No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR ESQUIVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Fifth Circuit

PETITION OF
DEFENDANT-PETITIONER VICTOR ESQUIVEL

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***Petitioner*,**

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Victor Esquivel, respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Esquivel encloses his affidavit of indigence in support of this motion.

Dated: January 4, 2020

/s/ Matthew M. Robinson
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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether Esquivel's Right to Counsel Was Constructively Denied When, in the District Court, Esquivel Moved for a New Trial and Requested New Counsel Based on Ineffective Assistance of Counsel, but That Same Attorney Was Appointed to Represent Esquivel on Direct Appeal, and That Attorney Filed No-merit Brief Insuring That the Convictions and Sentence Would Be Affirmed.

B. Whether Esquivel's Right to the Effective Assistance of Counsel Was Violated on Direct Appeal When Counsel Failed to Follow the Dictates of Anders v. California, Ignored Preserved Objections and Arguments, and Advocated Against Mr. Esquivel Receiving Relief.

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IV. OPINIONS BELOW

The United States District Court for the Western District of Texas entered a final appealable order on March 27, 2019, dismissing Petitioner's motion under 28 U.S.C. § 2255 and denying certificate of appealability. See, Esquivel v. United States, 09-cr-820-AM; 15-cv-120-AM. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's dismissal and declined to issue certificate of appealability Esquivel v. United States, No. 19-50461 (5th Cir. Sept. 16, 2020). Neither decision is reported, but both are attached.

V. STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction, as Petitioner was charged with crimes under the United States Code, including conspiracy to conduct affairs of an enterprise through a pattern of racketeering, murder, and conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. §§ 1962(d) and 1959. The Fifth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as the district court entered a final judgment order, and Petitioner timely filed a notice of appeal from the final judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Fifth Circuit rendered a final decision on September 16, 2020 and, pursuant to this Court's Order dated Mar 19, 2020, Petitioner is filing this petition within 150 days from that decision.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

U.S. Const. Amend. V.

> In all criminal prosecutions, the accused shall enjoy to right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the

> witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

VII. STATEMENT OF THE CASE

On July 14, 2009, a federal grand jury sitting in the Western District of Texas, Del Rio Division, returned a six-count indictment naming 12 defendants. Esquivel was charged in three of the counts. Count One charged Esquivel with conspiracy to conduct affairs of an enterprise through a pattern of racketeering, in violation of 18 U.S.C. §1962(d). Counts Five and Six charged Esquivel with murder and conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. §1959. District Court Document "Doc." 893, Order Denying § 2255 Motion; ROA.962-992.

Prior to trial Esquivel moved to suppress a July 19, 2008 police interview and admission of a cell phone number. It was argued that Esquivel's Fourth, Fifth, Sixth, and Fourteenth Amendments rights were violated on that date through the unlawful traffic stop, seizure, and coercive interrogation inside the police building without ever reading Esquivel his Miranda warnings. See ROA.11. Consequently, Esquivel argued that all fruits of the poisonous tree evidence gained and/or obtained by the Texas Department of Public Safety or any other law enforcement agencies arising from the July 19, 2008 incident must be excluded as evidence at trial.

The district court held a suppression hearing on August 26, 2010, and denied Esquivel's motion to suppress in an order dated June 27, 2011. Doc. 421, Minute Entry; ROA.12; Doc. 527, Order Denying Motion to Suppress; ROA.16. On April 27, 2011, one month prior to the commencement of trial, the district court granted a Motion to Withdraw filed by Mr. Calderon, as Attorney for the Mr. Esquivel and ordered that Attorney Charles King remain as CJA counsel.

ROA.14.

Esquivel also moved to sever his case from his co-defendant for purposes of trial. See, Doc. 354, Motion to Sever; ROA.11. He argued that he would be unfairly prejudiced by joinder of defendants because (1) the weight of evidence is greater against the other defendants, (2) statements of other co-defendants that could not otherwise be admissible against Esquivel may be admissible at a joint trial, and (3) co-defendants are likely to pursue antagonistic and/or mutually exclusive defenses at trial. Id. The motion was denied See, Doc. 523, Order Denying Motion to Sever, ROA16.

