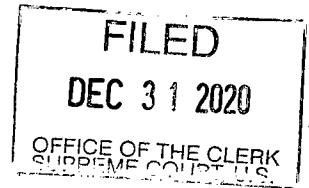


No. 20-7040 ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN LOVATO — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jonathan Lovato
(Your Name)

P.O. Box 10535
(Address)

Lubbock, Texas. 79408-3535
(City, State, Zip Code)

806-775-7036
(Phone Number)

QUESTION(S) PRESENTED

Does Petitioner state a valid claim of the denial of a Sixth Amendment Constitutional right to effective assistance of counsel?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Christopher Paul Andrade. (2017)
Northern District of Texas
Lubbock Division

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A	5 th Circuit opinion (original appeal)
APPENDIX B	Sentencing Transcript
APPENDIX C	5 th Circuit opinion on writ
APPENDIX D	Certificates of Completion
APPENDIX E	Practice Profile of Clinton W. Cook (2017).
APPENDIX F	Jonathan Lavato's Jail card.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A+C to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 8-04-20 + 10-16-17.

☒ No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Table of Authorities

- United States ex rel. Williams v. Twanney, 510 F.2d 634, 640 (CA7)
- Sietlaff v. Williams, 423 U.S. 876 (1975)
- Powell v. Alabama, 287 U.S. 45, 58 (1932)
- United States v. Sanchez-Barreto, 93 F.3d 17 (1st Cir. 1996)
- United States v. Cronin, 466 U.S. 648, 654
- Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed.2d 987 (1983)
- United States v. Decoster, 199 U.S. App. D.C. 359, 382, 624 F.2d 196, 219
- United States v. Franks, 230 F.3d 811
- United States v. Kim, 896 F.2d 678
- Strickland v. Washington, 466 U.S. 668, 80 L. Ed.2d 674, 104 S.Ct. 2052 (1984)
- United States v. Ash, 413 U.S. 300, 309 (1973)
- Lefler v. Cuper, 566 U.S. 156
- Premo v. Moore, 562 U.S. 115
- Apprendi v. New Jersey, 530 U.S. 466
- United States v. Rasmisel, 716 F.2d 301
- Betts v. Brady, 316 U.S. 455, 476 (1942)
- Hill v. Lockhart, 474 U.S. at 59, 106 S.Ct. at 370
- Woodward v. Collins, 898 F.2d 1027, 1079 (1990)
- Miller v. Dietke, 420 F.3d 356, 361 (2005)
- Eddings v. Okla., 455 U.S. 104, 114
- Williams v. New York, 337 U.S. at 247
- Williams v. Oklahoma, 358 U.S. at 585
- Coker v. Georgia, 433 U.S. 584, 597 (1977)

- Stein v. New York, 346 U.S. 156 (1953)
- Jackson v. Denno, 378 U.S. 368
- Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995)
- United States v. Conley, 349 F.3d 837, 842
- Glover v. United States, 531 U.S. 198, 203, 148, L.Ed.2d 604, 121 S.Ct. 696 (2001)
- United States v. Frank, 230 F.3d 811, 815 (5th Cir. 2000)
- Davis v. State, 144 S.W. 3d 192
- Commonwealth v. Jackson (1975) 459 Pa 669, 331 A2d 189
- United States v. Thomas, 211 F.3d 1186

TO THE HONORABLE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Petitioner Jonathan Lavato respectfully petitions
for a writ of certiorari to review the opinion and
judgment of the United States Court of Appeals for
the Fifth Circuit.

Opinion Below
See Appendix A and Appendix C

Constitutional and Statutory Provisions Involved

18 U.S.C. § 2255 and 5th and 16th Amendments
to the United States Constitution.

Statement of the Case

A. Factual History

On March 17, 2016, officer Walter Ernest Scott received information that an Unknown hispanic male approximately 26 years of age, could possibly be in possession of methamphetamines at the America's Best Value Hotel on 19th Street Room 128. The room was rented by Andre Shormone Williams on March 16, 2016, with a check out date by March 17, 2016 at 11:00 am. (Walter Ernest Scott narrative 16-9820 supplement 0007; Affidavit for Search Warrant.)

