No. 20-5962

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2019 TERM

ERIK DIAZ-COLON — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ERIK DIAZ-COLON, 91100-004
(Your Name)

FEDERAL CORRECTIONAL COMPLEX COLEMAN, USP #1
(Address)

P.O. BOX 1033 COLEMAN, FLORIDA 33521
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER PETITIONER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ADVISE HIM OF HIS RIGHT TO TESTIFY AT TRIAL?

II. WHETHER PETITIONER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE DISTRICT COURT'S CONSTRUCTIVE AMENDMENT OF THE INDICTMENT AS TO THE CIVIL RIGHTS CONSPIRACY OFFENSE, UNDER 18 U.S.C. SECTION 241(COUNT FIVE); AND THE AIDING AND ABETTING FOR DEPRIVING THE VICTIM OF HIS RIGHT AND PRIVILEGES BY THE CONSTITUTION, UNDER 18 U.S.C.S. SECTION 242(COUNT SIX), DURING THE JURY INSTRUCTIONS?

III. WHETHER PETITIONER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY PROVIDING DEFICIENT, INACCURATE, AND ERRONEOUS LEGAL ADVISE DURING THE PLEA AGREEMENT PHASE WHICH LEAD TO THE GOVERNMENT WITHDRAWING ITS PLEA AGREEMENT, THUS, PROCEEDING TO THE JURY TRIAL WHERE HE WAS CONVICTED OF ALL CHARGES AND RECEIVED A MUCH GREATER SENTENCE THAN OFFERED IN THE GOVERNMENT'S PLEA AGREEMENT?

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:

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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[X] is unpublished.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

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[X] is unpublished.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

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 20, 2020

[ ] 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: June 26, 2020, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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. § 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

CONSTITUTION OF THE UNITED STATES

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL...

HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

STATEMENT OF THE CASE

ON OCTOBER 8, 2009, PETITIONER WAS INDICTED IN A SUPERSEDING INDICTMENT WITH A CONSPIRACY TO COMMIT CAR JACKING IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371; CONSPIRACY OF DEPRIVATION OF RIGHTS (TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER COLOR OF LAW) IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 241; and DEPRIVATION OF RIGHTS UNDER COLOR OF LAW IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 242 and 2.

ON JUNE 2, 2011, PETITIONER FILED A MOTION FOR CHANGE OF PLEA. THE CHANGE OF PLEA HEARING WAS SCHEDULED TO BE HEARD ON JUNE 15, 2011. ON THAT DAY, THE GOVERNMENT INFORMED TO THE COURT IT WAS WITHDRAWING THE OFFER BECAUSE IT HAD NOT TAKEN INTO CONSIDERATION NEW EVIDENCE. THE COURT GRANTED THE GOVERNMENTS MOTION TO WITHDRAW ITS PLEA AGREEMENT. FOLLOWING A JURY TRIAL, PETITIONER WAS CONVICTED ON THE THREE (3) COUNTS OF THE SUPERSEDING INDICTMENT AND SENTENCED TO LIFE IMPRISONMENT.

PETITIONER TIMELY APPEALED HIS SENTENCE. ON APPEAL, PETITIONER, THROUGH COUNSEL AND IN SEVERAL pro se SUPPLEMENTAL BRIEFS, ARGUED THAT:

(1) HIS INDICTMENT WAS CONSTRUCTIVELY AMENDED BECAUSE THE JURY INSTRUCTIONS AND VERDICT FORM, BUT NOT THE INDICTMENT, SPECIFIED THAT HE WAS BEING CHARGED WITH THE "DEATH RESULTING" FORM OF THE OFFENSE DESCRIBED IN SECTIONS 241 and 242;

(2) HIS INDICTMENT WAS CONSTRUCTIVELY AMENDED ON THE CONSPIRACY TO COMMIT CAR JACKING COUNT;

(3) THE GOVERNMENT IMPROPERLY WITHDREW A PLEA OFFER IT MADE TO HIM BEFORE TRIAL; and

(4) THE JURY VERDICTS ON TWO OF HIS COUNTS OF CONVICTION WERE INCONSISTENT. UNITED STATES v. VIZCARRONDO-CASANOVA, 763 F.3d 89, 97 (1st cir. 2014).

