

No: **22-7076**

**In the
Supreme Court of the United States**

SERVANDO PINEDA-VALDEZ,

Petitioner,

vs.

Supreme Court; U.S.
FILED

MAR 07 2023

OFFICE OF THE CLERK

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

Servando Pineda-Valdez
Register Number: 26961-078
FCI Fort Dix
P.O. Box 2000
Joint Base MDL, NJ 08640

QUESTIONS PRESENTED FOR REVIEW

Should a writ of certiorari be granted since Servando-Pineda's title 28 U.S.C. § 2255 motion sufficiently alleged constitutional claims violations due to counsel's ineffectiveness by failing to review the case law, plea agreement, and discovery before filing a frivolous motion to withdraw Servando-Pineda's guilty plea that caused Pineda-Valdez to lose his acceptance of responsibility resulting in an extended term of incarceration.

**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 Fifth Circuit and the United States District Court for the Eastern District of Texas.

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

TABLE OF CONTENTS

Questions Presented for Review	ii
List of Parties to the Proceedings in the Courts Below	iii
Table of Contents	iv
Table of Authorities	vi
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	2
Statement of the Case	4
Reasons for Granting the Writ	6
Rule 10 - Considerations Governing Review on Writ of Certiorari	6
Should a writ of certiorari be granted since Servando-Pineda's title 28 U.S.C. § 2255 motion sufficiently alleged constitutional claims violations due to counsel's ineffectiveness by failing to review the case law, plea agreement, and discovery before filing a frivolous motion to withdraw Servando-Pineda's guilty plea that caused Pineda-Valdez to lose his acceptance of responsibility resulting in an extended term of incarceration	7
a. The Fifth Circuit Erred in Determining there was no Encouragement to Proceed Further	10
Conclusion	12
<i>United States v. Pineda-Valdez,</i> No: 22-40018 (5th Cir. December 12, 2022)	A-1

Pineda-Valdez v. United States,
4:19cv209 (E.D. Texas, December 7, 2021) B-1

Pineda-Valdez v. United States,
4:19cv209 (E.D. Texas, September 29, 2021)..... C-1

TABLE OF AUTHORITIES

<i>Hamzah v. Woodman's Food Mkt., Inc.</i> , 2016 U.S. Dist. LEXIS 7518 (W.D. Wis. Jan. 22, 2016)	7
<i>Kimmelman v. Morrison</i> , 477 U.S. 365	10
<i>Miller-El v. Cockrell</i> , 123 S. Ct. 1029 (2003)	10
<i>Swisher v. True</i> , 325 F.3d 225 (4th Cir. 2003)	11
<i>Valerio v Dir. of the Dep't of Prisons</i> , 306 F3d 742 (9th Cir. 2002), <i>cert. den.</i> (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788) 11	

Rules

Rule 10	6
Rule 10.1(a), (c)	7

Statutes

21 U.S.C. § 846	<i>passim</i>
28 U.S.C. § 1254	2
28 U.S.C. § 1654	11, 2
28 U.S.C. § 2255	<i>passim</i>

No:

**In the
Supreme Court of the United States**

SERVANDO PINEDA-VALDEZ,

Petitioner,

vs.

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

Servando Pineda-Valdez, 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 Fifth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision in *United States v. Pineda-Valdez*, No: 22-40018 (5th Cir. December 12, 2022), is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, Eastern District of Texas (Mazzant, A.), whose judgment was appealed to be reviewed, is an unpublished opinion in *Pineda-Valdez v. United States*, 4:19cv209 (E.D. Texas, December 7, 2021) is reprinted in the separate Appendix B to this Petition.

The Report and Recommendation of the Magistrate Judge for the District Court, Eastern District of Texas (Priest-Pineda-Valdez, K.), whose judgment was appealed to be reviewed, is an unpublished opinion in *Pineda-Valdez v. United States*, 4:19cv209 (E.D. Texas, September 29, 2021) is reprinted in the separate Appendix C to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on December 12, 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 parts:

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. Fifth Amendment

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. Sixth Amendment

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

A prisoner in custody under sentence of a court established by an 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. Title 28 U.S.C. § 2255.