On June 28, 2011, a jury trial commenced for Esquivel and his codefendant, Javier Guerrero. The government rested their case on July 5, 2011. The next day, July 6, 2011, Esquivel moved for a judgment of acquittal, which was denied by the court. On July 6, 2011, jury instructions were issued by the court. Doc. 559, Jury Instructions. And, the jury found Esquivel guilty as charged. ROA.16-18.

On July 13, 2011, Esquivel timely filed, pro se, a motion for new trial. The motion was received by the court on July 18, 2011. It was argued that the court improperly denied Esquivel the ability to "subpoena by writ of ad testificandum available witness Jose C. Cardona and Jesse Ramirez who are incarcerated in federal prison." See, Doc. 572. Motion for New Trial; ROA.18. It was noted that these individuals would have presented testimony that would have refuted the government's case. It was argued that counsel was ineffective for failing to move for recusal of the trial court judge and for failing to object to the court's refusal to allow Jose C. Cardona and Jesse Ramirez to testify. Id. Esquivel also filed, pro se, a motion to recuse the trial court judge. Id. That motion reasserted the bias claims raised in the motion for new trial, arguing that the trial court judge should have recused herself as a result of her alleged bias and unethical actions, and that the court's

bias tainted the trial and made it impossible for Esquivel to receive a fair trial. Id. On August 1, 2011, the court issued an order denying Esquivel's motion for new trial and motion to recuse. Id.

Sentencing occurred on April 12, 2012. ROA.19-20. Prior to sentencing, numerous objections were raised to the calculations in the presentence investigation report (PSR). ROA.2761-2771. Additionally, Esquivel asserted that the government had failed to provide material evidence to the defense prior to trial, in violation of Brady v. Maryland. ROA.2761-2763. All defense objections were summarily overruled and the district court sentenced Esquivel to two terms of life on each of counts one and five, and a term of 120 months on count six, all to run consecutively Doc. 888, Judgment; ROA.544-550.

Esquivel filed a notice of appeal and sought appellate review in the Fifth Circuit Court of Appeals. See, United States v. Esquivel, 5th Cir. App. No. 11-50907. Amazingly, despite the fact serious allegations had been made that Attorney King provided ineffective assistance during the trial, the same attorney was appointed to represent Mr. Esquivel on direct appeal. And, although Mr. Esquivel contested the charges and raised numerous objections in the trial, appellate counsel filed no-merit brief with the court pursuant to Anders v. California. Id.

Not surprisingly, the Fifth Circuit issued its decision affirming Esquivel's conviction and sentence on July 10, 2014. The United States Supreme Court denied certiorari on November 10, 2014. See, Esquivel v. United States, No. 14-6732.

Esquivel, pro se, filed a motion to vacate his convictions and sentence under 28 U.S.C. § 2255 and a supplement to that motion. See, Doc. 768, Motion to Vacate; ROA.586-598; Doc. 769, Memorandum in Support; ROA.599-616; Doc. 770, Supplement; ROA.617-623. Esquivel argued that his right to the effective assistance of counsel was violated when counsel:

> "(1) failed to investigate a defense or call witnesses suggested by him; (2) failed to move to recuse the Court after demonstrating personal bias against him; (3) failed to file a motion for a new trial; (4) failed to object to the government's pretrial discovery violations, despite its withholding potentially exculpatory evidence of interviews with cooperating informants; (5) failed to appeal the denial of his motion to suppress; (6) failed to appeal the violation of his right to a fair trial when he was forced to disrobe and present his tattoos to the jury; (7) failed to appeal the denial of his motion to sever his trial from his co-defendant; (8) failed to appeal the denial of his motion for judgment of acquittal; (9) failed to argue that the use of gang expert testimony linking him to the Texas Mexican Mafia violated his right to a fair trial; (10) failed to appeal the Court's refusal to address the merits of his pro se motions; (11) failed to appeal that the jury instructions did not require the jury to determine all of the elements of the offenses; and (12) failed to argue that consecutive life sentences were unreasonable.