ON AUGUST 18, 2014, THE COURT OF APPEALS FOR THE FIRST CIRCUIT AFFIRMED PETITIONER'S CONVICTION AND SENTENCE, Id. at 104.

ON OCTOBER 5, 2015, THE SUPREME COURT DENIED CERTIORARI. DIAZ-COLON v. UNITED STATES,_____U.S._____, 136 S.CT.30(2015).

ON OCTOBER 4, 2016, PETITIONER FILED A TIMELY MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE, PURSUANT TO 28 U.S.C. SECTION 2255, CLAIMING FIVE (5) GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

ON DECEMBER 13, 2016, THE GOVERNMENT FILED ITS RESPONSE TO PETITIONER'S SECTION 2255 PETITION, SUBMITTING THAT PETITIONER'S PETITION SHOULD BE DENIED WITHOUT HOLDING AN EVIDENTIARY HEARING BECAUSE HIS ALLEGATIONS HAVE NO MERIT.

ON APRIL 26, 2017, PETITIONER FILED HIS REPLY IN OPPOSITION TO THE GOVERNMENTS RESPONSE TO HIS SECTION 2255 PETITION.

PETITIONER'S SECTION 2255 PETITION WAS REFERRED TO THE MAGISTRATE JUDGE, HONORABLE CAMILLE VELEZ-RIVE, WHO ON JULY 18, 2017, ISSUED A REPORT AND RECOMMENDATION FINDING THAT PETITIONER CLAIMS LACK MERIT AS HE FAILED TO ESTABLISH THAT HE SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL. THUS, THE MAGISTRATE JUDGE RECOMMENDED THAT PETITIONER'S SECTION 2255 PETITION BE DENIED WITHOUT THE NEED TO HOLD AN EVIDENTIARY HEARING.

ON SEPTEMBER 12, 2017, PETITIONER FILED OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, WHERE HE ESSENTIALLY REITERATED AND MAINTAINED THE ARGUMENTS MADE IN HIS ORIGINAL SECTION 2255 PETITION TO SUPPORT HIS FIVE (5) CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, i.e.,

(1) PROVIDING DEFICIENT ADVICE LEADING TO THE GOVERNMENT WITHDRAWING ITS PLEA AGREEMENT AND HE PROCEEDING TO TRIAL;

(2) FAILING TO ADVISE HIM OF HIS RIGHT TO TESTIFY;

(3) FAILING TO OBJECT AT TRIAL TO THE COURT'S CONSTRUCTIVE AMENDMENT OF THE INDICTMENT AS TO THE DEPRIVATION OF RIGHTS AS TO COUNTS FIVE AND SIX;

(4) FAILING TO OBJECT TO THE COURTS FAILURE TO DEFINE REASONABLE DOUBT DURING THE JURY INSTRUCTION, AND;

(5) FAILING TO PRESENT TWO ALIBI WITNESSES AT TRIAL.

ON DECEMBER 26, 2017, THE GOVERNMENT SUBMITTED A RESPONSE IN OPPOSITION TO PETITIONER'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE VELEZ-RIVE, ESSENTIALLY REITERATING THE CONTENTIONS MADE IN THEIR FIRST RESPONSE TO PETITIONER'S SECTION 2255 PETITION.

ON DECEMBER 27, 2017, THE DISTRICT COURT ADOPTED THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION AND DENIED PETITIONER'S SECTION 2255 PETITION.

ON FEBRUARY 20, 2018, PETITIONER FILED A TIMELY NOTICE OF APPEAL.

ON JUNE 4, 2018, PETITIONER FILED A TIMELY APPLICATION FOR CERTIFICATE OF APPEALABILITY IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

ON FEBRUARY 20, 2020, THE COURT OF APPEALS DENIED PETITIONER A CERTIFICATE OF APPEALABILITY.

ON APRIL 30, 2020, PETITIONER FILED A TIMELY PETITION FOR PANEL REHEARING OR IN THE ALTERNATIVE FOR REHEARING EN BANC.