STATEMENT OF THE CASE

On November 8, 2016, Drug Enforcement Agency (“DEA”) agents met with a confidential source (“CS”) who stated that Pineda-Valdez was known for distributing five to ten kilograms of cocaine at a time in the Dallas/For Pineda-Valdez Movant by telephone and said he was interested in purchasing cocaine. The CS, under the direction and surveillance of the DEA, met with Pineda-Valdez, and Pineda-Valdez agreed to sell the CS five kilograms of cocaine. On January 10, 2017, the CS and an undercover officer who purported to be the customer for the five kilograms of cocaine, met with Pineda-Valdez Pineda-Valdez. Pineda-Valdez agreed to sell the undercover officer five kilograms of cocaine for \$32,000 apiece. They discussed methods regarding the delivery of cocaine. On February 17, 2017, the CS contacted Pineda-Valdez, and Pineda-Valdez stated that he would have a courier, “Michelin,” deliver five kilograms of cocaine to the CS. “Michelin” was later identified as co-defendant Miguel Arrellano. The CS, an undercover officer, and Arrellano subsequently met, and Arrellano provided a gift bag that contained

five kilograms of cocaine to the undercover officer. Arrellano was arrested at the scene. Pineda-Valdez contacted the CS after some time had passed and stated he had not heard from Arrellano. The CS informed Pineda-Valdez that the meeting had gone well and that the undercover officer had the money for the cocaine; however, the CS was having trouble locating Arrellano. Pineda-Valdez stated that he felt something was not right. After a few more calls between the CS and Pineda-Valdez and he agreed to meet the CS to receive the payment for the cocaine. The CS, at the direction of the DEA, told Pineda-Valdez to meet him at a Jack-in-the-Box restaurant in Plano. Upon his arrival, Pineda-Valdez was arrested.

On March 8, 2017, the grand jury returned an Indictment charging Pineda-Valdez in Count One with conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846. (Crim. Doc. 28).¹ On February 28, 2018, the District Court held a sentencing hearing where counsel argued a motion to withdraw the guilty plea as well an enhancement for possession of a firearm during the February 17, 2017, transaction. (Doc. 58, ¶-18). The court denied the objections, denied the motion to withdraw the guilty plea, and removed Pineda-Valdez's acceptance of responsibility since Pineda-Valdez' counsel had filed the motion to withdraw the guilty plea. (Doc. 89). Pineda-Valdez was sentenced to 168 months of incarceration. No direct appeal was filed.

¹ *United States v. Pineda Valdez*, 4:17cr00038 (USDC EDTX).

Pineda-Valdez then filed a Title 28 U.S.C. § 2255 alleging several instances of ineffective assistance of counsel. That pleading was denied. That order was in error since several allegations of ineffective assistance of counsel were not addressed. Pineda-Valdez proceeded with his request for a certificate of appealability, which was also denied. 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 EIGHT CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts 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. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

SHOULD A WRIT OF CERTIORARI BE GRANTED SINCE SERVANDO-PINEDA'S TITLE 28 U.S.C. § 2255 MOTION SUFFICIENTLY ALLEGED CONSTITUTIONAL CLAIMS VIOLATIONS DUE TO COUNSEL'S INEFFECTIVENESS BY FAILING TO REVIEW THE CASE LAW, PLEA AGREEMENT, AND DISCOVERY BEFORE FILING A FRIVOLOUS MOTION TO WITHDRAW SERVANDO-PINEDA'S GUILTY PLEA THAT CAUSED PINEDA-VALDEZ TO LOSE HIS ACCEPTANCE OF RESPONSIBILITY RESULTING IN AN EXTENDED TERM OF INCARCERATION.

The Fifth Circuit in denying Pineda-Valdez's request for a certificate of appealability erred since his pleadings encouraged to proceed further. Pineda-Valdez never heard from counsel what he "needed to hear" not what he "wanted to hear." *Hamzah v. Woodman's Food Mkt., Inc.*, 2016 U.S. Dist. LEXIS 7518, at *24 (W.D. Wis. Jan. 22, 2016) (plaintiff should expect his counsel to tell him what he needs to hear, rather than what he might prefer to hear). In all aspects of this case, Pineda-Valdez expected his counsel to provide adequate and competent representation as required by the Sixth Amendment. Here Pineda-Valdez was charged with a conspiracy to distribute "5 kilograms or more" of cocaine in violation of Title 21 U.S.C. § 846. (Crim. Doc. 28). The elements of the offense alleged, that "the overall conspiracy involved 5 kilograms of more a mixture or substance containing a

detectable amount of cocaine.” (Crim. Doc. 43). The plea agreement alleged that “the term of the conspiracy involved at least 5 kilograms but less than 15 kilograms of a mixture or substance containing a detectable amount of cocaine.” (Crim. Doc. 49). Finally, during the change of plea hearing, the following colloquy occurred:

THE COURT: And you agree that you knew the term -- that during the term of the conspiracy, the amount of cocaine involved was at least 5 kilograms but less than 15 kilograms?

