No. 24-5857

In the

# Supreme Court of the United States



DIMAS DELEON RIOS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Dimas DeLeon Rios presents the following question for review:

> Does an appellate court have an obligation to provide sufficient explanation for denying a certificate of appealability to enable a petitioner to seek meaningful review of that decision?

## PARTIES TO THE PROCEEDING

Petitioner Dimas Petitioner Rios and the United States of America are parties to the proceeding.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Dimas DeLeon Rios ("Petitioner"), proceeding *pro se*, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit, so that this Court may review the judgment below.

## OPINIONS BELOW

This matter seeks discretionary review of the refusal of the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit to grant Petitioner a certificate of appealability ("COA") to appeal a denial by the District Court of a petition brought pursuant to 28 U.S.C. § 2255. The District Court ruled that Petitioner's issues were without merit. *United States v. Rios*, 2023 U.S. Dist. LEXIS 145994, 2023 WL 5352311 (S.D. Tex., August 21, 2023). The text of the District Court's *Order* appears at Appendix A.

The United States Court of Appeals for the Fifth Circuit thereafter issued a *per curiam* opinion finding that Petitioner had failed to make "a substantial showing of the denial of a constitutional right."

Petitioner sought rehearing, which the Fifth Circuit erroneously denied as untimely. That decision, which was unpublished, appears at Appendix C. Rather than contest this procedural error, Petitioner now petitions this Court to issue a writ of *certiorari* to the Fifth Circuit.

These opinions are all unreported.

## JURISDICTION

This Court has jurisdiction to hear this *Petition* pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, § 2255 is the principal statutory provision involved in this *Petition*. The statute is set out in Appendix D.

## STATEMENT OF THE CASE AND FACTS

On March 24, 2016, Petitioner was named in a *Superseding Indictment* charging him with participation in a drug conspiracy in

violation of 21 U.S.C. § 846 and drug distribution charges in violation of 21 U.S.C. §§ 841(a) and (b)(1)(A). Pursuant to a *Plea Agreement*, Petitioner entered a guilty plea to one count of conspiracy to possess with intent to distribute more than 5 kilograms of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 846. This count was set out in a Third Superseding Indictment, handed up on August 17, 2017.

Petitioner pled guilty to one count of conspiracy to possess with intent to distribute cocaine. He was sentenced to 180 months in prison. Consistent with the appellate waiver contained in his plea agreement, Petitioner did not appeal.

Petitioner admitted in his *Plea Agreement* that from on or about January l, 2010 to on or about September l0, 2015, he had conspired to knowingly and intentionally possess with intent to distribute more than five kilograms of a mixture or substance containing a detectable amount of cocaine. He acknowledged that on April 20, 2013, a co-defendant – who was a United States Border Patrol Agent – told an Edinburg, Texas police officer that a suspicious vehicle, an abandoned car parked at a specific location on an expressway, might contain a controlled

substance. The Border Patrol agent was passing on information that Petitioner had given him. Based on the tip, an Edinburg police officer located the car and found about 17 kilograms of suspected cocaine, but when the substance was analyzed, it was found to contain less than 1% cocaine powder.

The strange results of the analysis caused federal agents to suspect that the reason for only trace amounts of cocaine being found was that the persons responsible for the 17 kilograms of substance planted in the car and the tip to authorities had stolen the actual cocaine from people for whom they were transporting it, substituting the sham coke bundles so that they could provide their bailors with an explanation for loss of the shipment. That way, the owners/shippers of the cocaine would believe the drugs had been lost to law enforcement – a cost of doing business – instead of to Petitioner and his co-conspirators, leaving the conspiracy free to resell drugs they had not paid for.

Petitioner admitted that in the Edinburg seizure, he and the conspirators had created the "sham" bundles and used unknowing local police to seize the "sham" cocaine for the purpose of covering up the

theft. After the seizures, Petitioner and his co-conspirators obtained copies of the seizure reports from local police departments and provided the reports to the shippers as proof of a completely fortuitous loss.

Count 13 of the *Third Superseding Indictment,* to which Petitioner did not plead guilty, alleged that three persons named in the indictment had kidnapped co-conspirator Carlos Oyervides because he allegedly owed a debt to the Gulf Cartel, a Mexican crime organization. After Oyervides' brothers refused to pay the ransom (because they believed that Oyervides had orchestrated the kidnapping as a ruse to get money from them), Oyervides then told the kidnappers that Petitioner could raise the ransom the Cartel was demanding. Petitioner did so, leading the government to allege that he was involved in a conspiracy to kidnap Oyervides. Petitioner vigorously argued that he had nothing to do with the kidnapping.

At sentencing, the Court said that "[t]his case would be very different if it were simply a drug smuggling case. I think everybody

would feel that the guideline sentence is vastly excessive. We do have kidnapping, which puts it in a different category..." *Sent.Tr.* 110.

