NO. 20-6794

IN THE UNITED STATES SUPREME COURT

OSCAR GUEVARA SALAMANCA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

The government has no response to the central point of Mr. Guevara Salamanca's argument—that the protections identified by the Court in *Custis* were triggered because the South Carolina sentence he received was the result of a *complete deprivation* of his most basic due process rights, not just a deprivation of his right to counsel. The government does not attempt to explain why a sentence based on a prior conviction resulting from complete deprivation of due process is tolerable, while one resulting from the deprivation of only the derivative right to counsel is not. It instead advances arguments that apply only to partial deprivations, those less than the total deprivation here—and so are inapplicable. At bottom, Mr. Guevara Salamanaca was sentenced to five years in prison without the assistance of counsel, without proper notice, and without being afforded the ability to appear and be heard. Allowing that hearing to be used to extend his sentence today offends the most basic concepts of our system of justice and is plainly erroneous.

The South Carolina hearing clearly proceeded in violation of due process—there is no dispute as to this conclusion. Pet. App. 3; BIO 6. Instead the government argues that the due process violations and absence of counsel here were insufficient to trigger the *Custis* protections. But, as Judge Stranch powerfully articulated in her dissent, what occurred here is different from claims of ineffective assistance of counsel and faulty guilty pleas—claims of partial deprivations at issue in *Custis*, *Daniels* and *Lackawanna*—because here *no* process was afforded. Pet. App. 6-8 (Stranch, J., dissenting); *Custis v. United States*, 511 U.S. 485, 496 (1994); *see also Daniels v. United States*, 532 U.S. 374, 378-79 (2001); *Lackawanna Cnty. Dist. Atty. v. Coss*, 532 U.S. 394, 403 (2001).

The government does not defend the procedures that occurred in South Carolina.[1] The hearing at issue here, even more so than the absence of counsel at a hearing that affords other due process protections, amounts to a foundational defect so thorough that it cannot be the basis for any incarceration, regardless of whether it is immediate or years after the violation. *See Powell v. Alabama*, 287 U.S. 45, 68 (1932) ("It never has been doubted . . . that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they . . . constitute basic elements of the constitutional requirement of due process of law."). It defies logic, the Court's clear pronouncements, and the most basic foundations of our system of self-governance to tolerate such "process" used by South Carolina by relying upon it today to sentence Mr. Guevera Salamanca to an additional five year in federal court. *Id*. ("[T]he necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898))).

The Court has repeatedly held that "final revocation of probation must be preceded by a hearing." *Black v. Romano*, 471 U.S. 606, 611 (1985); *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972). And due process requires that "[t]he probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; *an opportunity to be heard in person and to present witnesses and documentary evidence*; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation."

[1] It makes a fleeting suggestion that Mr. Guevera Salamanca should have requested counsel to trigger a right to counsel under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). BIO 12. But this assertion overlooks the fact that (1) he had no way to request counsel, because he had no notice as to the time, place or location of the hearing (Pet. App. 7); and (2) once a jurisdiction determines an individual has a right to counsel certain notices (not provided here), must be given before one can validly waive counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975).

Black, 471 U.S. at 611 (emphasis added) (citing *Scarpelli*, 411 U.S. at 786). Moreover, while it is true that in some circumstances individuals do not have a right to counsel, the right arises when other aspects of due process cannot alone ensure a fundamentally fair hearing. *See Scarpelli*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 488; *Black*, 471 U.S. at 611 (citation omitted). So, when these other due process protections are wholly absent, the right to counsel is plainly triggered. *See Scarpelli*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 488. Here, Mr. Guevara Salamanca had neither—he didn't have counsel, and he *also* had no opportunity to be heard in person or to present evidence in mitigation. In short, he had no hearing at all.