Officer M. Castillo and D. Merritt reported over police radio a silver 05' Chrysler Sebring bearing Texas registration GTX-5637 (Idat Scott) to Arleen Theres Keithley park in front of room 128. The unknown hispanic male and his female passenger got out of the car, and went into room 128 at approximately 11:35 am. Shortly thereafter the unknown female began carrying luggage and property to the vehicle. (Walter Ernest Scott narrative 16-9820 supplement 0007). The unknown hispanic male and his passenger got back into the car at approximately 11:42 am. (Daniel Walter Merritt narrative 16-9820 Supplement No. 0008) Due to the fact the room no longer belonged to no one since 11:00 am checkout time, if the unknown hispanic male was

driving off. Plain clothes officer Lowell Mericleth Owens, attempts to stop the unknown hispanic males freedom of movement with his unmarked police car, with no lights or siren activated. Subsequently Owens exits his vehicle without identifying himself as a police officer, brandishing his firearm beligerently, and yelling for the Unknown hispanic male to get out of the car. (Lowell Mericleth Owens police narrative 16-9820 Supplement No. 0013). When the Unknown hispanic male saw the barrell of the gun pointed at him and his female passenger. In fear for their lives, forced the females head down for her safety from the gun, and sped away from this dangerous and uncertain situation. During the chase, the unknown hispanic male believes a civilian is trying to kill him and his passenger. Subsequently officer Owens gives authorization to officer Billy Ray Mitchell to use his unmarked vehicle to conduct a collision with the unknown hispanic male's vehicle. (Id. at Owens; Billy Ray Mitchell police narrative 16-9820 Supplement No. 0012). Subsequently the unknown hispanic male's vehicle was forced into a multiple vehicle collision, resulting in one death and the unknown hispanic male

disabled and not being able to walk without use of a walker. The Unknown hispanic male and his passenger were initially unconscious, officer Mitchell noticed their eyes were absent of coherence, and that they were in shock and not in control of their bodies and simply acting in a state of confusion. (Id at Mitchell). Mitchell climbed on the unknown hispanic males vehicle to ensure he didn't have immediate access to a weapon, and didn't see anything in plain sight. The Unknown hispanic male and his passenger were handcuffed, and lethal coverage was maintained while emergency personnel removed the top of the vehicle, and placed the unknown hispanic male on a stretcher. (Id at Mitchell) Officers found \$1.00 U.S. dollars, a battery powered cell phone charger, pistol, but no magazine, a bag of methamphetamine weighing 3.17 grams, and a small bag of marijuana weighing 0.35 ounces, on the unknown hispanic male's person. Officers then executed a search warrant for room 128 that was obtained after the police chase. The unknown hispanic male was later identified as 33 year old Jonathan Laverde, and his female passenger

as 39 year old Timmy Lovato. Room 128 was clean of contraband. On March 21, 2016, at 1345 hours an affidavit and Search Warrant for the vehicle were completed, which officers found 114.96 grams of methamphetamine locked in the glove compartment.

Almost a month after the crash, Lovato spoke with law enforcement and admitted to being in police chases in the past, and usually getting away, but that he did not know who was trying to chase him and kill him. (Recording; on April 11, 2016 SA's Dilworth and Jacklyn Yandell interview with Lovato) Lovato's words were misconstrued to make it seem as if he knew he was being chased by police and deliberately ran, which is opposite from the truth.

A federal grand jury indicted Lovato for conspiracy to distribute and possess with intent to distribute methamphetamine (Count One), possession with intent to distribute 50 grams or more, but less than 500 grams, of methamphetamine (Count Seven), possession of a firearm in furtherance of a drug trafficking crime (Count Eight), and being a convicted felon in possession of a firearm (Count Nine). Lovato admitted to possessing the firearm and the drugs.

