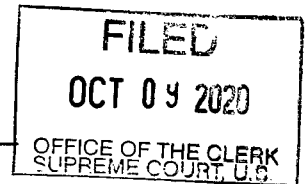


ORIGINAL

20-6121



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

JESUS ADAM LIZARRAGA,

Petitioner,

v.

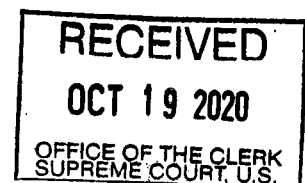
UNITED STATES OF AMERICA,

Respondent.

*On Petition for A Writ of Certiorari to the United
States Court of Appeals for the Eighth Circuit*

PETITION FOR A WRIT OF CERTIORARI

JESUS ADAM LIZARRAGA
Pro Se Petitioner
Fed. Reg. No. 14056-029
FCI Loretto
P.O. Box 1000
Cresson, PA 16630



QUESTION PRESENTED

Whether the Eight Circuit's denial of a certificate of appealability, where the district court summarily denied Mr. Lizarraga's motion to vacate, based on that court's erroneous determination that his claim - that his guilty plea was the result of gross misadvice, including former counsel's "promise that [Lizarraga] would not serve a prison sentence over 18 years," constituting ineffective assistance of counsel - was procedurally defaulted because he "failed to raise [this claim of ineffective assistance of counsel] on direct appeal," is irreconcilable with this Court's holding in *Massaro v. United States*, 538 U.S. 500 (2003), such that this Court should remand to the United States Court of Appeals for the Eighth Circuit with instructions to issue a certificate of appealability?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

RELATED CASES

- *United States v. Jesus Adam Lizarraga*, No. 6:15-cr-2027, U.S. District Court for the Northern District of Iowa. Judgment entered Feb. 23, 2016.
- *United States v. Jesus Adam Lizarraga*, No. 16-1589, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Apr. 6, 2017.
- *Jesus Adam Lizarraga v. United States*, No. 6:18-cv-2070, U.S. District Court for the Northern District of Iowa. Judgment entered Dec. 3, 2019.
- *Jesus Adam Lizarraga v. United States*, No. 20-1184, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Jun. 16, 2020.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS	ii
RELATED CASES.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE	4
A. Petitioner's Guilty Plea Was Not Knowing, Intelligent and Voluntary, Due to Ineffective Assistance of Counsel.	4
B. The District Court Summarily Denied the Motion to Vacate, Finding Petitioner's Claim to be Procedurally Defaulted, and Denied a Certificate of Appealability ("COA").	6

C.	The Eighth Circuit Denied COA	8
REASONS FOR GRANTING THE WRIT		9
ARGUMENT:		
A.	The COA Standard	9
B.	Reasonable Jurists Could Debate or, for that Matter, Agree that Relief is Appropriate on Petitioner’s Sixth Amendment Claim.	11
C.	Reasonable Jurists Could Debate or, for that Matter, Agree that Petitioner’s Claim is Not Procedurally Defaulted.	18
D.	This Court Should Summarily Reverse the Eight Circuit’s Order Denying COA	23
CONCLUSION		24

INDEX OF APPENDICES

Appendix - A: Judgment of the United States Court of Appeals for the Eighth Circuit denying a certificate of appealability. Dated: Jun. 16, 2020..... A1

Appendix - B: Order of the United States District Court for the Northern District of Iowa. Dated: Dec. 3, 2019
..... A2

Appendix - C: Order of the United States Court of Appeals for the Eighth Circuit denying panel rehearing and rehearing *en banc* on its prior denial of a certificate of appealability. Dated: Aug. 21, 2020 A11

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	10, 11
<i>Beckham v. Wainwright</i> , 639 F.2d 262 (5 th Cir. 1980)	16
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	5, 11
<i>Leavitt v. Jane L.</i> , 518 U.S. 137 (1996)	23
<i>Lee v. United States</i> , 137 S.Ct. 1958 (2017)	11
<i>Maryland v. Dyson</i> , 527 U.S. 465 (1999)	23
<i>Massaro v. United States</i> , 538 U.S. 500 (2003)	9, 11, 18, 19, 22, 23
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	9, 10, 11
<i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981)	23

