No. 24-5572 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

RAMON LOPEZ ALVARADO — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ramon Lopez Alvarado
(Your Name)

Federal Correctional Complex - Low
(Address)

P.O. Box 1000, Petersburg, VA 23804
(City, State, Zip Code)

(804) 733-7881
(Phone Number)

QUESTION(S) PRESENTED

Did the Eleventh Circuit Court of Appeals err in denying Petitioner's Motion for Certificate of Appealability where claims show that jurists of reason could disagree with the District Court's resolution of his Constitutional claims, or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further?

Did the Court of Appeals err in denying Petitioner's Motion for Appointment of Counsel to assist in obtaining the Certificate of Appealability?

Did Petitioner receive Constitutionally ineffective assistance of counsel on direct appeal where counsel refused to raise material claims, and refused to assist Petitioner to seek a petition for a Writ of Certiorari in the U.S. Supreme Court?

Did the District Court commit reversable error by denying Petitioner's Motion under 28 U.S.C. § 2255 without conducting an evidentiary hearing to resolve the factual disputes?

What remedy is available for the Constitutional violations and legal errors of the District Court, suffered by the Petitioner during trial, where the Court of Appeals is made aware of them but failed to act?

Did the District Court commit an error by denying Petitioner the right to effective cross-examination of the prosecutor's key witness, in violation of the U.S. Constitution's Sixth Amendment?

Did the District Court err by not making a pre-trial review of whether Petitioner's original deportation order was lawfully executed under 8 U.S.C. § 1326(a)?

Did the District Court err by allowing the jury to make a determination on the lawfulness of Petitioner's deportation under 18 U.S.C. § 1326(b)(2)?

Did the District Court commit an error of law by committing to the jury the decision of citizenship?

Was a new trial required if false testimony given at trial could, in any reasonable likelihood, have affected the jury's verdict?

Was a new trial required when there was a reasonable likelihood that disclosure of the truth during trial would have effected the judgment of the jury?

QUESTIONS PRESENTED (CONTINUED)

Was a hearing in District Court necessary when undisclosed evidence supporting Petitioner's claim of U.S. Citizenship was adduced by defense counsels at trial?

Did the actions of Petitioner's defense counsels constitute ineffective assistance of counsel prior to and during trial?

LIST OF PARTIES

[X] 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

- U.S. v. Lopez-Alvarado, No. 6:18-cr-80, U.S. Dist. Court for the Middle District of Florida. Date of conviction: Nov. 15, 2018.
- U.S. v. Lopez-Alvarado, 812 Fed. Appx. 873, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered: May 1, 2020.
- Lopez-Alvarado v. U.S., No. 6:21-cv-02068, U.S. Dist. Court for the Middle District of Florida. Date filed: Dec. 9, 2021. Date of judgment: May 31, 2023.
- Lopez-Alvarado v. U.S., 2024 U.S. App. LEXIS 6461, U.S. Court of Appeals for the Eleventh Circuit. Date of denial: Mar. 18, 2024.
- Lopez-Alvarado v. U.S., No. 23-12460, U.S. Court of Appeals for the Eleventh Circuit. Date of denial: June 11, 2024.

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STATUTES AND RULES (CONTINUED)

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

[X] For cases from **federal courts**:

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

[X] reported at 812 Fed. Appx. 873; 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,
[X] 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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 18, 2024.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 11, 2024, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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

1. The Fifth Amendment of the United States Constitution provides:

> "No person 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 ..."

2. The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. The statute under which Petitioner sought habeas corpus relief was 28 U.S.C. § 2255, which states in pertinent part:

> Federal custody; remedies on motion attacking sentence
>
> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the 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.
>
> (b) 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. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

On March 17, 2018, the Petitioner, Ramon Lopez Alvarado ("Lopez") was indicted for violation of 18 U.S.C. § 1326(a) for illegal re-entry into the United States without the consent of the Attorney General. On August 6, 2018, Mr. Lopez was taken to trial by jury. During the trial, the district court judge had the jury decide if Mr. Lopez was invited to a ceremony to take the Oath of Allegiance; whether the absence of immigration records indicated that event never occured; and whether he took the Oath and became a citizen. Mr. Lopez testified that he received a notice from the Immigration and Naturalization Services ("INS"), which directed him to appear at the local INS Building on December 6, 1995. Although Mr. Lopez appeared at the INS Building on that date and took the Oath of Allegiance, he did not have a copy of the INS Notice when he went to trial. However, after trial, but prior to sentencing, Mr. Lopez requested a copy of his discovery documents from his defense counsels (Mr. Larry Henderson and Ms. Karla Reyes). A thorough search of the documents showed a copy of the INS Notice, which told Mr. Lopez to appear at the INS Office on December 6, 1995. His defense counsels had the document all along, but failed to produce it at trial or have it admitted into evidence. Mr. Lopez immediately contacted his counsels and requested they take action to correct the error. Instead, they filed a motion for permission to withdraw as counsel from the case, which the court granted. The district court then appointed Mr. Mark Reyes to represent Mr. Lopez at sentencing. Mr. Lopez showed Mr. Reyes a copy of the INS Notice, which supported that his testimony at trial had been truthful, and contradicted testimony given by the government's witness, Mr. Charles Adkins. However, Mr. Reyes would not and did not provide the INS Notice to the district court as evidence. Instead, he told Mr. Lopez to show it to his appellate attorney and explain to him how the evidence was found.

At sentencing, Mr. Lopez was found guilty of violation of 18 U.S.C. § 1326(a). His sentencing guidelines range was 92-115 months of imprisonment. The judge made an upward variance of 53 months, and sentenced Mr. Lopez to 168 months of imprisonment, stating that he did not find Mr. Lopez's testimony to be credible, and that "he's perjured himself." Mr. Lopez timely appealed.

On November 27, 2018, counsel was appointed by Magistrate Judge Karla R. Spaulding for purposes of appeal. Pursuant to the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, Mr. H. Manuel Hernandez was appointed to represent Mr. Lopez to assist him in direct appeal of his case.

Later, Mr. Hernandez called Mr. Lopez to inform him about the ruling by the Court of Appeals affirming his conviction and sentence. On May 1, 2020, Mr. Lopez requested that Mr. Hernandez file a petition for rehearing, or a petition for a writ of certiorari in the U.S. Supreme Court. Mr. Lopez was not able to do this by himself because, at the time, the facility where he was incarcerated was locked down due to the COVID-19 pandemic; the law library was closed, and inmates were confined to their cells. In response, Mr. Hernandez sent a letter to Mr. Lopez dated May 2, 2020, which Mr. Lopez did not receive until almost three weeks later.