Mr. Lavato was appointed Clinton W. Cook a civil attorney who had little experience as a criminal lawyer, and unfamiliar with federal practice, as counsel on September 7, 2017. Counsel's initial visit to Lavato, was to introduce himself as Counsel that merely lasted no more than five minutes. On or around September 18, 2017, attorney informs Lavato that he's filed a motion for discovery that they will both go over, and discuss what motions to file and left. Counsel's next visit, was to inform Lavato he was facing 110 to 137 months by pleading guilty to Count Seven and 60 months by pleading guilty to Count Eight. Lavato then ask Counsel about going over the discovery and filing motions like they discussed the prior visit. Counsel claimed he had the discovery but forgot it at his office, and will bring it on his next visit. On October 24, 2017 Counsel visits Lavato advising him to sign the plea bargain. Lavato reminds Counsel about the previous visit when they agreed to go over the discovery and discuss motions to file. Counsel claimed he went over Lavato's discovery and he can not file any motions. Lavato then questions Counsel on different elements of his case, for example filing a Motion to Suppress the gun and drugs, due to the illegal search and seizure performed

by the police, like Lovato and his State Attorney
discussed. Lovato then learned Counsel did not attempt
to learn the facts of Lovatos case. Lovato refused
to plea to an offense which the Counsel has not
investigated, Lovato was also affected by Counsel's
statement "my son died to a drug overdose and this
should be a lesson learned." Lovato apologized
for counsels loss and explained "I am not responsible
for your sons death." Counsel then states "fine we
will get ready for trial, but you will not win."
Counsel then visits Lovato for a second time that
day, and despite Lovatos repeated objections to
plead guilty, Counsel spurns the plea on Lovato
again, refusing to take no for an answer. Counsel
erroneously told Lovato the Judge would not go over
the 197-month statutory maximum. However if
he takes it to trial and loses which he will that
he could in fact face 40 years up to life in a Federal
Prison. Counsel promised to subpoena Rae Brackman
from programs who runs the Step-up Program at the
Lubbock County Detention Center, Counsel also promised
to introduce to the Judge the numerous certificates
into evidence that he was successfully awaiting
himself outside of the "Step-up" program, Counsel

agreed but failed to do so. Lavato then receives addendum a couple days prior to sentencing stating that the Government filed an objection to the report, based on the fact that it omitted paragraph 5K2.1, of the U.S. Sentencing Guidelines, which authorizes the sentencing court to impose a sentence greater than the Guidelines where a death occurred. Lavato then wants to withdraw plea because Counsel promised Lavato that all relevant conduct was taken into consideration in calculating his guidelines, and the probation officer did not identify any factors that would warrant a departure from the applicable sentencing guideline range. Counsel informs Lavato the day before sentencing that he is not allowed to withdraw plea but when the Judge asks if he knows the guidelines are not binding on the Court, and that no one could predict with certainty the outcome of the Court's consideration of the guidelines, and that the actual sentence imposed was solely within the discretion of the Court so long as it was within the statutory maximum. Counsel tells Lavato to say yes he understands, in open court while under oath at the time of his guilty plea because he "does not want to piss

off the Judge by wasting his time."

Unexpectedly the Court imposed a 480-month sentence on each count of conviction, explaining that the sentence was an upward variance because "the nature and circumstances of the offense, and the history and characteristics of the defendant. In this particular case, the defendant, in an attempt to flee from the police, was involved in a traffic collision which resulted in the death of an innocent victim. This factor weighs heavily on the Court in addressing the sentencing objectives this morning."

The Fifth Circuit dismissed Lavato's Subsequent appeal, noting, "the brief does raise one potentially nonfrivolous claim for ineffective assistance of counsel related to the failure to object to a error in the Guidelines calculation, but notes that claims for ineffective assistance should generally be raised on collateral review rather than direct appeal."

The Fifth Circuit then states, "the record is not sufficiently developed to allow us to make a fair evaluation of Lavato's claims of ineffective assistance of counsel. Lavato then filed a §2255 motion.