<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	5, 17
<i>United States v. Bass</i> , 536 U.S. 862 (2002)	23
<i>United States v. Gordon</i> , 156 F.3d 376 (2d Cir. 1998)	17
<i>United States v. Herrera</i> , 412 F.3d 577 (5 th Cir. 2005)	16
<i>United States v. Hughes</i> , 330 F.3d 1068 (8 th Cir. 2003)	22
<i>United States v. Lizarraga</i> , 683 Fed. Appx. 529 (8 th Cir. 2017)	4, 5, 19, 20

STATUTES

18 U.S.C. § 841	4
18 U.S.C. § 846	4
18 U.S.C. § 1956	4, 15
28 U.S.C. § 1254	2

28 U.S.C. § 2106.....	23
28 U.S.C. § 2255.....	<i>passim</i>
28 U.S.C. § 2253(c)	3, 9, 11

USSG SECTIONS

§ 2D1.1	12
§ 2S1.1	13
§ 3E1.1	14

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Eighth Circuit denying Petitioner's motion for certificate of appealability is unpublished and may be found at USCA Case No. 20-1184; *Jesus Adam Lizarraga v. United States of America* (Jun. 16, 2020) (*Appendix - A1*).

The Order of the United States District Court for the Northern District of Iowa denying Petitioner's motion to vacate and denying him a certificate of appealability is unpublished and may be found at USDC Case No. 6:18-cv-2070; *Jesus Adam Lizarraga v. United States of America* (Dec. 3, 2019) (*Appendix - A2*).

The Order of the United States Court of Appeals for the Eighth Circuit denying panel rehearing and rehearing *en banc* on its prior denial of a certificate of appealability is unpublished and may be found at USCA Case No. 20-1184; *Jesus Adam Lizarraga v. United States of America* (Aug. 21, 2020) (*Appendix - A11*).

STATEMENT OF JURISDICTION

The order denying the motion for reconsideration was issued on August 21, 2020. The judgment denying Petitioner's motion for certificate of appealability was issued on June 16, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13 and this Court's Order dated March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, in light of the ongoing public health concerns relating to COVID-19. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Fifth and Sixth Amendments. The Fifth Amendment provides in pertinent part:

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

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c) provides that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

...

(B) the final order in a proceeding under section 2255.

...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Petitioner's Guilty Plea Was Not Knowing, Intelligent and Voluntary, Due to Ineffective Assistance of Counsel.

On September 15, 2015, the grand jury returned a four-count Superseding Indictment (DE #15), charging the Petitioner with conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846 (Count I); distribution of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) (Counts II and III); and money laundering in violation of 18 U.S.C. § 1956(a)(3)(B) (Count IV). See DE #15, at 1-3.

After counsel misadvised Petitioner that a formal plea offer limited his sentence exposure to no more than 18 years' imprisonment, the Petitioner accepted that offer and entered into a plea agreement with the government. The district court sentenced the Petitioner to 264 months' imprisonment on Count I of the Superseding Indictment and 240 months' imprisonment on Count IV of the Superseding Indictment, with the sentences to run concurrently.

On March 7, 2016, the Petitioner timely filed a notice of appeal. (DE # 47). On appeal, the Petitioner challenged his sentence. *See United States v. Lizarraga*, 683 Fed. Appx. 529, 530 (8th Cir. 2017). The Eighth Circuit Court of Appeals found that the district court's three-level adjustment for the Petitioner's role in the offense was appropriate. *See id.* at 532-33. The Eighth Circuit also

adjustment for the Petitioner's role in the offense was appropriate. *See id. at* 532-33. The Eighth Circuit also determined that the district court properly calculated the sentencing guidelines range and adequately explained its sentencing decision. *Id. at* 533-34. The Eighth Circuit affirmed the movant's judgment and sentence. *Id. at* 534.

