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In the
Supreme Court of the United States

JAVIER GUERRA,

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

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ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

Given the case's specifics, was the defense counsel ineffective according to the *Strickland v. Washington* 466 U.S. 668 (1984) precedent when failing to alert Guerra about potential sentence enhancement due to dismissed drug quantities? If so, did the Fifth Circuit err by not granting a certificate of appealability?

**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 Northern District of Texas.

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

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Javier Guerra, 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, was entered on May 25, 2023, *United States v. Guerra*, No. 22-11251, 2023 U.S. App. LEXIS 16791 (5th Cir. May 25, 2023), is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court from the Northern District of Texas Circuit, whose judgment is herein sought to be reviewed, was entered on March 10, 2023, an unpublished decision in *Guerra v. United States*, No. 3:21-CV-254-B-BK, 2022 U.S. Dist. LEXIS 203083 (N.D. Tex. Nov. 8, 2022), is reprinted in the separate Appendix B to this Petition.

The opinion of the Magistrate District Court from the Northern District of Texas Circuit, whose judgment is herein sought to be reviewed, was entered on September 25, 2023, an unpublished decision in *Guerra v. United States*, No. 3:21-CV-254-B-BK, 2022 U.S. Dist. LEXIS 204154 (N.D. Tex. Sep. 25, 2022) is reprinted in the separate Appendix C to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on May 25, 2023.

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:

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 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; nor shall private property be taken for public use, without just compensation.

Id. Fifth Amendment.

STATEMENT OF THE CASE

In 2017, Guerra was indicted with more severe charges in a third amended indictment. These charges included two counts related to drug conspiracies: one for conspiring to possess methamphetamine with the intent to distribute, and another for conspiring to possess cocaine with the intent to distribute. Additionally, he faced a charge for possessing a firearm to further his involvement in drug trafficking activities. (Cr. Case No. 1:14cr266, Doc. 1992, pg's. 3-5).

Later that same year, Guerra opted to enter a guilty plea based on the terms of a plea agreement. The plea agreement led to an amended information containing two counts. These counts combined the previous drug conspiracy charges into a single count, specifying a conspiracy to possess and distribute 500 grams of a mixture or substance containing detectable amounts of cocaine. The other count in the amended information was related to conspiracy to launder monetary instruments. In 2018, he received his sentence of 480 months of imprisonment for each of these counts, to be served concurrently. (Cr. Doc 2107) (Information) and (Cr. Doc. 2407). Following his sentencing, Guerra pursued a direct

appeal; however, this appeal was subsequently dismissed. (Cr. Doc. 2407).

Guerra timely filed the instant § 2255 motion on February 4, 2021, with a brief in support and an affidavit (Cv. Doc. 2; Doc. 3, brief and affidavit). He challenges the voluntariness of his guilty pleas, asserts ineffective assistance of counsel, and requests an evidentiary hearing. (See, 3:21cv00254, Doc. 2 at 4-5; Doc. 3). The Government filed a response in opposition, arguing that Guerra's guilty plea was knowing and voluntary and that he failed to show that counsel rendered deficient performance or that he was prejudiced (Cv. Doc. 11). Guerra filed a reply, arguing that the Government's response was inadequate and requesting an evidentiary hearing (Cv. Doc. 14).

Subsequent to the submission of the briefs, the Magistrate Judge released a Report and Recommendation ("Report") advising the denial of the § 2255 motion. In response, Guerra filed an objection to this Report (Cv. Doc. 16). Following this, the District Court rendered a decision to dismiss the § 2255 motion without convening a hearing (Cv. Doc. 18).

Guerra proceeded on appeal requesting a Certificate of Appealability ("COA") pursuant to Title 28 U.S.C. § 2253, however, the Fifth Circuit

Court of Appeals denied the request for a Certificate of Appealability.