Doc. 893 Order, at 4-5; ROA.965-966. In his pro se supplement, Esquivel argued:

> (1) the Court denied him counsel during trial by denying him the appointment of two attorneys and by failing to appoint new counsel to argue a motion for new trial; (2) the Court denied him counsel at the appellate phase, arguing that appointed counsel was adversely affected by a conflict of interest; (3) counsel failed to subject the prosecution's case to meaningful adversarial testing because of fear of the Court; (4) prosecutorial misconduct based on Assistant United States Attorney Joey Contrera's correspondence with Jose Cardona, who claimed he would testify on behalf of Esquivel that he ordered someone else to collect the dime from Garza, who then shot Garza in self defense; (5) counsel was ineffective for failing to challenge the application of the Hobbs Act to his case; (6) counsel was ineffective for failing to object to expert testimony that two people shot at the victim Jose Damian Garza, thus usurping the function of the jury; (7) counsel failed to inform the jury that he was incarcerated from June 30, 2005, to June 13, 2008; (8) counsel failed to object to his prior conviction for misprision of a felony to show his guilt in a drug conspiracy predicate act; and (9) the Court lacked the jurisdiction to sentence him because of a pending interlocutory appeal on the issue of a motion for new trial.

Id.

Through counsel, Esquivel filed a motion to supplement his pro se § 2255 arguments, which was granted by the district court. Doc. 807 Supplemental Argument; ROA.665-674. It was argued that: "Esquivel's Right to Counsel Was Constructively Denied When, in the District Court, Esquivel Moved for a New Trial and Requested New Counsel Based on Ineffective Assistance of Counsel, but That Same Attorney Was Appointed to Represent Esquivel on Direct Appeal, and that Attorney Filed

an Anders Brief." Id.

On March 28, 2019, the district court issued a judgment denying relief on all of Esquivel's claims, dismissing his § 2255 motion, and declining to issue certificate of appealability. Doc. 893 Order; ROA962-992; Doc. 894, Judgment; ROA.993.

Esquivel filed a timely notice of appeal and proceeded to the Fifth Circuit Court of Appeals. ROA.996-997. Esquivel moved for certificate of appealability concerning the following arguments:

A. Esquivel's Right to Counsel Was Constructively Denied When, in the District Court, Esquivel Moved for a New Trial and Requested New Counsel Based on Ineffective Assistance of Counsel, but That Same Attorney Was Appointed to Represent Esquivel on Direct Appeal, and That Attorney Filed No-merit Brief Insuring That the Convictions and Sentence Would Be Affirmed.

B. Esquivel's Right to the Effective Assistance of Counsel Was Violated on Direct Appeal When Counsel Failed to Follow the Dictates of Anders v. California, Ignored Preserved Objections and Arguments, and Advocated Against Mr. Esquivel Receiving Relief.

On September 16, 2020, the Fifth Circuit declined to issue certificate of appealability and dismissed the appeal. See, United States v. Esquivel, App. No. 19-50461, attached. Esquivel now petitions this Court for writ of certiorari so that these matters of exceptional constitutional importance can be heard and corrected.

VIII. STATEMENT OF FACTS

The following facts are taken directly from the district court order denying Esquivel's § 2255 motion:

> Trial testimony established that Esquivel, aka Youngster was a mid-level member of the Texas Mexican Mafia ("TMM"), a gang which engaged in drug trafficking and extortion. The TMM established its dominance throughout parts of Texas by demanding a ten percent fee, called the "dime," based on the value of illicit activity taking place within the TMM's territory. Non-TMM members paying the dime are promised protection from other gangs, among other services. Oftentimes, TMM

members implement violence, including murder, to collect the dime from those who resist paying, or to scare others into paying.