In his motion to vacate, pursuant to 28 U.S.C. § 2255, Petitioner challenged his guilty plea as not knowing, intelligent and voluntary, based on ineffective assistance of counsel. Specifically, Petitioner argued that counsel's advice that the formal plea offer under consideration – and ultimately accepted and executed – limited his sentence exposure to no more than 18 years' imprisonment, grossly misstated the terms of the plea agreement, underrepresented his advisory guideline range of imprisonment pursuant to the same – based on the plea agreement and the prosecution's stated views, an advisory guidelines range of at least 235-293 months' imprisonment applied –, was objectively inaccurate, fell below the minimum level of competence and constituted deficient performance under *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner further argued that absent counsel's misadvice, there was a reasonable probability that he would have persisted in his plea of not guilty and proceeded to exercise his right to a trial by jury, demonstrating prejudice under *Hill*.

B. The District Court Summarily Denied the Motion to Vacate, Finding Petitioner's Claim to be Procedurally Defaulted, and Denied a Certificate of Appealability ("COA").

Petitioner's §2255 Motion with attached Memorandum of Law and supporting Declaration raised a single claim of ineffective assistance of counsel, based on out-of-court misadvice provided by counsel concerning the sentencing consequences of a formal plea offer under consideration and ultimately entered, as described under penalty of perjury in Petitioner's declaration. Petitioner explained that counsel misadvised him of the sentencing consequences of the formal plea offer under consideration and ultimately entered, which rendered his plea not knowingly, intelligently, and voluntarily entered. In his declaration submitted under penalty of perjury, Petitioner described with specificity the misadvice he received from counsel concerning the sentence he would receive if he pleaded guilty – "Mr. Schmiede – after having reviewed the discovery and stating he was fully aware of all the facts and the prosecution's theory of the case and my role therein – advised me to accept the government's plea offer based on its sentencing benefits. Mr. Schmiede specifically advised me that if I accepted the formal plea offer I would receive a sentence of no more than 18 years' imprisonment, and I could potentially end up with a significantly shorter sentence." Petitioner further explained that he "pled guilty because Mr. Schmiede specifically advised me that if I accepted the formal plea offer I would receive a sentence of no more than 18 years' imprisonment, and I could potentially end up with a

significantly shorter sentence. I trusted him to understand the law and its application to the facts of my case." Finally, Petitioner averred that had he been accurately advised of the true applicable guidelines range of imprisonment he would have exercised his right to trial by jury. Under the circumstances of this case, and as set forth in Petitioner's Memorandum in Support of Motion to Vacate, these specific factual allegations constitute gross misadvice concerning the likely sentencing consequences of the plea, which rendered the plea itself unknowing, unintelligent, and involuntary.

The district court summarily denied this claim, without the benefit of hearing argument from the United States, without allowing expansion of the record to learn former counsel's position concerning the misadvice he provided Petitioner, and with no warning to the *pro se* prisoner movant that the court viewed his claim as ripe for summary denial. The court's ruling denying Petitioner's claim found that his claim was procedurally defaulted on two theories – the first of which is based on an error of fact, rising to the level of an abuse of discretion and the second is based on a legal conclusion which is irreconcilable with controlling precedent. Both of the district court's theories that Petitioner's claim was "procedurally defaulted," were set forth in its order:

To the extent that the movant is asserting that his counsel promised him that he would not receive a sentence above 18 years' imprisonment for pleading guilty,

the movant's assertion, again, has no basis in the record [and] the movant did not raise any issue regarding counsel's alleged promise that he would not serve a prison sentence over 18 years on direct appeal. Because the movant failed to raise this issue on direct appeal, his claim pursuant to 28 U.S.C. § 2255 is procedurally defaulted.

Accordingly, because the movant's claim is procedurally defaulted, his § 2255 motion shall be dismissed.

App. B, A8-9.

In the same order, the district court denied Petitioner a certificate of appealability. [*App. B, A9-10*]. Petitioner timely filed a notice of appeal.