This timely petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

In the year 2011, an intricate undercover investigation spotlighted Guerra as a prominent local supplier of illicit narcotics within the vicinity of Dallas, Texas. Over the span from 2012 to 2015, a comprehensive series of interviews with various informants consistently pointed to Guerra as a key source of substantial quantities of methamphetamine and cocaine, measured in kilograms. This pattern gained momentum in 2012 when law enforcement agents executed purchases of methamphetamine, each transaction encompassing ounce-level quantities, and directly linked to Guerra as the provider. This modus operandi persisted over the subsequent years, with law enforcement personnel consistently tracing methamphetamine acquisitions back to Guerra's involvement.

In the tapestry of evidence, the year 2015 saw pivotal moments that solidified the case against Guerra. In June of that year, vigilant agents bore witness to Guerra's participation in a significant cash exchange, tallying up to \$129,968. A mere month later, on July 9, 2015, law

enforcement authorities observed another substantial cash delivery made by Guerra, this time amounting to \$284,930. However, the turning point came on July 15, 2015, when agents executed a search at Guerra's residence. The search unearthed an array of critical items, including nine firearms, seven mobile devices, \$220,430 in cash, and intricate records intricately linked to drug-related activities. The prosecution argued that these meticulous drug ledgers served as a testament to Guerra's involvement, underscoring an inventory of 31 kilograms of cocaine, conservatively valued at \$821,500.

In an additional layer of corroboration, multiple cooperating defendants who had been apprehended provided consistent accounts of Guerra's pivotal role in the distribution of substantial quantities of methamphetamine, cocaine, and even heroin. This collaborative testimony further fortified the case against Guerra, presenting a comprehensive and compelling narrative of his deep involvement in the illicit narcotics trade.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT OF APPEALS HAS 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

GIVEN THE CASE'S SPECIFICS, WAS THE DEFENSE COUNSEL INEFFECTIVE ACCORDING TO THE *STRICKLAND v. WASHINGTON* 466 U.S. 668 (1984) PRECEDENT WHEN FAILING TO ALERT GUERRA ABOUT POTENTIAL SENTENCE ENHANCEMENT DUE TO DISMISSED DRUG QUANTITIES? IF SO, DID THE FIFTH CIRCUIT ERR BY NOT GRANTING A CERTIFICATE OF APPEALABILITY?

The present application was filed with the intention of obtaining a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c)(1)(B) and Federal Rule of Appellate Procedure 22(b)(1). The purpose of the certificate was to establish that the District Court's ruling on the substantive matter concerning the claim of ineffectiveness is subject to legitimate debate among reasonable legal scholars.

This established criterion was reaffirmed by the United States Supreme Court in the case of *Buck v. Davis*, 580 U.S. —, 137 S.Ct. 759, 773–75 (2017). Additionally, this standard has been consistently upheld in other judicial precedents, including *Tennard v. Dretke*, 542 U.S. 274, 282–83 (2004); *MillerEl v. Cockrell*, 537 U.S. 322, 335–38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

In pursuit of a COA, Guerra was required to showcase that a reasonable discourse could arise among jurists regarding whether the issues presented within the case were appropriately addressed or whether they possess a level of significance meriting extended deliberation (*Sorto v. Davis*, 672 F. App'x 342, 346 (5th Cir. 2016)). Additionally, the gravity of the penalty, which encompasses the imposed sentence in this specific instance, can also factor into the assessment of whether the COA should be granted (*Rosales v. Dretke*, 133 F. App'x 135, 137 (5th Cir. 2005)). When faced with uncertainty about bestowing the COA, it is customary for the decision to incline towards the petitioner (defendant) (*Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997)).

To succinctly encapsulate, this application endeavors to secure a certificate of appealability by contending that the District Court's resolution of the ineffectiveness claim is a matter that could engender debate among jurists of sound reasoning. As a result, it is asserted that further examination by the appellate court was justified.

To secure a certificate of appealability (COA), Guerra need not establish a definitive error beyond doubt. As elucidated in *Miller-El*, a claim can be considered debatable even if a consensus among reasonable

jurists regarding the petitioner's ultimate success post-COA and upon full examination is absent (537 U.S. at 338). In essence, § 2253(c) imposes a relatively lenient threshold for the issuance of a COA, a principle reinforced by the ruling in *Buck v. Davis*, 137 S.Ct. at 773–75.

