No. 20-5885

IN THE

SUPREME COURT OF THE UNITED STATES

Mario Perez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mario Perez
(Your Name)
FCI Edgefield
P.O. Box 725
(Address)
Edgefield, SC 29824
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. Whether Defense Counsel Provided Ineffective Assistance Under The Sixth Amendment For: Failing To Challenge The Factual Resume, Failing To Protect Petitioner After He Provided Exceptional Cooperation And Failing To Negotiate or Seek A Plea Agreement Formalizing Each Parties Respective Positions

II. Whether The District Court Not Holding An Evidentiary Hearing was In Err

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ____________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at U.S. V Perez 2018 U.S. Dist. Lexis 144181; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ____________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ____________________ court appears at Appendix ______ to the petition and is

[ ] reported at ____________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 22, 2020.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ______________________, and a copy of the order denying rehearing appears at Appendix ______.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including October 19, 2020 (date) on ________________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______________________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment To U.S. Constitution.

STATEMENT OF THE CASE

The Petitioner Mario Perez (hereinafter Petitioner) was arrested by Department of Public Service Officers on an outstanding warrant in Fort Worth, Texas. During his arrest officers saw in plain sight what appeared to be drug paraphernalia and a digital scale. Officers secured the apartment and gained consent from the Petitioner to search. The subsequent search lead to the seizure of over $9,000.00 in U.S. Currency, a drug ledger, a digital scale, methamphetamine and a firearm. At the time of his arrest Petitioner agreed to cooperate by setting up his methamphetamine supplier.

On December 9, 2015, a setting Grand Jury in the Northern District of Texas, returned a single count indictment for conspiracy to distribute 50 grams or more of a substance containing a dectable amount of methamphetamine in violation of Title 21 U.S.C. §§ 846 and § 841(a)(1), (b)(1)(A). (Case No. 4:15-CR-00271-A)

On January 16, 2016, without the benifit of a plea agreement the Petitioner appeared before the Honorable Judge John Mcbryde and entered a plea of guilty to Count 1 of the indictment. The District Court accepted the plea and ordered the U.S. Probation Department to prepare a Pre-Sentence Report. (PSR) The Pre-Sentence Report found that primarly based on the amount of methamphetamine involved in the Conspiracy that Petitioner's Guideline range was 360-Life.

On May 27, 2016, the Petitioner with Counsel at sentencing. The District Court denied the Petitioner's objection to the drug purity and adopted the PSR as factual. The Court heard testimony from a Government witness before granting a motion for a downward departure because of substantial assistance.

The Court then gave the Petitioner what it deemed a "very good bargin" and sentenced him to 340 months.

a timely notice of appeal was filed. The appeal was dismissed by the fifth Circuit Court of Appeals after Appellant Counsel filed a brief pursuant to Anders v California, 386 U.S. 738 (1967). See United States v. Perez 685 F. App'x 320 (5th Cir. 2017). The Petitioner did not file a writ of certiorari.

On July 2, 2018, the Petitioner filed a timely motion to vacate pursuant to Title 28 U.S.C. § 2255. (Case No. 18-cv-00542-A.) On August 24, 2018, the District Court denied the motion to vacate without holding an evidentiary hearing. (Case Cite United States

v. Perez, 2018 U.S. Dist LEXIS 144181. (See Appendix B). The Petitioner filed a motion for re-consideration pursuant to the Federal Rules of Civil Procedure 59(e) that was denied on September 26, 2018. A timely notice/application was made to the Fifth Circuit Court of Appeals requesting a certificate of appealibility (COA). The Fifth Circuit denied the request for a COA and a request for remand to hold an evidentiary. United States v. Perez, Case No. (See Appendix A)

The Petitioner requested and this Court granted 60 additional days in which to file, through October 16, 2020.