C. The Eighth Circuit Denied COA.

On June 16, 2020, the United States Court of Appeals for the Eighth Circuit denied COA. [*App. A, A1*]. On August 21, 2020, the United States Court of Appeals for the Eighth Circuit denied rehearing and rehearing *en banc* of its earlier judgment denying COA. [*App. C, A11*]. This petition is timely submitted, within 150 days of the Eighth Circuit's June 16, 2020 judgment denying COA. [*App. A*].

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of *certiorari*. At a minimum, this Court should order summary reversal because in denying a certificate of appealability, the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This is true because the district court's procedural ruling, finding that Petitioner's claim of ineffective assistance of counsel was procedurally defaulted, for failure to raise the same on direct appeal, is in direct conflict with this Court's holding in *Massaro v. United States*, 538 U.S. 500 (2003) and was thus clearly debatable amongst jurists of reason under controlling precedent. Additionally, Petitioner's claim that his plea was not knowing, intelligent or voluntary based on ineffective assistance of counsel provided the required constitutional dimension for a certificate of appealability.

A. The Certificate of Appealability Standard.

To obtain a certificate of appealability, a *habeas* petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must '[s]how 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.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

“[A] COA does not require a showing that the appeal will succeed.” *Id.* at 337. As this Court has explained: “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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.” *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Reasonable jurists could debate the merits of Petitioner's Sixth Amendment claim that his guilty plea was not knowing, intelligent and voluntary because it was

based on incomplete and incorrect advice of counsel. Additionally, reasonable jurists would agree that the district court's procedural ruling, that Petitioner's claim of ineffective assistance of counsel was procedurally defaulted – for failure to present the same on direct review – was clearly erroneous, as it conflicts with controlling precedent, including this Court's holding in *Massaro v. United States*, 538 U.S. 500 (2003). The legal argument, set forth below, demonstrates that Petitioner has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are “debatable among jurists of reason.” *Miller-El*, 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

B. Reasonable Jurists Could Debate or, for that Matter, Agree that Relief is Appropriate on Petitioner's Sixth Amendment Claim.

Petitioner's Sixth Amendment claim meets the standard for a certificate of appealability. Counsel provides ineffective assistance when he grossly misadvises his client about the sentencing consequences of a formal plea offer under consideration, including the maximum sentence exposure thereunder, and prejudice is demonstrated if there is a reasonable probability that the client would have rejected the plea if he had been accurately advised. *Lee v. United States*, 137 S.Ct. 1958, 1964-65 (2017); *Hill v. Lockhart*, 474 U.S. 52 (1985).

The record shows that Petitioner sufficiently pled deficient performance. Specifically, Petitioner explained

that his former counsel was deficient for providing Petitioner with a gross misrepresentation of the likely sentencing consequences of his plea. Counsel promised Petitioner that he would receive a sentence of no more than 18 years' imprisonment if he accepted the United States' plea offer. This was an obvious gross misrepresentation of the likely sentencing consequences of the plea, based on the reasonably foreseeable guidelines calculations triggered thereunder, and based on circumstances which counsel was aware of, or should have been.

Specifically, counsel should have been aware that the plea agreement included stipulations concerning the application of the United States Sentencing Guidelines ("USSG") to Petitioner's offense(s).

12. The parties stipulate and agree the United States Sentencing Guidelines should be applied, at least, as follows:

A. Base Offense Level – Drug Trafficking (Chapter 2): For Count 1, pursuant to USSG §2D1.1, the appropriate base offense level is 38, based upon defendant's involvement with at least 4.5 kilograms of "ice" or methamphetamine (actual).

B. Role in the Offense (Chapter 3 adjustment): The parties have no agreement on whether an upward adjustment for aggravating role applies. Defendant understands the United States believes that, as to Count 1, defendant was an organizer, leader, manager, or supervisor in the criminal activity. The parties are free to present evidence and argument on this issue.

