

NO. \_\_\_\_\_

IN THE UNITED STATES SUPREME COURT

\_\_\_\_\_ TERM

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**OSCAR GUEVARA SALAMANCA,**  
**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**  
**Respondent.**

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**PETITION FOR WRIT OF CERTIORARI**  
**TO THE UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

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## QUESTIONS PRESENTED FOR REVIEW

The state of South Carolina provided Oscar Guevara Salamanca no notice of the date, location, or time of a hearing to revoke his probation. Then, in his absence and without his having access to counsel, it revoked his probation and sentenced him to serve five years in prison. Years later, the district court below relied on the state revocation sentence to increase Mr. Guevara Salamanca's sentencing guideline range from 70-87 months to 130-162 months and sentenced him to 130 months in prison for illegally reentering the United States.

The panel majority below, the dissenting judge, and the state of South Carolina now agree that the state's revocation proceeding was "no doubt a violation of his right to due process under the Constitution." Pet. App. at 3; *id.* at 5 (Stranch, J., dissenting); *see also Osbey v. State*, 825 S.E.2d 48, 51 (S.C. 2019). But the panel majority concluded it was nonetheless proper for the district court to rely upon the plainly unconstitutional five-year sentence to nearly double Mr. Guevara Salamanca's federal sentence for illegal reentry.

The question presented is this:

May a federal district court enhance a federal sentence based on a prior sentence imposed by way of a clear and complete deprivation of the individual's due process right to be heard?

## **PARTIES TO THE PROCEEDINGS**

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

## **RELATED CASES**

*South Carolina v. Oscar Albert Guevara*,<sup>1</sup>Docket Nos. 99-GS-10-1008 through 99-GS-10-1012 (Ct. Gen. Sess., Charleston Co., S.C. May 16, 2003).

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<sup>1</sup> The state court documents use the name “Oscar Albert Guevara,” which is identified as an alias of Mr. Guevara Salamanca in the Presentence Investigation Report. (PSR, R. 23, PageID #45.)

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## **JURISDICTIONAL STATEMENT**

Oscar Guevara Salamanca pled guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326(a), (b)(2). He was sentenced by the District Court for the Eastern District of Tennessee on June 24, 2019. He appealed his sentence to the United States Court of Appeals for the Sixth Circuit, which affirmed the sentence on August 3, 2020.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Pursuant to Rule 13 of the Supreme Court and this Court's March 19, 2020 COVID-19 Order, the time for filing a petition for certiorari review is 150 days from the lower court judgment. Accordingly, this petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Brian Samuelson, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.



### **PRAYER FOR RELIEF**

Petitioner, Mr. Oscar Guevara Salamanca, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fifth Amendment due process clause of the United States Constitution provides, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”

The Fourteenth Amendment due process clause of the United States Constitution provides, “[n]or shall any State deprive any person of life, liberty, or property, without due process of law.”

The Sixth Amendment right to counsel of the United States Constitution provides, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

## STATEMENT OF THE CASE AND FACTS

In 1999 Mr. Guevara Salamanca received a probationary sentence in South Carolina for an incident in which he stole a police vehicle and made threats to the officers when he was apprehended. (Presentence Investigation Report (“PSR”), R. 23, PageID #50.) In 2003, while in custody in Virginia for burglary, “South Carolina served him with a Probation Citation, but in the blank for the date and time of the revocation hearing, the Citation state[ed] ‘TBA’,” and “[f]or the hearing’s location, the Citation sa[id] only ‘Charleston.’” Pet. App. at 7.<sup>2</sup> The citation notified Mr. Guevara Salamanca that he had a right to an attorney, but while he was still in custody in Virginia and without the assistance of counsel, South Carolina revoked his probation and imposed a five-year prison sentence. *Id.* This procedure “no doubt” violated his right to due process, as he was entitled to an opportunity to be heard. *Id.* at 3, 5. And, because he did not receive adequate notice, he “did not have the opportunity to pursue direct or collateral attacks on his South Carolina sentence.” *Id.* at 7. Even South Carolina has since held that this process violates due process. *Id.* (citing *Osbey v. State*, 825 S.E.2d 48, 51 (S.C. 2019)).