Subsequently, Mr. Lopez filed a claim of Ineffective Assistance of Counsel ("IAC") under 28 U.S.C. § 2255 against his defense counsels at trial, against Mr. Reyes at sentencing, and against Mr. Hernandez on appeal. His 2255 Motion was denied on March 18, 2024, and a Certificate of Appealability ("COA") was also denied. Mr. Lopez then filed a Motion for Reconsideration of Issuance of COA and Request for Panel Hearing, which was denied on June 11, 2024.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in denying Mr. Lopez's Motion for Certificate of Appealability (28 U.S.C. § 2253) where the District Court trial record clearly shows violations of federal constitutional rights as due process of law, and failed to conduct an evidentiary hearing to resolve the factual disputes.

On March 18, 2024, the Eleventh Circuit Court of Appeals denied the Motion for COA, concluding that Mr. Lopez failed to make a substantial showing of the denial of a constitutional right. The Court stated that his claims "are merely conclusory allegations unsupported by specifics" that fail to show how counsel's performance was deficient, or argue how he was prejudiced. The Court also denied Mr. Lopez's Motion to Proceed In Forma Pauperis and Request for Appointment of Counsel as moot. Mr. Lopez then filed a Motion for Reconsideration and Request for Panel Hearing.

On June 11, 2024, the Court of Appeals denied his Motion for Reconsideration, stating that he offered no new evidence or arguments of merit to warrant relief.

Mr. Lopez intends to show this honorable Supreme Court that his jury trial judgment and conviction for illegal re-entry under 18 U.S.C. § 1326(a) were obtained in violation of his constitutional rights under the Fifth and Sixth Amendments, including his right to Due Process and to confront the witnesses against him. Mr. Lopez was taken to trial by jury on his citizenship claim where the jury found him guilty solely because his trial counsels failed to present the jury with evidence that shows Mr. Lopez was invited to, and attended, a naturalization ceremony at the INS Office on December 6, 1995. There was no need for a jury to decide this question, as no jury can confer or grant citizenship, nor can a jury make a determination regarding

the lawfulness of the original deportation. These claims were presented to the Eleventh Circuit Court of Appeals to obtain a COA, but the court denied his motion. Mr. Lopez also filed a request for the assistance of appellate counsel to help him with his argument; the court denied that request, as well.

ARGUMENT

The COA statute, 28 U.S.C. § 2255(c)(2), permits the issuance of a COA only where a petitioner has made a substantial showing of the denial of a constitutional right. This statutory command explains that a petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'". See Slack v. McDaniel, 529 U.S. 473, 484 (2000)(quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). To satisfy that standard, this Court has stated, "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application...merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-El v. Cockrell, 537 U.S. 322, 337 (2003). Instead, a prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. Id. at 338. We have made equally clear that a COA determination is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." Id. at 336. The COA determination under 28 USC § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits.

The decision by the Eleventh Circuit Court of Appeals in denying Mr. Lopez's petition for COA is clearly in conflict with this Supreme Court's

previous decisions above. Mr. Lopez's case presents issues that are "reasonably debatable." See Buck v. Davis, 580 U.S. 100, 101 (2017). This Court should not allow these errors to go uncorrected. See Hernandez v. Peery, 2021 U.S. LEXIS 3546, 141 S. Ct. 2231 (J. Sotomayor, dissenting).

ARGUMENTS AMPLIFYING REASONS FOR WRIT

The Court of Appeals Erred in Denying Motion for Certificate of Appealability (28 U.S.C. § 2253) Where the District Court Failed to Conduct an Evidentiary Hearing to Resolve Factual Disputes.

These questions or issues were presented to the Court of Appeals in Mr. Lopez's Motion for Reconsideration of Issuance of COA and Request for Panel Hearing ("Motion for Reconsideration"). The panel hearing was conducted by two judges. In Crawford v. Washington, 541 U.S. 36, 68-69 (2004), the Supreme Court clearly established federal law, as set forth in Davis v. Alaska, 415 U.S. 308, 318 (1974); Delaware v. Van Arsdall, 475 U.S. 673, 678-9 (1986); Michigan v. Lucas, 500 U.S. 145 (1991), which indicates that the trial court committed constitutional error, in violation of the Sixth Amendment, by denying Mr. Lopez the right to effective cross-examination of the prosecution's key witness. In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. It admits no exceptions for cases in which the trial judge believes unconfronted testimony might be reasonably necessary to correct a misleading impression. See Hemphill v. New York, 142 S. Ct. 681, 693 (2022). This gives the accused the right to confront, in cross-examination, the witnesses against him face-to-face with those who give evidence at trial. Denial of the right of effective cross-examination is "constitutional error of the first magnitude and no amount of want of prejudice would cure it." Davis v. Alaska, supra at 318.

The question for this Court is: Did the district court trial judge

violate Mr. Lopez's Sixth Amendment right, under the Confrontation Clause, by allowing the government to introduce a statement from a witness without having that witness available to testify at trial?

During Mr. Lopez's citizenship jury trial, the government introduced a written statement from Mr. Walter D. Cadman, District Director, INS, into court and presented it to the jury (a copy is attached in Appendix D, Exhibit B). Defense counsel objected on the basis that Mr. Lopez was not aware of the statement. The judge overruled the objection. As a result, the statement that Mr. Lopez's Application for Citizenship was denied was admitted into evidence, and Mr. Cadman, who signed the statement, was not available for cross-examination. See Fed. R. Evid. 801(c). Hearsay is inadmissible unless it falls within an enumerated exception. See Fed. R. Evid. 802.

In Crawford, supra, the Supreme Court wrote: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes": confrontation. This means that the prosecution may not introduce "testimonial" hearsay against a criminal defendant, regardless of whether such statements are deemed reliable, unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant had prior opportunity for cross-examination. Id. at 53-68. Crawford described the class of testimonial statements covered by the Confrontation Clause as follows:

> Various formulation of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially; extra-judicial statements...contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. Id. at 51-52.

Lopez argues that the trial judge violated his Constitutional right under the Confrontation Clause to effective cross-examination during trial. This action by the district court was prejudicial against Mr. Lopez. The Confrontation Clause bars the admission of "testimonial statements" made by a non-testifying witness, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him. The document statement by Mr. Cadman denying Mr. Lopez's Application for Citizenship, without having an opportunity to cross-examine him, is alone sufficient to establish a violation of the Sixth Amendment. Id. at 68.

Prejudice due to the Confrontation Clause Violation -- Evidence Adduced at Trial

Mr. Lopez was taken to jury trial on his citizenship claim. During the trial, the district court judge had the jury decide if Mr. Lopez had been invited to an INS ceremony to take the Oath of Allegiance; whether the absence of immigration records indicated that event never occured; and whether he took the Oath and became a U.S. Citizen.

