No. _____

In The
Supreme Court of the United States

HECTOR MENDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fifth Amendment of the United States Constitution establishes that the federal government cannot deny a person life, liberty, or property "without due process of law." Additionally, 28 U.S.C. § 2255 guarantees a federal prisoner who files a motion for relief "shall" receive a "hearing" "[u]nless the motion and files and records of the case conclusively show the prisoner is entitled to no relief."

a) Does a district court deny a federal prisoner the constitutional or statutory "right to be heard" by completely misreading or ignoring the "files and records" of the case and thereafter erroneously denying relief on procedural grounds without a hearing?

b) Does a United States Court of Appeals deny a federal prisoner the constitutional or statutory right to be heard when it dismisses a Motion for Certificate Appealability on the purported ground that the prisoner failed to "meaningfully challenge" the district court's decision to dismiss on procedural grounds without a hearing, when the prisoner clearly did meaningfully challenge the district court's decision, both in the district court and in the appellate court?

PARTIES TO PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner Hector Mendez, is currently incarcerated in the Federal Bureau of Prisons. This Petition arises from a federal habeas corpus proceeding. There are no corporate parties involved in this case.

LIST OF RELATED PROCEEDINGS

United States v. Mendez, No. 7:15-CR-938-2 (S.D. Tex. Jan. 3, 2017 (Judgment Issued)).

United States v. Mendez, 717 Fed. Appx. 502, 2018 WL 1652414 (5th Cir. Apr. 5, 2018).

Mendez v. United States, No. 7:19-CV-00227 (S.D. Tex. Filed July 2, 2016).

Mendez v. United States, No. 22-40676 (5th Cir. Feb. 24, 2023 (Denying COA)).

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

Petitioner Hector Mendez respectfully petitions for a writ of certiorari to review the Order of the United States Court of Appeals for the Fifth Circuit dismissing his Motion for Certificate of Appealability.

OPINION BELOW

The Fifth Circuit's Unpublished Order denying Petitioner's Motion for Certificate of Appealability is attached in the Appendix (App. 1).

STATEMENT OF JURISDICTION

On February 24, 2023, the Fifth Circuit issued its Unpublished Order denying Petitioner a Certificate of Appealability regarding the district court's denial of his 28 U.S.C. Section 2255 Motion, without a hearing. The mandate issued on April 18, 2023. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution establishes that the federal government cannot deny a person life, liberty, or property "without due process of law."

28 U.S.C. § 2255 guarantees a federal prisoner who files a motion for relief "shall" receive a "hearing" "[u]nless the motion and files and records of the case conclusively show the prisoner is entitled to no relief."

28 U.S.C. § 636 requires a district court to "make a de novo determination of those portions of the [magistrate judge's] report . . . to which objection is made."

STATEMENT OF THE CASE

I. Factual History

I.A. The Initial Drug Bust

Petitioner Hector Mendez ("Mendez") was an officer with both the Mission Police Department and the Drug Enforcement Administration ("DEA"). His lengthy record was unblemished, until 2015 when a confidential informant ("CI") by the name of Reynol Chapa-Garcia ("Chapa") made allegations against Petitioner that would ruin Petitioner's life. In early 2012, Chapa was working as a CI for the DEA posing as a drug trafficker. Mendez was his handler. Chapa was introduced to a drug supplier named Salvador Gonzalez. ROA.2096:16-23. Gonzalez hired Chapa to ship a load of cocaine up to North Carolina. ROA.2099:5-3000:13, 2102:17-18.

Chapa was supposed to get the cocaine from Gonzalez then turn that cocaine (and Gonzalez) over to the DEA a la Mendez. Things seemingly went according to plan. On July 28, 2012, Mendez, working with Mission

Police Department K-9 Officer Charles Lopez, seized a vehicle purportedly containing the load of cocaine supplied to Chapa by Gonzalez. Mendez maintained that until that point, Chapa had physical control of the cocaine that he had received from Gonzalez three days earlier. Eventually, Gonzalez was arrested by Mendez and charged by federal complaint with cocaine trafficking.

I.B. The Confidential Informant's Allegation About the Conspiracy with Petitioner

Gonzalez was arrested in October 2012 on Mendez's federal complaint. Gonzalez eventually confessed that he had left the cocaine with Chapa at Chapa's house the morning of Wednesday, July 25, 2012. He contended, however, based on appearance and purity level, that the cocaine seized by Mendez and Lopez three days later was not the same cocaine he had delivered to Chapa.