Sixteen years later, Mr. Guevara Salamanca pled guilty in federal court to illegally reentering the United States after a prior removal and conviction for an aggravated felony. (Judgment, R. 40, PageID #104.) The United States Probation Office completed its Presentence Investigation Report (“PSR”), in which it noted that the South Carolina sentence was imposed in absentia. (PSR, R. 23, PageID #50-51.) When determining his guideline range the district court relied upon this prior, unconstitutionally imposed South Carolina

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<sup>2</sup> The dissenting judge accurately set forth the factual background in her opinion.

sentence to increase both his guideline base offense level and his criminal history category. Pet. App. at 3. The South Carolina sentence had the impact of increasing his range from 70-87 months to a range of 130-162 months.<sup>3</sup> *Id.* Mr. Guevara Salamanca had a criminal history that lacked significant violence and was marked instead by numerous theft-related offenses. (PSR, R. 23, PageID #49-53.) At sentencing the government noted the unusually high guideline range, but objected to a downward variance, and the district court sentenced him to 130 months of incarceration. (Sent. TR, R. 46, Page ID# 343-44, 348.)

Mr. Guevara Salamanca appealed, arguing that the South Carolina revocation proceedings violated his constitutional rights to be heard and to be represented by counsel, so the prior state sentence could not be used to nearly double his current guideline range. (Opening Br., App. R. 19; Reply, App. R. 28.) He made it clear that he was not challenging the underlying South Carolina conviction, only use of the revocation and five-year sentence imposed in his absence to increase his current guideline range. (Opening Br., App. R. 19 at 5-6, 15-17); *see also* Pet. App. at 7-8 (recognizing that he “challenge[d] only the use of his sentence as a predicate for the Guideline enhancement, not the constitutionality of his underlying conviction). He argued first that he was improperly denied counsel under *Custis v. United States*, 511 U.S. 485 (1994) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), but the fact that he was completely denied any opportunity to be heard was even more concerning. (Opening Br., App. R. 19 at 14-15, 21-22, 24-27; Reply, App. R. 28 at 11-12.) He also argued that even if *Custis* and *Scarpelli* did not require that the South Carolina

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<sup>3</sup> The South Carolina conviction caused a 10-point increase in Mr. Guevara Salamanca’s base offense level under U.S.S.G. § 2L1.2(b)(2)(A) and it caused his criminal history category to increase from a level V to a level VI. (PSR, R. 23, PageID #47-48, 50, 53, 56.)

sentence be excluded from his guideline calculation, the district court procedurally and substantively erred by allowing the plainly unconstitutional prior sentence to have such a drastic impact on his sentence. (Opening Br., App. R. 19 at 24-27; Reply, App. R. 28 at 11-12.) Had the district court not considered the five-year state revocation sentence, Mr. Guevara Salamanca's guideline range would have been only 70-87 months, well below the 130-month sentence he received. Pet. App. at 3.

In a divided opinion, the panel affirmed. The majority concluded that even though South Carolina clearly violated his due process rights, and even though such a violation is "unacceptable," the district court did not plainly error by relying upon it to increase Mr. Guevara Salamanca's current federal sentence. *Id.* Specifically, the majority found that this Court in *Custis* held that a prior sentence "may be collaterally attacked at federal sentencing only if the state procured that judgment in violation of the defendant's right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963)." *Id.* at 3-4 (*citing Custis*, 511 U.S. 485, 496-97 (1994)). It then concluded that probationers generally do not have a constitutional right to counsel, except in special circumstances as explained in *Scarpelli*, circumstances it found did not arise here. *Id.* at 4 (*citing Scarpelli*, 411 U.S. 778 (1973)). It also concluded that there was nothing unreasonable in the district court's reliance on the plainly unconstitutional South Carolina conviction, and thus the sentence was not procedurally unreasonable. *Id.* at 4-5.

The dissenting judge, however, concluded that *Custis* did not dictate the result here because the *Custis* Court was concerned with protecting the finality of state court *judgments* and the lack of efficiency in requiring district courts at sentencing to conduct broad ranging

inquiries to determine whether partial deprivations of constitutional rights occurred far in the past (such as ineffective assistance of counsel claims). *Id.* at 5-7. By contrast, here Mr. Guevara Salamanca did not seek to collaterally attack the judgment, but only the sentence, and thus no finality concerns arise. *Id.* at 5-6. This difference is important, because in *Custis* the Court interpreted the language in the Armed Career Criminal Act, a statute written by Congress, whereas here Mr. Guevara Salamanca challenges a guideline written by the Sentencing Commission. *Id.* at 6. This matters, Judge Stranch concluded, not only because the plain language of the two provisions differs (with the ACCA looking to prior *convictions* to enhance a sentence, but the guideline here looking to prior *sentences* to enhance a sentence), but because “the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches.” *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 384 (1989)).