REASONS FOR GRANTING THE PETITION

This Court has held time and again through a long history of decisions in many different circumstances and situations that criminal defendants are guaranteed the right to professional representation under the Sixth Amendment to the United States Constitution. This includes the plea negotiation phase. See Missouri v Frye, 566 U.S. 134 (2012)

The Petitioner contends the Court should grant this writ of certiorari because it rasies extremely important Sixth Amendment issues of ineffective assistance which affects federal sentencing practices for thousands of federal defendants in regards to pre-plea cooperation.

Federal defendants routinely cooperate with prosecutors for future consderation for a reduced sentence. However, many times as a colletral consequence of the cooperation defendants receive a sentence as severe or worse than if he had not cooperated.

The practice of cooperating and entering a plea of guilty is a common occurance in federal Courts. In these instances proffer and or plea agreements are a recognized tool for both prosecutors and defense attorneys to use when seeking to memorialize agreements between the parties.

Petitioner's Defense Counsel violated the Sixth Amendment when he provided ineffective assistance by:

1. Having the Petitioner agree to a factual resume misrepresenting his offense conduct.
2. Failing to protect the Petitioner after he provided exceptional, top cooperation by not seeking a plea agreement to memorialize important sentencing issues.
3. Counsel shifted the responsibility for Petitioner's defense to the Assistant United States Attorney assigned to the case.

Due to Defense Counsel's serious errors, misrepresentations and deficient advise Petitioner's Sixth Amendment right to professional representation was violated. Had Petitioner known then what he knows now, he would put the government to its burden and elected for trial. See Hill v Lockhart ___ U.S. ___ (1985)

Petitioner contends if Counsel would have functioned properly under the Sixth Amendment there is a high proability the out come of the proceedings would have been different. Id.

Legal Discussion

Petitioner claims his counsel provided ineffective assistance under the Sixth Amendment to the United States Constitution.

To prevail on an ineffective assistance of counsel claim, Petitioner must show (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 (1984); and "The reviewing court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id At 689

In the context of a guilty plea the same standard will apply with the controlling case being Hill v Lockhart ___ U.S. ___ (1985)

The Fifth Circuit used a flawed review process in affirming the District Court's order denying an evidentiary hearing that was not issued. The Rules under Title 28 U.S.C. Section 2255 were violated by both the District Court and Fifth Circuit Court of Appeals.

I

Whether Defense Counsel Provided Ineffective Assistance Under The Sixth Amendment For: Failing To Challenge The Factual Resume, Failing To Protect Petitioner After He Provided Exceptional Cooperation And Failing To Negotiate or Seek A Plea Agreement Formalizing Each Parties Respective Positions

The Petitioner was initially arrested by Police in Fort Worth, Texas on an outstanding warrant. While serving the arrest warrant police witnessed in plain sight suspected contraband. During a subsequent search police seized over $9,000.00 in U.S. currency, a drug ledger, a digital scale, methamphetamine and a handgun.

After his arrest the Petitioner agreed to orchestrate a buy/bust by setting up his methamphetamine supplier for police. (Appendix C P. 16) The buy/bust was accomplished with police seizing 24 ounces of methamphetamine, $10,000.00 in U.S. Currency and 10 pounds of marijuana. (Appendix C P. 17) Upon his arrest Petitioner's supplier agree to set up his methamphetamine distributer with a total seizure of 50 Kilograms of methamphetamine, $61,676.00 in U.S. currency and 13 firearms. (Appendix C P. 17) This lead to a futher seizure (the same day) of $37,000.00 in U.S. Currency, 8 Kilograms of ice methamphetamine and 20 gallons of liquid methamphetamine. (Appendix C P. 17)

In All, due to Petitioner's "exceptional" cooperation 80 Kilograms of methamphetamine $118,000.00 in U.S. currency and 15 hand guns were seized. (Appendix C P.18) Because of Petitioner's willingness cooperate a major drug distribution ring was dismantled.