In late 2014, federal agents began to question Chapa regarding Gonzalez's claims. Eventually, in 2015, Chapa began to point the finger at his DEA handler—Petitioner Mendez. By the time of Petitioner's 2016 trial, Chapa testified that he and Mendez had hatched a scheme. ROA.2536:22. According to Chapa's testimony, when Chapa got in a load of cocaine the plan was that he would secretly give that cocaine to Mendez. ROA.2545. Mendez would then take the cocaine from Chapa. ROA.2545-2548. Mendez would have part of the stolen cocaine mixed with a cutting agent (so as

to increase the volume of the cocaine while decreasing its purity). ROA.2536, 2578. He would then have the low-grade cocaine re-packaged. ROA.2536. Mendez would next buy a car and load it with the re-packaged cocaine. ROA.2536. He would abandon that car in a public location for police to then seize it. ROA.2536. Then Chapa and Mendez could sell the uncut stolen cocaine and pocket the profits. ROA.2542-2548.

When Gonzalez entered the picture in early 2012, Chapa testified he and Mendez saw their chance to put their plan into motion. Gonzalez ultimately delivered 15 kilograms of cocaine to Chapa's house the morning of Wednesday, July 25, 2012. ROA.2436, 2447. The story as related by Chapa at trial was that as soon as Gonzalez left the house, Chapa called Mendez. ROA.2545. Mendez came over to Chapa's house and took the cocaine. ROA.2545. He returned that same morning and took the DVD from Chapa's security system, too. ROA.2749. Mendez had the cocaine cut and repackaged (by unnamed people). ROA.2546, 2548. He acquired a car, put the repackaged cocaine in the car, and set up a sham drug bust with his co-defendant, Officer Charles Lopez. ROA.2548. The stolen high-purity cocaine was never discovered.

But Gonzalez knew his product. When he saw photographs of the bundles the police had seized, he claimed to know the packaging was not the same as the bundles of cocaine he had given to Chapa. ROA.2478, 3430. He told his attorney, who in turn got the drugs tested. ROA.3430. Those tests indicated the cocaine Lopez had seized was only eighteen percent

pure, which is far too low of a purity level for cocaine coming across the border. ROA.2476, 3439. Gonzalez—a drug dealer of standards—said that was a much lower purity level than what he would have had transported, and the AUSA believed him. ROA.2476, 3439.

Armed with the information from Gonzalez, the AUSA went back to Chapa and demanded an explanation. That was when Chapa eventually offered the story about the purported scheme between him and Mendez. ROA.3220. Conspiracy charges against both Chapa and Mendez resulted, based on Chapa's story. Shortly before trial, Officer Lopez was also indicted in a superseding indictment that omitted Chapa. Lopez's charge was making false statements to federal agents during the Mendez investigation. *See* 18 U.S.C. § 1001. After Mendez was sentenced, Lopez went to trial and was *acquitted*.

To this day, Mendez maintains that he and Chapa never had any kind of nefarious plan. He knew about the Gonzalez drug shipment as part of his work with the DEA. As far as he knows, Chapa maintained possession of the cocaine until the July 28 seizure. He never picked up the cocaine on the morning of July 25, 2012, he never returned that same morning to pick up the DVD from Chapa's security camera, and he never possessed cocaine or conspired with Chapa.

II. Procedural History

The Government proceeded to trial against Mendez in July 2016. CI Chapa was the Government's star

witness. Mendez's defense was that he never picked up the cocaine on July 25, 2012, or at any time, and was not part of any conspiracy. It was a test of whether the jury would believe Chapa's incentivized, uncorroborated testimony beyond a reasonable doubt or believe Mendez's defense. The jury believed Chapa and found Mendez guilty. In December 2016, after hearing and denying a Motion for New Trial, the Court sentenced Mendez to a term of 300 months of incarceration. ROA.3611.

In January 2017, while Mendez's case was on direct appeal, the Government tried co-defendant Charles Lopez for making false statements to federal agents during the Mendez investigation. Lopez's defense focused on the many problems in the Government's timelines of events, specifically on July 28, 2012, when Lopez seized the abandoned car containing the cocaine. Lopez's attorneys further asserted the only reason he was indicted was to prevent him from testifying in Mendez's favor at Mendez's trial. Lopez was acquitted. *United States v. Lopez*, 07:15-CR-00938-3, Judgment of Acquittal, doc. 182 (Jan. 20, 2017). Lopez and his attorney both provided affidavits that were filed with Petitioner's Section 2255 Motion.