She also explained that Mr. Guevara Salamanca’s case is distinguishable from *Custis* because he suffered a complete deprivation of his right to access counsel *in addition to* a complete deprivation of his most fundamental due process rights to notice and an opportunity to be heard. *Id.* at 7. This complete deprivation of the right to be heard was obvious from the face of the record, and thus unlike *Custis*, did not require a searching, time consuming, and onerous inquiry into a murky factual evaluation of whether counsel provided effective representation. *Id.* Judge Stranch also explained that the right to counsel, whether from *Gideon* or *Scarpelli*, is grounded in the due process right to be heard, and that the majority opinion applied an “illogical rule—whereby violations of the building-block ‘right to be

heard’ cannot be collaterally attacked but derivative violations of the ‘right to counsel’ can be . . . .” *Id.* at 8. Thus, she noted that even if Mr. Guevara Salamanca did not have a right to counsel at the violation hearing (which he clearly did), the district court still erred in concluding that Mr. Guevara Salamanca could not collaterally attack a prior sentence that plainly violated his right to appear and be heard. *Id.*

Judge Stranch also articulated why Mr. Guevara Salamanca had a right to counsel at the revocation hearing. *Id.* She noted that *Scarpelli* explains that at a revocation hearing, “[p]resumptively, counsel should be provided when a party is informed of a right to counsel; when the party is incapable of representing himself; or when, even where a violation is uncontested, a probationer could present mitigating facts that are complex or otherwise difficult to develop or present.” *Id.* (citing *Scarpelli*, 411 U.S. at 790). Here counsel was required because (1) South Carolina notified him of his right to an attorney; (2) he was incapable of representing himself as he was incarcerated in Virginia; and (3) his mitigation strategy required a deep understanding of the complex collateral consequences of his immigration status, convictions and sentences. *Id.* (citing *Scarpelli*, 411 U.S. at 790). His ability to effectively advocate for a mitigated sentence is particularly important here, she explained, because had he received a sentence of less than 13 months, his federal sentence would not have been nearly doubled under the guidelines. U.S.S.G. § 4A1.1(a)-(c) & cmt. (n.2); *id.* § 2L1.2(b)(2)(A) & cmt. (n.3); *see also* Pet. App. at 8 (“This complicated mitigation issue is significant, because, again, the validity of the length of the sentence, not the constitutionality of the underlying conviction, is at issue[.]”).

Finally, Judge Stranch found that if nothing else, the 130-month sentence was procedurally unreasonable because, even though the PSR indicated the revocation occurred in absentia, “the [district] court gave no consideration to the South Carolina due process violations.” *Id.* She explained that the “procedural reasonableness doctrine is the backstop that ensures sentences do not violate the basic due process requirements,” and therefore, even if the district court correctly included the South Carolina sentence in its guideline calculation, it still plainly erred by issuing a sentence based on the plainly unconstitutional five-year South Carolina sentence. *Id.* Because the question here goes to the heart of the due process clause it is of exceptional importance. Mr. Guevara Salamanca requests certiorari review.

## REASONS FOR GRANTING OF THE WRIT

The panel majority, the dissenting judge, and Mr. Guevara Salamanca agree there “was no doubt a violation of his right to due process under the Constitution . . . .” when South Carolina sentenced him to five years in prison without affording him the opportunity to be heard. Pet. App. at 3; *id.* at 5 (Stranch, J., dissenting). South Carolina now agrees that its procedure violated the Constitution. *Osbey v. State*, 825 S.E.2d 48, 51 (S.C. 2019). The panel majority acknowledged that South Carolina’s actions were “unacceptable,” but it concluded that it was nonetheless proper for the district court to rely upon the plainly unconstitutional five-year sentence to nearly double Mr. Guevara Salamanca’s instant sentence for illegal reentry. *Id.* This was error, requiring the attention of this Court.

The Sixth Circuit has expanded *Custis* beyond its intended reach, in conflict with the holdings of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 405-06 (2001)); and *Daniels v. United States*, 532 U.S. 374, 383 (2001). In addition, the Sixth Circuit has undercut the strength of the due process clause, and undermined the fairness, integrity and public reputation of judicial process by allowing a known, clear violation of Mr. Gruevara Salamanca’s most basic due process rights to again cause him to serve an extra five years in prison. The federal courts should not turn a blind eye to glaring violations of an individual’s most basic due process rights, and thereby sanction the repeated use of such violations to curtail an individual’s liberty.