Mr. Lopez testified that he received a notice from the INS, which directed him to appear at the local INS Office on December 6, 1995. A copy of the notice is found in Appendix D, Exhibit A. Mr. Lopez appeared at the INS Office on that date and took the Oath of Allegiance, but he did not have a copy of the INS notice when he went to trial. However, after trial but prior to sentencing, he requested a copy of his discovery documents from his defense counsels (Mr. Larry Henderson and Ms. Karla Reyes). A thorough search of the documents showed a copy of the INS Notice to Appear, which his defense counsels had all along, but failed to produce it at trial or have it admitted into evidence. Mr. Cadman's name appears on the INS notice. Mr.

Lopez received, and he claims that Mr. Cadman was the INS Officer who swore him in as a U.S. Citizen on December 6, 1995. But on March 12, 1996, the INS sent Mr. Lopez a letter, signed by Mr. Cadman, denying his application for naturalization. A copy of this letter is found in Appendix D, Exhibit B. With Mr. Cadman being a factual witness to these events, Mr. Lopez argues that the live testimony of Mr. Cadman at trial would have been extremely important to clarify the existing conflicts, and the jury might have reasonably questioned his reliability and/or credibility; that is, if cross-examination had taken place. Mr. Lopez argues that he was prejudiced by not having Mr. Cadman at trial to question him. See Davis v. Alaska, 415 U.S. at 315-6 (the right of confrontation, which is secured for defendants in...federal criminal proceedings, means more than being allowed to confront the witness physically; indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination).

The letter from Mr. Cadman (Exhibit B) makes conflicting claims. First: "Your Application for Naturalization as a citizen of the (U.S.) was received by this Service on March 20, 1995." However, Mr. Lopez appeared before Ms. Ana Pardo, an INS Officer, for his first examination on February 16, 1995. A copy of the Application for Naturalization, Form N-400, is found in Appendix D, Exhibit D. Second: "At your preliminary examination of December 6, 1993 you testified that you had been arrested on three different occasions." Mr. Lopez argues that he did not file any application with the INS on December 6, 1993, and that he did not recall being arrested ten times (as was alleged in Mr. Cadman's letter). However, Mr. Cadman's letter does not show how many arrests led to convictions, if any, or when these alleged arrests took place. Third: Mr. Cadman's letter declares that Mr. Lopez's application was denied on March 12, 1996, but he was sworn in as a U.S. Citizen by Mr. Cadman on December 6, 1995. Mr. Lopez was invited to appear at the INS Office for a naturalization

ceremony before Mr. Cadman, who "swore-in" Mr. Lopez and told him where to sign the Oath of Allegiance, and then declared him to be a United States Citizen. A copy of the signed Oath of Renunciation and Allegiance is found in Appendix D, Exhibit C. Yet, these documents were allowed by the district court to be introduced into evidence at trial and then shown to the jury without Mr. Cadman being present to verify them.

Mr. Lopez was indeed prejudiced by these events, and was denied the right of cross-examination of a witness, which is "Constitutional error of the first magnitude, and no amount of showing of want of prejudice would cure it." See Davis, supra at 318.

Mr. Lopez argues that not only was his right to confront Mr. Cadman face-to-face at trial denied, but also his Fifth Amendment right of Due Process was denied. Because of the admission of the out-of-court statement of Mr. Cadman was allowed into evidence, Mr. Lopez was forced to testify in his own defense, which deprived him of his Fifth Amendment right against self-incrimination.

The Supreme Court was clear on this issue: "The Sixth Amendment speaks with equal clarity to the Fifth Amendment:'In all criminal prosecution, the accused shall enjoy the right to be confronted with witnesses against him.' It admits no exception for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression." Hemphill v. New York, 142 S. Ct. at 693. See also, United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006)("It is true enough that the purpose of the right set forth in (the Sixth) Amendment is to ensure a fair trial; but it does not follow that the right can be disregarded so long as the trial is, on the whole, fair.").

The Confrontation Clause violation was not harmless error. In light of the evidence adduced at trial, the evidence contradicts Mr. Cadman's written

statement. Although the prosecutor, Ms. Wick, mentioned that Mr. Lopez appeared for his interview with the INS on December 6, 1995, she did not assist the defense counsels to disclose the copy of the Notice to Appear (Appendix D, Exhibit A). This document shows material information: the address of the INS Office; the date, time, and room number where the INS ceremony took place; Mr. Cadman's name and title; Mr. Lopez's Alien Number ("A-Number"); the date the statement was prepared; the name of the examiner; and Mr. Lopez's name and address. All of this information was hidden from the jury. Mr. Cadman's live testimony was needed at trial to clarify several questions: why did the INS have two files with Mr. Lopez's name and A-Number on them during his application process? Who used "white-out" to alter Mr. Lopez's application, as Ms. Pardo denied using it? Mr. Charles Adkins, an officer of the USCIS (formerly known as the INS), testified at trial, but could not provide an answer to these questions. Mr. Cadman was a factual witness to the events of December 6, 1995: he took part in the INS ceremony on that day, and swore in Mr. Lopez as a U.S. Citizen, then later denied his application for citizenship. These questions needed answers, and the jury was deprived of factual information and relevant evidence. These actions were prejudicial against Mr. Lopez.

The Supreme Court has noted that "the main and essential purpose of confrontation is not for the idle purpose of gazing upon the witness, or being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." Davis, supra at 315-6. Mr. Lopez argues that the district court error, which denied him effective cross-examination of a key witness, was not harmless, because Mr. Cadman's written statement contradicts the Notice to Appear and the jury might have reasonably questioned the witness' reliability or credibility if cross-examination had been allowed.

The District Court Committed an Error of Law in Committing to the Jury the Decision of Mr. Lopez's Citizenship.

The district court trial judge erred by creating a jury trial in Mr. Lopez's citizenship claim, because citizenship is a legal question for the court, not the jury, to decide. There is no need to present citizenship evidence to a jury on questions that are reserved for the court to resolve. "That the jury may not decide the validity of...citizenship, as that is a question of one's legal status." U.S. v. Clarke, 628 F. Supp. 2d 1, 13 (D.D.C. 2009). As laypersons, jury members have little, if any, knowledge of naturalization laws, and no jury, or even the courts (in most cases) can confer citizenship. See, e.g., Rios-Valenzuela v. Dep't of Homeland Sec., 506 F.3d 393, Fn.21 (5th Cir. 2007). There was no need to bifurcate the trial by jury. See United States v.U.S. Dist. Crt., 316 F.3d 1071, 1073 (9th Cir. 2002)(It follows that the district court committed an error of law in committing to the jury the decision of Chavez's nationality.).