III. The 28 U.S.C. Section 2255 Proceedings

III.A. The Grounds Raised and the Extensive Evidence Offered In Support of Them

After the conviction was affirmed on appeal, Mendez filed a timely 28 U.S.C. Section 2255 Motion based,

in large part, upon newly discovered, highly exculpatory, cell phone location records. ROA.6-23. **These were Petitioner's cell phone location records which the FBI did not release until *after* Petitioner was sentenced**. ROA.9-12. A **Government witness** testified at Petitioner's trial that said records did not exist. Specifically, the Section 2255 Motion included assertations that the Government's withholding of the cell phone location data records violated *Brady v. Maryland* (ground 1), Petitioner's right to confront and cross-examine witnesses (ground 2), and his Sixth Amendment right to compulsory process and to present a defense (ground 3). ROA.9, 10, 12. Petitioner supported these grounds with a copy of the newly discovered cell phone location records from the FBI report **dated after his sentencing**. ROA.97-104. He additionally attached the affidavit of a cell phone location expert who extensively discussed and analyzed the new cell phone location records. ROA.29-89. In short, Petitioner was nowhere near Chapa's residence the morning of July 25, 2012, or at any time from July 25 until the bust on July 28. He could not have taken possession of the cocaine as Chapa testified. The Government's conspiracy narrative completely unravels.

Petitioner also raised two grounds based on information contained in an exculpatory letter from the Mission Chief of Police to FBI Case Agent Ryan Porter. In the letter, the Chief explained how the Government was not accurately interpreting a dispatch log created by his police department relating to Lopez's seizure of the drugs. ROA.141. That exculpatory letter was not

presented at Mendez's trial. The information contained in that letter was never presented. It is not clear whether the Government had turned over the letter and trial counsel simply missed it or whether the Government never turned it over to begin with, although it is worth noting that the Government has never said the letter was disclosed. Consequently, Petitioner pled the error in the alternative—either counsel was ineffective for not presenting the exculpatory information in the letter (ground 4) or the Government violated *Brady* by withholding it (ground 5). ROA.13, 15. Petitioner supported these grounds of error by attaching to his Section 2255 Motion the letter itself. ROA.141-142.

Next, Petitioner attacked the Government's threats and ultimate indictment of Charles Lopez for making false statements to federal agents. By making Lopez a co-defendant shortly before Mendez's trial, he was no longer able to testify on Petitioner's behalf. The tactic essentially suppressed testimony favorable to Petitioner. Accordingly, Petitioner asserted the Government had improperly used its power to threaten and then indict a co-defendant in a way that violated Mendez's due process rights, his right to compulsory process, and his right to present a defense (ground 6). ROA.17. Applicant supported this ground of error by obtaining and submitting the affidavits of Lopez and Lopez's trial attorney. ROA.92-93, 95-96.

Finally, Petitioner presented favorable testimony at the hearing on his Motion for New Trial that was contrary to Chapa's relevant trial testimony. He then attempted to recall Chapa as a witness to confront (the

Government's star witness from trial) with that testimony. When he put Chapa on the stand, however, Chapa all of a sudden decided to plead the Fifth. ROA.3729, 3783. The court allowed it. ROA.3729, 3783. Accordingly, Petitioner averred this move violated his rights to due process, to compulsory process, to cross-examine a witness, and to present a defense (ground 7). ROA.19. Chapa went on to again testify as the Government's star witness, albeit less successful, in the Charles Lopez trial.

III.B. The Rulings of the Courts Below

The United States Magistrate Judge (USMJ) filed her report and recommendations (R&R) **without holding a hearing** on August 24, 2022. Petitioner filed timely and specific objections. The district court approved the USMJ's R&R and denied Petitioner a Certificate of Appealability. Petitioner then filed a timely and extensive Motion for Certificate of Appealability in the Fifth Circuit Court of Appeals. A three-judge panel from the Fifth Circuit issued a brief, unpublished order claiming Petitioner had somehow "abandoned" his argument that his constitutional claims were not procedurally barred.