After retaining Counsel at his own expense Petitioner was advised to sign a proffer agreement and continue to truthfully cooperate with police. At the conclusion of Petitioner's cooperation he had numerous meeting and phone conversations with counsel that were centered around entering a guilty to the indictment. During one of the Attorney client conferences, Counsel produced a factual resome developed by the Government laying out the stipulated facts that would form the basis of Petitioner's guilty plea.

The stipulated facts contained within the factual resome placed the Petitioner as a member of a large scale drug trafficking conspiracy that was not the case. Petitioner informed Counsel that he did not even know most of his co-defendants and only had dealings with his methamphetamine supplier. Petitioner explained to Counsel he had only a buy-sell relationship and was not involved in this conspiracy as alleged by the factual resome.

Counsel brushed aside any concerns telling Petitioner "not to worry" about the specifices and to not place in jeopardy the antisipated motion for substantial assistance the Government would be filing. Counsel further informed him the AUSA in charge of the case would be recommending a ten year sentence so not signing the factual resume could only harm his case.

Counsel provided ineffective assistance for advising the Petitioner to sign the factual resume which contained inaccurate information that became the basis for a plea that was both unintelligent and unknowing. Boykin v. Alabama, ___ U.S. ___ ( ) (finding a guilty plea must be bot intelligent and knowing). Furthermore, the plea must not result from threats, improper promises, misrepresentations or coercion. Bousley v. United States, 523 U.S. 614 (1998).

Defense Counsel made misrepresentations as to how much time Petitioner was facing. Numerous times Defense Counsel made represensentations to Petitioner that because of his exceptional cooperation he was facing "actually" ten years. Counsel further explained the final sentence would be driven by the AUSA's recommendation to the Court.

Counsel provided objectively unprofessional representations by improperly relating his alleged conversations with the Assistant U.S. Attorney. This conduct lead to Petitioner stipulating to facts forming the basis of his plea.

A guilty plea would not be voluntary, knowing or intelligent if a defendant does not have "sufficient awareness of the relevant circumstances and likely consequences. Bradshaw v Stumpf, 545 U.S. 175 (2005).

Petitioner's decision to plea guilty was not based on the relevant circumstances or likely consequences but strickly on Defense Counsel's repeative assurances he was facing a likely sentence of ten years.

Later, after the Pre-Sentence Report (PSR), did the same factual resume emerge again and ultimately was the proximate cause of the 340 month sentence imposed by the sentencing court.

Counsel provided ineffective assistance when he failed to seek to negotiate or even discuss the need for a plea agreement with the Government. Instead Counsel advised Petitioner to enter and open plea without the benifit of a plea agreement to memorialize where the Government stood on important sentencing issues. This advise was based on "trusting" the Government to file a motion due to Petitioner providing substantial assistance. However, as a result of not having a plea agreement the advise was shown to be woefully inadaquate.

It is well established a federal defendant does not have a right to be offered a plea nor does a federal court have to accept. Missouri v Frye, 566 U.S. 134 (2012). However, Petitioner's right to have counsel seek a plea agreement is compentent representation. This Court found that the plea agreement stage is a critical phase in any criminal proceedings: Lafler v Cooper, 566 U.S. __ (2012)(finding that the vast majority of criminal prosecutions are resolved through the plea barginning process) Id.

Petitioner pressed his Defense Counsel for the need to seek a plea bargin to formalize the Government's position in regards to sentencing factors. Petitioner wanted the Government to memorialize its position as to drug quantity and percentage of reduction for his substantial assistance. Counsel explained no plea agreement was necessary or needed because the key or linchpin driving his final sentence would be the "exceptional" "top" cooperation he provided authorities. Counsel's prediction turned out to be true in a morbidly oppsite fashion.

Petitioner's final sentence was driven by his cooperation, but not by his substantial assistance. Petitioner's cooperation lead to police seizing a very large amount of methamphetamine that turned out to be the driving force behind his final sentence.