The panel majority concluded that a violation of the right to counsel is the only due process violation that can be collaterally attacked at a subsequent sentencing, and that Mr. Guevara Salamanca did not have a right to counsel at his revocation hearing. Pet. App. at



3-4. But this conclusion ignores the fact that Mr. Guevara Salamanca did not suffer a partial deprivation, such ineffective assistance of counsel (as alleged in *Custis*), but instead suffered a complete deprivation of all his fundamental due process rights in addition to the absence of counsel. *Id.* at 7 (Stranch, J., dissenting). It also glosses over the fact that probationers *are* entitled to counsel when (1) a party is notified of his right to an attorney; (2) he is incapable of representing himself; or (3) even if the violation is uncontested, where his mitigation strategy is complex or otherwise difficult to develop. *Id.* at 8 (Stranch, J., dissenting) (citing *Scarpelli*, 411 U.S. at 790). Mr. Guevara Salamanca had a right to counsel that South Carolina curtailed. That alone is sufficient to disregard its five-year revocation sentence today. But, he was also wholly prevented from appearing and presenting either a defense or information in mitigation—which also means he had no real ability to attack the validity of the conviction either through direct appeal or collaterally.

While *Custis* rightly holds that sentencing courts should not be required to hold complete collateral attack hearings as part of a current sentencing for claims that a party previously suffered a partial deprivation of a due process right, it cannot mean that a complete deprivation of one's rights to notice, to appear, and to be heard should be ignored. *See Custis*, 511 U.S. at 487. That would turn the logic of *Custis* on its head, and hold the derivative right to counsel above the fundamental “building-block” due process rights which are the very reason the right to counsel is so precious. *Id.* at 485, 494-95 (the right to counsel is unique “because of our oft-stated view that ‘[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel’” (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932))).

The Sixth Circuit erred by allowing the complete due process deprivations Mr. Guevara Salamanca suffered to be repeated by enhancing his current sentence with a prior sentence he received without notice, without the ability to appear or to be heard, and without the right to counsel. Because a ruling in favor of Mr. Guevara Salamanca will lead directly to relief, this case presents the Court with a good vehicle to address how federal courts should treat prior sentences procured by a state in complete absence of the fundamental protections of due process. The Court should grant certiorari to address this overstep.

## ARGUMENT

**A district court violates due process when it increases a term of incarceration based on a prior state sentence imposed in absentia, without the opportunity to appear and be heard, and without the assistance of counsel.**

A sentencing court cannot, in compliance with due process, rely upon a prior conviction that was procured in the absence of counsel (or a valid waiver thereof) as a basis for the instant sentence imposed. *Tucker*, 404 U.S. at 449-50 (remanding sentence for reconsideration when the trial judge, when setting the defendant's sentence, explicitly relied on two prior convictions imposed in violation of the right to counsel); *Burgett v. Texas*, 389 U.S. 109, 115 (1967) ("To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of [*Gideon*.]" (internal citation omitted)). This is true even if the defendant is actually guilty of the underlying offense, as the current sentencing court might impose a lesser sentence "if he had known that the respondent had already been unconstitutionally imprisoned for [a number of years]." *Tucker*, 404 U.S. at 449 n.8.

The right to counsel is so fundamental that a conviction obtained in violation of this right amounts to a "jurisdictional defect." *Custis*, 511 U.S. at 496. As a result, a defendant in a federal sentencing proceeding facing the enhanced fifteen-year mandatory minimum of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), has a right to collaterally attack the validity of previous state convictions used to enhance his sentence when the prior convictions were obtained in violation of his right to counsel. *Id.* at 487. This right to counsel is so precious not in its own right, but because it ensures that the most basic requirements of due process—the right to notice, to appear, and to be heard—are preserved. *Id.* at 494-95 (the right to counsel is unique "because of our oft-stated view that

‘[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel’”); *Powell*, 287 U.S. at 69 (if “a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense”); *id.* at 72 (“the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel”); *Gideon*, 372 U.S. at 339, 341-45 (the Sixth Amendment’s right to counsel is incorporated through the Fourteenth Amendment’s due process clause); Pet. App. at 8 (Stranch, J., dissenting).