Reasons for Granting the Petition

As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Siebert v. Williams, 423 U.S. 876 (1975).

It is not enough to assume that counsel thus precipitated into Lovato case thought there was no defense, and proceeding to plea without preparation. No attempt was made to investigate. No opportunity to do so was given. Lovato was immediately hurried to plea..... Under the circumstances disclosed, Lovato was not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. Powell v. Alabama, 287 U.S. 45, 58 (1932).

Lovato can make out a Sixth Amendment claim of ineffectiveness of assistance of counsel only by pointing to specific errors made by counsel. Such as.....

1. Denying Lovato the right to go to trial.
2. Counsel pressured Lovato into pleading guilty.
3. Coercing Lovato to not only plead guilty, but to answer yes to Judges questions such as:
(a) having gone over the presentence report with my lawyer.
4. Complete denial of counsel where attorney spent no more than 30 minutes total with Lovato, from initial visit, until

Feb. 23, 2017 the day of sentencing.

5. Counsel's refusal to learn the facts of the case.
6. Counsel lying to Lavato that the Statutory Maximum sentence was 197 months when the true Statutory Maximum were in fact 480 months to count seven and up to life for Count Eight.
7. Never discussed or went over one piece of discovery with Lavato.
8. Never went over or discussed any motions to file like Counsel promised. Such as "Motion to Suppress" the drugs and gun that Lavato pleaded to, due to a defective search warrant.

9. As stated on the plea agreement on page 6. (par. 12) under Waiver of right to appeal or otherwise challenge sentence:

"The defendant, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) a arithmetic error at sentencing, (b) to challenge the voluntariness of his plea of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

Lavato makes a Sixth Amendment claim because Counsel erred by refusing to file a direct appeal to Lavato's Substantial Rights to an arithmetic error at sentencing: At Level 25 Lavato's sentence range was 110-137 months. But at level 23, The Range falls to 92-115. Even a sentence of 115 months is orders of Magnitude below the 480-month sentence meted out. Lavato should be allowed a remand to Advocate for a lesser variance informed by the Correct

part of Embarrassment.

THE PSR DOES PRESENT POINT OF ERROR.

Lavato also challenges the competence of his trial counsel due to the fact trial counsel failed to file a Motion to vacate his conviction on the ground that evidence of perjury by officers/probation officer (of Lavato admitting running from police when in fact the audio recording states otherwise.) and the Government knew or should have known of that perjury. Which is a major error

Also PSR Error

Lavato also claims page 1 of the PLEA AGREEMENT states 1 Rights of the defendant: Lavato understands that he has the right:

- a. to plead not guilty;
- b. to have a trial by jury;
- c. to have his guilt proven beyond a reasonable doubt;
- d. to confront and cross-examine witnesses and to call witnesses in his defense; and
- e. against compelled self-incrimination.

Which rights a, b, c, and d, were violated as Lavato has been claiming since March 03, 2017., on his direct appeal since Lavato was refused a plea withdrawal hearing by his attorney. The case should have been remanded for

an evidentiary hearing and appointment of new counsel at the District Level. Lurato was pressured into pleading guilty, which prevented Counsel from effectively advocating Lurato's request to withdraw plea. United States v. Sanchez-Barreto, 93 F.3d 17 (1st Cir. 1996)

"The accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty." Quoting Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed. 2d 987 (1983)

Nothing my attorney promised me was true, he did not advocate for me, he objected to nothing, had no further questions, he was just there. Counsel entirely failed to subject to prosecution's case to meaningful adversarial testing, as if Lurato was subject to a complete denial of Counsel and his Sixth Amendment right that makes the adversary process itself presumptively unreliable.

"The Sixth Amendment, however, guarantees more than the appointment of competent counsel. By its terms, one has a right to 'Assistance of Counsel [for] his defence. Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied." United States v. Dewster, 199 U.S. App. D.C. 359, 382, 624 F.2d 196, 219 (Mackinnon, J., concurring), cert. denied, 444 U.S. 944 (1979).