Ultimately on January 21, 2016, Petitioner appeared before the Honorable Judge John Mcbryde and entered a guilty plea. After the plea was accepted the District Court ordered the U.S. Probation Department to compile a Pre-Sentence Report (PSR)

The final PSR determined Petitioner's Base Offense Level under the United States Sentencing Guidelines would be 38. This level was determined by the amount of methamphetamine attributed to Petitioner derived from his cooperation. The PSR further determined three 2-level enhancements would be applied for: importation of drugs from Mexico, possession of a dangerous weapon and maintaining a drug premies. This raised Petitioner's Offense level to 44. It was then determined Petitioner should receive 3-level reduction for acceptance of responsibility for an adjusted offense level of 41 and a Criminal History of ~~VI~~. This corresponds to a Guideline range of 360 months to life in prison. However, due to Petitioner's offense of conviction being under Title 21 U.S.C. §§ 846 & 841(a)(1), (b)(1)(B) the Guideline range became 360-480 months.

The Petitioner appeared with Counsel on May 27, 2016. At Sentencing the Court denied Petitioner's Single objection to the methamphetamine found the PSR to be factual and took testimony from the Case Agent in regards to a motion the Government filed pursuant to the United States Sentencing Guidelines Section 5K1.1. The Agent in Charge of Petitioner's case described his cooperation as "exceptional" "top". (Appendix C P. 18-19)

The Court granted the Government's motion for a downward departure for substantial assistance then stated:

Court: Had you been charged with your actual offense behavior, the guideline range would have been 360 months to life. And, of course we can't take into account in determing what sentence to impose that --- your proffer information, but that is something that needs to be taken into account in evaluating what, if any departure there should be under the motion filed by the government, the 5K1.1 motion and theres a great deal of drug activity there that causes the court some concern. (Appendix C P. 19)

The Court then told the Petitioner he had a "very good bargain" for him today and sentenced him to 340 months.

Two seperate constitutional errors were committed by Counsel:

1.

Counsel failed to negotiate with the Government to fix Petitioner's drug quantity calculation. Because of that error the U.S. Probation Department used the information from Petitioner's proffer to significantly increase his sentence. This Court has found that

Any increase in a defendants sentence has Sixth Amendment implications. Glover v United States, 531 U.S. 198 (2001) (finding and increase of 6 to 21 months for defendant, could have caused sufficient prejudice to constitute ineffective assistance, provided counsel's performance was unreasonable.)

The evidence is uncontraverted that the determing factor relied on by the Sentencing Court was the drug quantity when the Court stated:

> "there's a great deal of drug activity there that causes the court some concern."
> (Appendix C, P. 19)

It was clear from the Pre-Sentence Report that the drug quantity was derived through the apprehension of individuals and seizures made of methamphetamine identified by the Petitioner.

Counsel failed to negotiate the amount of methamphetamine to be attributed to the Petitioner causing him to be held accountable for all the drugs seized due to his cooperation. This error by counsel had the prejudicial affect of lengthing Petitioner's sentence.

A seperate, collatral consequence, of the drug quantity is counsel's failure to inform the Petitioner that his cooperation could be used to change his final sentence. This Court held that a defense Counsel provides ineffective assistance by failing to disclose a negative colletral consequences to a defendant. Padilla v. Kentucky, 559 U.S. 134 (2012)(Finding that counsel who did not inform the defendant about deportation as a result of his guilty plea provided ineffective assistance) Id.

At no time pre-plea did Counsel inform the Petitioner that as a colletral consequence of his Cooperation and guilty plea he could receive and increased sentence.

This Court held that ommisions by Counsel in regards to negative colletral consequences can be construed as ineffective assistance under Strickland and Hill. See Lee v. United States, ___ U.S. ___ (2017)(Finding that the colletral consequence of failing to advise defendant as to deportation is ineffective assistance; that regardless of the probability of a more serious outcome a Petitioner can show prejudice) Id.

Petitioner, as in Lee, declares that had Counsel advised him he would have discontinued his cooperation, not entered a guilty plea and continued to trial regardless of the probability of a longer sentence.