Mr. Guevara Salamanca had a right to counsel when South Carolina imposed the five-year revocation sentence. Pet. App. at 8 (Stranch, J., dissenting). In *Scarpelli*, the Court explained that while there is not a blanket rule requiring counsel in every revocation hearing, under many circumstances the appointment of counsel is constitutionally required. 411 U.S. at 786-91. Those circumstances include “when a party is informed of a right to counsel; when the party is incapable of representing himself; or when, even where a violation is uncontested, a probationer could present mitigating facts that are complex or otherwise difficult to develop or present.” Pet. App. at 8 (Stranch, J., dissenting) (*citing Scarpelli*, 411 U.S. at 790). Here, each of these three circumstances were present, so counsel was constitutionally required for Mr. Salamanca Guevara. *Id.* (Stranch, J., dissenting). The citation with which South Carolina served him explicitly notified him that he was entitled to counsel. *Id.* (Stranch, J., dissenting). He was incapable of representing himself at the hearing because he was incarcerated in a different state at the time. *Id.* (Stranch, J., dissenting). And his mitigation strategy required the expertise of someone who understood

and could explain the collateral consequences of his conviction on both his immigration status and any future criminal liability. *Id.* (Stranch, J., dissenting).

Not only were these three circumstances present, but the minimum requirements of due process protections were *absent*. In *Scarpelli*, the Court emphasized that the right to a final revocation hearing includes the right to the “minimum requirements of due process” which includes the opportunity to be heard and to present evidence. 411 U.S. at 786; *accord Morrissey v. Brewer*, 408 U.S. 471, 488 (1972) (the minimum protections of due process require that an individual facing a parole revocation “have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or if he did, that circumstances in mitigation suggest that the violation does not warrant revocation”). While the existence of these other due process protections will militate against also appointing counsel in some circumstances, *id.*, they were absent here. Mr. Guevara Salamanca did not receive adequate notice, was prevented from appearing and had no opportunity to be heard.

The absence of these protections mattered. Had he been present, with counsel, he could have advocated for less than five years. Pet. App. at 8 (Stranch, J., dissenting). His lost ability to seek a lower sentence in the state proceeding is crucial because it is the *length* of the South Carolina sentence that triggers the guideline enhancements. Pet. App. at 8 (Stranch, J., dissenting) (“This complicated mitigation issue is significant because, again, the validity of the length of the sentence, not the constitutionality of the underlying conviction, is at issue here.”). Due process therefore required South Carolina to appoint counsel. *Id.* (Stranch, J., dissenting). And, as noted on the citation it served him, South Carolina had determined that probationers such as Mr. Guevara Salamanca had a right to counsel, yet they failed to provide him one. Pet. App. at 7, 8 (Stranch, J., dissenting).

Because South Carolina sentenced Mr. Guevara Salamanca to five years in prison in violation of his right to counsel, he can collaterally attack that sentence during his federal sentencing.<sup>4</sup>

Even in the absence of a right to counsel, *Custis* does not permit the district court to rely on the unconstitutional South Carolina sentence to increase Mr. Guevara Salamanca's federal sentence today. While *Custis* held that a federal defendant may collaterally attack a prior conviction solely on the ground that the conviction was procured in violation of the right to counsel, 511 U.S. at 487, this pronouncement *assumed* that the prior conviction was otherwise imposed in accordance with the fundamental due process rights to notice, to appear, and to be heard. *Id.* at 494-95. The Court thus did not reach the question here—whether a prior sentence imposed in clear violation of these most basic due process rights can similarly be collaterally attacked at a later sentencing.

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<sup>4</sup> For purposes of the question presented here, any distinction between a sentence previously imposed at an initial conviction (and thus subject to the Sixth Amendment right to counsel) and a sentence imposed during revocation (and thus subject to the due process right to counsel) is a distinction without a difference. Both the Sixth Amendment right to counsel and the due process clause right to counsel are derived from the same due process concerns. Under both, appointed counsel is required because “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” *Custis*, 511 U.S. at 494-95 (quoting *Powell*, 2897 U.S. at 68-69) (discussing the right to counsel under the Sixth Amendment); *Scarpelli*, 411 U.S. at 788 (explaining that counsel is required under the due process clause where necessary to ensure the defendant receives a fundamentally fair hearing); *see also* Pet. App. 7-8 (Stranch, J., dissenting). Indeed, once triggered, the rights are coextensive. *Compare Gideon*, 372 U.S. at 339, 341-45 (applying Sixth Amendment right to counsel), with *In re Gault*, 387 U.S. 1, 40-41 (1967) (applying due process clause right to counsel); *see also United States v. Robertson*, 40 F. App'x 933, 939-40 (6th Cir. 2002) (remanding where the defendant's sentence was enhanced by a prior sentence which may have been procured in violation of her due process right to counsel).