ON JUNE 26, 2020, THE COURT OF APPEALS DENIED THE PETITION FOR REHEARING AND REHEARING EN BANC. THE FORMAL MANDATE OF THE COURT OF APPEALS WAS ISSUED ON JULY 6, 2020. THUS, THIS PETITION FOR A WRIT OF CERTIORARI ENSUE.

REASONS FOR GRANTING THE PETITION

I. PETITIONER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ADVISE HIM OF HIS RIGHT TO TESTIFY AT TRIAL.

UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, DEFENDANTS ARE ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE STANDARD ESTABLISHED BY THIS HONORABLE COURT'S LANDMARK CASE OF STRICKLAND v. WASHINGTON, 466 U.S. 668, 104 S.CT 2052(1984). TO FIND INEFFECTIVENESS, COUNSEL'S PERFORMANCE SHOULD BE SO PREJUDICIAL TO UNDERMINE THE CONFIDENCE IN THE FAIRNESS OF TRIAL OR ITS RESULTING CONVICTION. TITLE 28, UNITED STATES CODE, SECTION 2255.

IN ORDER TO ESTABLISH SUCH A CLAIM, PETITIONER MUST MAKE A TWO PART SHOWING. FIRST, DEFENSE COUNSEL'S PERFORMANCE MUST BE DEFICIENT, THAT IS, THE ATTORNEY MUST HAVE "MADE ERRORS SO SERIOUS THAT COUNSEL WAS NOT FUNCTIONING AS THE 'COUNSEL' GUARANTEED THE DEFENDANT BY THE 6tH AMENDMENT." STRICKLAND, 466 U.S. AT 687, 104 S.CT. 2052. ON TOP OF A FLAWED PERFORMANCE, THERE MUST ALSO BE PREJUDICE TO THE DEFENSE. Id. IT MUST BE "REASONABLY LIKELY" THAT THE RESULT OF THE CRIMINAL PROCEEDING WOULD HAVE BEEN DIFFERENT, Id. AT 696, AND THAT LIKELIHOOD "MUST BE SUBSTANTIAL, NOT JUST CONCEIVABLE." HARRINGTON v. RICHTER, 562 U.S. 86, 112, 131 S.CT. 770, 792(201); SEE ALSO GONZALAZ-SOBERAL v. UNITED STATES, 244 F.3d 273, 278 (1ST CIR.2001) ("A REASONABLE PROBABILITY IS ONE'SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME'"). IN APPLYING THIS TEST, JUDICIAL SCRUTINY OF COUNSEL'S PERFORMANCE MUST BE HIGHLY DEFERENTIAL. PETITIONER HAS THE BURDEN TO SHOW INEFFECTIVE ASSISTANCE BY A PREPONDERANCE OF THE EVIDENCE.

THUS, THIS HONORABLE COURT SHOULD FIND THAT PETITIONER HAS MET THIS BURDEN IN THE CASE AT THE BAR FOR THE REASONS WELL EXPLAINED BELOW.

PETITIONER PROCEED TO TRIAL ON JULY 18, 2011, AND THE TRIAL CONTINUED UNTIL SEPTEMBER 18, 2011. PETITIONER NEVER TESTIFIED IN HIS OWN DEFENSE BECAUSE HIS TRIAL COUNSEL NEVER INFORMED HIM ABOUT WHETHER HE WOULD LIKE TO DO SO; NOR THE DISTRICT COURT ADVISE HIM OF HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE. PETITIONER WOULD HAVE OFFERED TESTIMONY EXCULPATING HIM FROM AT LEAST PART/SOME OF THE CRIME FOR WHICH HE WAS CONVICTED, i.e,

HE "AUTHORIZED/APROVED/ORDERED THE KILLING OF THE VICTIM OF THE CAR-JACKING."