On July 13, 2008, Javier Guerrero, a co-defendant and lieutenant' of the "830' area of the TMM, called a meeting in Sabinal, Texas. The meeting was attended by numerous TMM members, including Esquivel. As a show of force, Guerrero ordered the murders of at least two individuals who refused to pay the dime, and several TMM members. In pertinent part, Arturo "Pollo" Villarreal, the lieutenant of the Eagle Pass area, volunteered for the murder of Enrique "Buck" Garza or his brother Jose Damian Garza. Villarreal then assigned the murder to Esquivel and Juan Alfredo "Freddy" Gloria-Perales.

On July 18, 2008, Esquivel and Gloria-Perales traveled from Eagle Pass to Hondo, Texas, broke into Jose Damian Garza' s home while wearing masks (and while Garza's daughter and her two friends were present), and jointly fatally shot Garza a total of at least nine times before returning to Eagle Pass. Shortly after the fatal shooting, law enforcement detained Esquivel, who then provided agents with his cell phone number. Based on cell phone data, law enforcement was able to confirm Esquivel's presence near the meeting in Sabinal and Garza's home in Hondo at the time of the shooting.

IX. REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

In the instant case, Esquivel made two arguments demonstrating, at minimum, a substantial showing of the denial of his constitutional rights. Specifically, that his right to counsel was constructively denied on direct appeal and at sentencing, in violation of the Fifth and Sixth

Amendments to the United States Constitution. Those arguments are briefed below. In refusing to issue certificate of appealability, the Fifth Circuit incorrectly applied Supreme Court precedent and sanctioned the district court's decision to dismiss Esquivel's § 2255 motion despite the obvious and apparent violations of Esquivel's right to the assistance of counsel on appeal. Therefore, Esquivel asks that this Honorable Court exercise its authority under Supreme Court Rule 10 and grant certiorari with respect to the following claims.

A. Esquivel's Right to Counsel Was Constructively Denied When, in the District Court, Esquivel Moved for a New Trial and Requested New Counsel Based on Ineffective Assistance of Counsel, but That Same Attorney Was Appointed to Represent Esquivel on Direct Appeal, and That Attorney Filed No-merit Brief Insuring That the Convictions and Sentence Would Be Affirmed.

The record establishes that an actual conflict between Mr. Esquivel and defense counsel existed when Mr. Esquivel asserted serious claims of ineffective assistance of trial counsel in the district court. As a result, Mr. Esquivel's Sixth Amendment right to counsel was constructively denied when that same attorney was appointed to represent him on direct appeal. Then, despite a record ripe with preserved objections, defense counsel file a no merit brief in the Fifth Circuit that focused exclusively on reasons why Mr. Esquivel's conviction and sentence should be affirmed. Under the circumstances, the appointment of trial counsel to represent Esquivel on direct appeal amounted to a complete deprivation of counsel under the Sixth Amendment. Therefore, the judgment in this case should be vacated and reinstated so that Mr. Esquivel can directly appeal his convictions and sentence to this Court.

It is well settled that all criminal defendants are entitled to the assistance of counsel. U.S. Const. amend. VI; Foster v. Illinois, 332 U.S. 134, 136-37, 67 S. Ct. 1716 (1947). "The Constitution's

guarantee of assistance of counsel cannot be satisfied by mere formal appointment." Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992).

> That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063 (1984).