LOWATO demonstrates prejudice based on counsel's failure to object to the dangerous weapon enhancement.

It was in fact noted by THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT in its language.

The brief does raise one potentially non frivolous claim for ineffective assistance of counsel related to the failure to object to a possible error in the Guideline calculation, but notes that claims for ineffective assistance should generally be raised on collateral review rather than direct appeal. "Possessing a dangerous weapon can not be used to enhance a defendant's sentence under U.S.S.G. § 2K2.4 when he was also convicted of a violation of 18 U.S.C.S. § 924 (c) if possessing a dangerous weapon was related to possessing a firearm in relation to a drug-trafficking crime for which he was convicted under 18 U.S.C.S. § 924 (c). Thus, Counsel was ineffective in failing to object to the sentencing judges erroneous enhancement of his sentence. United States v. Franks, 230 F.3d 871.

Lowato received a Addendum to the presentence report, after counsel explained to Lowato Pg. 29 #127 PART C. FACTORS THAT MAY WARRANT DEPARTURE to state: "The Probation officer has not identified any factors that would warrant a departure from the applicable sentencing guideline range." (which by the way was only one of the very few things he need to Lowato, out of the whole PSR)

The Addendum was printed at Friday on February 17, 2017, and was never discussed to Lavato & was received by Lavato in the mail Wednesday on February 22nd, the day before sentencing starting. "The Government filed an objection to the report based on the fact that it omitted paragraph 5K2.1 of the U.S. Sentencing Guidelines which authorizes the sentencing court to impose a sentence greater than that authorized by the guidelines where a death occurred as a result of the defendant's actions. Lavato is entitled to notice of, and the opportunity to be heard on, the intention to depart and the departure was substantively improper. Lavato is entitled to prior notice of the District Court's intention to depart and an opportunity to be heard as to why an upward departure was improper. United States v. Kim, 896 F.2d 678.

Counsel failed the effective assistance of counsel required by the Constitution.

THE COURT: "The file also reflects that the government has filed an objection to the report, Counsel, if you wish, you may address your objection to that report."

Government: "Your Honor, the addendum to the presentence report filed in this case appropriately addressed that objection, your honor."

Court: "All right. Defense have any response?"

Mr. Calk: "No, Your Honor"

THE COURT: "All right. The Court will sustain the objection."

(Transcript of Sentencing Hearing, page 3 of 10 lines 10-19)

Counsel put on no defense. Lavato did not want to enter a plea of guilty to begin with, much less had he known he would get 480 months. Lavato claims his innocence that a death of an innocent victim occurred due to Lavato's actions. Due to the fact an unmarked car with no lights or sirens in plain clothes pulled a gun on Lavato and his girlfriend and never identified himself as a police officer, at a time in our Country when police injustice is very common. Lavato and his girlfriend were in fear for their life. SK2.1 The Sentencing factor that caused the court to vary upward was a fact that should be found by a jury, before it can be used as an enhancement in sentencing. Counsel allowed the Court to sustain the objection to the presentence report. The text of the Sixth Amendment requires not merely the provision of Counsel to the accused, but Assistance, which is to be for his defence. Thus, the core purpose of the counsel guarantee was to assure Assistance at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." United States v. Gonic, 466 U.S. 648, 654 (1984). citing United States v. Ash, 413 U.S. 300, 309 (1973).

The Sentencing process in this case violated the

Due Process Clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lavato did not have adequate notice that the judge might depart upward. due to § 21.1. Without such notice, the Court is denied the benefit of the adversary process. As wrote in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984)

Furthermore the Court noted:

THE COURT: "I note that the addendum also sets out a correction to paragraph 83 of the presentence report, as well as paragraph 120. Any objections to the corrections to the presentence Report?"

Government (Mr. Long): "None from the government, Your Honor."

Mr. Cook: "None from the defense, Your Honor."