The district court also erred by allowing the jury to make a determination on the lawfulness of the deportation order under 18 U.S.C. § 1326(a). The jury could not have found beyond a reasonable doubt that Mr. Lopez was an alien, and solely on the basis of the deportation order. See, e.g., U.S. v. Ortiz-Lopez, 24 F.3d 53, 56 (9th Cir. 1994). Nor could the jury have found if Mr. Lopez's deportation on December 18, 1998, was lawfully conducted or executed. There was reasonable probability that Mr. Lopez would not have been deported; his jury conviction is in violation of due process. There was an error by the trial judge in allowing the jury to decide the lawfulness of the deportation order. See U.S. v. Ordonez, 328 F.Supp. 3d 479 (4th Cir. 2018)("For purposes of an alleged unlawful deportation order asserted in defense of an illegal re-entry charge, prejudice exists if, but for the errors complained of, there

was reasonable probability the the defendant would not have been deported.").

The District Court Erred by Not Making a Pretrial Review of Whether the Original Deportation Order was Lawfully Executed Under 18 U.S.C § 1326(a).

The district court was required to conduct a pretrial review of whether the prior deportation order was lawful. In U.S. v. Mendoza-Lopez, 481 U.S. 828, 837-8 (1987), the Supreme Court concluded that since lawful deportation was a material element of the statutory offense, due process required, in this limited situation, a pretrial review of whether the prior deportation order was lawful. Mr. Lopez was deported under the 1996 Immigration Amendment statutory definition found at 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony); his deportation hearing was conducted on December 18, 1998. This part of U.S. Code is also known as the Immigration and Nationality Act ("INA").

On April 10, 1995, Mr. Lopez was indicted for Florida State Offense F.S. 800.04(1), Lewd Act Upon a Child (Case No. CR-95-4426). The event occured on June 12, 1990. For immigration purposes, this crime is defined as a Crime of Moral Turpitude; see 8 U.S.C. § 1182(a)(2)(A)(i)(1). This state offense was not classified as an aggravated felony on the date of occurence or on the date of indictment. Mr. Lopez was deported on December 18, 1998 under the 1996 Immigration Amendment Statute, INA § 237(a)(A)(iii); see also 8 U.S.C. § 1101(a)(43). This part of the INA calls for deportation for commission of an aggravated felony. As Mr. Lopez's crime was one of moral turpitude, and not an aggravated felony, he was deported under the wrong statute definition; since his deportation was illegal, he should still have the immigrant status he had prior to deportation.

Mr. Lopez also had the benefit of the Judicial Recommendation Against Deportation (JRAD), 8 U.S.C. § 1251(b)(2), repealed after November 29, 1990. He also could have invoked the rule of lenity; the JRAD prevents use of a

conviction to exclude an alien from entering the United States. See U.S. v. Castro, 26 F.3d 557, 558 Fn.2 (5th Cir. 1994); and Javir v. U.S., 793 F.2d 449, 452 (2d Cir. 1986). In Mendez v. INS, 563 F.2d 956, 958-9 (9th Cir. 1977), the Court of Appeals held that due process must allow the non-citizen to return lawfully to the United States to the same status he held prior to the unlawful deportation.

Mr. Lopez was wrongfully deported in 1998, and is not deportable at the present time, yet he has been convicted for illegal entry into the United States. The district court failed to make a pretrial review of Mr. Lopez's prior deportation; this action has been substatially prejudicial to him. See Mendoza-Lopez, 481 U.S. at 837-8, and 8 U.S.C. § 1326(d).

Undisclosed Evidence Adduced at Trial by Defense Counsels Supports the Claim of American Citizenship.

Relevant cases: Ng Fung Ho v. White, 259 U.S. 276 (1922); Agosto v. INS, 436 U.S. 748 (1978); Iasu v. Smith, 511 F.3d 881 (9th Cir. 2007).

Relevant statutes: 8 U.S.C. §§1421(b)(1)(A), 1448(c); 8 C.F.R. §§337.9(a), 1337.9(a), 1337.3(a)(4).

The reviewing court must focus on the impact on the jury, and whether a new trial is necessary when there is reasonable likelihood that disclosure of evidence adduced at trial would have affected the judgment of the jury. This Court should ask: what would be the outcome of the case if defense counsels had introduced or presented the INS Notice to Appear to the jury?

This evidence contradicts the statement that was allowed by the district court as government evidence. The presence of Mr. Cadman was necessary, since "it is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." Agosto, at 757; and Ng Fung Ho, supra at 282. Mr. Lopez did not merely assert a claim of citizenship: he supported his claim with sufficient

evidence to entitle him of a finding of citizenship, and upon petition for a writ of habeas corpus. Id. at 282. The trial by jury requires that all the facts and evidence be disclosed so the jury can know the whole truth of the case.

The executive may deport certain aliens but has no authority to deport citizens. An assertion of U.S. "citizenship is thus a denial of an essential jurisdictional fact" in a deportation proceeding. Id. at 284. See also Frank v. Rogers, 102 U.S. App. D.C. 367, 253 F.2d 889, 890 (D.C. Cir. 1958)("Until the claim of citizenship is resolved, the propriety of the entire proceeding is in doubt."). Because the deportation of "one who so claims to be a citizen obviously deprives him of liberty...[and] may result also in loss of both property and life, or of all that makes life worth living," the Fifth Amendment mandates that any person with a non-frivolous claim to U.S. citizenship receive a judicial evaluation of the claim. Ng Fung Ho, supra at 284-5. In that case, the Supreme Court found that this constitutional right would be violated by the deportation of two men following executive proceeding, and directed that writs of habeas corpus issue to permit federal district court review of their citizenship claims.

In Agosto v. INS, supra, the Supreme Court held that whenever an individual seeking review of a deportation order claims to be a U.S. citizen, and makes a showing that his claim is not frivolous, a federal court of appeals must transfer the proceedings to a federal district court for a de novo hearing of the nationality claim if it finds a genuine issue of material fact is presented as to the individual's nationality. The Supreme Court concluded that the evidence adduced by the alleged alien to support his claim of U.S. citizenship created genuine issue of material fact that could only be resolved in a de novo hearing in the district court. Id. at 757. Mr. Lopez's claim of

citizenship is not frivolous: the INS Notice to Appear directs him to show up at the INS Office on December 6, 1995, which he did; and he was sworn in as a United States citizen before an INS officer and District Director Walter Cadman. Mr. Lopez is entitled to a hearing so he can present evidence that was adduced at trial by his defense counsels.

A New Trial is Necessary When There is Any Reasonable Likelihood That Disclosure of the Truth Would Have Affected the Judgment of the Jury.