C. Base Offense Level – Money Laundering (Chapter 2): For Count 4, pursuant to USSG §2S1.1(a)(1), the base offense level is the offense level for the underlying offense from which the laundered funds were derived, the drug trafficking offense. As calculated above, the appropriate offense level for the drug trafficking offense is 38.

D. Money Laundering (Specific Offense Characteristic): For Count 4, a two-level upward adjustment is appropriate pursuant to USSG §2S1.1(b)(2)(B).

E. Acceptance of Responsibility (Chapter 3 adjustment): The

United States agrees for purposes of USSG §3E1.1(b) that defendant timely notified authorities of defendant's intention to enter a guilty plea.

Memorandum of Plea Agreement,
DE #30, pp. 7-8.

Those stipulations triggered an advisory guideline range of 210-262 months' imprisonment for Count 4 and at least 168-210 months' imprisonment for Count 1. However, the prosecution's theory of Petitioner's role in the offense on Count 1, in tandem with the factual admissions in Petitioner's plea and evidence provided in discovery indicated that the likely guideline range of imprisonment for Count 1 would be 235-293 months. Minimally competent counsel would have drawn the same conclusions set forth herein, based on the terms of the plea offer and the evidence revealed during discovery.

From counsel's perspective at the time he advised Petitioner that the plea exposed him to no more than 18 years' imprisonment, the readily foreseeable consequences of Petitioner's plea included being sentenced based on a TOL of 38 on Count 1. This is true because the plea agreement and discovery materials put counsel on notice that the following USSG calculations were likely applicable to the offense in Count 1: a stipulated BOL of 38, a three-level increase for role in the offense, and a three-level reduction for acceptance of responsibility, resulting in a total offense level of 38. At

the lowest criminal history category of I, this triggers an advisory guideline range of imprisonment of 235-293 months' imprisonment. This is roughly 6.5 years longer than the exposure counsel conveyed to Petitioner.

Assuming, *arguendo*, that counsel could reasonably believe that Petitioner would prevail on the role in the offense enhancement related to the guidelines range for Count 1, the plea agreement stipulated that Petitioner would be sentenced based on a TOL of 37 on Count 4. The plea agreement stipulated that the following USSG calculations were applicable to the offense in Count 4: a stipulated BOL of 38, a two-level increase as a result of conviction under §1956, and a three-level reduction for acceptance of responsibility, resulting in a total offense level of 37. At the lowest criminal history category of I, this triggers an advisory guideline range of imprisonment of 210-262 months' imprisonment. This is roughly 4 years longer than the exposure counsel conveyed to Petitioner. Counsel's gross misrepresentation of the likely sentencing consequences of the plea fell below the minimum level of competence, required of an attorney representing a criminal defendant, and was professionally unreasonable.

It seems plausibly that former counsel's absence at the time that Petitioner signed the plea agreement and the rushed circumstances surrounding any post-signing/pre-change of plea hearing consultation may have contributed to counsel's failure to properly interpret and convey the terms and consequences of the latest formal plea offer. This is true because according to the record created by AUSA Chatham at Petitioner's change

of plea hearing, counsel "was not able to come and actually physically meet with his client until this morning. He had somebody come, get the defendant, sign-off on it late last week but I will note for purposes of the plea agreement itself that we have extended the offer until the date that it was signed." Perhaps, there was a prior offer that capped Petitioner's sentence exposure in the manner which counsel described. If so, while that makes counsel's failing more understandable it does NOT in any way detract from Petitioner's clear showing of deficient performance based on the gross misadvice former defense counsel provided concerning the terms and consequences of the particular formal plea offer then under consideration.

Where the issue is whether to plead guilty or not, "the attorney has a duty to advise the defendant of the available options and possible consequences" resulting from the decision. *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1980). An attorney must advise his client of the likely sentencing consequences of any formal plea under consideration. *See United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005) ("One of the most important duties of an attorney representing a criminal defendant is advising the defendant about whether he should plead guilty. An attorney fulfills this obligation by informing the defendant about the relevant circumstances and the likely consequences of a plea. Apprising a defendant about his exposure under the sentencing guidelines is necessarily part of this process."). It is well-settled that failure to do so constitutes deficient performance within the meaning

of the first prong of *Strickland*'s ineffective assistance of counsel test.