Counsel did not object to the 2 point enhancement under § 201.1(b)(1) that should not have been applied to Lavato in addition to the § 924(c) conviction. The § 201.1(b)(1) enhancement was improper as it amounts to double counting the gun charge.

"To satisfy the Constitution, Counsel must function as an advocate for the defendant, as opposed to a friend of the court" Jones v. Barnes, 463 U.S. 745, 758 (1983)

Furthermore Counsel was deficient in providing erroneous legal advice concerning the plea bargain, since

the reliability caused Lavato to lose the benefits of the bargain. Lafler v. Cooper, 566 U.S. 156. Under the circumstances it's reasonable to conclude that Counsel's decision to opt for a quick plea bargain did amount to deficient performance. The Court reasonably could have found that Lavato would not have accepted the plea agreement. Prem v. Moore, 567 U.S. 115. The district court based its sentencing decision on certain extreme facts that violate Lavato's due process clause, and sentenced Lavato to 480 months imprisonment as if he had been convicted by a jury of murder. It is unconstitutional to remove from the jury the assessment of facts that increased the prescribed range of penalties to which Lavato was exposed. Apprendi v. New Jersey, 530 U.S. 466. Counsel's failure to object to the upward variance by the judge, failure to object to the inflammatory remarks the prosecution made during plea associated with state charges, which judge claims was a deciding factor in Lavato's sentence. Failure to object to the Government's evidence that rendered Lavato's plea fundamentally unfair. United States v. Rasmisel, 716 F.2d 301.

From the day ordered, granting motion for discovery from the judge, until the day Lavato was forced unwillingly to sign Plea Agreement after repeated objections and under duress, was 41 days. Counsel's failure to learn the facts

of Lavato's case, which if he did would have given Lavato a more than a fair chance to having the evidence suppressed and "Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented." Betts v. Brady, 316 U.S. 455, 476 (1942). No

such presumption, however, is warranted when a lawyer forces much less advises his client to plea bargain to an offense which the attorney has not investigated. Such conduct is always unreasonable. Lavato can show prejudice if "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. at 59, 106 S.Ct. at 370. In short a

decision to investigate some issues and not others or even a decision to conduct virtually no investigation is governed by Strickland and its progeny. Lockhart v. Collins, 898 F.2d 1027, 1079 (1990).

Counsel's preparation time, counsel's inexperience, the gravity of the charge against Lavato, the complexity of the case being counsel is a civil attorney not criminal, the denial of witnesses on Lavato's behalf, not to mention a recent death of counsel's son due to an overdose of

drugs, not only made it a conflict of interest, but distracted counsel to the point that Counsel was not fully engaged in Lavato's defense. Were circumstances that made it unlikely that Lavato received effective assistance of counsel. United States v. Crone, 466 U.S. 648.

Furthermore to prove his good character, as the court observes, Lavato introduced evidence to his attorney that he was a Mentor in a program that builds character as well as calling on Ms. Rae Brackman as a witness to clarify the nature of these organizations and their activities which would have undermined the judge's determination "to protect the public from further crimes of the defendant." Ms. Rae Brackman was willing and still is ready to testify Lavato has changed numerous lives, not only in the Step-up program, but in the Lubbock County Detention Center's population as well. Lavato inspired the jail to donate to Hurricane Victims in Houston, Lavato also inspired the jail to allow inmates to draw and have officers donate the money made to the Hurricane Victims. Lavato also started a Lubbock County Jail Newspaper to help the inmates that were not in no classes or programs to change their thinking in order to change their circumstances. Lavato has also been involved in numerous plays to stop bullying in the Jail. Along with numerous other activities that Ms. Rae Brackman was

Willing and ready to testify to as a witness on Lavato's behalf. Counsel claimed he was going to call Mrs. Rae Brockman as a witness, however Counsel made his decision not to call Mrs. Rae Brockman as a witness without speaking to her, and without even proving her name. Counsel at the time was aware of these accomplishments, and many more, but offers no tactical or strategic explanation for this lack of investigation. Miller v. Dretke, 420 F.3d 356, 361 (2005). Outside of the Step-up program and before sentencing Lavato in fact produced said certificates to his Counsel which he had in his possession at the time of sentencing, which were not attempts but rather **CERTIFICATES OF COMPLETION**, however Counsel did not introduce included:

1. Parenting While incarcerated
2. First Degree Viewer Guide
3. Beyond Prison, Probation, and Parole
4. Anger Management: SA M HSA + Glasgow
5. Anger Management - Tammy Smith / Education Coordinator
6. Financial Peace Program
7. Parenting with Parents in Crises
8. Parents in Crises

Also in his possession at sentencing Counsel had a schedule of the current classes Lavato was taking which included another: Anger Management,

Emotional Intelligence, Positive Perspectives, Parenting, Financial Education, Yoga, Group Therapy, Accountability Group, Interpersonal Skills, Life Skills, Healthy Habits, Mindfulness, Conflict Resolution, Elife Mens Group (Church), AA./N.A., Slam Poetry, Job Readiness, (2nd) Interpersonal Skills, Art, Orientation, as well as participate on projects, and a (2nd) life skills class. Which I also gave a copy of my weekly scheduled classes before sentencing that he also had in his possession but refused to introduce to the judge.

Also Ms. Tammy Smith the Education Coordinator at the Lubbock County Detention Center was also promised by Counsel to be subpoenaed to testify. Which she was willing and able to testify, that I would go with her to just about every dorm in the jail to teach classes to other inmates on changing their thinking, as well as building character. Lovato was also involved in many other activities with the Education Coordinator Tammy Smith as well as being her personal assistant, that Ms. Tammy Smith was and still is willing to testify to. Lovato also wrote over 36 letters including one to the White House on how the Lubbock County Detention Center's Program Department changed his life, in hopes the rest of the Nation will start a program like the Step up, which a local

News channel KLBK-TV-13 came out in response to Lavato's letter to do a special on the program. Lavato continues to be pro-active however, these are the accomplishments Lavato was involved in at the time of Lavatos sentencing. However Counsel never objected to the aggravating evidence such as the letters submitted to the Court by the children of Mrs. Tran and instead made a statement which sounded as an admission of guilt or claiming responsibility for the death of the victim. The only mitigating evidence introduced was:

THE COURT: "All right, Sir. Defense have any evidence or argument?"
Mr. Cook: "Yes, Your Honor. Mr. Lavato wishes to express his extreme remorse for the consequences of his actions upon the Tran family and others."
(Lines 6-19)
(Trial Transc.)

In that vein, he wishes the court to rule that he is attempting to take his life in a more positive direction through all the efforts he can at the place where he is incarcerated. He is enrolled in the Step Up program, which attempts to improve his emotional skills, interpersonal skills, his life skills, and personal growth, and he would ask the Court to take note of these efforts in order for him to better allow himself to express his remorse for the people he has harmed."

From this statement it is clear that the Counsel for Lavato did not give the Judge the opportunity to

evaluate the evidence in mitigation and was unable even to consider the evidence. "Neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."

Eddings v. Oklahoma, 455 U.S. 104, 114. Counsel was ineffective for not even giving the judge a chance to examine the evidence of "aggravating" and "mitigating" factors at the sentencing hearing. And where sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[highly] relevant -- if not essential -- to the selection of an appropriate sentence" Williams v. New York, 337 U.S., at 247 (emphasis added)

Mr. Justice Black, stated in Williams v. Oklahoma, 358 U.S., at 585.: "[in] discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." (Emphasis added.) It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed. A punishment is disproportionate "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on

either ground." Collier v. Georgia, 433 U.S. 584, 592 (1977).

Governments conditory allegations that Lavato "admitted that this was not his first police chase and that he usually gets away." was not properly determined to be voluntary.