THE DEFENDANT: Yes, ma'am.

Id. (Doc. 88 at 11).

There was no question that the alleged drug quantity in the *conspiracy*, to which Pineda-Valdez plead guilty, was a drug quantity of “5 kilograms but less than 15 kilograms” of cocaine. Pineda-Valdez relied on his attorney to make all the proper decisions on defense pleadings to file and the advice to provide. However, on February 12, 2018, counsel filed a frivolous motion to withdraw/set aside the guilty plea based on an argument that the drug quantity seized by the co-defendant was 4945.40 grams of cocaine, below the 5-kilogram threshold. (Doc. 76). By pleading counsel disregarded the conspiracy *plea* that Pineda-Valdez entered. However, as the court noted in the order of denial, the “Defendant entered a plea of guilty pursuant to a plea agreement before Judge Johnson to Count one of the indictments, which charged a violation of 21 U.S.C. § 846. (Doc. 91). The court correctly determined that the conspiracy involved a violation of § 846 thus the motion to

withdraw the plea based on one transaction of 4945.40 grams was frivolous. The most prejudicial effect on Pineda-Valdez was that the court relied on the counsel's frivolous filing to deny Pineda-Valdez's acceptance of responsibility, thus elevating his final guideline range. (Crim. Doc. 89). The court imposed a sentence of 168 months where the initial guideline calculation determined 108-135 months with a 120-month mandatory minimum. Pineda-Valdez was advised by counsel just before sentencing, that the motion to withdraw the plea would succeed. That was not the case and the misleading erroneous information led to an elevated sentence. Counsel's non-familiarity with the federal charges of conspiracy, their application of the sentencing guidelines, and the risk of losing acceptance of responsibility were crucial to Pineda-Valdez.

There was no logical explanation for why counsel would file a motion to withdraw the plea based on drug quantities that were within the agreed range when the parties entered into the plea agreement. Counsel's unfamiliarity with the guidelines was critical to Pineda-Valdez's case and ultimately, resulted in an elevated final sentence.

As raised in the 2255, the counsel never explained the guidelines to Pineda-Valdez before providing the plea of guilt. The filing of this frivolous pleading supports the position that the counsel was unfamiliar with the guidelines and the federal statute for conspiracy which was prejudicial to Pineda-Valdez. Even if the

court determined that some sort of strategy existed, which none is apparent, the Supreme Court has noted that “a single, serious error may support a claim of ineffective assistance of counsel.” *Id. Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). This “single serious error” could cause counsel’s performance to fall “below the level of reasonable professional assistance”, even where, “counsel’s performance at trial was “generally creditable enough”, and even where counsel had made “vigorous cross-examination, attempts to discredit witnesses, and [an] effort to establish a different version of the facts.” *Id.* at 386. Here the effects of the frivolous filing were prejudicial to Pineda-Valdez.

a. The Fifth Circuit Erred in Determining there was no Encouragement to Proceed Further

The Supreme 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 "full consideration" in the course of the COA inquiry is forbidden by § 2253(c). *Id.* at 1039 ("When a court of appeals side steps [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).

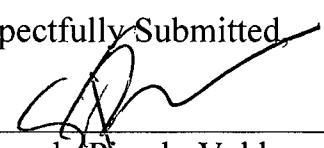
The Fifth Circuit need only to agree that based on the record, Pineda-Valdez was entitled to have the case proceed further, not that he will be victorious on the merits of his claim. Although the District Court has denied all the claims without an evidentiary, (an error in this case) this Circuit Court had the authority to grant the relief and expand upon it. *Valerio 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 the district court has denied it as to all issues but also to expand COA to include additional issues when the district court has granted COA as to some but not all issues.) As such, this court must agree, that a jurist of reason would have agreed that there was a strong possibility that Pineda-Valdez was not aware of counsel's frivolous filing to vacate the plea, thus permitting the matter to proceed further. The Fifth Circuit erred as a matter of law in not granting the COA.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Fifth Circuit.

Done this 7, day of March 2023.

Respectfully Submitted,



Servando Pineda-Valdez
Register No.: 26961-078
FCI Fort Dix
P.O Box 2000
Joint Base MDL, NJ 08640