Mr. Lopez argues that the prosecutor, Ms. Wick, knew about the INS Notice to Appear, which has relevant and material information. She failed to disclose the document during trial, and failed to assist the defense counsels in cross-examination to disclose the Notice to Appear or alert the court about the evidence. These actions deprived the jury of vital information. Further, she allowed the government's witness, Mr. Charles Adkins of the U.S.C.I.S., to testify under oath that there was no evidence that Mr. Lopez was invited to appear at the INS Office on December 6, 1995. She knew that Mr. Adkins' testimony was false, as there was in fact evidence that Mr. Lopez appeared at his appointment on that date. Yet she made no attempt to correct Mr. Adkins' false testimony.

The jury is entitled to know all the facts, evidence, and witnesses related to the case; in short, they are entitled to know the truth. When the prosecutor chose to use false testimony to obtain a conviction, and there is any reasonable likelihood that the testimony may have affected the judgment of the jury, due process is violated. See U.S. v. Barham, 595 F.2d 231, 240 (5th Cir. 1979), citing Napue v. Illinois, 360 U.S. 264 (1959)(holding that the prosecutor cannot obtain a conviction with aid of false testimony where the prosecutor knows such testimony is false.).

It is also immaterial whether the false testimony directly concerns

an essential element of the government's proof, or whether it bears only upon the credibility of the witness. As the Supreme Court explained in Napue, "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. at 269.

In this case, Mr. Lopez argues that Mr. Adkins' testimony in cross-examination left the jury with the false impression that there was no evidence he was ever invited to, or went to, the INS Naturalization ceremony on December 6, 1995. The jury was entitled to know about the INS Notice to Appear and all of the information on its face. It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney or prosecutor has the responsibility and duty to correct what he or she knows to be false and elicit the truth. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair. See Napue, 360 U.S. at 269-70.

In Giglio v. U.S., 405 U.S. 150 (1972), the Supreme Court reversed Giglio's conviction, concluding that credibility as a witness was in important issue in the case. The Court also announced the standard that controls false evidence or perjured testimony cases: "A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." Id. at 154. See also, U.S. v. Agurs, 427 U.S. 97, 103 (1975)(A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what

he or she subsequently learned was false testimony). Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." U.S. v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995); Agurs, 427 U.S. at 103; Giglio, 405 U.S. at 154; and Napue, 360 U.S. at 271.

However, the reason the lower materiality burden applies where there is knowing use of perjured testimony is that a situation involves prosecutorial misconduct and a corruption of the truth-seeking function of the trial process. U.S. v. Bagley, 473 U.S. 667, 680 (1985); Agurs, 427 U.S. at 104; Barham, 595 F.3d at 242.

Mr. Lopez contends that had the existence of his INS Notice to Appear been disclosed to the jury at trial, his case would have been strengthened, the prosecution's case would have been weakened, and the jury's verdict would have been different. The undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury.

The question before this Court is whether the prosecution violated Mr. Lopez's due process rights by failing to correct Mr. Adkins' testimony, using the aid of false testimony to obtain an unlawful conviction. The information on the face of Mr. Lopez's Notice to Appear from the INS was plainly favorable and material to his claim of citizenship. The jury was left with the mistaken impression that his testimony that he received the notice was not credible, and that no evidence existed of his appearance. The Supreme Court established decades ago that evidence is favorable in the Brady context if it has "some value" in helping the defendant's case. Kyles v. Whitley, 514 U.S. 419, 450 (1995). The Court has further explained that there is value where the evidence tends to exculpate the defendant or impeach a witness, or might

reduce the potential penalty. See Brady v. Maryland, 373 U.S. 83, 88 (1963). Favorable evidence also qualifies as material is there is "any reasonable likelihood" it could have "affected the judgment of the jury." Wearry v. Cain, 577 U.S. 385, 392 (2016); Brown v. Louisiana, 143 S. Ct. 886, 887 (2023).

A conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution. See Drake v. Portuando, 553 F.3d 230, 240 (2d Cir. 2009)(citing Mooney v. Holohan, 294 U.S. 103, 112 (1935)). This is so because, in order to reduce the danger of false testimony, we rely on the prosecutor not to be simply a party in litigation whose sole object is the conviction of the defendant before him. The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost.

Mr. Lopez urges this Court to hold these federal Constitutional errors, which combined to deprive him of due process and a fair trial. These errors can never be treated as harmless. See Chapman v. California, 386 U.S. 18, 24 (1967). As such, his conviction under 18 U.S.C. § 1326(b)(2) should be reversed.

During the trial, the judge requested to both prosecution and defense counsels for any evidence showing that Mr. Lopez was invited to the INS Office on December 6, 1995. Below are excerpts from Day 1 of the district court trial:

> The Court: And when they specified the date he could appear, there's a record in Immigration's files that indicates this?

After a long conversation, the Prosecutor responded:

> Ms. Wick: Your Honor, I don't--we don't have any evidence that happened. (Transcript, pg. 19, l. 17-18)

Both the prosecution and defense counsels had the same discovery documents. Here, the prosecutor had the opportunity to assist the defense by disclosing the INS Notice to Appear, and to prevent or correct the government's witnesses from further false testimony regarding the issue that there was no

available evidence that Mr. Lopez was ever invited to the INS Office on December 6, 1995 to take the Oath of Allegiance. Instead, Ms. Wick kept silent.

During cross-examination, another opportunity arose to disclose the Notice Appear, showing that indeed Mr. Lopez received the Notice to Appear:

> The Court: Any cross-examination?
>
> Ms. Reyes (Defense Counsel): Yes, Your Honor. Your Honor, pursuant to 26.2, I would request any Jencks material.
>
> The Court: All right. Thank you. If there are any materials, written statements by the witness that have not previously been produced, now would be the time.
>
> Ms. Wick: It's been provided, Your Honor.
> (Transcript, pg. 202, l. 15-22)

The trial judge, having thoughts about what really happened during Mr. Lopez's citizenship hearing, later stated:

> The Court: Well, let's assume they made a mistake, they swore him in as a citizen on day one and denied his application on day five. If the--if 339.9 states the date of the oath--if you're properly invited to come to the ceremony, whether it's the court or the INS, if you're invited to go to the ceremony, you make the renunciation, and you state the Oath, does that make you a citizen in 1995? Let's assume that occured.
>
> Ms. Wick: Can I have one moment, Your Honor?
> (Transcript, pg. 20, l. 22-25 and pg. 21, l. 1-4)

A "prosecutor must refrain from improper methods calculated to produce a wrongful conviction." U.S. v. Blakely, 14 F.3d 1557, 1560 (11th Cir. 1994); Berger v. U.S., 295 U.S. 78, 85-89 (1935)(Prosecuting attorney, whose interest in a criminal prosecution is not that it should win a case, but that justice be done). Thus, a "prosecutor is...forbidden to make improper suggestions, insinuations, and assertions calculated to mislead the jury." Id. at 88.