The procedure of submitting the issue of the alleged confessions voluntariness does not satisfy the Due Process and the Fourteenth Amendment requirements; Counsel rendered ineffective assistance of counsel because Lavato was entitled to a hearing to determine the voluntariness of his alleged confession. Which allows a jury to make the ultimate determination of the confessions voluntary character and its truthfulness. Stein v. New York, 346 U.S. 156 (1953) also Wicker v. Denver, 378 U.S. 368.

Further, Lavato pled guilty under a mistaken belief that the statutory minimum sentence was 110 months and if the Court decides to run Count 8 consecutive to Count 7 the maximum sentence he could receive would be 197 months. Counsel informs Lavato the only way he could receive 480 months on the drug charge (Count 7) and life on the gun charge (Count 8) was through trial. "Failing to properly advise the defendant of the maximum sentence that he could receive falls below the objective standard required by Strickland. When the defendant lacks a full understanding of the risks going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court."

Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995). Lavato was denied his constitutional right to effective counsel relative to his initial decision to stand trial rather than plead guilty. Lavato claims counsel either purposely or was unfamiliar with the Sentencing Guidelines and substantially misstated Lavato's exposure if he were to be found guilty at trial. Counsel's assistance fell well below the objective standard of reasonableness required by Strickland.

The Supreme Court ruled that, "Quite to the contrary, our jurisprudence suggests that 'any amount of actual jail time has Sixth Amendment significance; which constitutes prejudice for purposes of the Strickland test.'" United States v. Cole, 349 F.3d 837, 842 (citing and quoting Glover v. United States, 531 U.S. 198, 203, 148 L. Ed. 2d 604, 121 S.Ct. 696 (2001), and United States v. Franks, 230 F.3d 811, 815 (5th Cir. 2000) (finding prejudice where defendant was sentenced under Guidelines range of 70 to 87 months instead of the proper 57 to 71 month range)). Franks applies to Lavato's case where counsel failed to object to the 2 point enhancement under § 2D1.1 (b)(1) that should not have been applied to Lavato in addition to the § 924(c) conviction. Showing prejudice, that put Lavato's Guideline range to 110-137 months, instead of the proper 92-115 months. Whether there was a reasonable probability that, but for Counsel's actions, Lavato would have received a lesser sentence than he did turns on first, whether Lavato

would have pleaded guilty if he knew of the true criminal penalty he faced.

In Regards to the hotel search warrant where Lavatos arrest was illegal because it was not based on probable cause where the only basis for Lavatos arrest was the informants tip, which did not meet the legal standards for probable cause. The facts asserted in the affidavit were insufficient under the totality of the circumstances to even establish that Probable cause existed for the issuance of a search warrant.

The officers affidavit did not indicate how the Informant knew Lavato, what his relationship to him, if any, what Lavatos correct name was, or how long the Informant had known Lavato. There was several statements in his affidavit with reckless disregard for the truth and knowingly made false assumptions and statements regarding Lavatos identity. Davis v. State, 144 S.W. 3d 192 Arrest was not based on probable cause where arresting officer had only very sketchy description of suspect which is equally applicable to great many individuals in area. Commonwealth v. Jackson (1975) 459 P.2d 669, 331 A.2d 189. Furthermore the information from Informant lacked any indicia of reliability and was vague and generalized. Any finding of reasonable suspicion would have to rest on observation alone and not on the tip. The unremarkable comings

18

and going loading duffle bags from the room into the car and preparing to leave failed to provide any indicia of illegal conduct for reasonable suspicion analysis. Due to the fact this is common at a hotel, and any hindsight officer would say there was no reasonable suspicion and trying to stop Lavato and his girlfriend from leaving the hotel in unmarked vehicles in plain clothes without identifying himself as an officer, with no lights or sirens activated, given that Lavato did not fit the description given by police was unlawful, and the evidence should have been suppressed. Carter v. Texas, 211 F.3d 1186 Counsel rendered ineffective assistance of counsel for failure to file Lavato's Motion to Suppress evidence obtained from an illegal search.

Conclusion and Prayer

For these reasons, Petitioner Jonathan Lavato asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Dated December 31, 2020.

Respectfully Submitted,
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