Because the South Carolina hearing plainly deprived Mr. Guevera Salamanca of the right to appear and be heard, it is no answer to simply say that his mitigation strategy did not trigger the right to counsel under *Scarpelli's* test, without addressing the underlying due process violations. BIO 10-13; *see also Black*, 471 U.S. at 611 ("the decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) *a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation*" (emphasis added) (citations omitted)). His inability to appear and be heard matters tremendously here, because it is the *length* of his revocation sentence that so dramatically enhanced his current federal sentence, such that the ability to advocate for less than five years' imprisonment was all the more necessary. Pet. App. 8 (Stranch, J., dissenting). Under any reading, his right to counsel was triggered by the South Carolina hearing.

The government also suggests that even if Mr. Guevera Salamanca had a right to counsel at his revocation hearing, that right would not deserve the *Custis* protections because it is based on the Due Process Clause right to counsel instead of the Sixth Amendment right to counsel. BIO 10-

11. While it is true that the absence of counsel under the Sixth Amendment "is a unique constitutional defect . . . ris[ing] to the level of a jurisdictional defect' which therefore warrants special treatment among alleged constitutional violations," in part because such failure "will generally appear from the judgment roll itself, or from an accompanying minute order," it is also true that the same level of defect is present here—and equally easy to decipher from the record—where in addition to no counsel, no process was afforded. *See Lackawanna*, 532 U.S. at 404 (quoting *Custis*, 511 U.S. at 496). The government otherwise provides no reason to treat the due process right to counsel as inferior, nor can it since both rights are grounded in the same constitutional underpinnings and are coextensive once triggered. *See* Pet. 16 n.4; *compare Powell*, 2897 U.S. at 68-69) *with Scarpelli*, 411 U.S. at 788; *and compare Gideon v. Wainwright*, 372 U.S. 335, 339, 341-45 (1963) (applying Sixth Amendment right to counsel), *with In re Gault*, 387 U.S. 1, 40-41 (1967) (applying due process clause right to counsel).

Consistent with its failure to meaningfully acknowledge the lack of notice and ability to appear and be heard, the government again relies on cases addressing only partial deprivations of both due process and the right to counsel when discussing *Custis*. BIO 13-14. It is undoubtedly true that when an individual has counsel, a partial due process violation cannot trigger *Custis's* protections and thus cannot be attacked either at a later sentencing, or in a later federal habeas attack. *Custis*, 511 U.S. at 489; *Daniels*, 532 U.S. at 376; *Lackawanna*, 532 U.S. at 403-04. But in each of these cases the defendant had counsel and was complaining only of counsel's ineffective assistance or of a faulty guilty plea hearing. *Custis*, 511 U.S. at 489; *Daniels*, 532 U.S. at 377; *Lackawanna*, 532 U.S. at 397. In each case the defendant was afforded the most basic protections of due process including the right to appear and be heard. *See Custis*, 511 U.S. at 489; *Daniels*, 532 U.S. at 377; *Lackawanna*, 532 U.S. at 397. Because those deprivations did not rise to the level

of the complete absence of counsel and due process, they say nothing about what happened here. They're simply inapposite.[2]

Similarly, and despite the government's assertion otherwise (BIO 14-15), it does not matter that the South Carolina hearing was used to enhance Mr. Guevara Salamanca's guideline range as opposed to a statutory range, because the inquiry and resulting harm—extended incarceration without due process—is identical in both instances. In fact, the "eight other courts of appeals" the government alludes to (BIO 15-16) support Mr. Guevera Salamanca as they each acknowledge that *Custis* also precludes sentencing courts from enhancing a guideline range with a prior conviction obtained without counsel.[3] In short, the *Custis* protections, when triggered, apply equally to an enhancement under either the Federal Guidelines or a statute.