The record further demonstrates that absent counsel's misadvice, there is a reasonable probability that Petitioner would have persisted in his plea of not guilty and proceeded to exercise his right to a trial by jury. Petitioner only pleaded guilty as a result of counsel's misadvice, which convinced him that accepting the plea would limit his sentence exposure to no more than 18 years' imprisonment and possibly result in a much shorter sentence. Had counsel provided accurate advice, that based on the readily foreseeable consequences of the plea and attendant circumstances, Mr. Lizarraga faced an advisory guidelines range of imprisonment of roughly 6.5 years longer than the maximum that counsel promised, Mr. Lizarraga would have persisted in his plea of not guilty and proceeded to exercise his right to trial by jury.

The huge difference between the likely sentence communicated by counsel and the accurate likely sentence arrived at by applying the guidelines to the facts known by, or available to counsel, indicates a reasonable probability that absent counsel's gross misrepresentation of the sentencing consequences of the plea, Mr. Lizarraga would have persisted in his plea of not guilty and proceeded to trial by jury. *See, e.g., United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998) ("The fact that there is a great disparity between the actual maximum sentencing exposure under the Sentencing Guidelines and the sentence exposure represented by defendant's attorney provides sufficient objective evidence to establish

a reasonable probability that the outcome of the proceedings would differ.").

The district court summarily denied this claim, without the benefit of hearing argument from the United States, without allowing expansion of the record to learn former counsel's position concerning the misadvice he provided Mr. Lizarraga, and with no warning to the *pro se* prisoner movant that the court viewed his claim as ripe for summary denial. The district court's written order denying Petitioner's motion to vacate makes clear that the basis of the ruling are dual theories under which Petitioner procedurally defaulted his claim of ineffective assistance of counsel. Thus, the district court did not address the claim on its merits and Petitioner's *prima facie* showing of ineffective assistance of counsel is sufficient to establish the requisite constitutional dimension for issuance of COA.

C. Reasonable Jurists Could Debate or, for that Matter, Agree that Petitioner's Claim is Not Procedurally Defaulted.

The district court's summary denial of Petitioner's claim, without the benefit of hearing argument from the United States, without allowing expansion of the record to learn former counsel's position concerning the misadvice he provided Petitioner, and with no warning to the *pro se* prisoner movant that the court viewed his claim as ripe for summary denial, is more than debatable, it is simply a error of law, in irreconcilable conflict with controlling precedent, including this Court's holding in *Massaro v.*

United States, 538 U.S. 500 (2003). The district court's ruling denying Petitioner's claim found that his claim was procedurally defaulted on two theories – the first of which is based on an error of fact, rising to the level of an abuse of discretion and the second is based on a legal conclusion which is irreconcilable with controlling precedent. The district court's first theory that Petitioner's claim is "procedurally defaulted," was set forth in its order:

To the extent that the movant is asserting that his counsel provided ineffective assistance by failing to advise him that he was subject to a three-level upward adjustment for his role in the offense, there is no basis in the record for such an assertion. The plea agreement states that the issue would be litigated at sentencing. The movant and counsel clearly discussed the issue, as counsel objected to the three-level adjustment in the PSR. Further, the parties argued the issue at the sentencing hearing. Moreover, the issue was raised on direct appeal, and the Eighth Circuit determined that the court's three-level adjustment for the movant's role in the offense was appropriate. See Lizarraga, 682 Fed. App'x at 532-33. Because the movant raised this issue on direct

appeal, his claim pursuant to 28 U.S.C. § 2255 is procedurally defaulted.

App. B, A8.