IT IS CLEAR THAT A DEFENDANT HAS A "FUNDAMENTAL CONSTITUTIONAL" RIGHT TO TESTIFY IN HIS OWN DEFENSE, ROCK v. ARKANSAS, 483 U.S. 44, 51-53, 107 S.CT. 2704, 97 L.Ed.2d 37(1987), AND THAT THE RIGHT MUST BE UNFETTERED, "HARRIS v. NEWYORK, 401 U.S. 222, 230, 91 S.CT. 643, 28 L.Ed.2d 1(1971). THE RIGHT TO TESTIFY MAY NOT BE WAIVED BY COUNSEL ACTING ALONE. SEE UNITED STATES v. MULLINS, 315 F.3d 449, 454 (5TH CIR.2002) (THE DEFENDANTS RIGHT TO TESTIFY IS SECURED BY THE CONSTITUTION AND ONLY HE CAN WAIVE IT."); SEXTON v. FRENCH, 163 F,3d 874, 881 (4TH CIR.1998) ("EVERY CIRCUIT THAT HAS ADDRESS THE ISSUE HAS HELD THAT THE RIGHT TO TESTIFY IS PERSONAL AND MUST BE WAIVED BY THE DEFENDANT.") LEMA v. UNITED STATES, 987 F.2d 48, 52 (1ST CIR.1993) (ASSUMING, BUT NOT DECIDING THE QUESTION); VEGA-ENCARNACION v. UNITED STATES, 1993, U.S. APP. LEXIS 10068 AT *9 (1ST CIR.1993) ("THE RIGHT TO TESTIFY IS PERSONAL AND CANNOT BE WAIVED BY COUNSEL HAS FAILED TO INFORM A DEFENDANT OF HIS RIGHT TO TESTIFY, WE DO NOT BELIEVE THAT A WAIVER OF THAT RIGHT ME BE INPLIED FROM DEFENDANTS SILENCE AT TRIAL; "AT TRIAL, DEFENDANT'S GENERALLY MUST SPEAK ONLY THROUGH COUNSEL, AND, ABSENT SOMETHING IN THE RECORD SUGGESTING A KNOWING WAIVER, SILENCE ALONE CANNOT SUPPORT AN INFERENCE OF SUCH A WAIVER." CHANG v. UNITED STATES, 250 F.3d 79, 84 (2nd CIR.2001); SEE ALSO MULLINS, 315 F.3d at 455 (DECLINING TO PLACE UPON THE DEFENDANT THE RESPONSIBILITY TO ADDRESS THE COURT DIRECTLY IS CONSISTENT WITH THE REALITY THAT ROUTINE INSTRUCTIONS TO DEFENDANTS REGARDING THE PROTOCOLS OF THE COURT OFTEN INCLUDE THE ADMONITION THAT THEY ARE TO ADDRESS THE COURT ONLY WHEN ASKED TO DO SO.")

FURTHERMORE, ONCE A PRISONER REQUESTS RELIEF UNDER SECTION 2255, A DISTRICT COPURT MUST GRANT AN EVIDENTIARY HEARING ON THE PRISONER'S CLAIMS UNLESS "THE MOTION AND THE FILES AND RECORD OF THE CASE CONCLUSIVELY SHOW THAT THE PRISONER IS ENTITLED TO NO RELIEF." 28 U.S.C. SECTION 2255. IF A DISTRICT COURT HOLDS AN EVIDENTIARY HEARING ON THE CLAIM, THE FIRST CIRCUIT REVIEW ITS FACTUAL CONCLUSIONS FOR CLEAR ERROR. AWON v. UNITED STATES, 308 F.3d 133, 140 (1ST CIR.2002). IF A DISTRICT COURT DISMISSES A SECTION 2255 CLAIM WITHOUT HOLDING AN EVIDENTIARY HEARING, WE TAKE AS TRUE THE SWORN ALLEGATION OF FACT SET FORTH IN THE PETITION "UNLESS THOSE ALLEGATIONS ARE MERELY CONCLUSORY, CONTRADICTED BY THE RECORD, OR INHERENTLY INCREDIBLE."

ELLIS v. UNITED STATES, 313 F.3d 636, 641 (1ST CIR. 2002).