During the COA stage, the appellate court is tasked with a preliminary assessment of the underlying merits of the claims, concentrating on whether the District Court's determination is subject to legitimate dispute (*Buck v. Davis*, 137 S.Ct. at 774, quoting *Miller-El*, 537 U.S. at 327, 348).

In the present instance, the District Court delved into the substance of the § 2255 motion and did not conduct a hearing. In this case, the District Court thoroughly considered the merits of the § 2255 motion. However, it fell short of authorizing an evidentiary hearing in response to Guerra's assertion that his defense counsel, Michael Todd, failed to apprise him that the methamphetamine linked to the dismissed counts would be attributed to him during the sentencing phase (Cv.Doc. 2 at 4). Consequently, Guerra contends that the absence of comprehensive information from both his legal representation and the Court rendered his plea uninformed and lacking in understanding (Cv.Doc. 3 at 12). As

per Guerra's perspective, if he had been provided with a comprehensive overview of the sentencing guidelines and relevant conduct prior to the trial, he would not have entered a guilty plea (Cv.Doc. 13 at 12).

"It was only during the sentencing hearing," Guerra asserts, "[that] counsel acknowledged for the first time that the methamphetamine would be factored into the sentencing calculations" (Cv.Doc. 3 at 18). Notably, none of these statements were contradicted, and all transpired off the official record. Guerra maintains the validity of his affidavit, reiterating that the lack of comprehensive information from both his legal counsel and the Court rendered his plea unknowledgeable and not fully informed (Cv.Doc. 3 at 12). He firmly believes that if he had been provided with a comprehensive breakdown of the sentencing guidelines and pertinent conduct prior to the trial, he would not have chosen to plead guilty (Cv.Doc. 13 at 12). This advice was extended before the plea was presented in court, encompassing conversations and meetings that occurred "off the record" and necessitated an evidentiary hearing for clarification. This procedural requirement is supported by the precedent set in *United States v. Blake*, No. 19-51187, 2021 U.S. App. LEXIS 20084, at *5 (5th Cir. Mar. 24, 2021), emphasizing the necessity for credibility

determinations in resolving conflicting testimony. The Report took the position that during the change of plea that the court advised Guerra that the court did not “know what [his] sentence will be” and that it would be able to determine the guideline range only after considering the Presentence Report (“PSR”) and any objections. (Cr.Doc. 2206 at 24; Report at 5). However, those statements do not address that counsel “[fail[ed] to explain how the guidelines relevant conduct and enhancements would affect his final sentence before advising him to plead guilty” None of these positions are addressed at the change of plea hearing. The court did not go over the guidelines and did not explain the guideline’s intricacies or the basic explanation of the guidelines. The explanation of the guidelines, based on the specifics of Guerra’s case” was not addressed. Although the court explained the preparation of the PSR and the calculation of the guideline range (Cr.Doc. 2206 at 24-25), the explanation was only on the basic application, of the guidelines, not an explanation as to how drug quantities would apply Guerra’s case.

Furthermore, allegations concerning counsel's alleged failure "to elucidate how the sentencing guidelines, relevant conduct, and

enhancements would impact the final sentence prior to advising the plea" (Doc. 2 at 5; also see Doc. 3 at 15) remain unsubstantiated by the existing case records and documents. In essence, this absence of evidence on the record does not disprove Guerra's claims, aligning with the principles established in the case of *Blake*.

The Report adopted the stance that during the plea change, the court informed Guerra that it lacked knowledge about the eventual sentence outcome and that the guideline range could only be determined post evaluation of the Presentence Report ("PSR") and any objections raised (Cr.Doc. 2206 at 24; Report at 5). However, these statements fail to address the fact that counsel neglected to elucidate "how the guidelines' *relevant conduct* and enhancements would impact his final sentence before advising him to plead guilty." None of these positions were brought up during the plea change proceeding. The court did not delve into the intricacies of the guidelines, nor did it provide a comprehensive explanation of their fundamental tenets. The specifics of how the guidelines applied to Guerra's particular situation were not addressed. While the court did offer insights into the PSR preparation and guideline range computation (Cr.Doc. 2206 at 24-25), this explanation pertained

solely to the rudimentary application of the guidelines, without delving into how drug quantities would impact Guerra's case. The obligation to elucidate the statutory maximum sentence explanation was not fulfilled. However, it's important to note that Guerra's sentence was based on the calculations of drug quantities pertinent to his relevant conduct, rather than the statutory maximum.

