

No.

IN THE
SUPREME COURT OF THE UNITED STATES

MELCHOR MUNOZ,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals**

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTION PRESENTED FOR REVIEW

Whether – in a case where (1) the revocation of a criminal defendant’s citizenship is *mandatory* as a result of a plea to a criminal conviction but (2) the defendant was told during the plea proceeding only that the Government “might” seek revocation – the 28 U.S.C. § 2255 “date on which the facts supporting the claim presented could have been discovered through the exercise of due diligence” trigger *per se* begins to run on the date that the Government sends a letter indicating an intent to bring a revocation proceeding that does *not* specifically state that the revocation proceeding is *mandatory* rather than discretionary.

B. PARTIES INVOLVED

The parties involved are identified in the style of
the case.

**C. TABLE OF CONTENTS AND TABLE OF
CITED AUTHORITIES**

1. TABLE OF CONTENTS

A.	QUESTION PRESENTED FOR REVIEW . .	i
B.	PARTIES INVOLVED	ii
C.	TABLE OF CONTENTS AND TABLE OF AUTHORITIES	iii
1.	Table of Contents	iii
2.	Table of Cited Authorities	iv
D.	CITATION TO OPINION BELOW	1
E.	BASIS FOR JURISDICTION	1
F.	STATUTORY PROVISION INVOLVED	2
G.	STATEMENT OF THE CASE	2
H.	REASON FOR GRANTING THE WRIT	9
	The question presented is important	9
I.	CONCLUSION	17

2. TABLE OF CITED AUTHORITIES

a. Cases

<i>Gonzalez v. United States</i> , No. 19-11182 (11th Cir. Nov. 20, 2020)	12
<i>Padilla v. Kentucky</i> , 599 U.S. 356 (2010)	14
<i>Solano v. United States</i> , 2013 WL 3456739 (S.D. Ohio Jul. 9, 2013)	15-16
<i>United States v. Choi</i> , 581 F. Supp. 2d 1162 (N.D. Fla. 2008)	11

b. Statutes

21 U.S.C. § 841(a)(1)	2-3
21 U.S.C. § 841(b)(1)(A)(ii)	2-3
21 U.S.C. § 841(b)(1)(B)(vii)	2-3
28 U.S.C. § 1254	1
28 U.S.C. § 2255	<i>passim</i>
28 U.S.C. § 2255(b)	15
28 U.S.C. § 2255(f)(4)	2, 9, 11, 13

The Petitioner, MELCHOR MUNOZ, requests that the Court issue its writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on November 8, 2021. (A-3).¹

D. CITATION TO OPINION BELOW

The opinion below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the opinion/final judgment of the Eleventh Circuit Court of Appeals.

¹ References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number.

F. STATUTORY PROVISION INVOLVED

A 28 U.S.C. § 2255 motion must be brought within a one-year limitations period. The period runs from the latest of four possible triggers – and the trigger that applies in this case is “the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2255(f)(4).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case concerns the district court’s denial of the Petitioner’s 28 U.S.C. § 2255 motion. The Petitioner was charged in a superseding indictment with conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana, pursuant to 21 U.S.C.

§ 841(a)(1), (b)(1)(A)(ii), and (b)(1)(B)(vii). The procedural history of the case – as set forth in the district court’s § 2255 order – is as follows:

On June 6, 2009, Mr. Munoz applied to become a United States citizen. . . . On September 8, 2009, . . . Mr. Munoz took the oath and became a citizen.

. . . On July 26, 2018, the government filed a complaint in a separate proceeding in this court seeking to revoke Mr. Munoz’s citizenship.

. . . .

On June 7, 2011, a grand jury indicted Mr. Munoz and others on a single count: conspiring between January 1, 2010 and May 30, 2011 to distribute and possess with intent to distribute cocaine and marijuana. ECF No. 46. A superseding indictment added defendants but did not change the dates of the alleged conspiracy. ECF No. 83. A second superseding indictment expanded the dates, now alleging a conspiracy between June 1, 2008 and May 30, 2011. ECF No. 202.

Mr. Munoz pled guilty on April 9, 2012. He signed a plea agreement that

included this statement: “The Defendant understands that this conviction *may* adversely affect the Defendant’s immigration status and may lead to revocation of his citizenship and deportation.” ECF No. 321 at 3 (emphasis added). At the plea proceeding, during which Mr. Munoz was under oath, the government’s attorney addressed the possible effect of the guilty plea on Mr. Munoz’s citizenship:

Mr. Munoz is a nationalized citizen of the United States, originally from Mexico. Mr. Munoz was nationalized, I believe, in October of 2009. The law provides that, if someone was engaged in criminal activity and thus not of good moral character as they professed when becoming a citizen, that that citizen is subject to revocation.