MOREOVER, IN OWENS v. UNITED STATES, 483 F.3d 48 (1ST CIR.2007), A CASE WITH STRIKING SIMILARITY AS PETITIONER'S ISSUE, THE FIRST CIRCUIT FOUND THAT OWENS STATED IN HIS AFFIDAVIT THAT HE WAS NEVER TOLD OF HIS RIGHT TO TESTIFY; ONE OF OWEN'S TRIAL ATTORNEYS STATED THAT HE DID NOT RECALL TELLING OWENS OF HIS RIGHT TO TESTIFY, AND THE OTHER TRIAL ATTORNEY SAID NOTHING ABOUT THE ISSUE... THUS, BECAUSE OWEN'S ALLEGATIONS ARE NOT IMPLAUSIBLE, AND BECAUSE THEY COULD, IF TRUE, ENTITLE HIM TO RELIEF, THE DISTRICT COURTS DECISION TO DENY AN EVIDENTIARY HEARING WAS AN ABUSE OF DISCRETION... ACCORDINGLY, WE REMAND THIS CLAIM TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER OWEN'S COUNSEL DID NOT INFORM HIM OF HIS RIGHT TO TESTIFY, WHETHER OWEN'S WOULD HAVE TESTIFIED IF SO INFORMED, AND THE NATURE OF HIS TESTIMONY. OWEN'S 483 F.3d AT 57, 60, 61.

FURTHER, THE GOVERNMENT DID NOT PROVIDE THE COURT WITH AN AFFIDAVIT FROM PETITIONER'S TRIAL ATTORNEY, MR. VICTOR P. MIRANDA-CORRADA, CONTRADICTING AND REFUTING PETITIONER'S ALLEGATIONS THAT HIS ATTORNEY FAILED TO INFORM HIM OF HIS RIGHT TO TESTIFY AT TRIAL. ACCORDINGLY, PETITIONER HAD PROVIDED A FAIR (AND AT LEAST DEBATABLE) CLAIM THAT HE IS ENTITLED TO RELIEF, AND HE HAS MADE A "SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT, OR AT THE VERY LEAST, HE IS ENTITLED TO AN EVIDENTIARY HEARING ON THIS CLAIM, THUS, CERTIORARI SHOULD BE GRANTED AS TO THIS CLAIM.

II. PETITIONER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE DISTRICT COURT'S CONSTRUCTION AMENDMENT OF THE INDICTMENT AS TO THE CIVIL RIGHTS CONSPIRACY OFFENSE, UNDER 18 U.S.C. SECTION 241 (COUNT FIVE); AND THE AIDING AND ABETTING FOR DEPRIVING THE VICTIM OF HIS RIGHT AND PRIVILEGES PROTECTED BY THE CONSTITUTION, UNDER 18 U.S.C. SECTION 242 (COUNT SIX), DURING THE JURY INSTRUCTIONS.

PETITIONER AVERS THAT THE COUNT OF HIS INDICTMENT CHARGING HIM WITH VIOLATING 18 U.S.C. SECTION 241 AND 242 (COUNT FIVE & SIX, RESPECTIVELY), WERE CONSTRUCTIVELY AMENDED BY THE DISTRICT COURT WHEN, THE JURY WAS INSTRUCTED ON THE BODILY INJURY AND DEATH RESULTING FORMS OF THE CRIME, AND HIS TRIAL COUNSEL FAILED TO OBJECT TO THE DISTRICT COURT'S CONSTRUCTIVELY AMENDING THE INDICTMENT DURING THE JURY INSTRUCTIONS PHASE AT HIS TRIAL.

THUS, PETITIONER'S ASSERTS THAT HE WAS NOT SUBJECTED TO THE ENHANCED PENALTIES UNDER SECTIONS 241 and 242 BECAUSE THE SUPERSEDING INDICTMENT DID NOT CHARGE THAT BODILY HARM OR DEATH RESULTED FROM THE VIOLATION OF THE VICTIMS RIGHTS, AS TO COUNTS FIVE AND SIX.

