

No. 23-

IN THE
Supreme Court of the United States

ALEX ESTUARDO IXCOPAL HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner, ALEX ESTUARDO IXCOPAL-HERNANDEZ, submits the Fifth Circuit Court of Appeals' ruling granting the Government's request to expand the record on direct appeal—with documents that were not part of the record before the District Court and without providing Petitioner an adequate chance to respond before granting the Government's motion a mere five days after it was filed—is a violation of due process, which was exacerbated when the Fifth Circuit solely relied on the supplemental materials to resolve the appeal. Thus, the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and a compelling reason is presented for discretionary review. Mr. Ixcopal-Hernandez therefore requests that this Court grant this Petition and allow this case to proceed for a determination of whether the Due Process Clause was violated.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Alex Estuardo Ixcopal-Hernandez:	Petitioner (Defendant-Appellant in the lower courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alex Estuardo Ixcopal-Hernandez, requests this Court grant this Petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals (sometimes referred to as “the Fifth Circuit” or “the Appellate Court”). Mr. Ixcopal-Hernandez submits the Fifth Circuit denied him his due process rights by granting the Government’s motion to supplement the record on direct appeal with crucial new evidence without giving him a reasonable opportunity to respond to the enlargement of the record with information which was not before the District Court. The Appellate Court directly accepted the Government’s supplementation within five days after the motion was filed despite a Court order that Petitioner could object within fourteen days after the motion was filed. Moreover, in resolving this appeal, the Fifth Circuit merely cited to the supplemental material. Thus, Mr. Ixcopal-Hernandez submits that this Petition should proceed to further review.

REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Alex Estuardo Ixcopal-Hernandez*, No. 21-50807 (5th Cir. February 9, 2023), appears at Appendix A to this petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, Pecos Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Ixcopal-Hernandez for illegal reentry into the United States in violation of 8 U.S.C. § 1326(b)(2). Mr. Ixcopal-Hernandez pleaded guilty to the above charge. Prior to the entry of judgment and the direct appeal, the District Court narrowed the issue to whether a prior California conviction would mean Mr. Ixcopal-Hernandez should be convicted under 8 U.S.C. § 1326(b)(1), as opposed to 8 U.S.C. § 1326(b)(2). The Fifth Circuit held the illegal reentry violation was correctly prosecuted under 8 U.S.C. § 1326(b)(2) and affirmed the sentence of the District Court. A copy of the Fifth Circuit opinion is attached at Appendix A, and a copy of the District Court's judgment is attached at Appendix B.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence 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; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

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 witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner's Initial Briefing Filed with the Fifth Circuit Court of Appeals

As noted, the final judgment at the District Court level reflects that Mr. Ixcopal-Hernandez was convicted of illegal re-entry under 8 U.S.C. § 1326(b)(2). ROA.29-34. Mr. Ixcopal-Hernandez timely filed a notice of appeal. ROA.44. The undersigned was appointed to represent Mr. Ixcopal-Hernandez on his direct appeal, and subsequently filed an *Anders* brief, along with a motion to withdraw, on February 8, 2022. *United States v. Ixcopal-Hernandez*, Fifth Circuit No. 21-50807. On June 30, 2022, the Fifth Circuit denied counsel's motion to withdraw and ordered him to file a brief on the merits. *Id.* at docket no. 00516378435. The Appellate Court explained:

An independent review of the record and counsel's brief discloses a nonfrivolous appellate issue regarding whether, based on the available record, Ixcopal-Hernandez's prior California conviction constitutes an aggravated felony that supports the entry of a conviction under 8 U.S.C. § 1326(b)(2). *See* 8 U.S.C. § 1101(a)(43)(B); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015); *United States v. Lopez-Cano*, 516 F. App'x 350, 353, 356 (5th Cir. 2013); *see also United States v. Trujillo*, 4 F.4th 287, 291 (5th Cir. 2021) ("Entering conviction based on § 1326(b)(2) rather than § 1326(b)(1) can have collateral consequences for the defendant, such as permanent inadmissibility to the United States."), *cert. denied*, 142 S. Ct. 837 (2022).