Here, the prosecutor called the government witness to testify that there was no evidence that Mr. Lopez was invited to the INS Office on December 6, 1995, then herself failed to disclose the INS Notice to Appear, and, most importantly, deprived the jury from the truth about what really took place on

that day. These events had the effect of leading to the wrongful conviction of Mr. Lopez.

The trial judge directly requested from defense counsels any evidence where Mr. Lopez's name appears on the INS records. The following excerpt is from Day 1 of the district court trial:

> The Court: And I know this is a factual inquiry, but you would agree with me that there would be a written record of that. When Immigration produced its file, there would be some evidence that Mr. Lopez-Alvarado's name appeared on that list and he actually took the Oath.
>
> Mr. Henderson (Defense Counsel): It is our contention that Mr. (Lopez) came back after the date of the examination and attended a ceremony and received the Oath.
>
> The Court: At a Naturalization Office?
>
> Mr. Henderson: Yes, Your Honor.
>
> The Court: So that he applied. They told him to get more paperwork concerning your arrest history, which you denied initially and now it minimized--he comes back in and they give him the Oath?
>
> Mr. Henderson: That's correct, Your Honor. They specified the date he could appear, he did appear, and he received the Oath.
>
> The Court: And when they specified the date he could appear, there's a record in Immigration's file that indicates this?
>
> Mr. Henderson: I do not know, Your Honor. Certainly, if we had that record, if we had the documents, we would produce it to the Court.
> (Transcript, pg. 15, l. 6-25)

After trial concluded, but prior to sentencing, Mr. Lopez requested the discovery documents from his defense counsels. After a thorough review, he found a copy of the INS Notice to Appear. This document shows that his testimony to the Court was truthful, and that he did not perjure himself. Yet, his sentence was enhanced by the district court judge for this reason: perjury.

Mr. Lopez Received Ineffective Assistance of Defense Counsel at Both the District Court and the Court of Appeals.

The Sixth Amendment grants criminal defendants the right to have effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). Mr. Lopez's right to effective assistance of counsel, prior to and during trial, was denied. Defense counsels at trial failed to provide effective assistance on multiple fronts: they failed to present the critical INS Notice to Appear; failed to call INS District Director Walter Cadman as a factual witness regarding INS procedures and the citizenship ceremony on December 6, 1995; failed to investigate the validity of Mr. Lopez's original deportation order; failed to investigate Mr. Lopez's citizenship discovery documents; failed to research applicable immigration laws; failed to find out who used correction fluid ("white-out") on Mr. Lopez's citizenship application (a copy of this document, INS Form N-400, Application for Naturalization, is found in Appendix D, Exhibit D); failed to discover, or even ask why, the INS had two files for Mr. Lopez, both with his name and A-number; failed to object during trial to the Court allowing the jury to decide on a citizenship issue, as citizenship is not for a jury to decide; and failed to mention or introduce into evidence the INS Fingerprint Notification dated August 11, 1998 (a copy of this document is found in Appendix D, Exhibit E). If the INS denied Mr. Lopez's Application for Naturalization on March 12, 1996, why did they send him a notice that he needed to come in and update his fingerprints on August 11, 1998? The INS' files have obvious errors, and defense counsels failed to research them or bring them to the attention of the court.

Mr. Lopez has clearly shown that counsels' errors were serious enough to deprive him of a fair trial, a trial whose result is reliable. Id. at 687. Mr. Lopez also clearly shows counsels' performance was deficient if it "fell below" an objective standard of reasonableness. Id. at 688. Mr. Lopez was

prejudiced by defense counsels' errors: he has been convicted for violation of 18 U.S.C. § 1326 for being in the United States illegally when he was deported under the wrong immigration statute definition; he was sentenced to 168 months in prison for a crime he did not commit; and, in light of the newly presented evidence adduced at trial, due to counsels' deficient performance Mr. Lopez cannot prove that he in fact went to the INS Office on December 6, 1995 and took the Oath of Allegiance. But for the numerous errors of Mr. Lopez's defense counsels, "the result [of his trial] would have been different." Id. at 694.

Mr. Lopez was also denied the right of effective assistance of counsel on direct appeal. He wrote three letters to his appellate counsel, Mr. Manuel Hernandez, and asked him to raise the claim about the evidence that was not introduced at trial (specifically, the INS Notice to Appear), but Mr. Hernandez refused to do so, stating that the evidence was not part of the trial; ironically, he raised the validity of the deportation order dated December 18, 1998. Appellate counsel failed to raise several claims: 1) that the evidence showing Mr. Lopez received the INS Notice to Appear was not introduced at trial and was kept from the jury; 2) the violation of the Confrontation Clause right to effective cross-examination at trial; 3) the claim about whether the district court erred by allowing the jury to make a determination on the lawfulness of the prior deportation under 18 U.S.C. § 1326(a); and 4) that the district court never made a determination if Mr. Lopez's first deportation was lawful regarding a felony charge in Florida on June 12, 1990. This last action was in violation of statute definition. He was unlawfully deported, yet he is being convicted for unlawful entry into the United States, or because he cannot prove that he was a U.S. citizen due to the deficient assistance of defense counsels. The issue about whether Mr. Lopez was lawfully deported is not for the jury to decide; it is a legal question for the Court to decide

prior to trial. See U.S. v. Cisneros-Garcia, 159 Fed. Appx. 464, 467 (9th Cir. 2005)("While § 1326(d) permits an alien to challengs the legality of his prior deportation order, it was not intended that the validity of a prior deportation be contestable as part of a § 1326 jury trial."); U.S. v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996)("Because the lawfulness of the prior deportation is not an element of the offense under § 1326, [defendant is] not entitled to have the issue determined by a jury."); Smith v. Ashcroft, 295 F.3d 425, 431 (4th Cir. 2002)("The [Mendoza-Lopez] Court concluded that since lawful deportation was a material element of the statutory offense, due process required...a pretrial review of whether the prior deportation order was lawful.")(emphasis in original); and U.S. v. Hasanaj, 2005 U.S. Dist. LEXIS 49043 (E.D. Mich)("The Supreme Court held that while the lawfulness of the prior deportation is not an essential element in a criminal prosecution for violation of § 1326, a defendant can mount a collateral challenge to the deportation order in a pretrial motion to determine whether ther was a violation of due process")(citing U.S. v. Mendoza-Lopez, 481 U.S. 828 (1987)). It is well established by the Supreme Court that the district court must determine whether the prior deportation was valid. The lawfulness of the prior deportation is a legal question for the court to decide prior to trial. Mr. Lopez was entitled to effective assistance of counsel on direct appeal, per the Sixth Amendment, and this right was denied by the actions and/or inactions of appellate counsel.