2.

Counsel provided ineffective assistance under Strickland when he shifted his responsibility to advocate to the Government's attorney.

From the start of Petitioner's criminal proceedings Defense Counsel's advise centered around what the Government was doing, not what the defense would be doing.

1. When discussing with Counsel the need for a plea agreement, his response was to trust the AUSA.

2. When Petitioner objected to the factual resume, Counsel cautioned him to not jeopordice his substantial assistance motion.

3. When the Pre-Sentence Report was prepared and Petitioner pointed out to Counsel how his Base Offense Level (BOL) had been inflated by using his proffer statements, Counsel responded by describing the large reduction the AUSA would be requesting from the Court.

4. When Petitioner wished to challenge the methamphetamine purity level contained in the Pre-Sentence Report he had to overcome his Defense Counsel.

On every occasion Petitioner needed his Attorney to give him objective professional advise Counsel reminded him of what the Government would be doing.

What occurs more times than not is attorneys stop representing the defendant because what controls his final sentence will be the decision made by the Government's Attorney. As was the case here.

There are complexed dynamics associated with defending someone who has cooperated including making certain the cooperation does not harm the defendant more than helping.

The Defense Counsel's conduct was so unreasonable that the out come of the proceedings were undermined (Strickland, 466 at 694)

"The bench mark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [guilty plea in this case] cannot be relied upon as having a just result. Cullen v. Pinholster, 563 U.S. 170 (2011)

Due to Counsel shifting his responsibility to the Government a breakdown in the adversarial process took place. Counsel did not function objectively under the Sixth Amendment.

II

Whether The District Court
Not Holding An Evidentiary
Hearing Was In Err

The District Court's decision to not hold an evidentiary hearing was in violation of the Rules that Govern Section 2255.

It should be noted that in the District Court's Memorandum Opinion and order there was no language specificlly discussing or denying, holding or not holding an evidentiary hearing. The District Court mentions under "Analysis" when someone is entitled to an evidentiary hearing, however, no order denying one was issued. (See Appendix C)

Rule 8 of the Rules tha Govern Section 2255 plainly lays out when a court should hold an evidentiary hearing. a hearing is necessary under Section 2255 when there is independent indicia of likely merit of a claim such as supported by one or more affidavits.

1. Petitioner supplied to the District Court two seperate affidavits: 1) swearing to

to conversations he had with his attorney in regards to the length of sentence he could expect, and 2) one from a co-defendant affirming his claim of his non-participation in the conspiracy alleged in the indictment.

2. Neither in the Government's response to the motion to vacate or in the District Court's memorandum and opinion were mention made of the two affidavits. (See Appendix B & D)

3. The Government did not refute the two affidavits by obtaining an affidavit from counsel of record.

4. An evidentiary hearing was needed to adjudge how there was inconsistencies between the case Agents report and the PSR. When the Petitioner rasised this in his original Section 2255 the Government responded:

"he offered conclusory allegations and 'at best manufactures and immaterial inconsistency between the PSR and an Agent's investigative report'"
(See Appendix D P. 13 of 19).

The Petitioner made claims supported by the record and made material by use of affidavits yet no evidentiary was held.

It should be noted that a search of LEXIS NEXIS found no cases heard before the Honorable Judge John McBryde in regards to Section 2255 where he held or granted an evidentiary hearing going back 25 years. The same search shows the Honorable Judge McBryde "never" granted a Section 2255 except for Johnson II. Perfect record. This means for the last 25 years no movant has filed a constitutional claim with enough merit for an evidentiary hearing to be held.

This Petitioner along with many other defendants "need" this Court to compel the lower courts to comply substantially with Rule 8 of Section 2255.

This Petitioner Request a limited remand for the purpose of holding an evidentiary hearing.

Based on the records and argument an evidentiary hearing is needed and not holding one is debatable amoungest jurists of reason. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mario Perez

Date: 9/23/20