At the same time, the government erroneously relies on *Beckles* for the proposition that "a defendant would have fewer due-process rights in the context of the advisory Sentencing Guidelines than in the context of the ACCA's statutory minimum." BIO 14-15. But *Beckles* is specific to the void-for-vagueness doctrine—it does not address the fundamental rights to notice and to appear—and the Court was clear that even though the vagueness doctrine does not apply,

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[2] Even if what occurred in South Carolina was equivalent to only these partial deprivations, Mr. Guevara Salamanca should still be allowed to proceed in his attack on the South Carolina conviction because the lack of notice and ability to appear and be heard, in addition to the absence of counsel means he had no mechanism to directly appeal or collaterally attack the result of the South Carolina hearing. Pet. App. 6 (Stranch, J., dissenting); *Daniels*, 532 U.S. at 384; *Lackawanna*, 532 U.S. at 405 (O'Conner, J., plurality).

[3] *See United States v. Bacon*, 94 F.3d 158, 162-62 (4th Cir. 1996) (citing *United States v. Cordero*, 42 F.3d 697, 700 (1st Cir. 1994); *United States v. Jones*, 27 F.3d 50, 52 (2d Cir. 1994); *United States v. Thomas*, 42 F.3d 823, 824 (3d Cir. 1994); *United States v. Bonds*, 48 F.3d 184, 186–87 (6th Cir. 1995); *United States v. Arango-Montoya*, 61 F.3d 1331, 1335 (7th Cir. 1995); *United States v. Killion*, 30 F.3d 844, 845 (7th Cir. 1994); *United States v. Jones*, 28 F.3d 69, 70 (8th Cir. 1994); *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir. 1994); *United States v. Garcia*, 42 F.3d 573, 575 (10th Cir. 1994); *United States v. Burke*, 67 F.3d 1, 2 (1st Cir. 1995).

the Federal Guidelines are not "immune from constitutional scrutiny." *Beckles v. United States*, 137 S. Ct. 886, 895 (2017). Moreover, *Beckles* "does not render 'sentencing procedure[s]' entirely 'immune from scrutiny under the due process clause.'" *Id*. at 896 (quoting *Williams v. N.Y.*, 337 U.S. 241, 252 n.18 (1949); *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

Beckles explains that the vagueness doctrine is "analytically district" from other constitutional provisions that apply to the Federal Guidelines or sentencing in general as it requires "a different inquiry" which is "not interchangeable with 'the rational of [the Court's] cases construing and applying [different constitutional provisions]" to the sentencing context. *Id*. at 895 (discussing *Peugh v. United States*, 569 U.S. 530, 544 (2013) (holding that the Ex Post Facto Clause applies to the Federal Guidelines); *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) (holding that reliance on a vague sentencing factor "can taint the sentence" in violation of the Eighth Amendment)). Here the inquiry focuses on whether the process provided Mr. Guevara Salamanca by South Carolina was so fundamentally deficient that it cannot be used to enhance his sentence. If the answer is yes—which it is—then the remedy is clear. A hearing wholly void of the due process rights to notice and to present a defense cannot be the basis for any incarceration. *Powell*, 287 U.S. at 68 ("that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard" (citing *Galpin v. Page*, 18 Wall. 350, 368 (1873))); *Scarpelli*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 488. A guideline enhancement results in further incarceration just as much as a statutory enhancement. The inquiry and the resulting harm are the same.

Finally, the fact Mr. Guevera Salamanca did not raise the error until his direct appeal is no barrier to the Court's review and correction of the error itself. The Court "repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the

parties below." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). And it has remanded on plain error review when it concludes that the outcome might be different in the absence of the error. *See Hicks v. United States*, 137 S. Ct. 2000 (2017) (mem.) (Gorsuch, J., concurring) (collecting cases). A guideline calculation error is just the sort of error that meets the plain error standard in the ordinary case. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016) (a guideline calculation error effects an individual's substantial rights because there is "a reasonably probability that the district court would have imposed a different sentence under the correct range"); *Rosales-Mireles*, 138 S. Ct. at 1907-08 (the risk that an individual will serve a sentence longer than necessary due to a guideline calculation error is an "unnecessary deprivation of liberty [that] particularly undermines the fairness, integrity or public reputation of judicial proceedings").