FURTHERMORE, ON DIRECT APPEAL, PETITIONER, IN A PRO SE SUPPLEMENTAL RAISED A CLAIM ALLEGING THAT THE DISTRICT COURT CONSTRUCTIVELY AMENDED THE INDICTMENT. THE COURT OF APPEALS FOR THE FIRST CIRCUIT DETERMINED THAT BECAUSE PETITIONER'S INDICTMENT SPECIFIED ONLY THE BASE LEVEL OFFENSE UNDER SECTIONS 241 and 242, THERE CAN BE NO QUESTION THAT PETITIONER'S INDICTMENT WAS CONSTRUCTIVELY AMENDED WHEN THE JURY WAS INSTRUCTED ON THE BODILY INJURY AND DEATH RESULTING FORMS OF THE CRIME. SEE UNITED STATES v. LNU, 544 F.3d 361 (1ST. CIR.2008) ("IN DETERMINING WHETHER THERE HAS BEEN A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT, WE GENERALLY EVALUATE WHETHER THE DEFENDANT HAS DEMONSTRATED THAT THE ALLEGED ALTERATION IN THE INDICTMENT DID IN FACT CHANGE THE ELEMENTS OF THE OFFENSE CHARGE..."). THEREFORE, TO INDICT A PERSON FOR THE FORM OF THE OFFENSE RESULTING IN A LESSER MAXIMUM SENTENCE AND THEN CONVICT HIM OF THE ENHANCED OFFENSE WITH A HIGHER MAXIMUM SENTENCE IS TO CONSTRUCTIVELY AMEND THE INDICTMENT. CF.LNU, 544 F.3d at 369.

MORE IMPORTANTLY WAS THE FACT THAT THE HONORABLE CIRCUIT COURT OF APPEALS DETERMINED AND CONCLUDED THAT: "AS WE HAVE ALREADY NOTED, THERE WAS ERROR HERE AND IT WAS PLAIN TO EVERYONE WHO READ THE INDICTMENT AND KNEW THE BASIC LAW" THAT A CONSTRUCTIVE AMENDMENT TO THE INDICTMENT AS TO COUNTS FIVE & SIX OCCURRED IN THIS CASE. HOWEVER, THE CIRCUIT COURT OF APPEALS DENIED PETITIONER'S CONSTRUCTIVE AMENDMENT ISSUE BECAUSE HIS TRIAL COUNSEL DID NOT OBJECT TO THE BODILY INJURY AND DEATH RESULTING FORMS OF THE CRIME AT THE TRIAL LEVEL BELOW. SEE UNITED STATES v. VIZCARRONDO-CASANOVA, 763 F.3d 89, at 97-100 (1ST CIR.2014).

CONSTRUCTIVE AMENDMENTS ARE FORBIDDEN SO AS THE PRESERVE DEFENDANT'S FIFTH AMENDMENT RIGHT TO INDICTMENT BY A GRAND JURY, FROM PROSECUTION FOR THE SAME OFFENSE IN VIOLATION OF THE SIXTH AMENDMENT, AND TO PROTECT THE DEFENDANTS SIXTH AMENDMENT RIGHT TO BE INFORMED OF THE CHARGES AGAINST HIM.

THUS, WHERE, AS HERE, TRIAL COUNSEL FAILED TO OBJECT TO THE DISTRICT COURTS CONSTRUCTIVE AMENDMENT OF THE INDICTMENT THAT WAS SO OBVIOUSLY PLAIN AND VAILED THAT ANY COMPETENT LAWYER WHO HAVE OBJECTED TO IT, NO FURTHER EVIDENCE IS NEEDED TO DETERMINE WHETHER COUNSEL WAS INEFFECTIVE FOR NOT HAVING DONE SO. IT IS CONCLUSIVE THAT ANY COMPETENT LAWYER WOULD HAVE OBJECTED TO