As the Supreme Court has observed, "Although counsel is present, the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided."United States v. Cronic 466 U.S. 648, 654 n.11, 104 S. Ct. 2039, 2044 n. 11 (1984). As the Court has explained, "There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658, 104 S. Ct. at 2046 (footnote omitted). Therefore, in cases of actual or constructive denial of counsel, prejudice is presumed. Id. In Strickland, the Court added that:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. See United States v. Cronic, 466 U.S. at 659, and n.25, 104 S. Ct. at 2046-2047, and n.25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S. at 659, 104 S. Ct. at 2047. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

466 U.S. at 692, 104 S. Ct. at 2067.

A constructive denial of counsel occurs when the defendant is deprived of "the guiding hand of counsel." Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 64, 77 L. Ed. 158 (1932), cited in Cronic, 466 U.S. at 660-61, 104 S. Ct. at 2047-48. There are at least three other circumstances in which a presumption of prejudice would be required to ensure the fairness of a proceeding: (1) "if

counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" (2) "when although counsel is available during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial;" or (3) "when counsel labors under an actual conflict of interest." Cronic, 466 U.S. at 659-60, 662 n.31, 104 S. Ct. at 2047, 2048 n.31. See also, Burdine v. Johnson, 231 F.3d 950, 954-55 (5th Cir. 2000).

In the instant case, Attorney King labored under an actual conflict of interest and could not have provided representation guaranteed under the Sixth Amendment. Esquivel attacked counsel's performance during trial and alleged that Attorney King had rendered ineffective assistance of counsel. Such an allegation necessarily put counsel in an adversarial position to Mr. Esquivel. Indeed, the Strickland inquiry presupposes that trial attorneys will respond to accusations of ineffective assistance and outline what they did to represent their clients. Strickland v. Washington, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions"). By alleging that his attorney provided ineffective assistance of counsel an inmate waives any privilege that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices. Johnson v. Alabama, 256 F.3d 1156, 1178 (11th Cir. 2001); see also In re Lott, 424 F.3d 446, 452-53 (6th Cir. 2005) (attorney-client privilege is waived "by claiming ineffective assistance of counsel or by otherwise raising issues regarding counsel's performance").

When a prisoner shows an actual conflict that adversely affected his attorney's performance and thus denied him his Sixth Amendment right to effective assistance of conflict-free counsel,

Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980), provides the applicable standard for evaluating the claim. A defendant may show a denial of the assistance of counsel under Cuyler without showing prejudice. Perillo v. Johnson, 205 F.3d 775, 781-82 (5th Cir. 2000). "Courts of appeals applying Cuyler traditionally have couched its test in terms of two questions: (1) whether there was an actual conflict of interest, as opposed to a merely potential or hypothetical conflict, and (2) whether the actual conflict adversely affected counsel's representation." United States v. Infante, 404 F.3d 376, 391 (5th Cir. 2005). "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Mickens v. Taylor, 535 U.S. 162, 172 n.5, 152 L. Ed. 2d 291, 122 S. Ct. 1237 (2002). A court must ask whether defense counsel "labored under a conflict of interest, which was not merely hypothetical, and whether that conflict adversely affected the representation (i.e., whether it was an actual conflict)." Infante, 404 F.3d at 392.

Esquivel was represented by Charles King during trial, sentencing, and direct appeal. In his § 2255 motion, Mr. Esquivel made claims at sentencing that Attorney King provided ineffective assistance of counsel in the trial court. However, that was not the first time Esquivel had notified the district court of ineffective assistance. At the conclusion of the jury trial, Esquivel filed, *pro se*, a motion for new trial alleging three grounds, including ineffective assistance of trial counsel, which was denied by the district court. See, Doc. 572, Motion for New Trial; Doc. 577, Order. Acting *pro se*, Esquivel then filed a motion to appoint counsel. Doc. 598, Motion. In that motion he argued that he filed for a new trial based upon ineffective assistance of counsel and that he needed the court to appoint him new counsel for his appeal. Id. The district court did not inquire into Mr. Esquivel's claims of ineffective assistance of counsel. Instead, the court denied Esquivel's request to appoint new counsel, finding that his *pro se* motions would not be considered because he was represented by

counsel. See, Doc 577, Order; Doc. 602, Order.[1] Mr. Esquivel was subsequently sentenced to consecutive life sentences. Attorney King was appointed to represent Mr. Esquivel on direct appeal and filed a no-merit brief.