Id. at pages 1-2. Accordingly, counsel filed a brief and argued, as suggested by the Fifth Circuit, that Mr. Ixcopal-Hernandez should have been convicted under 8 U.S.C. § 1326(b)(1), rather than 8 U.S.C. § 1326(b)(2).

The Opening Brief on the Merits

In making his argument to the Fifth Circuit that his conviction was only supported as a conviction under 8 U.S.C. § 1326(b)(1), Mr. Ixcopal-Hernandez initially pointed out that

review was for plain error because there was no argument to the District Court that judgment should have been entered under 8 U.S.C. § 1326(b)(1). (Opening Brief, page 9.) Thus, pursuant to jurisprudence of this Court, Mr. Ixcopal-Hernandez must first identify: (1) a forfeited error; (2) that is clear or obvious, rather than subject to a reasonable dispute; and (3) that affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If Mr. Ixcopal-Hernandez could identify the three matters listed above, the Court “may correct the error at [its] discretion if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotation omitted).

To this end, Mr. Ixcopal-Hernandez argued he should not have been punished under 8 U.S.C. § 1326(b)(2) because he had no prior “aggravated” felony. (Opening Brief, page 10.) By way of background, “aggravated felonies” are defined at 8 U.S.C. § 1101(a)(43). *Id.* Relevant here is 8 U.S.C. § 1101(a)(43)(B), which provides that an “aggravated felony” includes a crime of “illicit trafficking in a controlled substance (as defined in section 802 of Title 21) including a drug trafficking crime (as defined in section 924(c) of Title 18).” *Id.* Therefore, the issue before the Fifth Circuit was whether Mr. Ixcopal-Hernandez’ prior California conviction was a drug trafficking crime and thus an aggravated felony. *See id.* If the conviction was not an aggravated felony, then Mr. Ixcopal-Hernandez’ conviction under 8 U.S.C. § 1326(b)(2) should be reformed to establish a conviction under 8 U.S.C. § 1326(b)(1). *Id.* (citing *Lopez-Cano*, 516 F. App’x at 351-52). In sum, Mr. Ixcopal-Hernandez argued the record did not establish his prior California state court conviction was an aggravated felony. (Opening Brief, pages 10-11).

The Fifth Circuit's Opinion on the Merits

In rendering its decision, the Appellate Court first observed that Mr. Ixcopal-Hernandez was arguing that “his judgment should reflect a conviction pursuant to [8 U.S.C.] § 1326(b)(1) because his predicate offense, a prior California conviction for possession of a controlled substance for sale, was not properly classified as an aggravated felony such that it would support a conviction under [8 U.S.C.] § 1326(b)(2).” (Appendix A, pages 1-2).

The Fifth Circuit then observed that review was for plain error:

Under the modified categorical approach, a conviction would constitute an aggravated felony only if documents, such as the charging document or plea agreement, establish that the defendant’s conviction was based on a substance prohibited under the Controlled Substances Act (CSA). *See United States v. Gomez-Alvarez*, 781 F.3d 787, 792, 794-96 (5th Cir. 2015).

(*Id.* at page 2). The Court then explained:

Ixcopal-Hernandez argues that the record did not contain any approved documents from which the district court have determined that his conviction under § 11378 involved a substance prohibited under the CSA. He is correct. However, the Government has supplemented the record on appeal. Among the documents submitted by the Government was a felony complaint charging Ixcopal-Hernandez with a violation of California Health and Safety Code § 11378, asserting that he unlawfully possessed methamphetamine for the purpose of a sale.