So one of the *potential* consequences of this plea of guilty is that the government *may* seek to revoke Mr. Munoz’s citizenship and have him deported at the conclusion of his sentence. *The*

*decision has not been made
whether or not to do that,
but that is a possibility in
this case.*

ECF No. 587 at 18 (emphasis added). Mr. Munoz's attorney responded that this was in the plea agreement and "was reviewed in detail and discussed with my client." *Id.* at 19.

I followed up, making sure Mr. Munoz understood:

I am not a judge who deals with citizenship matters. So I will have nothing to do with the question of whether this case has any effect on your citizenship status. What I want you to understand is – well, just what I told you, I'm not the judge that deals with this. This *could* have an effect on your citizenship status. *I don't know that it will; I don't know that it won't.* I just want to make sure that nobody has made any promises to you about whether or not this will affect your citizenship

status.

Id. at 19-20 (emphasis added). Mr. Munoz confirmed that nobody had made any promises to him on this subject. *Id.* at 20.

After this exchange, Mr. Munoz pled guilty. He was sentenced on July 27, 2012, to 188 months in prison, the low end of the guideline range. He did not appeal. Based on United States Sentencing Guidelines Amendment 782, the sentence was later reduced to 151 months. Mr. Munoz is serving that sentence.

(A-20-24).

On October 29, 2018, the Petitioner filed a § 2255 motion. In the motion, the Petitioner asserted that his guilty plea was involuntary and/or defense counsel rendered ineffective assistance of counsel by misadvising him regarding the impact that the conviction in this case would have on his citizenship. The Government subsequently responded to the § 2255 motion and the Petitioner filed a reply to the

Government's response. The magistrate judge thereafter issued a report and recommendation recommending that the Petitioner's § 2255 motion be denied, finding that the Petitioner's § 2255 motion was untimely. The Petitioner timely filed objections to the report and recommendation.

On November 23, 2020, the district court accepted – but on different grounds – the magistrate judge's recommendation that the Petitioner's § 2255 motion be denied (i.e., the district court found that the Petitioner's § 2255 motion was timely, but the district court proceeded to deny the motion on the merits). (A-18). In its order, the district court granted a certificate of appealability on the following issue:

whether Mr. Munoz is entitled to relief on the ground that his attorney, the government, and the court told him at the time of his guilty plea that the resulting conviction might, not that it necessarily

would, lead to revocation of his citizenship.

(A-41-42).

On appeal, the Eleventh Circuit Court of Appeals affirmed the denial of the Petitioner's § 2255 motion – but it did so on a different ground than the one relied upon by the district court: the Eleventh Circuit concluded that the Petitioner's § 2255 motion was untimely (and therefore the Eleventh Circuit declined to address the merits of the motion). (A-3).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

In the opinion below, the Eleventh Circuit Court of Appeals concluded that the Petitioner's ' 28 U.S.C. § 2255 motion is "time barred":

[The Petitioner] he knew to a certainty that the Department would revoke his citizenship when he received its letter dated September 25, 2017.

(A-14). For all of the reasons set forth in the district court's § 2255 order, the Eleventh Circuit's opinion is incorrect:

A § 2255 motion must be brought within a one-year limitations period. The period runs from the latest of four possible triggers. [] The trigger that applies in this case is "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4).

This order analyzes the limitations issue on the assumption that Mr. Munoz is correct on the merits – that revocation

is mandatory based on the criminal conviction. Whether that assumption is indeed correct – that is, whether Mr. Munoz is right on the merits – is addressed in the next section of this order.

By letter dated September 25, 2017, the government notified Mr. Munoz of its intent to bring a revocation proceeding. On October 26, 2017, an immigration attorney gave the government notice of his representation of Mr. Munoz. The government says that with diligence Mr. Munoz could have discovered that revocation was mandatory based on the September 25 letter. Indeed, the government says Mr. Munoz *did* recognize this, as shown by his retention of an immigration attorney. This occurred more than one year before October 29, 2018, the date on which the § 2255 motion was filed. The magistrate judge entered a report and recommendation accepting this argument and concluding the § 2255 motion is untimely.

The flaw in the argument is this. The September 25, 2017 notice indicated only that the government intended to seek revocation, not that this was mandatory. Mr. Munoz was told at the plea proceeding in 2012 that the government might seek revocation; his

complaint now is not that the government *could* do this, but that the government *was required* to do this. Nothing in the September 25 notice indicated a revocation proceeding was mandatory rather than discretionary. So nothing in the September 25 notice informed Mr. Munoz of the “facts supporting the [current] claim.” 28 U.S.C. § 2255(f)(4).