Regardless of whether Mr. Esquivel was correct when he asserted that Attorney King was ineffective, the events above demonstrate that an actual conflict existed as a result of the ineffective assistance claims. The district court did not inquire into the conflict, but continued Attorney King's appointment at sentencing and direct appeal. Despite Mr. Esquivel's arguments that Attorney King was ineffective, Attorney King did not move to withdraw in the district court or on direct appeal.

Esquivel was adversely affected by the actual conflict. Because Attorney King represented Esquivel in the district court and direct appeal, he could not argue or assess whether he had provided effective assistance to Esquivel. Further, Attorney King could not address whether the district court had erred in dismissing Esquivel's pro se motions and refusing to appoint new counsel. Instead, the Anders brief filed by Attorney King is silent concerning Esquivel's pro se complaints of ineffective assistance and request for new counsel.

These circumstances demonstrate that an actual conflict existed between Attorney King and Mr. Esquivel such that his right to counsel at sentencing and on direct appeal was constructively denied. Accordingly, his conviction and sentence should be vacated so that he may be resentenced and directly appeal his conviction and sentence to the Fifth Circuit, this time with conflict free counsel.

In denying § 2255 relief, the district court found that Esquivel's right to conflict free counsel

[1]The court also stated that it believed Mr. Esquivel did not prepare the motion, but that it was prepared by Jose Cristobal Cardona.

was not violated because Esquivel "proceeded to trial and clearly was never forced to plead guilty." ROA.971. The court also found that:

> Assuming there was an actual conflict between Esquivel and King, Esquivel has not demonstrated any prejudice from any purported conflict. Again, Esquivel proceeded to trial and was not actually forced to plead guilty. Moreover, Esquivel does not contend that a conflict adversely affected counsel's performance at trial. And to the extent that Esquivel argues that counsel should have, but could not, raise issues of his own incompetence on appeal, 'in most cases a motion brought under § 2255 is preferable to direct appeal for deciding an ineffective assistance.' Massaro v. United States, 538 U.S. 500, 504 (2003). Esquivel, now represented by retained counsel, was able to raise any ineffective assistance of counsel claims he wanted. Thus, Esquivel suffered no prejudice from any conflict, if there was one.

ROA.972.

The district court's reasoning is erroneous because if an actual conflict of interest existed, Esquivel's right to counsel was constructively violated, and prejudice is presumed as a matter of law. An "actual" conflict of interest between counsel and a defendant is different than ineffective assistance of counsel and there is no need to demonstrate prejudice under Strickland. The district court improperly conflated these two standards and addressed only the ineffective assistance of counsel standard by requiring Esquivel to prove prejudice under Strickland. Thus, the district court's reasoning was not merely debatable, it was flat wrong because if an actual conflict of interest existed, Esquivel was not required to prove prejudice. Cronic, 466 U.S. at 659-60, 662 n.31, 104 S. Ct. at 2047, 2048 n.31. See also, Burdine v. Johnson, 231 F.3d 950, 954-55 (5th Cir. 2000

Because the district court's reasoning in denying relief on this basis was flat wrong, certificate of appealability should issue as to whether Esquivel's right to counsel was constructively denied on direct appeal. Accordingly, certiorari should be granted.

B. Esquivel's Right to the Effective Assistance of Counsel Was Violated on Direct Appeal When Counsel Failed to Follow the Dictates of Anders v. California, Ignored Preserved Objections and Arguments, and Advocated Against Mr. Esquivel Receiving Relief.

Despite the fact Esquivel was convicted at trial, had preserved numerous objections and arguments throughout the proceedings in the district court, had been convicted at trial, and received an upward departure of consecutive life sentences, appellate counsel filed a no-merit brief. Petitioner submits that appellate counsel ignored claims that had merit and argued that Esquivel's appeal had no merit. Therefore, counsel was ineffective on appeal and Esquivel should be afforded a new opportunity to appeal.