The only real question here is whether the error meets the second prong of plain error review, and it does. The complete deprivation of Mr. Guevara Salamanca's due process rights to appear and be heard is a "clear" and "obvious" error under the Constitution and this Court's existing precedents. *United States v. Olano*, 507 U.S. 725, 734 (1993); *see United States v. Cavasoz*, 950 F.3d 329, 337 n.3 (6th Cir. 2020) ("[B]inding case law need not address the same statute for the district court's interpretation of that statute to be plain error . . . [r]ather, binding case law must clearly answer the question presented."). The district court agreed that the South Carolina sentence was "*no doubt* a violation of [Mr. Guevara Salamanca's] right to due process under the Constitution," because "when revocation is discretionary, as it is in South Carolina, probations are entitled to be heard." Pet. App. 3 (emphasis added) (citing *Black*, 471 U.S. at 611; *Morrissey*, 408 U.S. at 488; *Sneed v. Donahue*, 993 F.2d 1239, 1243–44 (6th Cir. 1993)). But

it was not just any violation of due process, it was so extensive that it amounted to no hearing at all.

The Court has long held that fundamental fairness requires a hearing where the defendant is provided notice and an opportunity to be heard—even in the context of a probation revocation. *Powell*, 287 U.S. at 68 (citing *Holden*, 169 U.S. at 389; *Galpin*, 18 Wall. at 368); *Black*, 471 U.S. at 611; *Scarpelli*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 488. If the absence of counsel during a hearing that otherwise gives the defendant the ability to appear and defend himself cannot be used to enhance a later sentence (*Custis*, 511 U.S. at 489; *Daniels*, 532 U.S. at 376; *Lackawanna*, 532 U.S. at 403-04), then plainly, absence of counsel during a hearing that *also* precludes the ability to appear and be heard cannot be used to enhance a latter sentence. The binding law of this Court clearly answers the question here. It was plainly erroneous to enhance Mr. Guevara Salamanca's sentence based on the South Carolina hearing.

And, this plain error is not just an idiosyncratic anomaly, but goes to the heart of our criminal justice system, and the footing of the Federal Guidelines. The basic structure of the Federal Guidelines looks not only to the fact of a prior conviction, but also to the *length* of the sentence imposed. U.S.S.G. § 4A1.1. And, under this particular guideline the length of a prior sentence impacts not only one's criminal history score, but also causes large enhancements to one's offense level. U.S.S.G. § 2L1.2(b). This relatively new guideline (amended to its current form November 1, 2016) emphasizes the length of prior convictions as a basis for enhancement instead of the type of crime previously committed. *Compare* U.S.S.G. § 2L1.2 (Nov. 1, 2015) *with* U.S.S.G. § 2L1.2 (Nov. 1, 2016). And in fiscal year 2020 approximately 20,000 individuals were sentenced under this guideline alone. United States Sentencing Comm'n, 2020 Sourcebook

of Fed. Sentencing Statistics, Fig. I-2 No. of Immigration Offenders Over Time Fiscal Years 2011-2020.[4]

Judge Stranch was correct. The right to counsel is derived from the right to be heard, so a complete deprivation of Mr. Guevera Salamanca's right to be heard triggers the *Custis* protections. Pet. App. 8. It was plain error to rely upon the South Carolina sentence which "no doubt" violated his most fundamental due process rights (Pet. App. 3) as the basis for increasing his current sentence by five years. This mistake requires the attention of the Court due to the depth of the error as well as the breadth of its impact. Review is necessary to remedy the harm here and ensure that others do not suffer the same fate.

CONCLUSION

For the reasons stated herein and in his Petition, Mr. Guevara Salamanca urges the Court to grant the Petition and vacate the judgment of the court below.

Respectfully submitted,

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[4] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/FigureI2.pdf (last visited May 18, 2021).