(*Id.* at pages 2-3). This led the Fifth Circuit to conclude:

Because the felony complaint served as the charging document, the complaint is an approved source to establish the fact of a prior conviction under the modified categorical approach. *See Gomez-Alvarez*, 781 F.3d at 794-96. Accordingly, the district court did not plainly err in concluding that Ixcopal-Hernandez’s prior California conviction of possession for a sale of a

controlled substance was an aggravated felony. *See United States v. Castellon-Aragon*, 772 F.3d 1023, 1024-26 (5th Cir. 2014).

The judgment of the district court is AFFIRMED.

(*Id.* at 3) (full citation to *Castellon-Aragon* added).

The Government’s Files a Motion to Supplement the Record and the Fifth Circuit Rules

The Government its Appellee’s Brief on September 29, 2022. On the same day, the Government filed an Opposed Motion to Supplement the Record on Appeal with the Fifth Circuit. In the motion, the Government sets out to supplement the record to prove the California case was an “aggravated felony.” It declared:

In preparing the Appellee’s brief, the undersigned AUSA conferred with the U.S. Probation Officer, Dina Meller, who forwarded the documents she reviewed while preparing the presentence report.

In order to assist the Court in its resolution of the appeal in this matter, the Government moves to supplement the record on appeal with the documents from the Orange County district court.

The undersigned respectfully requests that the record on appeal be supplemented with the felony complaint and docket from case 12FC0661, SAPD number 12-07120, Orange County, California. Should the Court grant this motion to supplement, the undersigned further requests that this Court instruct the District Clerk’s Office to make the supplemental record available to the parties.

(Document No. 81, pages 1-2).

Thus, the Government was not only asking the Fifth Circuit to supplement the record, it was asking the Appellate Court to enlarge the record with evidence that was not of record before the District Court. In fact, as discussed below, the Fifth Circuit not only granted the

motion, but used this new information as the sole basis for ruling in the Government's favor on direct appeal.

As noted, the information with which the Government sought to supplement the record was "the felony complaint and docket from case 12CF0661, SAPD number 12-07120, California." (*Id.* at 2). The Fifth Circuit granted the motion, and the procedure for that is discussed below.

Important at this juncture, however, is that the Fifth Circuit stated in its opinion on the merits that Mr. Ixcopal-Hernandez had argued the drug conviction was not an aggravated felony because the record did not establish it was prohibited under the CSA. (Appendix A, page 2). The Appellate Court then declared: "He is correct." (*Id.*) However, the Fifth Circuit actually declared that Mr. Ixcopal-Hernandez was not correct because the supplemental material became the sole reason for affirming the District Court, even though that information was not before the District Court. To repeat the Fifth Circuit's conclusion from its review of the supplemental information, the Appellate Court stated:

Because the felony complaint served as the charging document, the complaint is an approved source to establish the fact of a prior conviction under the modified categorical approach. *See Gomez-Alvarez*, 781 F.3d at 794-96. Accordingly the district court did not plainly err in concluding that Ixcopal-Hernandez's prior California conviction of possession for sale of a controlled substance was an aggravated felony. *See Castellon-Aragon*, 772 F.3d at 1024-26.

(Appendix A at page 3).

Revisiting the Government's Motion to Supplement the Record on Appeal

As noted above, the Government filed the motion to supplement the record on appeal with information that was not before the District Court on September 29, 2022. The Fifth Circuit CM/ECF docket entry on this motion provides: "Response/Opposition is due on October 11, 2022." (District Clerk docket entry dated September 29, 2022). However, the Appellate Court did not give Mr. Ixcopal-Hernandez until October 11, 2022, to respond because the Fifth Circuit granted the motion on October 4, 2022. Thus, the Fifth Circuit entered an order based on evidence that was profoundly critical to this case without giving the Petitioner a chance to timely respond to the Government's requested supplementation of the record. This was a violation of due process.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. Factual Overview

It was clear that the record presented to the District Court and presented originally on direct appeal did not establish that Mr. Ixcopal-Hernandez had a conviction for a prior drug offense that was an aggravated felony. As the above discussion establishes, when the Government noticed it could not prove the prior was an aggravated felony, it went and found a "new" document that was not part of any record before either court to show that the prior was an aggravated felony. In granting the motion, the Fifth Circuit failed to abide by its own rulings about the use of the supplemental records. The Appellate Court ordered that Petitioner had until October 11, 2022, to respond. Yet, the Fifth Circuit gave no credence to

its own order and granted the motion to supplement on October 4, 2022, seven days before Mr. Ixcopal-Hernandez' deadline to respond.