The right to counsel extends to appeals. A defendant in a criminal case has a Sixth Amendment right to the effective assistance of counsel on direct appeal. *See* Evitts v. Lucey, 469 U.S. 387, 406, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963) (an accused is entitled to assistance of counsel on an appeal as a matter of right); In re Magwood, 113 F.3d 1544, 1551 (11th Cir. 1997). The test to establish a claim that *appellate* counsel was ineffective for failing to pursue a claim on direct appeal is the same Strickland standard. See 466 U.S. at 688, 694. *See* Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 764, 145 L. Ed. 2d 756 (2000) (holding that a habeas applicant must demonstrate that "counsel was objectively unreasonable" in failing to file a merits brief addressing a non-frivolous issue and that there is "a reasonable probability that, but for his counsel's unreasonable failure * * *, he would have prevailed on his appeal").

"In Anders, the Supreme Court specified how appointed criminal counsel should proceed when determining, 'after a conscientious examination,' that a client's appeal is 'wholly frivolous.'" Graves v. McEwen, 731 F.3d 876, 878 (9th Cir. 2013) (quoting Anders v. California, 386 U.S. 738,

744, 87 S. Ct. 1396 (1967)). "In that circumstance, the Court concluded, counsel 'should so advise the court and request permission to withdraw.'" Id. (quoting Anders, 386 U.S. at 744). "'That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.'"Id. (quoting Anders, 386 U.S. at 744). The brief that is required under this procedure has come to be known as "an Anders brief." See id. "The Anders brief is designed to safeguard a defendant's Sixth Amendment right to direct appellate counsel." Id. (citing Anders, 386 U.S. at 745).

When appellate counsel has failed to "file an opening brief 'referring to anything in the record that might arguably support the appeal," the attorney has failed to "satisfy the requirements set forth in Anders." United States v. Mendoza Guizar, 611 F.3d 1026, 1026, 1027 (9th Cir. 2010). "The Anders brief should present the strongest arguments in favor of the client supported by citations to the record and applicable legal authority." Id. (citing Penson v. Ohio, 488 U.S. 75, 81, 109 S. Ct. 346 (1988); McCoy v. Court of Appeals, 486 U.S. 429, 439, 108 S. Ct. 1895 (1988). This "requirement was designed to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability." McCoy, 486 U.S. at 439. But the requirement serves more than just assisting the Court. The procedure, which includes having counsel suggest issues for the non-attorney client "will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." Graves, 731 F.3d at 878.

In the instant case, appellate counsel was woefully inadequate. Counsel filed a no-merit brief when several potential errors had been preserved for appellate review. Counsel failed to appeal the

denial of Esquivel's motion to suppress. Counsel failed to appeal the violation of Esquivel's right to a fair trial when he was forced to disrobe and present his tattoos to the jury. Counsel failed to appeal denial of Esquivel's motion to sever the trial from his co-defendant. Counsel failed to appeal the denial of Esquivel's motion for judgment of acquittal. Counsel failed to argue that the use of gang expert testimony linking him to the Texas Mexican Mafia violated his right to a fair trial. Counsel failed to appeal the court's refusal to address the merits of Esquivel's *pro se* motions and constitutional claims. Counsel failed to argue on appeal that the jury instructions failed to require the jury to determine all of the elements of the offense. Counsel failed to argue that consecutive life sentences were unreasonable.

Appellate counsel "identifie[d] no potentially arguable issues." See Mendoza Guizar, 611 F.3d at 1027. Counsel did not "present the strongest arguments in favor of the client supported by citations to the record and applicable legal authority." Id. To the contrary, Attorney King advocated against relief, telling the Fifth Circuit that "the record as a whole indicates a pattern of fairness by the trial court in moving the proceedings along in an orderly fashion, while at the same time allowing the Defendant (and other parties) ample time in which to prepare for trial." Anders Brief, at 14.[2] Rather than suggest that the district court erred by failing to grant Esquivel's motion to suppress, motion in limine, motion for special jury instructions, and motion for new trial, and submit a few cases that might show that the issues may have merit (and then let Esquivel actively argue in favor of those issues), attorney King actively argued to the Fifth Circuit that the issues had to fail. Accordingly, while the attorney was required to identify potentially arguable issues, he instead raised issues that

