

22-5515
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Jose Agapito Salas,
Petitioner,

v.

United States Of America,
Respondent.

(28 U.S.C. §2255 COA Habeas Proceeding)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
No. 21-11081

PETITION FOR A WRIT OF CERTIORARI

FILED
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CLERK OF THE CIRCUIT
SUPREME COURT, U.S.
ORIGINAL

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QUESTIONS PRESENTED

At The Federal Level After The District Court Receives An Ordered Response From The Government To A Federal Prisoner's Petition For Habeas Corpus Relief, Title 28 U.S.C. §2255, Subsection (b), Requires The District Court To "Determine the issues and make findings of fact and conclusions of law with respect thereto."

Did The District Court Adhere To This Congressional Mandate In Petitioner's Case, When The Court Denied And Dismissed Petitioner's First-Time Habeas Motion, "[F]or the reasons stated in [the] Respondent's thorough and well-drafted response," Without Making The Court's Own Findings Of Fact And Conclusions Of Law With Respect To Petitioner's Habeas Claims?

If not,

Did The District Court's Procedural Resolution Of Petitioner's Habeas Motion In This Manner Violate Petitioner's Fundamental Right To Due Process Of Law, By Undermining Petitioner's Ability To Satisfy The Certificate Of Appealability Criteria As Announced By This Court In Order To Effect An Appeal Of The District Court's Judgment?

Interested Parties

Petitioner Jose Agapito Salas do certify in accordance with Rule 14(b) of the rules of the Supreme Court that all interested parties does appear in the caption of the case as appear on the cover page.

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CONSTITUTIONAL PROVISIONS

1. Constitutional Amendment V: "No person shall be . . . deprived of life [or] liberty . . without due process of law." Id
2. Constitutional Amendment VI: "In all prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defence."

STATUTE & RULES

3. Title 28 U.S.C. §2255(b) holds in pertinent part:

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 [A]ttorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. [.] . .

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I. OPINIONS BELOW

The final judgment of the Fifth Circuit United States Court Of Appeals denying Jose Agapito Salas's request for Certificate Of Appealability (COA) was entered on May 12, 2022, the Court's Order appear as APPENDIX A to this petition.

The final judgment of the United States District Court For the Northern District Of Texas, USDC No. 21-CV-103, was entered on September 13, 2021, the District Court's Order appears as APPENDIX B to this petition.

II. JURISDICTIONAL STATEMENT

The Fifth Circuit United States Court Of Appeals jurisdiction was based on 28 U.S.C. §2253(a).

The jurisdiction of the District Court were based on 28 U.S.C. §2255(a).

The jurisdiction of this Court to review the correctness of the lower appellate court's judgment is based on 28 U.S.C. §1254(1).

III. STATEMENT OF CASE

On March 21, 2018 in the United States District Court for the Northern District Of Texas, Lubbock Division, Jose Agapito Salas, a non-citizen of the United States who does not speak or understand the english language, entered into a signed Plea Agreement with the Government to a Superseding Information [aided by Court provided interpreter], charging that on August 4, 2015 in the Lubbock Division of the Northern District Of Texas, Salas knowingly Possessed with the intent to Distribute 50 grams or more of methamphetamine, but less than 500 grams of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §841(a)(1), and §841(b) (1)(B)(viii). See Criminal Docket (CRD#) entry #53, Cause No.

17-CR-090-01

Attached to the government Plea Agreement were a Factual Resume reflecting the parties agreement that Salas had possessed and distributed methamphetamine on August 4, 2015 to an undercover DEA Task Force Officer. See CRD#69 page 2 of 5 at narration 2.^{1/} The Factual Resume also reflected the parties agreement that the distributed methamphetamine were sent to the DEA South Central Laboratory for analysis, and was discovered that the purity was actual methamphetamine in the amount of 54.79 grams. See Factual Resume page 4 of 5 at narration 9

On May 30, 2018 the Presentence Investigation Report was returned under Seal. See CRD#100-1

^{1/} In the lower Fifth Circuit Court Of Appeals Salas used the page numbers assigned to the documents the parties prepared. Here before this Court Salas uses the Electronically Filed system assignment numbers when the pleadings were filed in the District Court.

Although Salas had pled guilty to a Superseding Information charging that he possessed and distributed 50 grams or more, but less than 500 grams of methamphetamine to an undercover officer on August 4, 2015. Id The PSR cover page erroneously reflected that the charge Salas was charged with in the Superseding Information was for 50 grams or more of methamphetamine, leaving out the but less than 500 grams of the substance. See CRD# 101 at page 1 of 23 The PSR also held Salas responsible for 1, 267.86 grams of methamphetamine. See PSR page 13 of 23 paragraph 37 through page 14 of 23. The PSR found that Mr. Salas had for relevant conduct purposes is responsible for methamphetamine distributed by others on October 4, 2015, October 5, 2015, and June 14, 2016 totaling 1, 267.86. Id Which amount assigned Salas a Base Offense Level of 34. See PSR page 15 of 23 paragraph 43

On July 13, 2018 Salas appeared for sentencing before Senior Judge Sam R. Cummings. See SENTENCING TRANSCRIPT (CRD# 134) The Court confirmed from Salas that he had received and gone over the PSR with his Attorney Mr. David Martinez. Id at page 3 of 7 lines 12 through 15. The Court noted the Government had filed a statement adopting without objection the findings of the PSR. The Court also noted that Mr. Martinez had filed objections. Id Mr. Martinez informed the Court that he had made objections to the PSR [with the Probation Department] concerning the investigation report, and as a result had received an addendum to the report concerning the defense objections, and that because of these events Mr. Salas

had no additional evidence or arguments.^{2/} Based on the position of the parties, the Court ultimately sentenced Mr. Salas to 262 months of imprisonment, and a five-year term of supervised release. Id page 5 of 7 through 6 of 7

Direct Appeal

On July 25, 2018 Salas filed a timely Notice Of Appeal. Due to his family unable to cover the cost of appellate counsel, Salas moved to voluntarily dismiss his appeal. On April 30, 2019 the Fifth Circuit United States Court Of Appeals granted the request. See CRD # 143

Mr. Salas's 28 U.S.C. §2255 Proceeding

On May 3, 2021 Mr. Salas filed his first-time 28 U.S.C. §2255 motion to Vacate, Set Aside, or Correct Sentence before the Northern District Of Texas, United States District Court. See Civil Docket (CVD #) entry 1, Cause No. 21-CV-00103-C Mr. Salas represented by private counsel raised three grounds of error

2/ The remaining sentencing record shows that defense counsel Mr. Martinez presented no mitigating evidence regarding the drug quantity in Mr. Salas's case. For example, counsel had not investigated the veracity of the PSR allegations noted at page 12 of 23 paragraph 31 for the date of October 4, 2015, or paragraph 33 for the date of October 5, 2015, and paragraph 36 for the date of June 14, 2016, none of which Mr. Salas was present for, nor charged with in the narrowed Superseding Information he pled guilty to.

that occurred in the underlying criminal proceeding. In the Section 2255 motion, CVD #1, supported by separate Memorandum and Law, CVD #1-1 (SM) counsel argued as Ground One, that Salas incarceration is unlawful because he has been imprisoned for criminal conduct lacking a factual basis, that such process violated Salas's constitutional right to due process of law: to an indictment, to a jury trial, and the right to confrontation. See CVD #1 page 5 of 13

In Ground Two, CVD #1 page 6 of 13 , counsel argued Mr. Salas's guilty plea is involuntarily made because the Plea Agreement only served notice concerning the August 4, 2015 distribution offense, and that the Superseding Information charged Salas with Possessing with Intent to Distribute 50 grams of more, but less than 500 grams of Methamphetamine. And because the Plea Agreement's terms, the Factual Resume thereof, and the Superseding Information led Salas to believe he was only pleading guilty to the single distribution offense occurring on August 4th Salas's resulting guilty plea is involuntary. Id

And, in Ground Three, Salas habeas counsel argued Mr. Salas's trial counsel, David Martinez, had been ineffective in failing to investigate, to advise Salas in his native language [Spanish] and failing to present evidence in mitigation of sentencing. Counsel argued but for Mr. Martinez's deficient performance Mr. Salas would not have been sentenced to an additional 175 months of imprisonment. CVD #1 page 8 of 13 ^{3/} Also see, SM page 50 of 57 n.III

3/ Habeas counsel also served the District Court notice of Attorney Martinez's probated suspension from the State Bar Of Texas for his failures in another client's case. See SM page 53 of 57 and SM Exhibit L (Agreed Judgment Of Probated Suspension).

through page 56 of 57

Timeliness Of §2255 Motion

At the outset before setting forth the above foregoing claims and arguments, Mr. Salas's habeas counsel addressed the untimeliness issue surrounding Mr. Salas's motion for relief. Counsel recognized under 28 U.S.C. §2255(f), a habeas petitioner has a one-year statute of limitation, running "from the date on which the judgment of conviction becomes final. . ." 28 U.S.C. §2255(f)(1). Counsel noted that "[A] federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default." Dretke v. Haley, 541 U.S. 386, 388, 124 S.Ct. 1847, 1849 (2004) Counsel further noted that there exist a narrow exception, where there is a fundamental miscarriage of justice, which is also called the "actual innocence" exception. Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604 (1998) "[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." See Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649 (1986) Habeas counsel relied on this narrow exception, arguing Mr. Salas is actually innocent of distributing the additional quantities of methamphetamine beyond that contained in the government provided Plea Agreement, Factual Resume, and Superseding Information. See Habeas Counsel's "EXCEPTIONS TO THE TIMELINESS REQUIREMENT OF §2255 APPLY HERE" SM page 17 of 57 through 32 of 57

In counsel's arguments regarding the timeliness issue, counsel acknowledged that the Fifth Circuit Court Of Appeals granted Salas's motion for voluntary dismissal on April 30, 2019. And for purpose of §2255(f)(1) Salas's §2255 motion was due by April 30, 2020. Id SM 18 of 57 Nevertheless, counsel argued that Salas could establish cause and prejudice such that the procedural bar should not apply. Alternatively, counsel argued the actual innocence exception applies to Mr. Salas's case, as his 262 month term of imprisonment is a fundamental miscarriage of justice because he is innocent of the additional methamphetamine added to his sentence, and that the Government had absolutely no evidence to support Jose Salas was responsible for the additional amounts. Therefore, counsel submitted, tolling is warranted and that the District Court should review Salas's habeas claims. Id Counsel went on to argue that Salas could demonstrate cause for not raising his claim on direct appeal, counsel argued Salas could not have done so as the record at the time of Salas appeal did not contain the evidence he has now discovered to support his claim that he did not commit the additional offenses for which he was sentenced for. SM page 19 of 57, Also See Affidavit Of Jose Salas, SM Exhibit J

In his averment Jose Salas states he did not understand his sentence at first due to his inability to understand the english language, and the lack of explanation from Attorney Martinez. Id Habeas counsel noted that all of the relevant paperwork is in English, of which Salas understood very little, and Salas did not know he had been sentenced for additional offenses.

Counsel argued when Salas discovered the details of his sentence, he was confused by the length of his sentence because Mr. Martinez had informed Salas that he would be sentenced to five years. Id See Jose Salas's Affidavit. Also, SM page 20 of 57 In support of the miscarriage of justice, or actual innocence exception Jose Salas relied on the post appeal discovery of his brother, Gamaliel Salas, who indicated to Jose that he has personal knowledge that Jose was not involved in the distribution transactions he was sentenced for, and Gamaliel Salas who admits his own involvement in the transactions in question has agreed to testify on his brother Jose Salas behalf. See Affidavit Of Gamaliel Salas, SM Exhibit I With respect to this showing regarding cause for the procedural default and timeliness issue, counsel noted that Jose Salas pled guilty, correctly believing that he was pleading guilty to the specific incident on August 4, 2015, and no evidence regarding any other incidents came before the District Court until the PSR, which was merely the submission from the United States Probation Officer. See PSR, SM Exhibit G. As a result habeas counsel moved the District Court to vacate Jose Salas's sentence and impose a sentence based solely on the August 4, 2015 incident, which induced Salas to plead guilty in the first place with assurances of counsel given the 54.79 grams of methamphetamine contained in the Offered Plea Agreement's Factual Resume, See CRD # #69 at page 4 of 5 narration 9

4/

District Court's Preliminary Review Of §2255 Motion

On May 4, 2021 the District Court conducted a preliminary review of Jose Salas's §2255 motion. See CVD #2 Finding that Salas had presented claims not undermined by the files and records of the case, the Court issued a Show Cause Order to the United States Attorney Office directing them to respond to the allegations set forth in Mr. Salas's habeas motion. Id

Government Response To Jose Salas §2255 Motion

On July 6, 2021 the Government filed their Court ordered response. See CVD #5 In the response the government argued because Salas's §2255 motion were untimely it should be dismissed. Alternatively, the government argued because Salas's claims are procedurally defaulted, waived, and based on a misunderstanding of how federal sentencing works his motion should be denied with prejudice. See Government Response (GR) page 7 of 21 Further, the government argued that Salas had admitted under oath that he had read or had his plea documents read to him, that he understood his sentencing range to be 5 to 40 years of imprisonment, and that his sentence would be imposed after consideration of the advisory

4/ 28 U.S.C. §2255(b) requires the lower federal District Courts to conduct a preliminary assessment of the merit of a federal prisoner's habeas petition. In part §2255(b) holds:

"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."

Sentencing Guidelines, and that no one could predict with certainty what his sentence would be. GR page 10 of 27 The government pointed out that the PSR had assigned Salas a Base Offense Level 34 under U.S.S.G. §2D1.1. That the drug quantity determination was reached by applying the relevant conduct provisions, which require that both the actual offense conduct and related conduct, to which Salas admitted, to be counted. See U.S.S.G. §1B1.3 Along with an enhancement for presence of a firearm, the methamphetamine being imported from Mexico, Salas's role in the offense, and an adjustment for acceptance of responsibility. The government stated these factors led to a sentencing range of 210 to 262 months of imprisonment, which in the government's view fell within Salas's statutory maximum range of 5 to 40 years. GR page 11 of 27

As to the timeliness of Mr. Salas's §2255 motion, the government argued that the motion is untimely, that Salas had failed to show his entitlement to the extraordinary remedy of equitable tolling. GR page 14 of 27 Namely, the government argued Salas had moved to voluntarily dismiss his direct appeal, which the Fifth Circuit Court Of Appeals granted on April 30, 2019. See CRD #143 Therefore, for purposes of 28 U.S.C. §2255(f)(1) Salas's motion was due to be filed no later than April 30, 2020, the government argued Salas's motion was not filed until May 3, 2021. GR page 15 of 27

The government noted Salas's claim of newly discovered evidence consist of an Affidavit from a family member and codefendant [Gamaliel Salas] saying that Jose Salas was not responsible for the methamphetamine in other locations and other possession and distribution transactions in which the codefendant were involved. The government argued that Jose Salas's evidence is not new and that Salas indisputably was aware of his own conduct, and should have known what drug transactions he did or did not commit. GR page 15 of 27 The government argued Jose Salas's own affidavit, his averment that he has "personal knowledge" that the disputed drug amounts belonged to his Uncle and codefendant [Belizario Salas, See SM page 16 of 57 through 17 of 57, and SM Exhibits H and I] were involved. The government argued that Salas's now offered "personal knowledge" claim is not new because if has personal knowledge now he had personal knowledge of the events at the time of his guilty plea, sentencing, and before the AEDPA one-year limitation period expired. GR page 16 of 27^{5/}

5/ Jose Salas based his affidavit on personal knowledge because it is required by the Federal Rules Of Civil Procedure, Rule 56(c). Had he not done so the contents of such affidavits would likely be viewed as merely conclusory and rejected by the trier of fact. In addition, lower federal Courts has recognized with respect to affidavits provided by family members, that a "district court may not discount a petitioner's declarations simply because they may be self serving," and rely on corroborating affidavits from family members. See Sawyer v. United States, 874 F.3d 276, 279 (7th Cir. 2017)

Alternatively, the government argued even if Jose Salas did not understand what was in his PSR he failed to establish with reasonable diligence that he could not have learned of the information [Gamaliel Salas's willingness to testify favorably that Jose Salas's had no involvement in additional drug sales that he was held responsible for] within one year from the time his conviction became final. GR page 17 of 27 Thus, the government argued Jose Salas failed to show the required diligence, and the District Court should find that his motion is untimely under Section 2255 (f)(1) and (4). GR page 17 of 27 The government did acknowledge even if time barred, Section 2255's one-year limitations period is subject to equitable tolling. Id Yet, the government offered Salas had not demonstrated that his language difficulties warranted equitable tolling. GR page 18 of 27

Next, the government noted Salas's claim that a miscarriage of justice exception applies to toll the limitation period. GR page 18 of 27 However, the government argued that Salas is not actually innocent because he admitted that he sold the methamphetamine that forms the basis of [his] guilty plea. Id The government also argued that Salas's claim of innocence also extends to the other charges the government elected to forego, and that Salas made no attempt to demonstrate that his "actual innocence" argument passes muster because he did not show that he is actually innocent of the original drug offense that would have carried a higher statutory sentencing range.

Therefore, the government argued even if the actual innocence exception exist Salas has not shown such helps him. GR page 19 of 27^{6/} Notwithstanding, the government went on to argue that the District Court should dismiss Salas motion with prejudice. Id And that Salas's claims are procedurally defaulted for failing to raise them on direct appeal. GR page 20 of 27 Next, the government argued that Salas's claims are waived by his guilty plea. GR page 20 of 27 narration 3 The government went onto argue that Salas's claims are waived by a knowing and voluntary appeal waiver. GR page 22 of 27 through 23 of 27 That the record shows Salas entered a knowing and voluntary guilty plea. GR page 24 of 27

Finally, the government addressed Salas's ineffective assistance of counsel claim, counsel's failure to conduct an adequate pretrial investigation, counsel informing Salas that he would receive five years of imprisonment, and counsel's failure to make forceful

6/ Though the government had initially charged Salas with a conspiracy to possess with intent to distribute methamphetamine, to induce Salas into pleading guilty the government elected to forego the conspiracy charge and narrow the scope to that set forth in the Superseding Information to which Salas assented by signing a waiver of his right to an indictment and pled guilty to the information that specifically listed the date of August 4, 2015, and the amount of methamphetamine distributed as 50 grams or more, but less than 500 grams of the substance. See CRD #53 page 1 of 3 [Superseding Information filed March 22, 2018] This charging allegation was further enforced by the Government's Plea Agreement's Factual Resume. See CRD #69 page 2 of 5 narration 2, and page 4 of 5 narration 9, which narration shows that the amount of methamphetamine Salas distributed was 54.79 grams as tested by a DEA laboratory, therefore falling within the 50 but less than 500 grams of the substance the Superseding Information gave notice of. On this record, Salas should not have been held for any additional amount beyond that which he assented to. Cf. United States v. Bailey, 800 Fed. Appx. 216, 219 (5th Cir. 2020)(defendant's guilty plea to a narrower charge barred restitution for the entire loss amount of the conspiracy.)

sentencing arguments. GR page 25 of 27 The government discounted these arguments because in their view Salas had not shown what counsel's investigation would have revealed. That Salas could not establish prejudice from counsel's failure to advise him in Salas's native language. Id As to Salas's claim that counsel had informed him that he would receive five-years, the government argued that the constitution does not require lawyers to predict with certainty what advisory guideline range may apply. GR page 26 of 27 The government concluded their argument by stating that Salas had made a direct hand-to-hand narcotic transaction to an undercover officer, and thus any claim that he now makes that he would have elected to go to trial is suspect. GR page 27 of 27

Salas's §2255 Reply

On July 23, 2021 Salas's habeas counsel filed Salas reply, (SR). See CVD #6. In reply counsel argued the government had not proved that Jose Salas had trafficked methamphetamine as part of an organization linked to the Sinaloa cartel.^{7/} SR page 7 of 24 Here counsel argued that Jose Salas pled guilty to a specific offense which occurred on August 4, 2015, of intentionally and knowingly distributing or possessing with intent to distribute, 50 grams or more, but less than 500 grams, of a mixture, or substance

7/ The government made the allegation in their Statement Of Facts in their §2255 response. See GR page 7 of 27.

containing a detectable amount of methamphetamine. Further, counsel argued that much of the Government's Statement Of Facts either describe actions of other individuals or are based upon a confidential informant's tip of inadmissible hearsay, and thereby insufficient to support a conviction [sentence] of a greater offense than to which Jose Salas pled guilty. SR 7 cf 24 Counsel informed the District Court that the government's response had acknowledged that the other drug transactions were committed by Belizario Salas and Lorenzo Salas-Hernandez. See GR pages 8 of 27 through 10 of 27 Habeas counsel argued that Salas did not plead guilty to any other offense for which he was necessarily convicted and sentenced for. SR page 9 of 24 Counsel argued that the government's assertion that no exception applies to the untimeliness of Jose Salas §2255 motion is inaccurate. Counsel acknowledge that the motion is untimely, but nevertheless argued that Salas can show that an exception applies which would allow Salas to overcome his procedural default. SR page 10 of 24 As to the government argument that Jose Salas having personal knowledge of his own conduct is not new evidence, counsel pointed out that the new evidence is the Affidavit of Gamaliel Salas. And that Gamaliel's affidavit were not available at the time of Jose Salas's plea. That Gamaliel recently decided to come forward. SR page 10 of 24 Counsel argued that Jose Salas's sentence of 22 years based upon constitutional error forming the basis of his §2255 motion is sufficient to establish the cause and prejudice exception should be applied in this case.

SR page 10 of 24 through 11 of 24 Habeas counsel pointed to her arguments set forth in Salas's §2255 Memorandum at Pages 21 of 57 through 23 of 57 in support of this position. Alternatively, habeas counsel argued that the fundamental miscarriage of justice exception applies and excuses Salas's procedural default. SR pages 11 of 24 Habeas Counsel then pointed to the Affidavit of Gamaliel Salas who states that "[Jose Salas] was not present and did not possess any of the other amounts of methamphetamine listed in his sentencing report . . ." SR page 11 of 24 (Gamaliel Salas Affidavit at SM Exhibit I) Habeas Counsel further highlighted Gamaliel Salas averment that "[T]he drugs in the home belonged only to my Uncle, Belizario." Id See SR page 12 of 24 Counsel stated Gamaliel Salas affidavit is the new evidence of actual innocence of the additional crimes for which Jose Salas was effectively convicted and sentenced for. Id

Next, counsel noted as the government response indicated, that Jose Salas had entered into an appeal waiver as part of his Plea Agreement, though counsel offered that Jose Salas has demonstrated cause and prejudice for not raising his claims on direct appeal, his appeal waiver contained in the Plea Agreement prevented him from bringing his claims on direct appeal. SR page 13 of 24 Counsel argued the Government cannot have it both ways, first noting Salas had entered an appeal waiver, then claiming he committed a procedural default of his constitutional claims by failing to raise them on direct appeal. That these are conflicting positions, and certainly, Salas appeal waiver barred the claim on direct. SR page 14 of 24

Counsel next addressed the government's mischaracterization of Jose Salas claim by hiding behind the Guidelines relevant conduct provision. SR page 20 of 24 Counsel argued Jose Salas's Section 2255 memorandum and the record of the case shows that Salas's plea was neither voluntary or intelligently made because (1) Salas did not know the true nature of the charge against him and the direct consequences of his plea, (2) Jose Salas relied upon his attorney's faulty explanation of the plea agreement because the documents were presented to him in English, and (3) Jose Salas relied upon his attorney's advice that he would receive a five-year sentence if he signed the plea agreement. And though he answered "yes" at the Change of Plea hearing, he was merely following what Attorney David Martinez told him to do. SR page 20 of 24 through 21 of 24 Finally, habeas counsel noted the need for an evidentiary hearing and her belief that Jose Salas has presented evidence entitling him to a hearing to prove that Attorney Martinez had been ineffective, also to ascertain that his plea of guilty was not knowing and intelligently made. SR page 20 of 24 through 23 of 24.

District Court's Final Judgment

On September 13, 2021 the District Court entered the final judgment in the case. See CVD #7 and #8 [APPENDIX B] In a two page Order the Court viewed Jose Salas's §2255 motion as presenting three claims, (1) he was wrongly convicted and sentenced based upon erroneous drug quantity, and as a result (2) his plea was unknowing and involuntary, and (3) he received ineffective assistance of counsel.

See Appendix B (CVD #7 page 1 of 2) Having identified the aforementioned claims the District Court's judgment stated; "Having considered Movant's Motion, Respondent's Response, Movant's Reply, and all relevant records, the Court is of the opinion that Movant's Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody should be DENIED and DISMISSED with prejudice for the reasons stated in Respondent's thorough and well-drafted Response. All relief not expressly granted is DENIED". (emphasis in underline). The District Court went on to deny Jose Salas a Certificate Of Appealability, for the reasons set forth in the court's order. CVD # page 2 of 2

Jose Salas's Application For COA Before The Fifth Circuit

On October 25, 2021 Jose Salas filed a Notice Of Appeal and the matter was docketed before the Fifth Circuit United States Court Of Appeals. See Court Of Appeals Docket (CAD) #1 dated 10/25/21. On November 5, 2021 the Electronic Record was requested by the appellate Court from the District Court. On November 10, 2021 believing the District Court erred in the procedural manner the Court assessed and resolved his §2255 motion, Salas filed an Application For Certificate Of Appealability, which incorporated a Brief In Support. Id CAD Appeal No. 21-11081, APPENDIX C hereto this Writ Petition at page 4 of 4. In the brief Salas raised a single claim for the issuance of a COA. That is, Whether the District Court's procedural resolution of his first-time §2255 Motion, denying and dismissing the same, "for the reasons stated in Respondent's thorough and well-drafted response," violate the requirement of 28 U.S.C. §2255(b)? Which holds, "[T]he [C]ourt

shall . . . determine the issues and make findings of facts and conclusions of law with respect thereto[,"] regarding a prisoner's habeas petition. [emphasis added in brackets] See Salas's Application COA Brief pages 25 through 31

In his COA request Salas argued that it was error for the District Court to deny and dismiss his first-time §2255 motion on an unchanged record, that led to the District Court ordering the Government to respond to the claims set forth in the motion without making independent findings of fact and conclusions of law. See Salas's COA Brief at page 26 Salas cited Fifth Circuit precedent United States v. Edwards, 711 F.2d 633 (5th Cir. 1983) Wherein the Circuit Court had found that it was error for the District Court to summarily deny Edwards motion under §2255 without making findings of fact and conclusions of law, as Edwards had presented a viable claim of ineffective assistance of counsel claim, predicated upon an issue one of Edward's co-conspirators had prevailed on appeal. The Edward Court found that such findings of fact and conclusions of law is indispensable to appellate review. Id 711 F.2d at 634

Salas also argued that the District Court's procedural adoption of the government's reasoning and conclusions regarding his claims not only violated §2255(b), but also the party presentation rule, the role assignment of neutrality this Court observed in Greenlaw v. United States, 554 U.S. 237, 243 (2008) See Salas's COA Brief at page 27 In the COA request Salas observed that §2255(b) envisions after the parties have had their say the

District Court as the neutral arbiter of the issues the parties has framed and presented is charged with the duty to impartially determine whose arguments or claims prevail in accordance with the facts and established law. Id Salas argued the District Court's statement adopting the reasons and conclusions of the Respondent creates the appearance of bias, which all courts should seek to avoid. Id COA Brief pages 27 through 28 Finally, as Jose Salas had presented an Affidavit from his brother Gamaliel Salas averring that Jose is innocent, that the methamphetamine found in the home belonged to their uncle Belizaro, and claims regarding the ineffectiveness of his Attorney Mr. Martinez, who Jose Salas claims informed him that he would receive five-years of imprisonment, claims never before addressed by the District Court, Jose Salas sought a COA regarding the matter. In support Salas cited United States v. Garza, 797 Fed. Appx. 906, 907 (5th Cir. 2020) wherein the Circuit Court granted a COA regarding Whether an actual-innocence claim constitutes an exception to the waiver in a Plea Agreement. Based on these factors Jose Salas sought the granting of a COA, and an evidentiary hearing. See COA Brief pages 28 through 31

On May 12, 2022 the Fifth Circuit United States Court Of Appeals issued an Order denying Jose Salas request for a Certificate Of Appealability related to the District Court's failure to have made independent findings of fact and conclusions of law with respect to the claims raised by Salas's §2255 motion, and the District Court's failure to have set an evidentiary hearing.

See APPENDIX A page 1 and 2 The Appeals Court found that the Salas had not satisfied either ground necessary to obtain a COA. The Appeals Court concluded their analysis by stating, "Salas fails to make the requisite showing on either ground. "[T]he motion and the files and records of the case conclusively show that [Salas] is entitled to no relief." §2255(b). Accordingly, IT IS ORDERED that Appellant's motion for certificate of appealability is DENIED." (emphasis added in underline)

Believing the lower Courts committed fundamental error in the handling of his first-time habeas petition, Jose Salas now seeks relief from this Honorable Court.

IV. REASONS FOR GRANTING THE WRIT

Petitioner Jose Agapito Salas seeks an Order of the Court GRANTING, VACATING, and REMANDING (GVR) his case back to the lower Fifth Circuit United States Court Of Appeals. Salas seeks the granting of a Writ Of Certiorari because both the District and Appeals Courts denied him his most basic constitutional right to Due Process Of Law, his right to fully heard with respect to the claims setforth in his first-time habeas petition, under the appropriate legal standards. A right this Court long ago recognized. Cf. Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893 (1976) ("The fundamental requirement of Due Process is the opportunity to be heard, at a meaningful time and in a meaningful manner.") Salas argues when the District and Appeals Courts resolved his Section 2255 motion and COA proceedings that were premised on a never before addressed factually supported claim of actual innocence in the manner the Courts did, the Courts violated this fundamental right.

(a.) Non-Compliance With 28 U.S.C. §2255(b)

As Mr. Salas set out in the Statement Of Facts above, when he filed his Section 2255 motion, the District Court in Ordering the Government to respond to the claims set forth in the motion necessarily found that the record and files of the case did not conclusively show that Salas is not entitled to relief. Section 2255(b) supports this conclusion:

"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."

(emphasis added in underline)

The habeas record shows that the District Court ordered the government to respond to the claims set forth in Mr. Salas's habeas petition, a petition that is supported by a never before addressed sworn declaration of a witness claiming to have first hand knowledge of Jose Salas's innocence with respect to the additional quantities of methamphetamine that greatly enhanced petitioner Salas's sentence. None speculative or conclusory averments if true entitles Mr. Salas to an evidentiary hearing for Salas's brother Gamaliel Salas affidavit relates to matters occurring outside the courtroom. See Machibroda v. United States, 368 U.S. 487, 494-95, 82 S.Ct. 510 (1962) (finding the District Court had erred in noncompliance with 28 U.S.C. §2255 requirement of making factual findings with respect to petitioner's petition allegations, which "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light.")

Also, in United States v. Reed, 719 F.3d 369 (5th Cir. 2013) the Fifth Circuit granted the defendant a Certificate Of Appealability with respect to his claim of ineffective assistance of counsel during plea negotiations. Because the defendant had argued that he would have accepted a plea offer but for his attorney's overestimation of the sentence he would receive if he accepted the government's plea offer. The Circuit Court found that the District Court's dismissal of the defendant's §2255 motion without granting an evidentiary hearing was improper inlight of the defendant's affidavit based on personal knowledge, that trial counsel had predicted a thirty-six month sentence if he accepted the government's plea deal. 719 F.3d at 373-75

The Sixth Amendment provides "the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970) That right "extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012). As the record before the District Court shows, Jose Salas raised a similar claim concerning his attorney's erroneous estimation of his sentence if he accepted the government's plea offer. According to Jose Salas's affidavit, he states his attorney told him that he would receive five years of imprisonment if he pled guilty, Salas's Affidavit attached to his §2255 just as in the Reed case cited above is made on Salas's "personal knowledge", that is, communications with his attorney that occurred outside the courtroom, upon which the existing trial record could cast no real light. See Salas's Affidavit, SM Exhibit J

It is, therefore submitted the district court erred in not granting an evidentiary hearing in this case with respect to Mr. Salas's actual innocence claim, as well as his ineffective assistance of counsel claim, his counsel's under-estimation of his sentence. See United States v. Herrera, 412 F.3d 577, 581 (5th Cir. 2005) ("An Attorney who under-estimates his client's sentencing exposure by 27 months [Salas's by 175 months] performs deficiently because he does not provide his client with information needed to make an informed decision about accepting a plea offer or going to trial.")^{8/} Because the district court did not address these issues directly the motions and files and records of the case could not have shown Jose Salas is not entitled to relief. The district court erred in deferring to the Government's reasoning and conclusions to deny and dismiss Salas's first-time habeas motion. Congress in fashioning 28 U.S.C. §2255(b) assigned to the District Courts the role in the adversary process of determining the ultimate facts and conclusions of law with respect to the habeas claims a defendant brings before the Court. In adopting the position of a party opponent in this fashion, the Court tarnishes the role neutrality all courts sitting in judgment should adhere to. In failing to do so in this case, the district court violated Mr. Salas's most basic fundamental right, that is, the opportunity to be heard on his constitutional claims, at a meaningful time and in a meaningful manner.

8/ Had Mr. Salas been held responsible for the 54.79 grams of methamphetamine setforth in the government's Factual Resume to their written Plea Agreement Salas would have been assigned a Guidelines Base Offense level 20, with his Criminal History I scoring he faced a sentencing range of 46-57 months of imprisonment, which would be consistent with his attorney having purportedly told him he only faced 5-years imprisonment.

(b.) The District Court's Adoption Of The Government's Response As The Basis For The Court's Final Judgment Affected The Fifth Circuit Court's Ability To Determine Salas Entitlement To A Certificate Of Appealability.

It is established that a petitioner may appeal the District Court judgment denying a Writ Of Habeas Corpus only when the petitioner has been issued a Certificate Of Appealability (COA). 28 U.S.C. §2253(c)(1). To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253 (c)(2). And, where the district court judgment relies on a procedural question, the petitioner must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed 2d 542 (2000)

Salas argues when the district court adopted the Government's reasons and conclusions that formed the basis for their requesting denial and dismissal of Salas's habeas motion, the district court's action made it impossible for the Fifth Circuit to determine which of the above two components of the COA standard formed the basis for the district court's judgment, and what basis to analyze Mr. Salas's request for a COA on appeal. As Mr. Salas setforth in the Statement Of Case above and as can be readily confirmed by review of the government's response, the government raised many arguments and contentions regarding why the district court should deny and dismiss Salas's motion. Arguments that Salas's §2255 motion is untimely and that he failed to demonstrate his entitlement

to the extraordinary remedy of tolling. GR at CVD #5 page 14 of 27 n.1. That Salas's habeas claims are procedurally defaulted by his failure to raise them on direct appeal. GR page 19 of 27 n.2 That Salas's claims are waived by his guilty plea. GR page 20 of 27 n. 3 That Salas's claims are waived by a knowing and voluntary appeal waiver. GR page 21 of 27 n.4 And, that Salas's claims are without merit. GR page 22 of 27 n. 5 Thus, whether the basis for the district court's denial and dismissal was a merit based determination of Mr. Salas's habeas claims, a statute of limitation impediment, or procedural bar cannot be ascertained absence full compliance with §2255(b). The record shows the district court denied Salas's a COA, "For the reasons set forth herein". See District Court's Final Judgment, CVD #7 page 2 of 2 at APPENDIX B. And, the expressed basis for the district court's "reasons" were "For the reasons stated in Respondent's thorough and well-drafted Response." Id

As Mr. Salas argued above the district court violated the party presentation principle and the role assignment courts have in the adversary process. For as a general matter, our legal system "follow the principle of party presentation" by "rely[ing] on the parties to frame the issues for decision and assign[ing] to courts the role of neutral arbiter of matters the parties present." United States v. Sineneng-Smith, 140 S.Ct. 1575, 1576, 206 L.Ed 2d 866 (2020) And though this Court observes the party presentation principle to be "supple, not ironclad[,]" the Court maintains the principle that "a court is not hidebound by the precise arguments of counsel." Id at 1579, 1581

Also see, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed 2d 152 (1991) wherein this Court unanimously held, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Id. It is, therefore, submitted that the district court departed drastically from what Congress intended in enacting 28 U.S.C. §2255(b) and the long standing principle of neutrality that's at the core of the party presentation principle. And, because of the district court's deference to the government counsel's reasoning and conclusions Salas was denied his fundamental right to due process, and deprived of a meaningful appeal colored at the outset by the district court's deprivation of this important constitutional right. For example, in United States v. Lewis, 534 Fed. Appx. 243, 244 (5th Cir. 2013) the defendant moved the Court for a COA to appeal the district court's summary dismissal of his §2255 motion. Although the Appeals Court noted that the rules governing section 2255 proceedings do not require findings of fact and conclusions of law when it "plainly appears" from the record and motion that a movant is entitled to relief, "such are plainly indispensable to appellate review." (citing Hart v. United States, 565 F.2d 360, 362 (5th Cir. 1978)) Thus, the Court found without an understanding of the reasons underlying the district court's summary dismissal, "this court is unable to determine whether Lewis has raised issues on appeal which meet the standard for issuance of a COA,". (citation ommitted)

Id 534 Fed. Appx. at 244 Therefore, the Circuit Court granted Lewis a COA to the district court for entry of reasons for its denial of Lewis' §2255 motion. Id Mr. Salas states the Circuit Court should have acted similarly in his case.

(c.) Remand Is Necessary Because The Fifth Circuit Court Compounded The Deprivation Of Petitioner Salas's Fundamental Right To Due Process.

Mr. Salas believes he has established above that the District Court committed fundamental error when the Court deferred to the judgment of the Government in resolving his first-time habeas motion, in clear contravention of the requirements of 28 U.S.C. §2255(b). Salas argues when he appealed the district court's procedural handling of his habeas proceeding to the Fifth Circuit he did so not on the factual findings and conclusions of law conducted by the district court, but those found and argued by the government. On appeal Mr. Salas maintained the position and arguments his habeas Attorney, Ms. Susan J. Clouthier, had presented to the district court.^{9/} Notwithstanding, when the Fifth Circuit Court denied Salas's request for a COA with respect to the procedural handling of his §2255 by the district court, the Court stated, "Salas fails to make the requisite showing on either ground." [presumably referring to the requirements of Slack v. McDaniel, 529 U.S. 473, 484 (2000)] See Judgment Of the Fifth Circuit Court, page 2 at APPENDIX A But how could Salas make such a showing when the District Court did not make an independent merit

9/ Salas was no longer able to pay for counsel's service to effect his appeal of the court's judgment, so he is proceeding Pro Se with the aid of a jailhouse lawyer who prepared the COA request below as well as the instant Certiorari petition.

based finding or a procedural impediment one? In Von Moltke v. Gillie, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed 309 (1948) this Court vacated the District Court's denial of the defendant's habeas motion that were based on the claim that his Attorney had been ineffective, that his guilty plea were involuntary because it had been induced by an FBI Agent. This Court found upon denying the defendant's motion the district court had failed to make findings of fact and conclusions regarding these issues, thus the Court vacated and remanded for the district court to "make explicit findings" on issues relating to his attorney's representation, where answers could not be determined from the record itself and fathoming what the district court had concluded "from what he wrote . . . would be the most tenuous guessing." Id 332 U.S. at 727, 730-31 (Frankfurter, J. concurring)) Likewise, in Mr. Salas's case absence these findings by the district court, the Fifth Circuit had to guess why the district court ruled the way it did.

Finally, Salas states the Fifth Circuit committed clear error in considering his request for a COA using Slack v. McDaniel's criteria, while also trespassing into the province of the district court in making the COA decision it did. When the Appellate Court denied Salas's COA the court stated, "[T]he motion and the files and records of the case conclusively show that [Salas] is entitled to no relief." §2255(b) [citation to §2255(b) in original] See Court Of Appeal Final Judgment, APPENDIX A, page 2. The Appeals Court erred in making this finding, because the district court necessarily found to the contrary during the initial screening, ordering the Government to respond to Salas's §2255 claims. Remand is warranted.

V. CONCLUSION

WHEREFORE, Jose Agapito Salas does move this Honorable Court for issuance of the Writ Of Certiorari, vacating, and remanding his case back to the lower Fifth Circuit United States Court Of Appeals.

Respectfully Requested,

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Executed this 22nd Day Of August 2022

VI. CERTIFICATE OF SERVICE

I Jose Agapito Salas do certify that I have served a copy of this PETITION FOR WRIT OF CERTIORARI on the United States Solicitor General by U.S. Mail, first-class postage prepaid and addressed as follow:

United States Solicitor General
Department Of Justice, Room 5614
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Executed this 22nd Day Of August 2022

Under 28 U.S.C. §1746

Jose Salas
Jose Agapito Salas, Petitioner-Pro Se