THE CONSTRUCTIVE AMENDMENT AS ARTICULATED BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT DURING PETITIONER'S DIRECT APPEAL. SEE UNITED STATES v. VIZCARRONDO-CASANOVA, 763 F.3d at 100 (1ST CIR.2014). IT IS CLEAR THAT PETITIONER'S CONSTRUCTIVE AMENDMENT CLAIM WOULD HAVE SUCCEEDED ON DIRECT APPEAL. HAD TRIAL COUNSEL OBJECTED TO THE DISTRICT COURT'S CONSTRUCTIVELY AMENDING THE INDICTMENT AT THE TRIAL LEVEL, THE FIRST CIRCUIT ON APPEAL WOULD IN ALL PROBABILITY, HAVE OPTED TO GRANT A NEW TRIAL AS TO COUNTS FIVE AND SIX OF THE SUPERSEDING INDICTMENT. THERE CAN BE DOUBT, THEN, THAT COUNSEL'S FAILURE TO OBJECT TO THE DISTRICT COURT'S CONSTRUCTIVE AMENDMENT AT THE TRIAL LEVEL UNDERMINES CONFIDENCE IN THE OUTCOME OF PETITIONER'S DIRECT APPEAL SUFFICIENT TO SATISFY THE PREJUDICE PRONG OF STRICKLAND.

THEREFORE, PETITIONER HAS PROVIDED A FAIR (AND AT LEAST DEBATABLE) CLAIM THAT HE IS ENTITLED TO RELIEF BECAUSE HE HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT, OR AT THE VERY LEAST, HE IS ENTITLED TO AN EVIDENTIARY HEARING ON THIS CLAIM, THUS, CERTIORARI SHOULD BE GRANTED AS TO THIS CLAIM.

III. PETITIONER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY PROVIDING DEFICIENT, INACCURATE, AND ERRONEOUS LEGAL ADVISE DURING THE PLEA AGREEMENT PHASE WHICH LEAD TO THE GOVERNMENT WITHDRAWING ITS PLEA AGREEMENT, THUS, PROCEEDING TO A JURY TRIAL WHERE HE WAS CONVICTED OF ALL CHARGES AND RECEIVED A MUCH GREATER SENTENCE THAN OFFERED IN THE GOVERNMENT'S PLEA AGREEMENT. PETITIONER ASSERTS THAT THE ERRONEOUS LEGAL ADVISE PROVIDED BY HIS TRIAL COUNSEL OF THE REVISED PLEA AGREEMENT TERMS THAT THE GOVERNMENT WAS OFFERING LED TO THE GOVERNMENT WITHDRAWING ITS PLEA OFFER, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. PETITIONER'S COUNSEL'S EGREGIOUS MISUNDERSTANDING OF THE LAW, i.e., THAT A FIVE(5) OFFENSE LEVEL GUIDELINE ENHANCEMENT FOR BRANDING A FIREARM DURING THE COMMISSION OF THE CRIME DID NOT APPLY, AND COUNSEL'S ERRONEOUSLY MISUNDERSTANDING OF LAW WERE HE THOUGHT THAT A THREE(3) OFFENSE LEVEL GUIDELINE ENHANCEMENT APPLIED INSTEAD CAUSED A LONG DELAY IN PETITIONER SIGNING THE GOVERNMENTS PLEA AGREEMENT AND, IN TURN, RESULTED IN THE GOVERNMENT WITHDRAWING ITS OFFER. OTHERWISE, PETITIONER WOULD HAVE TIMELY ACCEPTED OFFER AND WOULD HAVE RECEIVED A MORE LENIENT SENTENCE, RATHER THAN, GOING TO TRIAL AND RECEIVING A LIFE SENTENCE. SEE APPENDIX D (A COPY OF PETITIONER'S E-MAIL TO THE GOVERNMENT DETAILING THE ERRONEOUS CALCULATED ENHANCEMENT FOR THE BRANDISHING OF A FIREARM, UNDER U.S.S.G. SECTION 2A2.2 (b)(2)(c), AND, ALSO EXPLAINING TO THE GOVERNMENT THAT:

"ALLOWING THE PLEA AGREEMENT TO BE ENTERED WITH AN ERRONEOUS CALCULATION WOULD AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL," FOR THE HONORABLE COURT'S VIEWING, VERIFICATIONAL PURPOSES, AND CONVENIENCE. SUBSEQUENTLY, THE GOVERNMENT EXPLAINED TO PETITIONER'S COUNSEL IN AN E-MAIL THAT HE WAS WRONG AND EXPLAINED THAT: "UNDER U.S.S.G. 2B3.1 (b)(2)(c), A 5 LEVEL INCREASE APPLIES IT A FIREARM WAS BRANDISHED OR POSSESSED." THE SUB-SECTION INVOLVING A 3 LEVEL INCREASE PERTAINS TO A 'DANGEROUS WEAPON', NOT A FIREARM. THEREFORE, A 5 LEVEL INCREASE IS APPLICABLE IN OUR CASE. (NOTE-U.S.S.G. SECTION 2A2.2, CITED IN YOUR LETTER, IS NOT APPLICABLE IN OUR CASE.") SEE APPENDIX E (A COPY OF THE GOVERNMENT'S E-MAIL TO PETITIONER'S COUNSEL ADVISING HIM OF HIS MISUNDERSTANDING OF THE LAW AS TO THE BRANDISHING OF A FIREARM ENHANCEMENT FOR THE HONORABLE COURTS VIEWING, VERIFICATIONAL PURPOSES, AND CONVENIENCE.). NEVERTHELESS, WITH THIS INFORMATION REVEAL TO PETITIONER'S COUNSEL BY THE GOVERNMENT IN ITS E-MAIL AS TO HIS ERRONEOUS MISUNDERSTANDING OF THE LAW AS TO THE FIREARM ENHANCEMENT, COUNSEL DID NOT AGREE AND INSISTED THAT PETITIONER SIGN THE PLEA AGREEMENT.

IN MISSOURI v. FRYE, 566 U.S. 134, 132 S.CT. 1339, 182 L.Ed 2d 379 (2012) AND LAFLER v. COOPER, 566 U.S. 156, 132 S.CT 1376, 182 L.Ed. 2d 298(2012), THE SUPREME COURT HELD THAT DEFENSE COUNSEL HAVE A CONSTITUTIONAL OBLIGATION TO COMMUNICATE TO THEIR CLIENTS ANY PLEA AFFERS AND ACCURATE ADVISE ABOUT THOSE OFFERS, EVEN IF THE CLIENTS END UP REJECTING THE PLEA OFFERS AND SUBMITTING TO A FAIR TRIAL PROCESS. THE SHOWING ON PREJUDICE IN CONTEXT OF REJECTED PLEA OFFERS A DEFENDANT MUST DEMONSTRATE THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERROR'S, THE CLIENT WOULD HAVE ACCEPTED THE PLEA OFFER.

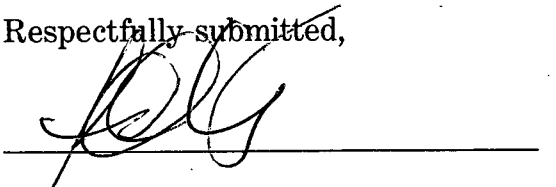
LIKEWISE, PETITIONER'S HAS DEMONSTRATED THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, i.e., COUNSEL'S EGREGIOUS MISUNDERSTANDING OF THE LAW REGARDING THE BRANDISHING OF THE FIREARM ENHANCEMENT IN THE GOVERNMENT PLEA AGREEMENT, PETITIONER WOULD HAVE TIMELY ACCEPTED AND SIGNED THE PLEA AGREEMENT AND RECEIVED A MORE LENIENT SENTENCE, i.e., 97-121 MONTHS OF IMPRISONMENT, AS STATED IN THE PLEA AGREEMENT, RATHER THAN, LIFE IMPRISONMENT FOR PROCEEDING TO TRIAL.

THEREFORE, PETITIONER HAS PROVIDED A FAIR (AND AT LEAST DEBATABLE) CLAIM THAT HE IS ENTITLED TO RELIEF BECAUSE HE HAS MADE SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT, OR AT THE VERY LEAST, HE IS ENTITLED TO AN EVIDENTIARY HEARING ON THIS CLAIM, THUS, CERTIORARI SHOULD BE GRANTED AS TO THIS CLAIM.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 17 September 2020