REASONS FOR GRANTING THE PETITION

At the most basic level, a court in post-conviction review hears arguments, reviews evidence, and makes a ruling. This is procedural due process of the Fifth

Amendment boiled down to its barest bones. U.S. CONST. amend. V. To this day, this has never happened in this case. Petitioner made arguments and presented affidavits in support of those arguments. The USMJ did not conduct any hearing despite the mandates of Section 2255. *See* 28 U.S.C. § 2255 (guaranteeing a federal prisoner who filed a motion for relief "shall" receive a "hearing" "[u]nless the motion and files and records of the case conclusively show the prisoner is entitled to no relief."). Instead, the USMJ ruled said Petitioner had not discussed caselaw and had presented no evidence in support of his assertions. This is easily proven false by the court's own records. Petitioner offered extensive briefing. He submitted *five* affidavits along with highly exculpatory cell phone location records in the FBI's sole possession that were not available until after Petitioner's Motion for New Trial was denied and he was sentenced.

One could imagine how quickly Petitioner rushed to correct the bafflingly egregious misstatements of record facts in his extensive Objections to the R&R. In reviewing the USMJ's R&R, the district court was tasked with "mak[ing] a de novo determination" on the objected-to matters. *See* 28 U.S.C. § 636. Rather than doing so, the district court, in one line, adopted the R&R.

Petitioner then went to the Fifth Circuit Court of Appeals and offered still more briefing explaining how he actually did offer significant new evidence, affidavits, and briefing in support of his Section 2255 Motion. He described how the R&R was flat wrong, not on

matters of legal reasoning but on recitation of actual facts. He pleaded with the Fifth Circuit to make the court below consider—or at least acknowledge—the briefings and affidavits *filed of record* that it said did not exist. He took up almost all of the permitted 13,000 word count in doing so. The Fifth Circuit found Mendez failed to meaningfully challenge the district court's ruling.

The usual course of judicial proceedings is to hear evidence, analyze the law, and make a ruling. Something inexplicable happened with the initial court in this case which caused it to misrepresent that there was no briefing and no evidence in support of Petitioner's assertions. Every court after that has essentially rubber stamped the initial court. Litigating this case has truly been a twilight zone. This is one of those rare cases where the courts below "so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

I. Petitioner's Section 2255 Motion Has Been Repeatedly Denied Based on Significant Misstatements of Record Facts Regarding Newly Discovered Cell Phone Location Records

This case is—or at least should be—remarkably straight-forward. Petitioner, a distinguished police officer, was found guilty of possessing and conspiring to

possess cocaine with the intent to distribute it. There was no objective evidence. Everything hinged on the incentivized testimony of a confidential informant. Petitioner knew he was not at the key locations at the key times (July 25, 2012), but all he had was his word. Cell phone location records would have supported his defense, but everyone thought those records could never be located because too much time had passed. The Government's witness testified at trial that the best they could likely ever hope for was a reprint of a cell phone bill, which does not contain location information.[1]

But miracles happen. **After Petitioner was sentenced**, the FBI released the cell phone *location* records to Petitioner's co-defendant, who eventually got them to Petitioner. Petitioner brought those records to the court in his initial Section 2255 proceedings, thinking surely he would at least get a hearing.[2] *See* 28 U.S.C. § 2255. To his astonishment, however, the USMJ issued an R&R replete with blatantly incorrect factual

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[1] The USMJ somehow misread this testimony to mean the cell phone location records were actually offered into evidence at Petitioner's trial, but they unequivocally and indisputably were not. The only thing offered at trial was a bill reprint—a matter discussed at length throughout the briefing.

[2] Petitioner based his first three grounds on the newly discovered cell phone location records, contending the failure to disclose the records prior to trial violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), his Sixth Amendment rights to confront and cross-examine adverse witnesses, and his rights to compulsory process and to present a defense. ROA.9-12.

statements of record facts before recommending a denial of relief.

I.A. The Incorrect Record Facts Recited in the R&R

- "The Government included Movant's cell phone records in its exhibit list prior to trial." ROA.392.
- "[T]he Government introduced Exhibit 114 into evidence—without objection—which included the cell phone records in question." ROA.393.
- "[Petitioner's trial attorney] could have obtained those [cell phone] records at any time." ROA.393.
- "[Petitioner] could have obtained—by way of subpoena or otherwise—his own cell phone records prior to trial. Without explanation, [Petitioner] failed to do so." ROA.393-394 (citations omitted).
- "Movant knew—or should have known—of the content and substance of his own phone records." ROA.394.

I.B. The Legal Conclusion Based Upon the Incorrect Recitation of Facts

Because Petitioner did not raise the issue related to the cell phone location records on direct appeal, they were procedurally barred

from being considered in the Section 2255 proceedings. ROA.392.

"[Petitioner] has wholly failed to prove the first prong of the *Brady* analysis; [sic] specifically, that the Government suppressed evidence . . . Accordingly, [Petitioner's] first three claims in his § 2255 motion to vacate—which are predicated on the so-called 'withheld' exculpatory cell phone records—conclusively fail." ROA.395.

I.C. What the Record Actually Proves

- The Government's witness at trial testified Sprint had tried to recover the cell phone location records, but that those records were only saved for eighteen months. ROA.3117-3118. Several years had passed before the investigation into Petitioner had even started, so the records were likely irretrievable. ROA.3117-3118 (cell phone location records were "kept in a searchable format for 18 months. It may be theoretically possible to extract them after that. It is a very long and tenuous and unguaranteed process.").
- The records (thought forever lost) certainly were not available at trial—the only thing the Government could offer at trial was a reprint of Appellant's phone bill, which of course does not include location data. ROA.3109 (Government's Exhibit 114).

- Petitioner filed a Motion for New Trial. A hearing on that motion was held on December 20 and December 21, 2016. ROA.492-493.
- The trial court denied Petitioner's Motion for New Trial on December 21, 2016. ROA.493.
- After denying the Motion for New Trial, the trial court sentenced Petitioner on December 21, 2016. ROA.493.
- On December 28, 2016, the FBI issued a report to Petitioner's co-defendant who had not yet gone to trial (and who was acquitted at his trial). ROA.95-104.
- The December 28, 2016, FBI report contained the cell phone location records from Petitioner's phone that were previously thought to be irretrievable. ROA.95-104.
- The trial attorney for Petitioner's co-counsel got the new location records to Petitioner after the co-defendant was acquitted. ROA.94.
- The cell phone location records establish that—as Petitioner has always said—he was *not* at the key locations during the key time frames that are at the heart of the Government's narrative and theory of the case. ROA.29-89.
- Because the location records were not released by the FBI until after the trial court had denied Petitioner's Motion for New Trial and had sentenced him, he could not have made them part of the appellate record.

Consequently, he could not have raised issues related to them on direct appeal.

I.D. Evidence and Arguments Petitioner Presented On This Issue that, To This Day, Have Never Been Substantively Addressed By Any Court

In support of the assertion in his Section 2255 Motion that newly discovered location records proved his innocence, Petitioner offered the following affidavits:

- the affidavit of a cell phone expert analyzing the new location records ROA.29-89;
- the affidavit of the attorney for Petitioner's co-defendant who explained how he received and shared the records after Petitioner was sentenced ROA.95-142;
- the affidavit of Petitioner's trial counsel, who, in explaining how he could have effectively used them at trial, said he never saw the records and was under the impression they could not ever be retrieved ROA.25-28; and
- the affidavit of Petitioner's motion for new trial counsel, who said the same ROA.142-147.

All of these affidavits were filed before the case was even referred to the USMJ.

In its Answer, the Government was the first to say the records had been disclosed at trial.[3] Petitioner spent over twenty pages extensively quoting from the trial and offering analysis rebutting this flatly incorrect factual recitation in his Reply Brief to the Government's Answer. ROA.252-283. This argument included the clear heading, "The Government's assertion that the records were entered during Mendez's trial is factually incorrect." ROA.273-283. The section ended by pointing out that the issue could not have been raised on direct appeal because the report was not disclosed to anyone, much less Petitioner, until after it was too late to make it part of the appellate record. ROA.281-283.

The next time Petitioner did so was in his Objections to the R&R. ROA.430. This analysis was done under the heading, "The Report is Incorrect: Movant Did Not Have the Cell Tower Location Records Until After He Had Been Sentenced and His Motion for New Trial Had Been Heard and Denied." ROA.436.

Petitioner again tried to get the Fifth Circuit to understand how this recitation was factually incorrect in his Motion for Certificate of Appealability. He devoted twenty pages of argument to the issue in his Motion for Certificate of Appealability. (Appellant's Motion for Certificate of Appealability and Brief in Support, pgs. 16-36).

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[3] It appears as though the USMJ just adopted the Government's Answer. In point of fact, Petitioner's lengthy Reply Brief was never once even referenced by the USMJ.

I.E. Rulings of the Courts Below

The USMJ recommended denial of Petitioner's claims related to the newly discovered cell phone location records based upon the flatly incorrect recitations of fact set forth above. The district court, with no substantive analysis, adopted the USMJ's R&R. The United States Court of Appeals for the Fifth Circuit held "Mendez fails to meaningfully challenge the district court's procedural dismissal of these claims in his COA motion, and these issues are abandoned." *United States v. Mendez*, No. 22-40676, 2 (5th Cir. Feb. 24, 2023) (App. 2).

I.F. An Exercise of the Court's Supervisory Power Is Warranted

The courts below have misstated record facts or have endorsed those key misstatements of fact without substantive analysis. At every opportunity, Petitioner has pointed out the error. But it is truly as though no one has read his pleadings. This suspicion is reinforced by the fact that significant pleadings and affidavits he has submitted and discussed again and again have not, to this day, ever been referenced, much less discussed, by any court. Petitioner does not lightly voice this concern, but it is truly the only thing that makes sense.

This is not a case where legal interpretation is up for debate. This is a case that never got off the ground because the initial court made up its own set of facts (contrary to the actual facts before it) and then denied Petitioner relief based off of those incorrect facts. The

USMJ for the McAllen Division of the Southern District of Texas did not correctly recite the record before it. It did not at all acknowledge the analysis Petitioner presented to it. It is not just that Petitioner did not receive a hearing—Petitioner was not heard. *See* U.S. CONST. amend V.; 28 U.S.C. § 2255. This is one of those rare cases where the courts below "so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Accordingly, Petitioner asks the Court to remand the case back to the court below for an analysis or additional action based on the actual record evidence.

II. Petitioner's Section 2255 Motion Was Denied Based on Significant Misstatements of Binding Caselaw Regarding an Exculpatory Letter From the Chief of Police

At trial, the Government's narrative had an important "gotcha" moment based on the police dispatch logs purportedly proving the seizure of the cocaine by Petitioner's co-defendant, Lopez, was a sham. According to the Government, Petitioner called co-defendant Lopez once the car with the drugs was ready to be seized. Based on the dispatch logs, the Government concluded, Lopez pulled into the parking lot with the car and called the tow truck immediately. *Then* he ran the license plate and discovered the license plate did not match the VIN. This indicated Lopez's guilt because it showed he knew from the beginning of the stop

what he was about to find—because he was in on the conspiracy. Thus, the interpretation of the dispatch logs was an important feature of the Government's case against Petitioner. *See* ROA.3556 (the prosecutor's closing argument discussing how the conspiracy with co-defendant Lopez was reflected by the dispatch logs).

The actual problem was that the Government was not reading the dispatch logs correctly. And they knew it. On August 24, 2015, the Chief of the Mission Police Department authored a letter addressed to FBI Special Agent Ryan Porter. ROA.141. That letter establishes co-defendant Lopez ran the tags on the suspect car at 6:32, one minute after he arrived on the scene at 6:31. ROA.141. In other words, running the tags was one of the *first* things co-defendant Lopez did, not the last as the Government argued at Petitioner's trial. The Chief's letter established that the events surrounding the seizure of the car were in fact conducted according to Department protocol, contrary to what the Government insisted at trial. There was nothing sinister about the abandoned car seizure. The Chief's letter not only undercut the Government's contention, it supported Petitioner's contention that the seizure was conducted normally, pursuant to protocol, and therefore indicated there was no conspiracy by the police officers.

Petitioner again obtained and presented this letter in support of his Section 2255 Motion. It was unclear whether the Government never disclosed the letter or whether Petitioner's trial attorney had simply

not caught it in the discovery. Accordingly, Petitioner argued that the failure to get the substance of that letter before the jury was either ineffective assistance of counsel or prosecutorial misconduct. ROA.14-15.

II.A. The R&R's Findings and Conclusions

- "[Petitioner's] claim that [trial counsel] rendered constitutionally deficient performance based on Chief Dominguez's letter is conclusory and thus fails on that basis alone." ROA.398.
- Counsel could not have been ineffective because the letter was inadmissible hearsay. ROA.398.
- Counsel's strategy was to discredit the informant (Chapa), so because trial counsel had a strategy, he could not have been ineffective. ROA.399.
- Petitioner's *Brady* claim was procedurally defaulted because it was not raised on direct appeal. ROA.400.
- Because Petitioner could not establish whether the letter was withheld or simply missed by trial counsel, his *Brady* claim was "entirely speculative and unsupported." ROA.401.