[2]This Court can take judicial notice of documents filed in United States v. Esquivel, 5th Cir. App. No. 11-50907.

he was asserting were not potentially arguable and had no chance of winning—even taking the time to explain why to the Fifth Circuit. In addition to advocating against Mr. Esquivel receiving relief on appeal, attorney King failed entirely to address Esquivel's pro se filings, including the motion for new trial, which included an allegation of ineffective assistance and a request for new counsel.

Attorney King failed to "file an opening brief 'referring to anything in the record that might arguably support the appeal'" and, therefore, the attorney failed to "satisfy the requirements set forth in Anders." Mendoza Guizar, 611 F.3d at 1026, 1027 (9th Cir. 2010). The brief raised issues that the attorney asserted could not win and, consequently, failed to "present the strongest arguments in favor of the client supported by citations to the record and applicable legal authority." See *id*. (citing Penson, 488 U.S. at 81. Thus, Esquivel was not afforded the advocacy required under Anders and the Sixth Amendment. McCoy, 486 U.S. at 439. He did not have "the same rights and opportunities on appeal" as others with retained counsel or even others with court appointed counsel. Graves, 731 F.3d at 878.

Appellate counsel failed to appeal the denial of Esquivel's motion to suppress. Counsel failed to argued Esquivel's right to a fair trial was violated when he was forced to disrobe and present his tattoos to the jury. Counsel failed to appeal denial of Esquivel's motion to severe the trial from his co-defendant. Counsel failed to appeal the denial of Esquivel's motion for judgment of acquittal. Counsel failed to argue that the use of gang expert testimony linking him to the Texas Mexican Mafia violated his right to a fair trial. Counsel failed to appeal refusal to address the merits of Esquivel's pro se motions and constitutional claims. Counsel failed to argue that consecutive life sentences were unreasonable.

Appellate counsel's failure to argue any of the claims above in favor of a brief advocating for

the preservation of Esquivel's conviction and consecutive life sentences was objectively unreasonable and amounts to ineffective assistance of counsel. Robbins, 120 S. Ct. at 764. Mr. Esquivel's Sixth Amendment right to counsel on direct appeal was constructively denied when the same attorney whom Esquivel had accused of ineffectiveness during trial was appointed to represent Esquivel on direct appeal. Then, despite the fact numerous objections had been preserved in the district court, and despite the fact the court imposed an upward departure at sentencing, counsel filed a brief in the Fifth Circuit asserting that no appellate arguments were available and that Esquivel's convictions and sentence should be affirmed. Counsel may have truly believed no meritorious issues were present. However, it is equally as likely that counsel filed a no merit brief in order to retaliate against Esquivel for alleging that counsel was ineffective during trial

Under the circumstances, it is clear and evident that appellate counsel provided ineffective assistance. Esquivel's motion under § 2255 should have been granted so that an amended judgment could be issued and Esquivel could timely appeal and receive the assistance required under Cronic, Strickland and Anders. See, e.g., United States v. Peak, 992 F.2d 39, 40 (4th Cir. 1993) (remanding with instructions to vacate criminal judgment and enter new judgment).

Because the district court's reasoning in denying relief on this basis was flat wrong, certificate of appealability should have issued as to whether Esquivel's right to counsel was denied on direct appeal. Accordingly, certiorari should be granted.

CONCLUSION

Petitioner respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a on January 4, 2021 a true and accurate copy of the foregoing was sent via U.S. Mail with sufficient postage affixed to the Office of the Assistant United States Attorney, at 601 N.W. Loop 410, San Antonio, TX 78216 and the Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001 and a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

/s/ Matthew M. Robinson
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