Nor does the record indicate that the retention and appearance of an immigration attorney provided immediate notice to Mr. Munoz that revocation was mandatory. Attorneys, even good ones with expertise in a particular area, often must do research to determine the law applicable in specific circumstances. Mr. Munoz’s attorney had dealt with a similar case in this court, *United States v. Choi*, 581 F. Supp. 2d 1162 (N.D. Fla. 2008), but that case involved not revocation of citizenship but removal of a noncitizen – a markedly different issue governed by different statutory provisions. The record does not indicate that with diligence Mr. Munoz could have learned from the immigration attorney by October 29, 2017 – a date one year before he filed the § 2255 motion – that the information given Mr. Munoz in connection with the guilty plea was incorrect.

That the limitation period runs from the date when Mr. Munoz knew or

should have known the information was wrong is consistent with *Gonzalez v. United States*, No. 19-11182 (11th Cir. Nov. 20, 2020). There an alien defendant filed a coram nobis petition challenging a guilty plea entered in reliance on incorrect advice that the plea would not be a basis for deportation. The court held the timeliness of the petition should be analyzed from, at the latest, the date when the defendant knew the advice was wrong. The petition was filed 20 months after that date and thus was untimely. Here, in contrast, the delay from the date when Mr. Munoz knew or should have known the advice he received was wrong was less than the one-year limitations period.

In sum, the record does not show that the § 2255 motion is barred by the statute of limitations.

(Doc 614 - Pgs 5-8). Consistent with the district court's well-reasoned analysis, the Petitioner's § 2255 motion is *not* time barred. The Petitioner was told at the plea proceeding in 2012 that the Government *might* seek revocation – not that revocation was *mandatory*. As correctly explained by the district court, *nothing* in the

Government's September 25, 2017, notice indicated a revocation proceeding was *mandatory* rather than discretionary – so nothing in the September 25th notice informed the Petitioner of the “facts supporting the [current] claim.” 28 U.S.C. § 2255(f)(4). And as found by the district court, the record does *not* indicate that with diligence the Petitioner could have learned from the immigration attorney by October 29, 2017 – a date one year before he filed the § 2255 motion – that the information given the Petitioner in connection with the guilty plea was incorrect.

The Petitioner asserts that the § 2255 one-year time period began to run on the date that the Government actually filed the complaint to revoke his naturalization (i.e., July 26, 2018) – and the Petitioner filed his § 2255 motion within one year of that date. Prior to the date that the Government filed the

complaint to revoke the Petitioner's naturalization, the Petitioner was on notice only that his guilty plea "could" affect his citizenship – not that the guilty plea "would"/"will" affect his citizenship (which was the correct advice required by *Padilla v. Kentucky*, 599 U.S. 356 (2010)). In finding that the time period in question began to run on an earlier date, the Eleventh Circuit refers to dates that letters were sent. Contrary to the Eleventh Circuit's finding, the Petitioner submits that the application of the § 2255 limitations period requires an easy-to-apply triggering mechanism. In this case, the triggering mechanism was July 26, 2018 – the date the Government actually filed the complaint to revoke the Petitioner's naturalization.

Alternatively, it was improper for the Eleventh Circuit to reverse the district court's finding regarding timeliness without first remanding the matter for an

evidentiary hearing. § 2255 requires a court to hold a hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). The motion, files, and records in this case do not “conclusively” show that the Petitioner knew – or could have discovered through the exercise of due diligence – that his citizenship was subject to *mandatory* revocation (as a result of his guilty plea) more than one year prior to the date that he filed his § 2255 motion. *See, e.g., Solano v. United States*, 2013 WL 3456739 at *3 (S.D. Ohio Jul. 9, 2013) (“The United States Magistrate Judge is DIRECTED to appoint counsel to represent Petitioner, and to conduct an evidentiary hearing on: (1) the question of whether the Motion to Vacate, Set Aside or Correct Sentence was timely filed under § 2254(f)(4), i.e., when the facts supporting Petitioner’s

ineffective assistance of counsel claim could have been discovered through the exercise of due diligence . . .”).

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to clarify the proper application of the § 2255 “date on which the facts supporting the claim presented could have been discovered through the exercise of due diligence” trigger. The issue in this case is important and has the potential to affect all § 2255 motions nationwide. Accordingly, for the reasons set forth above, the Petitioner prays the Court to grant this petition for writ of certiorari in order to address this important issue.²

² Because the Eleventh Circuit Court of Appeals failed to address the merits of the Petitioner’s underlying § 2255 motion, the Petitioner is hopeful that the Court will ultimately grant relief and thereafter remand this case to the Eleventh Circuit with directions that the court address the merits of the Petitioner’s § 2255 motion/appeal.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER