No: 22-5138 **ORIGINAL**

In the
Supreme Court of the United States

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SUPREME COURT, U.S.

ARTHUR FRANK CARDENAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In light of this Court's decision *in Rehaif v. United States*, 139 S.Ct. 2191 (2019) must show that the defendant knew he possessed the firearm and also that *he knew he had the relevant status* when he possessed it. Although it appears that Cardenas' prior convictions can easily support a conviction on such a violation, however, the missing "knowledge element" not charged in the indictment, may render the indictment invalid. With that foundation, Cardenas provides the following questions for review:

1. Should a certificate of appealability should be granted since the District Court and the Ninth Circuit erred in not granting a certificate of appealability.

2. Should a writ of certiorari should be granted since Cardenas rights to be brought before a judicial officer for arraingment was not satisfied.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Eastern District of Washington.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Arthur Frank Cardenas, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is unpublished decision in *United States v. Cardenas*, No. 20-35450, 2022 U.S. App. LEXIS 8535 (9th Cir. Mar. 30, 2022), is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, Eastern District of Washington (Nielsen, WM.), whose judgment was appealed to be reviewed, is an unpublished opinion in *Cardenas v. United States,* No. 2:14-CR-0087-WFN-1, 2020 U.S. Dist. LEXIS 59339 (E.D. Wash. Apr. 3, 2020) is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on March 30, 2022.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law...

Id.

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

Title 28 U.S.C. § 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id.

STATEMENT OF THE CASE

At approximately 6:40 am on April 26, 2012, the Spokane Police Department ("SPD") received reports of shots fired in the area of W. 6th Avenue on the lower South Hill. SPD Officer William Hager was flagged down by a woman driving a white Chevrolet Malibu sedan in the area of the W. 13th Avenue. The woman, identified as Alicia Favro. Favro jumped out of the vehicle and began screaming that her friend had been shot. The man, identified as Cardenas, had been shot in the stomach. Cardenas was able to spell his name but did not respond to questions about who shot him, where the shooting took place, or whether anyone else was there. Cardenas had been shot twice on each side of his abdomen. Officer Hager gave a ride to Favro to the hospital. On the way to the hospital, Officer Hager received radio updates that caused him to reconsider whether Cardenas and Favro were victims or suspects. Favro made several inconsistent statements, and the focus of her concerns appeared to shift from the condition of Cardenas to the status of the investigation. As they approached the emergency room, Hager told Favro that he would need to search her purse. Favro clutched both purses to her chest. When Hager took the purses, Favro became hysterical and admitted that she had a .380 semi-automatic in the purse. Meanwhile at the original scene attention was focused on a duplex at 1823 and 1825 W. 6th Avenue. After gaining entry, the residence at 1823 was vacant and the residence at 1825 contained boxes as though

someone was preparing to move in or out. Bullet holes were found in the fence and the house of the residence on the south side of the alley from the residence at 1825. Several witnesses heard shots and saw vehicles and a man wearing dark clothes were running toward a closed end of the alley and a second man was wearing a white shirt, was at the back of the duplex near the white car. The second man was holding his stomach as if he had been shot. Search warrants were obtained for 1825 W. 6th Avenue and the white Chevrolet Malibu. After a search of the residence, two .380 shell casing and one .40 caliber shell casing were found in the living room. A bullet hole and fragments consistent with a .40 caliber bullet were located below the living room window. A third .380 casing was found outside the backdoor near the alley. The Chevrolet Malibu was towed to a police storage facility. Before serving the warrant, the fire department inspected the vehicle for hazardous materials based on concerns expressed by medical staff at the hospital. Members of the fire department reported seeing suspected controlled substances in the trunk. The warrant was amended to include evidence of drug trafficking. In the trunk, officers found a portable safe, a duffle bag, a pillowcase, and a purse. The door of the portable safe was bent as though it had been pried open. Inside officers found a blue zippered bag and a black plastic bag. The blue zippered bag contained $17,410 organized in bundles wrapped in rubber bands. A Tupperware container contained 243.9 grams of actual methamphetamine. A duffle bag

contained some personal articles, several containers, and a canteen. In a canteen pocket on the military bag, officers found a money belt that held a grenade. The grenade was x-rayed and broken into fragments by the bomb squad. The x-ray and fragments were examined by an ATF expert who determined that the grenade was a destructive device.

On August 21, 2014, Cardenas appeared for arraignment, represented by the Federal Public Defender. The same day Attorney John R. Crowley ("Crowley") filed a Notice of Appearance. Crowley filed a motion to suppress the search of the vehicle that was denied. The trial proceeded and Cardenas was found guilty on all counts. Immediately after the jury verdict, Cardenas expressed his dissatisfaction with his Crowley, alleging several ineffective assistance of counsel instances. On July 23, 2015, the court allowed Crowley to withdraw (based on the ineffectiveness allegations) (ECF. 102) and on November 15, 2015, Cardenas, through new counsel, filed a motion for a new trial based on ineffective assistance of counsel. (ECF. 111). The government filed an affidavit from Crowley addressing the ineffectiveness claims (ECF. 155), most important for that proceeding:

> Crowley indicated that he communicated the substance of the plea offer made by the government to Defendant, but that Defendant refused to consider any settlement despite Crowley's advice that he do so.

> Crowley indicated that his continued discussions with the government resulted in the indefinite postponement of the government's filing of a notice for a sentencing enhancement under 21 U.S.C. § 851.

In substance, absent the usual "you should accept this offer, etc...." there was no direct explanation as to the strength of the government's case with Cardenas so he could make an informed decision as to whether to plead guilty or proceed to trial. After a hearing on the claims, the court denied Cardenas new trial motion, based on the allegations of ineffectiveness. (ECF. 159, 161). However, no application of the Strickland v. Washington, 466 U.S. 668 (1984) standards were applied.

Cardenas was sentenced to 270 months, followed by 5 years supervised release. He proceeded on appeal and on May 15, 2018, the Ninth Circuit, (Gould Ikuta, and Tunheim), affirmed the sentence and conviction. *United States v. Cardenas,* 735 F. App'x 235 (9th Cir. 2018). A Writ of Certiorari was not sought. In his post-conviction 2255, Cardenas raised several ineffective assistance of counsel claims and a *Rehaif v. United States*, 139 S. Ct. 2191 (2019) violation. The District Court determined that the ineffective assistance of counsel claims was addressed at sentencing and that the *Rehaif* claim failed because "the Government had ample circumstantial evidence to show that Mr. Cardenas was aware he had previously been convicted of a felony." (ECF. 199 at 2). The District Court denied

the Title 28 U.S.C. § 2255 and the Ninth Circuit refused to grant a Certificate of Appealability. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
> >
> > (b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

A WRIT OF CERTIORARI SHOULD BE GRANTED SINCE THE DISTRICT COURT AND THE NINTH CIRCUIT ERRED IN NOT GRANTING A CERTIFICATE OF APPEALABILITY.

The District Court denied Cardenas' claims on the fact that the claims were addressed during the motion for a new trial. Although the claims were addressed on whether a new trial should be granted or not, the claims were not addressed under counsel's advice to Cardenas. That claim has never been addressed under a *Strickland v. Washington*, 466 U.S. 668 (1984) standard of review. Cardenas made specific allegations of ineffectiveness that were not addressed by either Court. For example, there was no testimony from counsel during the motion for new trial hearing (several ineffective assistance of counsel claims were addressed during this hearing), however, in a nutshell, counsel at no stage testified that he advised Cardenas of the chances of success based on his experience so Cardenas can decide whether to proceed to trial or accept an offer. That claim was alleged in the 2255 and not addressed. Neither was the claim of *Rehaif* addressed.

In *Rehaif*, this Court overruled precedent from the Sixth Circuit - and every other circuit to have spoken on the issue - about the scope of the crime defined in § 922(g). Before *Rehaif,* the government secured a felon-in-possession conviction by proving merely that the defendant knowingly possessed a firearm and that a court had earlier convicted him of a felony, defined under the statute as a crime

punishable by more than one year in prison. But the Supreme Court proclaimed in *Rehaif* that the government "*must show that the defendant knew he possessed the firearm and also that he knew he had the relevant status when he possessed it.*" 139 S. Ct. 2191, 2194 (2019) (emphasis added). Because Cardena's indictment made no mention of this knowledge-of-status element and the governing statute, the conviction violates the Fifth Amendment's indictment clause.

The District Court merely determined that "the Government had ample circumstantial evidence to show that Mr. Cardenas was aware he had previously been convicted of a felony." (ECF. 199 at 2). This decision does not address that the jury was not allowed to determine the element of the charged offense. The statute does not read of the "circumstantial evidence" the government may rely upon to convict, Rehiaf addresses that the government *"must show that the defendant knew he possessed the firearm and also that he knew he had the relevant status when he possessed it." Id.* 139 S. Ct. 2191, 2194 (2019). Those elements were never proven by jury, nor addressed by the Court.

This Court's opinion in *Miller-El* made clear that whether to grant a COA is intended to be a *preliminary* inquiry, undertaken before full consideration of the petitioner's claims. *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003) (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); *Id.* at 1040 (noting that "a claim can

be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail") (emphasis added); *Id.* at 1042 (noting that "a COA determination is a separate proceeding, one distinct from the underlying merits"); *Id.* at 1046-47 (Scalia, J., concurring) (noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such as "full consideration" in the course of the COA inquiry is forbidden by § 2253(c). *Id.* at 1039 ("When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is, in essence, deciding an appeal without jurisdiction."). *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003). Here this Court must only agree that based on the record, Cardenas was entitled to have the case proceed further, not that he will be victorious on the merits of his claim. Even if the District Court has denied all the claims without an evidentiary, (an error in this case) this Court has the authority to grant the relief and expand upon it. V*alerio v Dir. of the Dep't of Prisons,* 306 F3d 742 (9th Cir. 2002), cert den (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788) (court of appeals not only has the power to grant COA where a district court has denied it as to all issues but also to expand COA to include additional issues when a district

court has granted COA as to some but not all issues.) The granting of a writ of certiorari is required to address the COA claims that were not addressed.

A WRIT OF CERTIORARI SHOULD BE GRANTED SINCE CARDENAS RIGHTS TO BE BROUGHT BEFORE A JUDICIAL OFFICER FOR ARRAINGMENT WAS NOT SATISFIED

Cardenas was indicted on June 18, 2014. (ECF. 1). He sat at the Kittitas County Correctional Center in Ellensburg, WA for a total of 55 days (08/12/2014) waiting for the government to issue a writ of habeas corpus *ad prosequendum*. (ECF. 6). The Court issued the order on August 13, 2014, a total of 56 days later. (ECF. 7). By now Cardenas had been indicted 56 days and counting. As a result, Cardenas was not arraigned until August 21, 2014, a mere 6 days before his speedy trial would elapse. Prejudice was evident. Cardenas had no option at this stage but to waive his speedy trial rights, severely prejudicing his constitutional rights. By the time an actual waiver of his right occurred, a total of 92 days or 28 days *after* arraignment had elapsed. Crowley should have immediately filed a motion to dismiss the indictment based on the Sixth Amendment violation, however, failed to do so. The district court determined, without even considering the government's position, that Cardenas did not merit relief. (ECF. 189 at 3). The District Court determined that Cardenas' trial was scheduled for October 27, 2014, which was within the 70-days of August 21, 2014. (ECF. 189 at 3). However, the court did

not consider the prejudice against Cardenas based on the delay. At a minimum, a prejudice determination was required.

In *Barker*, the Supreme Court set forth "criteria by which the speedy trial right is to be judged." *Id.* at 516. Those are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice against the defendant. *Id.* The Court has required an inquiry into the first three factors and determines the weight to be given each. *United States v. Ingram*, 446 F.3d 1332, 1336 (11th Cir. 2006). If those three factors weigh heavily against the government, then the defendant need not show actual prejudice to succeed on his motion. *Id.* Initially, the length of the delay is a "triggering mechanism" in that no speedy trial inquiry is necessary unless the delay is long enough to be "presumptively prejudicial." *Id.* If it is not sufficiently lengthy, then no further inquiry is made. *Id.* If it is, then this factor must be weighed along with the other three criteria Identified in *Barker*. The delay between indictment and the first speedy trial waiver, in this case, is 92 days. The extent to which the delay exceeds the bare minimum necessary to prompt inquiry is significant because "the presumption of prejudice intensifies over time." *Id.* at 651. Furthermore, the significance of the post-indictment delay is even greater. Thus, the length of delay weighs heavily against the government. The second factor is the reason for the delay, with "different weights . . . assigned to different reasons." *Id.* The *Barker*

court identified three types of reasons and the varying weights to be assigned to each. Deliberate attempts by the government to delay the trial and hamper the defense are weighed heavily against the government. *Id.* On the other end of the spectrum, a valid reason for delay justifies delay. *Id.* at 531. In the middle of the continuum is government negligence, which "should be weighted less heavily [than bad faith] but should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* Here, there was no attempt to locate Cardenas who was in custody at the Kittitas County Correctional Center in Ellensburg, WA. The delay was government negligence in requesting Cardenas' transfer to Federal Court. On the flip side of the equation, Crowley was receiving referrals from Cardenas, both in State and Federal Court, so there was no incentive to have the charges dismissed. Crowley was riding the benefits of Cardenas' incarceration and delay, violating his Sixth Amendment rights. Thus based on these facts, this court should grant a writ of certiorari and remand the matter to the Ninth Circuit.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Ninth Circuit.

Dated June 27 2022.

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