

22-6567
No.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JAN - 9 2023

OFFICE OF THE CLERK

Pedro Benitez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals Second Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Pedro Benitez
(Your Name)

P.O. Box 1009
(Address)

Welch WV 24801
(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- (1) When PETITIONER ATTORNEY failed to cite SUPREME COURT PRECEDENT *Dean v United States* (2014) in the DISTRICT COURT, did that failure deprive the DISTRICT COURT the DISCRETION to LOWER the SENTENCE on the UNDERLYING OFFENSE?
- (2) When the DISTRICT COURT DENIED PETITIONER 2255 ON AFFIDAVITS ALONE, ON WHETHER COUNSEL WHO WAS TOLD BY PETITIONER TO FILE A DIRECT APPEAL, WAS THE DISTRICT COURT REQUIRED TO HOLD A EVIDENCE HEARING?

LIST OF PARTIES

[N] All parties appear in the caption of the case on the cover page.

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

RELATED CASES

NONE

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TABLE OF AUTHORITIES CITED

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STATUTES AND RULES

28 U.S.C. 2255

OTHER None

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

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

OPINIONS BELOW

For cases from **federal courts**:

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

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 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

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 is unpublished.

For cases from **state courts**:

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

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 is unpublished.

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

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

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 21, 2022.

No petition for rehearing was timely filed in my case.

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

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

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

For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth amendment of U.S. Constitutional
fifth amendment of U.S. Constitutional

STATEMENT OF THE CASE

PETITIONER FILED A 28 U.S.C. 2255 ASSERTING THAT COUNSEL WAS INEFFECTIVE IN HIS ASSISTANCE, WHEN HE FAILED TO CITE UNITED STATES SUPREME COURT PRECEDENT, THAT WOULD OF ALLOWED THE DISTRICT COURT TO USE HIS DISCRETION TO RENDER A LOWER SENTENCE ON PETITIONER UNDERLYING OFFENSE. IN ADDITION PETITIONER CONTEND THAT AN EVIDENCE HEARING SHALL HAVE BEEN GIVEN, WHERE IT WAS PETITIONER WORD AGAINST ATTORNEY WORD THAT HE TOLD HIS ATTORNEY TO FILE HIS DIRECT APPEAL, AND THAT THE FILES RECORDS DID NOT DISPUTE PETITIONER ASSERTION.

REASONS FOR GRANTING THE PETITION

IN *Dean v United States*, 137 S.Ct. 1170 (2017), the Supreme Court held that when a defendant is facing two consecutive sentence—one for a predicate offense, which does not carry a mandatory minimum sentence, and one for an offense committed under 924(c), which does carry a mandatory minimum sentence—the court may consider the defendant's 924(c) sentence when deciding the proper time to be served for the predicate offense. See, *United States v Bonilla*, 700 F.3d Appx 82 (2nd Cir 2017) (quoting, *Dean v United States* 137 S.Ct. 1170 (2017)).

The failure of counsel to cite *Dean* at sentencing caused a substantive due process of law pursuant to the 3553(a) factors, as the sentence of the mandatory sentence of the 924(c), and the sentence for the predicate offense did not get the proper balancing under the 3553(a) factors. *United States v Crute*, 668 F.3d Appx 9 (2nd Cir 2016) (quoting, *Molina-Martinez v United States*, 136 S.Ct. 1338 (2016) (finding that when a defendant is sentenced under an erroneously calculated guideline range, "The error itself can and most often will be sufficient to show a reasonable probability of a different outcome absent the error. As this Supreme Court has made clear, it is ~~obligatory~~ that counsel should have cited *Dean* at the critical stage of a sentencing adversary hearing. *Glover v United States*, 531 U.S. 198 (2001) (holding, "An error by counsel at sentencing that amounts to any extra jail time is prejudicial under the Sixth Amendment, and has Sixth Amendment significance.

Thus, Petitioner attorney performance of not citing *Dean* and its citation to the courts, shall not be excused.

(5)

← Continue on attached →
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This Supreme Court has consistently made clear to the lower district courts, when the district courts are faced with conflicting affidavits like whether Petitioner or Counsel is right on filing an appeal. Contested factual issues may not be decided on the basis of affidavits alone, unless the affidavits are supported by other evidence in the record. *United States v Hayman* 342 U.S. 205 (1952).

Petitioner presented factual evidence through his affidavit, that was in conflict with his attorney affidavit instructing him to file my notice of appeal. And the fact that the District Judge expressed that he explained to Petitioner that he was waiving his right to appeal as stated in the attached Court order appendix(B), do not show that the files and records conclusively show that Petitioner was not entitled for his Counsel to be effective in filing a timely notice of appeal as requested by Petitioner. *Campusano v United States*, 442 F.3d 770 (2nd Cir 2006) (quoting *Roe v Flores-Ortega*, 528 U.S. 470 (2000)).

CONCLUSION

The petition for a writ of certiorari should be granted. Appoint Counsel pursuant to 18 U.S.C. 3006(a)

Respectfully submitted,

Pedro Bentley

Date: January 6th 2023