II.B. What the Record Actually Proves

- The Government never said it had disclosed the police chief's letter.

- Trial counsel's affidavit did not reference the letter.
- Even if the letter itself would not have been admissible, the chief could have easily been called to the stand to offer testimony consistent with the letter.
- Because the hearing was not conducted on the Section 2255 Motion, it was never established whether counsel intentionally failed to put the chief on the stand and discuss the dispatch logs as part of a strategy.
- Strategy discrediting the informant's credibility and correcting the Government's interpretation of the dispatch logs were not mutually exclusive.
- The prosecutor during trial heavily relied on an incorrect interpretation of the dispatch logs—an interpretation discredited by the chief's letter. ROA.3556.
- Because the hearing was not conducted on the Section 2255 Motion, it was never established whether the Government had turned over the letter. The USMJ simply assumed it had without any basis for doing so.

II.C. Rulings of the Courts Below

The USMJ recommended denial of Petitioner's claims related to the police chief's letter. The district court, with no substantive analysis, adopted the USMJ's R&R. The United States Court of Appeals for the Fifth Circuit held Petitioner had failed to make a

substantial showing of a denial of a constitutional right or that reasonable jurists would find the district court's assessment debatable or wrong. *United States v. Mendez*, No. 22-40676, 2 (5th Cir. Feb. 24, 2023) (App. 2).

II.D. An Exercise of the Court's Supervisory Power Is Warranted

As above, the USMJ made up a set of facts and then denied relief based on those inventions. Every court since has endorsed those insupportable factual assumptions and the legal reasoning that follows. At every opportunity, Petitioner has again pointed out the error, but to no avail. Petitioner was clearly not heard. The courts below "so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Accordingly, Petitioner asks the Court to remand the case back to the court below for an analysis or additional action based on the actual record evidence.

III. The Circuit Court Denied Petitioner's Motion for a Certificate of Appealability Based on Significant Misstatements of Record Facts

Clearly, the cell phone location records were not available to Petitioner at trial or at any time in which they could have been included in the

appellate record, much less effectively utilized. This was due to factors extraneous to Petitioner. This was not only clear in the trial record itself, it was set out by Petitioner in clear detail both to the district court and to the Fifth Circuit. Petitioner conclusively established "cause" as to the cell phone location records. The trial record itself established "cause." The records were purportedly unavailable and likely never would be. Further, in his Section 2255 Motion and through the affidavits of trial counsel, his cell phone expert, and others, Petitioner conclusively established "prejudice" as to being denied the use of his cell phone location records at his trial as well as at his hearing on Motion for New Trial. This too was set out in detail in the district court and in the Fifth Circuit. Therefore, the case for cause and prejudice was not only **not** abandoned, it was conclusively established.

In *Bousley v. United States*, 523 U.S. 614, 622 (1998), this Court made it clear that a Section 2255 motion is procedurally defaulted when it is the kind of claim that "can be fully and completely addressed on direct review based on the record created," but was not raised on appeal. Clearly, the trial record alone establishes that is not the case here and Petitioner further explained through briefing and affidavits why that is not the case here to the district court and to the Fifth Circuit. Further, the Government's own witness at trial explained why that is not the case here. Petitioner buttressed said explanations with affidavits. None of that was even acknowledged, much less addressed or discussed by the district court or the Fifth Circuit.

Clearly, Petitioner was not even "heard," within the meaning of the Constitution much less given a hearing as required by statute. *See* 28 U.S.C. § 2255. Petitioner also explained at every opportunity and in detail why he was "prejudiced" by the suppression of the exculpatory cell phone location records. In short, they completely undercut the Government's uncorroborated narrative of the conspiracy. This "prejudice" argument was likewise supported by multiple affidavits and caselaw.

In *Murray v. Carrier*, 477 U.S. 478, 488 (1986), this Court explained that the "cause" necessary to excuse procedural default exists if "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the . . . procedural rule." Such cause "ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Id*. at 492.

The prejudice required to overcome a procedural default was set out in *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999), "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence [when the "cause" complained of as here was withheld *Brady* material], but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Further, this Court has said that a Certificate of Appealability should issue when "jurists of reason would find it debatable whether the district court was

correct in its procedural ruling," if the movant has made at least one facially valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2002). Petitioner clearly demonstrated that he neither waived nor abandoned any of his claims, either procedurally or on the merits.

CONCLUSION AND PRAYER

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

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Respectfully submitted,

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