II.
The Due Process Violation

The jurisprudence of this Court establishes that it is a violation of due process to deny the Mr. Ixcopal-Hernandez a fair opportunity to defend himself against the Government's attempt to supplement the record. *See In re Oliver*, 333 U.S. 257, 273 (1948). To this end, this Court in *In re Oliver* identified the following rights as among the minimum essentials of a fair ruling.

A person's right to reasonable notice . . . and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

See id. While *In re Oliver* addressed the right to cross examine a witness, this Court's explanation of the law is relevant here because it was grounded in due process. *See id.* at 294-95. Specifically, this Court held that the right to cross examination—a principle which applies in this case to the Government's motion to supplement—is implicit in the Constitutional right of confrontation and helps assure the “accuracy of the truth-determining process.” *Id.* at 295. Indeed, this Court stated that the denial of the right to confront the Government brings into question the ultimate “integrity of the fact finding process.” *Id.*

The action of the Fifth Circuit in this case was essentially the right to challenge the evidence against Mr. Ixcopal-Hernandez at sentencing. When the Appellate Court set a due

date for what is essentially the opportunity to challenge the Government's new evidence, the above holding in *In re Oliver* shows this action by the Fifth Circuit completely prevented Mr. Ixcopal-Hernandez from asserting his right to challenge the evidence against him. Thus, the Fifth Circuit violated Mr. Ixcopal-Hernandez' due process rights by not following its own order to permit him to object to the introduction to new evidence which was not before the District Court.

The ruling of the Fifth Circuit further falls below the due process standard set out in *United States v. Superville*, 124 F.3d 191, 191 (5th Cir. 1997). There, the defendant sought to supplement the record on appeal with new evidence. The Fifth Circuit denied the request because "we will not consider factual evidence that has not been presented in the District Court." *Id.* (citing *United States v. Flores*, 887 F.2d 543, 546 (5th Cir. 1989)). Mr. Ixcopal-Hernandez lost his due process right to make this argument on appeal. It should also be noted that the Fifth Circuit has only permitted evidence not submitted to the District Court where it was "omitted from the appellate record by error or accident." *See Worldwide Detective Agency Inc. v. Cannon Cochran Mgmt. Servs., Inc.*, 622 F. App'x 383, 387 (5th Cir. 2015) (citing FED. R. APP. P. 10(e)(2)(C)).

Finally, in *Cooper v. Oklahoma*, 517 U.S. 348, 350-53 (1996), this Court addressed the issue of whether a law that presumes a defendant is competent to stand trial unless he can prove his incompetence by clear and convincing evidence violates due process. In resolving the issue, this Court relied on *Medina v. California*, 505 U.S. 437, 446 (1992), declaring that a "[h]istorical practice is probative of whether a procedural rule can be

characterized as fundamental.” Clearly, the right of the appellant to be permitted to timely object to enlarging the record on appeal with the very evidence that will settle the dispute—without it having been introduced in the District Court—is grounded in due process. For these reasons, the Fifth Circuit violated Mr. Ixcopal-Hernandez’ due process rights as guaranteed by the Constitution, this Court and the Fifth Circuit.

CONCLUSION

For the reasons set forth above, Mr. Ixcopal-Hernandez submits that compelling reasons are presented in support of discretionary review on the important issue of due process concerns by this Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, ALEX ESTUARDO IXCOPAL-HERNANDEZ, respectfully requests that this Honorable Court grant this Petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court based on new evidence in violation of Mr. Ixcopal-Hernandez’ due process rights. Petitioner also requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

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