The district court's ruling is based on a simple of error of fact, rising to the level of an abuse of discretion, i.e., that Petitioner's claim that counsel was constitutionally ineffective for misadvising him concerning the potential applicability of the 3-level enhancement was the same as Petitioner's direct appeal challenge to the applicability of that enhancement. On direct appeal to the Eighth Circuit, Petitioner challenged his sentence and the district court's application of the 3-level enhancement for aggravating-role under § 3B1.1(b). *See United States v. Lizarraga*, 682 Fed. Appx. 529, 532 (8th Cir. 2017). In his §2255 motion, Petitioner raised a Sixth Amendment claim that his plea was not knowingly, intelligently and voluntarily entered as a result of ineffective assistance of counsel. It is one thing to assert that a guideline enhancement was erroneously applied – this was the crux of Petitioner's direct appeal claim; it is something altogether different to assert, in a §2255 proceeding, that one's counsel was constitutionally deficient for misadvising his client that such guideline enhancement would not apply and therefore the guidelines range triggered by a formal plea under consideration would not include such enhancement. Those are separate and distinct legal claims. The Eighth Circuit's prior ruling that the 3-level enhancement for aggravating-role under §

3B1.1 applies in no way informs any element of Petitioner's Sixth Amendment claim.

The district court's second theory that Petitioner's claim is "procedurally defaulted," was also set forth in its order:

To the extent that the movant is asserting that his counsel promised him that he would not receive a sentence above 18 years' imprisonment for pleading guilty, the movant's assertion, again, has no basis in the record [and] the movant did not raise any issue regarding counsel's alleged promise that he would not serve a prison sentence over 18 years on direct appeal. Because the movant failed to raise this issue on direct appeal, his claim pursuant to 28 U.S.C. § 2255 is procedurally defaulted.

Accordingly, because the movant's claim is procedurally defaulted, his § 2255 motion shall be dismissed.

App. B, A8-9.

This ruling constitutes a clear error as controlling precedent – both from this Court and the Eight Circuit – mandates that claims of ineffective assistance of counsel may be initially presented in a §2255 motion, and that claims so presented are not considered procedurally defaulted. *See Massaro v. United States*, 538 U.S. 500 (2003) (holding that defendant could raise ineffective-assistance-of-counsel claim in collateral proceeding, even though defendant could have, but did not raise claim on direct appeal); *see also United States v. Hughes*, 330 F.3d 1068, 1069 (8th Cir. 2003) ("When claims of ineffective assistance of trial counsel are asserted on direct appeal, we ordinarily defer them to 28 U.S.C. § 2255 proceedings."). Accordingly, the "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro*, 538 U.S. at 509.

The district court's ruling dismissing Petitioner's § 2225 motion based on its analysis that his claim of ineffective assistance of counsel was procedurally defaulted for failure to have been presented on direct review constitutes a clear error or at a minimum reasonable jurists could debate whether the ruling constitutes a clear error, entitling Petitioner to a COA on this issue.

The Eighth Circuit denied Petitioner a COA in a cursory four sentence judgment. [*App. A, A1*]. Both the district court's erroneous procedural ruling and the Eighth Circuit's cursory denial of COA are unsupportable

on the record and under this Court's holding in *Massaro v. United States*, 538 U.S. 500 (2003) and the progeny thereof. As reasonable jurists could debate the appropriateness of the district court's decision finding that Petitioner's claim was procedurally defaulted, as described, *supra*, a COA should issue as to this question.

D. This Court Should Summarily Reverse the Eighth Circuit's Order Denying COA.

This Court has authority to “reverse any judgment” brought before it and “remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106. Summary reversals are “usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was “contrary to” established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was “plainly wrong”). The Eighth Circuit's order denying Petitioner's motion for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Eighth Circuit, vacate the Eighth Circuit's order denying COA and remand the matter to the Eighth Circuit with instructions to grant COA.

Respectfully submitted,

JESUS ADAM LIZARRAGA
Pro Se Petitioner
Fed. Reg. No. 14056-029
FCI Loretto
P.O. Box 1000
Cresson, PA 16630

10/9, 2020