A petitioner does not have to show prejudice where he was constructively denied assistance of appellate counsel. See Lofton v. Whitley, 905 F.2d 885, 887 (5th Cir. 1990)("If the defendant is actually or constructively denied assistance of appellate counsel, prejudice is presumed"); Penson v. Ohio, 488 U.S. 75, 88 (1988)("As we stated in Strickland, the 'actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.' 466 U.S. at 692."); and Sharp v. Puckett, 930 F.2d 450,

452 (5th Cir. 1991)("When...the defendant is actually or constructively denied any assistance of counsel, prejudice is presumed, and neither the prejudice test of Strickland nor the harmless error test of Chapman v. California, 386 U.S. 18 (1967) is appropriate.").

Mr. Lopez states that his claims of ineffective assistance of defense counsel are founded on their failure to perform basic research; to conduct a reasonable investigation into the law; and to "conduct a reasonable investigation into the law and the facts of the case" are fundamental to the case. See Hall v. Warden, 686 Fed. Appx. 671, 684; Thomas v. Lumpkin, 995 F.3d 432, 454 (5th Cir. 2021); and Strickland, 466 U.S. at 691. Regarding Mr. Lopez's immigration and citizenship process and status, "The right to...effective assistance of counsel is...the right of the accused to require the Prosecution's case to survive the crucible of meaningful adversarial testing" (U.S. v. Cronic, 466 U.S. 648, 656 (1984)), and "the adversary fact-finding process" rests on counsel's duty to have conducted a reasonable investigation into the law and facts of the case. But there is nothing in the record showing that counsel made any preparation for Mr. Lopez's defense before or during trial. The deprivation of the right to the effective assistance of counsel recognized in Strickland is such an error. Id. at 686.

On the other hand, because "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issued defined in advance of the proceeding" (Id. at 685), Mr. Lopez was denied competent or effective representation regarding counsel's cross-examination of the government's witnesses because counsel failed to interview any of the government's witnesses prior to trial, or to interview any of the other individuals involved in his citizenship proceeding that were not called as witnesses for the prosecution, before trial. Counsel failed as

well to call such individuals as witnesses for the Defense. Mr. Lopez states that in light of the admission in the record during trial that there were two "A-files" from the INS involving his citizenship proceedings, what a proper investigation of the "point of law [and the pertinent facts] that [were] fundamental to this case" (Hall v. Warden, 668 Fed. Appx. 671, 684 (11th Cir. 2017) (citing Hinton v. Alabama, 571 U.S. 263, 274 (2014)), "prior to and during trial" would have revealed is that the government did not "ma[k]e out a case 'Case or Controversy' between [itself] and the defendant within the meaning of Article III." Warth v. Seldin, 422 U.S. 490, 498-99 (1975); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998); Tyler v. Judges, 179 U.S. 405, 406-09 (1900); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936). Had counsel presented a cogent defense based on the claim that the government lacked Article III standing it would have altered the outcome of the proceedings in the district court because, based on Mr. Lopez's Due Process rights, "an impartial and disinterested tribunal...[wherein] the arbiter was not predisposed to find against him." U.S. v. Rowan, 510 Fed. Appx. 870, 872 (quoting Marshall v. Jerrico, Inc., 466 U.S. 238, 242 (1980)).

The U.S. Supreme Court has jurisdiction to review a Court of Appeals' denial of an application for a Certificate of Appealability.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. § 2253 to include a provision in § 2253(c) that unless a "circuit justice or judge" issues a certificate of appealability ("COA"), an appeal may not be taken to a Court of Appeals from a final order in a proceeding under 28 U.S.C. § 2255. Such is the case with Mr. Lopez: because his request for a COA was denied both initially and on appeal, his case has not been able to proceed.

In House v. Mayo, 324 U.S. 42 (1945), the Supreme Court held that because cases in which certificates of probable cause (a term used prior to the 1996

AEDPA enactment; now known as "certificate of appealability") were refused were not "in" a Court of Appeals, the Supreme Court lacked statutory certiorari jurisdiction to review refusals to issue said certificates. However, in Hohn v. U.S., 524 U.S. 236 (1998), the Supreme Court held that under 28 U.S.C. § 1254(1), it does have jurisdiction, on certiorari, to review a denial by a circuit judge or a panel of a Federal Court of Appeals of a certificate of appealability; that the portion of Mayo, supra, holding the Supreme Court lacks statutory certiorari jurisdiction over denials of certificates of appealability / probable cause is overruled; stare decisis concerns do not require the Supreme Court to adhere to this portion of Mayo; and that § 1254(1) permits the Supreme Court to review denials of motions for leave to intervene in the Court of Appeals in proceedings to review the decision of an administrative agency.

Mr. Lopez was denied his rights under the Fifth and Sixth Amendments to the Constitution. This permits him to seek relief from the Supreme Court via a petition for a writ of certiorari due to the denial of his request for a COA by the lower courts. In Miller-El, supra at 327, the Supreme Court stated:

> "Consistent with our prior precedent and the test of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Mr. Lopez has clearly shown that his rights under the Fifth and Sixth Amendments were violated in the arguments above. Although courts normally follow the rule of stare decisis, the Supreme Court, in Hohn, supra at 250, says, "We have recognized...that stare decisis is a 'principle of policy' rather than 'an inexorable command.'" (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

Therefore, because the Supreme Court has jurisdiction to review the denial of a COA from the lower court via a petition for writ of certiorari, it has the ability to review Mr. Lopez's case and grant him relief.

The District Court committed reversible error in denying Petitioner's 28 U.S.C. § 2255 Motion without conducting an evidentiary hearing to resolve the factual disputes in counsel's errors.

The district court decided that Mr. Lopez cannot show that jurists of reason would find this court's procedural ruling debatable, and Mr. Lopez failed to make a substantial showing of the denial of a Constitutional right. The court also denied a COA, and dismissed the case with prejudice.

Mr. Lopez contends the district court's decision is wrong, because the claims in this case clearly show Constitutional violations; facts, evidence, and the law show not only counsel's errors, but also court and prosecutor violations.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant in federal courts the right to effective assistance of counsel, including appointment of counsel for indigent defendants, pursuant to 28 U.S.C. § 1915(d) and the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. See also, Fed. R. Crim. P. 44(a)("A defendant who is unable to obtain counsel has a right to have counsel appointed to represent (him) at every stage of the proceeding from initial appearance through appeal.").

The Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland, supra at 686. This Court has held that the right to effective counsel applies to all "critical stages of the criminal proceeding." Montejo v. Louisiana, 556 U.S. 778, 786 (2009); Lee v. U.S., 582 U.S. 357, 376 (2017). These stages include pre-trial investigation and preparation, interview of potential witnesses, and making an independent investigation of facts and circumstances of the case. The Supreme

Court states that effective representation requires an attorney to conduct a reasonable investigation into the law and the facts of the case. Strickland, supra at 691-94. Failure to do this results in a constitutionally unfair proceeding where counsel's "ignorance of a point of law that was fundamental to petitioner's case combined with counsel's failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hall v. Warden, supra at 684 (citing Hinton v. Alabama, supra at 274).