Here, it is readily apparent that Mr. Guevara Salamanca's fundamental due process rights were violated. South Carolina now views the process it used as unconstitutional, and the panel majority below agrees that the five-year sentence "was no doubt a violation of [Guevara Salamanca's] right to due process" because he was denied the ability to be heard. Pet. App. at 3; *Osbey*, 825 S.E.2d at 51. Thus, the Court's concern in *Custis* that anything other than the right to counsel would be too arduous to investigate during a later sentencing is not present here. 511 U.S. at 488; *accord* Pet. App. at 6 (Stranch, J., dissenting).

At the same time, the due process violation was so extensive and complete that it also precluded any meaningful ability of Mr. Guevara Salamanca to directly or collaterally attack the conviction. Pet. App. at 6 (Stranch, J., dissenting). Now, 16 years later, his only available path for attacking the South Carolina sentence is to argue that it should not be the basis for nearly doubling his current term of incarceration. *Id.* Because the due process violation was so complete this is one of those "rare cases" where "no channel of review was actually available" to him. *Daniels*, 532 U.S. at 383; *Lackawanna*, 532 U.S. at 405-06; Pet. App. at 6 (Stranch, J., dissenting). "When a defendant cannot 'be faulted for failing to obtain timely review of a constitutional claim,' a collateral attack at sentencing may be appropriate." Pet. App. at 6 (Stranch, J., dissenting) (*quoting Lackawanna*, 532 U.S. at 405-06). South Carolina's five-year sentence can—and should—be collaterally attacked at a current sentencing, and it should not have been relied upon to enhance Mr. Guevara Salamanca's federal sentence. *Id.* (Stranch, J., dissenting) ("This exception applies where a judgment is imposed without notice or an opportunity to be heard because such a judgment 'wants all the attributes of a judicial determination; it is judicial usurpation

and oppression, and *never* can be upheld where justice is justly administered.” (quoting *Powell*, 287 U.S. at 64 (emphasis in *Salamanca*))).

Additionally, *Custis* was interpreting and applying the ACCA, which is a statute written by Congress, whereas here the Court is addressing a guideline written by the Sentencing Commission. Congress in the ACCA emphasized that an individual is deserving of an enhanced mandatory minimum if he has a prior *conviction* for a crime that *also* meets a specific definition of either “violent felony” or “serious drug offense.” 18 U.S.C. § 924(e). It matters not what sentence the individual actually received. *See id.* By contrast, here the Sentencing Commission is looking not to the fact of conviction, but to the length of the sentence imposed. Thus, the concerns the Court expressed in *Custis* regarding the need to preserve the finality of state convictions does not arise here. Pet. App. at 6 (Stranch, J., dissenting). And, the fact that Mr. Guevara Salamanca was deprived of his ability to advocate for a *lesser sentence* when South Carolina precluded his rights to notice, to appear, and to be heard are all the more momentous.

The fact that *Custis* addressed only the ACCA’s statutory mandatory minimum is also important because it means the Court had no occasion to address the separate question of whether reliance on a plainly unconstitutional prior sentence, procured in clear violation of an individual’s most basic due process rights, is unreasonable. A district court abuses its discretion when it commits a “significant procedural error” or imposes a substantively unreasonable sentence in light of the totality of the circumstances. *Gall v. United States*, 552 U.S. 38, 51 (2007). It is an abuse of discretion to turn a blind eye to the prior, complete deprivation of Mr. Guevara Salamanca’s due process rights and knowingly allow a clearly unconstitutional prior sentence drive up his federal term of imprisonment.



At bottom, Mr. Guevara Salamanca received 130-months (almost 11 years) in federal prison. Nearly half of that sentence is attributable to the unconstitutional South Carolina sentence. It was readily apparent to every member of the panel below that the procedures used by South Carolina violated Mr. Guevara Salamanca's most basic rights to appear and be heard. The South Carolina revocation sentence should not have been included in Mr. Guevara Salamanca's guideline calculation. And at a minimum, it was an abuse of discretion for the district court to use the plainly unconstitutional sentence as the sole basis to add five years, and thereby nearly double, his federal sentence.

### **CONCLUSION**

In consideration of the foregoing, Mr. Guevara Salamanca submits that the petition for certiorari should be granted, the order of the Sixth Circuit Court of Appeals vacated, and his case remanded for resentencing without consideration of the unconstitutional South Carolina sentence.

Respectfully submitted,

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