding insult to injury, the court went on: "Moreover, [counsel] ***has wholly failed to come forward with any mitigating reasons,*** never mind 'fairly powerful ones,' and we are not persuaded that the district judge unreasonably balanced the factors that went into crafting Cruz's sentence." *Id.* page 27, (Emphasis added). The court finished with this:

> The government contends that Cruz waived any arguments of disparity between himself and Ayala ***by failing to raise them at the sentencing hearing***.... And, although the majority of his "disparity arguments" focused on the lesser sentences meted out to "defendants with similar records and conduct," the issues of his culpability compared to Ayala and of sentencing disparities among defendants named in the Indictment were clearly raised before the district court. Therefore,

> we decline to find that Cruz waived this aspect of his argument.

Id. page 23, note 33. Having determined that defense counsel in fact raised, *but failed to adequately present*, disparity sentencing facts and any arguments, the First Circuit plainly overlooked the new facts underscoring the IAC at sentencing, now raised in this petition. It appears that the lower court forgot its prior critical observations in its published opinion about Cruz Vazquez's counsel.

CONCLUSION

For the foregoing reasons, Cruz Vazquez respectfully requests this Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit.

Dated: October 19, 2020

Respectfully Submitted,

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***Respondent*.**

Certificate of Service

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

I, EZEKIEL E. CORTEZ, state under oath that: I am a member of the Bar of the Supreme Court of the United States; that on October 19, 2020, pursuant to this Court's Order 589 issued April 15, 2020, an electronic copy of the Petition for *Writ of Certiorari* in the above-entitled case was e-filed with the Clerk of the Supreme Court of the United States; that I also deposited a paper copy in a United States post office mail box in San Diego, California, with priority postage prepaid,

properly addressed to the Clerk of the Supreme Court of the United States, the same day of e-filing said Petition for *Writ of Certiorari*, and with an additional copy of the Petition for *Writ of Certiorari* and Affidavit of mailing served on counsel for Respondent: Solicitor General of the United States, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001. Dated at San Diego, this October 19, 2020.

s/ *Ezekiel E. Cortez*
EZEKIEL E. CORTEZ, Affiant