Mr. Lopez's right to effective assistance of counsel, prior to and during trial, was denied. In any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances. See Strickland at 691. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Considering that counsel had a duty to make reasonable investigations of the law, i.e., the "point of law" that was "fundamental" to Mr. Lopez's case, or to make a reasonable decision that made a particular investigation unnecessary, Mr. Lopez now "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that challenged the action." Kimmelman v. Morrison, 477 U.S. 365, 381 (1986): in this case, counsel's failure to challenge the government's "standing" to prosecute the citizenship case in the district court and to have subjected the government's case to meaningful adversarial testing based on counsel's failure to perform basic research was not sound strategy. Id. (citing Strickland, supra at 688-89).

Mr. Lopez states that not only did counsel's representation in these regards fall below an objective standard of reasonableness, "but for counsel's

unprofessional errors, the result of the proceeding [in the District Court] would have been different." Strickland, supra at 694.

On July 16, 2024, Mr. Lopez filed a Motion to Recall Mandate and Amend Judgment dated May 1, 2020 by the Eleventh Circuit Court of Appeals, and a Motion for Apppointment of Appellate Counsel to assist him in seeking a writ of certiorari and a Motion for Leave to File Documents Out-of-Time.

The Motion to Recall Mandate was filed on the bases that his appellate attorney, Mr. Hernandez, violated the CJA, 18 U.S.C. § 3006A, and Fed. R. Crim. P. 44(a); Mr. Lopez had the right to seek a writ of certiorari in the Supreme Court. After the Court of Appeals affirmed the district court's conviction, Mr. Lopez asked Mr. Hernandez to file a request for rehearing, or a writ of certiorari to the U.S. Supreme Court; Mr. Hernandez refused both requests. By doing so, he failed in his duty, loyalty, and obligations to represent his client at every stage of the appellate proceeding. See Fed. R. Crim. P. 44(a).

On July 30, 2024, the Court of Appeals sent Mr. Lopez a "No Action / Deficiency Notice" that no action will be taken on his Motion to Recall Mandate (10259028-2), Motion for Appointment of Counsel (10259022-2), or his Motion for Rehearing En Banc (10259019-2). The reason given: this case is closed.

Mr. Lopez urges this Supreme Court to review this issue in his Motion under 28 U.S.C. § 2255 as to whether appellate counsel's refusal to assist his client in seeking the writ of certiorari establishes a case of constitutionally deficient and ineffective assistance of counsel. Mr. Lopez is of the belief that because of appellate counsel's actions, his direct appeal cases, No. 18-14928 and 18-14930, are still pending before this Court, since no petition for a writ of certiorari was filed. The COA should be granted to consider whether § 2255 relief is available for Mr. Lopez's claim that his

appellate counsel was ineffective for the reasons stated above. Mr. Lopez states that he is entitled to relief in the remedy fashioned in Wilkins v. U.S., 441 U.S. 468, 469-70 (1979). In that case, the Supreme Court directly afforded Wilkins relief by granting his petition, vacating the judgment, and remanding the case to the Court of Appeals to permit the timely filing of a petition for a writ of certiorari. Id. at 470. It noted, however, that if Wilkins had first "presented his dilemma to the Court of Appeals by way of a motion for the appointment of counsel to assist him in seeking review [before the Supreme Court], the Court then could have vacated its judgment affirming the conviction and entered a new one, so that this petitioner, with the assistance of counsel, could file a timely petition for certiorari." Id. at 469.

The Supreme Court in Wilkins clearly signaled that the Courts of Appeal should make appropriate relief available so that defendants are not disadvantaged by the failures in representation by CJA-appointed counsel. Mr. Lopez urges this Supreme Court to construe his § 2255 Motion to recall the Appeals Court mandate, grant this Motion, vacate the judgment, and remand the case to the Eleventh Circuit Court of Appeals with an order to issue a COA, and to appoint counsel to assist Mr. Lopez in filing a timely petition for writ of certiorari in the Supreme Court, in his direct appeal. Id. at 470.

SUMMARY

Mr. Lopez urges this Supreme Court to use its discretionary power and review the claims in this case, upon special and important reasons where Mr. Lopez received Constitutionally ineffective assistance of counsel prior to and during trial, as well as on direct appeal. The trial record shows that counsel's errors were so serious that they were not functioning as the counsel guaranteed by the Sixth Amendment. Mr. Lopez contends he has satisified both prongs in Strickland.

In light of the District Court trial record, the judge created a jury trial when a question on a citizenship issue is purely a legal question for the court to decide, then allowed the jury to make a determination on the lawfulness of the prior deportation orders. He also allowed the prosecutor to introduce the statement of the government's key witness into evidence without having effective cross-examination, depriving the jury from an possible questions that they may have for the witness.

The prosecutor failed to assist defense counsels in disclosing the evidence that shows very important information on its face and deprived the jury of that information, then allowed the testimony of the government witness that there was no evidence that Mr. Lopez was invited to the INS Office for a "swearing-in" ceremony on December 6, 1995. She knew that information and testimony was false because information was indeed available.

All these errors were not harmless. This Supreme Court has jurisdiction to review the district court's denial of a § 2255 hearing to resolve these issues that are in direct conflict with this Court's previous decisions, and the Eleventh Circuit Court of Appeal's ignoring or overlooking failed to issue the COA.

In Hohn v. U.S., 524 U.S. 236, 253, the Supreme Court held that jurisdiction exists to review the denial of a § 2255 motion and the COA. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the District Court's resolution of his Constitutional claims, or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, supra at 327; Buck v. Davis, supra at 115 (quoting Strickland, supra at 690).

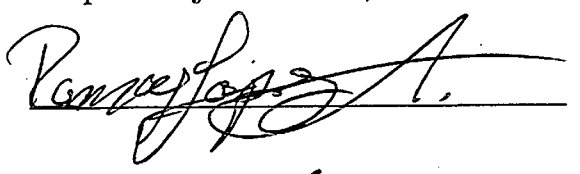
Mr. Lopez asks this Supreme Court to remand this case back to the Court of Appeals with an order to issue the COA in all claims and appoint appellate

counsel to assist him in preparing and presenting these claims in the District Court. Denying Mr. Lopez's COA is denying him access to the Court. In Wolff v. McDonnell, 418 U.S. 539, 579 (1974), the Supreme Court held that "the right of access to the court was premised, is found in the Due Process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental Constitutional rights," and because this Court should not allow the errors to go uncorrected. See Hernandez v. Peery, 141 S. Ct. 2231, 2236 (2021).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: September 6, 2024.