Furthermore, the plea change proceeding did not encompass Guerra's allegations that his sentencing would align with the plea agreement, including the drugs stipulated by the government in their factual basis (Doc. 3 at 15). Guerra asserted that both the plea and advice from Todd were grounded in the facts presented during the plea change (Doc. 3 at 16). There exists no record evidence to discredit the information conveyed to Guerra by counsel. The court's possession is limited to Guerra's affidavit, counsel's affidavit, and a plea change hearing that did not sufficiently clarify the contentions Guerra raised. Consequently, due to the conflicting nature of counsel's affidavit with Guerra's allegations, this Court is compelled to acknowledge the necessity for an evidentiary hearing to address the contested facts. This approach aligns with the precedent set in *Jones v. Frakes*, No. 8:21CV249, 2022 U.S. Dist. LEXIS

149525, at *13 (D. Neb. Aug. 19, 2022), which highlights that a district court should resolve factual disputes by conducting an evidentiary hearing, receiving evidence (including testimonies), and issuing findings. In light of the circumstances, there was no valid reason for the denial of a hearing in Guerra's case.

The ruling of the Supreme Court in *Miller-El* has underscored that the decision to grant a COA is intended as a preliminary assessment conducted prior to undertaking a comprehensive evaluation of the petitioner's claims. This principle is articulated in *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003), where it's emphasized that the initial threshold inquiry for a COA does not necessitate a full examination of the factual or legal foundations presented in support of the claims. The Court went on to clarify that a claim can be deemed debatable even if, following the granting of a COA and subsequent thorough examination, every reasonable jurist might collectively concur that the petitioner will not ultimately prevail (emphasis added). The Court further affirmed that the COA determination constitutes a distinct proceeding, separate from the underlying merits, in line with Justice Scalia's concurrence at *Id.* at 1046-47. The approach of conducting a "full consideration" of the claims

during the COA inquiry, as highlighted by the Court, is expressly prohibited by § 2253(c). The Court emphasized this point at *Id.* at 1039, stressing that bypassing the COA process by prematurely determining the appeal's merits and then basing the COA denial on this merits assessment amounts to an improper exercise of jurisdiction. This concept was reinforced in *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003), underlining the significance of adhering to the delineated COA procedure and refraining from prematurely delving into the merits before the appropriate COA assessment has been concluded.

In this context, this Court's obligation was solely to acknowledge that, based on the available record, Guerra possesses the right to pursue further legal proceedings, without implying his ultimate triumph on the merits of his claim. Even in situations where the District Court may have rejected all claims without affording an evidentiary hearing (which is a misstep in this instance), the Fifth Circuit maintained the authority to grant the necessary relief and even extend its scope. A relevant precedent, *Valerio v. Director of the Department of Prisons*, 306 F.3d 742 (9th Cir. 2002), *cert. denied* (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788, elucidates that the court of appeals possesses the power not only

to grant a COA when the district court has denied it for all issues but also to broaden the scope of the COA to encompass additional issues, especially when the district court has granted a COA for some issues while denying it for others.

This nuanced approach is particularly advantageous for Guerra, given that the recordings from the plea change hearing offer corroborating evidence for his claim, which has remained unaddressed by the District Court. Hence, in this light, the Fifth Circuit was required to concur that a reasonable jurist would acknowledge the substantial likelihood that Guerra might not have been fully apprised of the implications of waiving his guilty plea, thus justifying the continuation of the legal process. Thus, based on the foregoing, it was erroneous for the Fifth Circuit not to grant a certificate of appealability in this matter.

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 19, day of August 2023.

Respectfully Submitted,



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