In a motion made pursuant to 28 U.S.C. § 2255, Petitioner raised three ineffective assistance of counsel claims:

(1) His defense attorneys rendered ineffective assistance at sentencing by failing to investigate and advocate that the statements made by Government witness and co-defendant Carlos Oyervides relied upon in setting the Guidelines range were unreliable due to his out-of-court claims that he was the leader of the conspiracy;

(2) His defense attorneys rendered ineffective assistance at sentencing with respect to investigating and advocating regarding prior statements of witness Mario Solis; and

(3) His attorneys rendered ineffective assistance at sentencing with respect to investigating and addressing kidnapping allegations against him.

Petitioner argued that his defense attorneys were ineffective at sentencing by failing to call witnesses to address the falsehoods told by government witness Carlos Oyervides. Oyervides provided much of the information relied on by the Government and presentence report to brand Petitioner the leader/organizer of the conspiracy. But after he told the government that Petitioner ran the conspiracy, Oyervides appeared on a popular religious television program produced by Centro Christiano (Vida Eterna) and – while witnessing to his religious

conversion – boasted that he had been "the leader of the organization... I was the leader...right... and they are still sentencing the others with 14...10 years..." and "I had everything – the bridge from Reynosa to Hidalgo, the river was mine I would pass through there. From Falfurrias there are also Officers sentenced at checkpoints all of that I had it controlled."

He also testified in other proceedings in the Southern District of Texas inconsistent with his representations to agents in Petitioner's case. On July 10, 2019, he testified that his job in the drug theft ring "was to deliver the paper, to sell the merchandise and share the money. If [Carmen Meyer] was not happy with what she got paid, that is something that I was not in charge of. It was Maritssa Salinas who was in charge of that." *Transcript* (July 10, 2019), ECF 869, at p. 56.

Clearly, if Oyervides was correct that he and others ran the conspiracy, that not only undercut Petitioner being assessed Guidelines enhancements for being a leader but also brought into question whether anything he told agents implicating Petitioner's alleged leadership role was credible. However, the District Court ruled that Petitioner's *§ 2255 Motion* claim was that "trial counsel was ineffective in failing to present

evidence that Carlos Oyervides admitted during a television interview that he himself was the leader of the drug trafficking organization..." But it was not solely that both Carlos and Petitioner could have been enhanced as leaders of the conspiracy. Rather the issue was that the television interview did not just show that Oyervides was the leader/ organizer of the conspiracy, it showed that when he made out to the government that he was nothing but an errand boy, he was a liar.

The Government moved for summary judgment, arguing that even if Petitioner's allegations were true, he was not entitled to relief. It maintained that his attorneys performed "as required by the Sixth Amendment," and that his claims were not really that counsel was ineffective but rather that the court erroneously calculated his Guideline total offense level (a claim not cognizable in a § 2255 proceeding).

The Government is obligated to prove the facts underlying sentencing enhancements by a preponderance of the evidence. *United States v. Arayatanon*, 980 F.3d 444, 452 (5th Cir. 2020). The presentence report makes clear that Petitioner's leadership role, gun enhancement and at least some of the obstruction of justice

enhancement, relied on Oyervides' statements to the Government. That testimony was shot through with false statements to Government agents. Petitioner alleged in his § 2255 motion and supported the claim with a detailed declaration of the paralegal who had worked with defense counsel on Petitioner's sentencing, that the defense attorneys' strategy was to discredit the Government's star witness. Petitioner argued that this was a reasonable strategy that was negligently executed, and jurists of reason could easily have concluded that this was so.

Witness Mario Solis told the Government that Petitioner had tampered with witnesses, resulting in a § 2D1.1(b)(16)(D) enhancement, alleging that Petitioner had hired and paid for a lawyer for Solis in order to control what he told the authorities. Juan Guerra, the lawyer Solis claimed Petitioner had hired, was prepared to testify that Petitioner had hired him to represent Petitioner and no one else, thus showing that Solis's story was false. But Petitioner's lawyers, after subpoenaing Mr. Guerra as a witness, waived his testimony when he was running late for court. They explained to the District Court that "[t]he Government is essentially accusing Mr. Guerra of unethical

activity saying [he withdrew due to a conflict of interest] - and it's just false. I think he should have a chance to clear his name'." *Order, supra* at 2023 U.S. Dist. LEXIS 145994, *7-8. The Court at the time expressed its puzzlement, saying. "I would have given Mr. Guerra a hearing at any point on the issue of conflict. I don't know why he's just now wanting to clear his name. I would have - at any time - given him a hearing on that. So I don't see any point in waiting for that." *Id.*

No doubt defense counsel intended to call Mr. Guerra as a witness. That was not his mistake. Instead, his mistake came when the Court asked what Mr. Guerra's testimony would add to the proceeding. Rather than explain the reason for the witness, Petitioner's defense counsel told the court that he wanted just to give Mr. Guerra a chance to clear his name. If the Court heard from a disinterested member of the bar that Solis, a source for evidence used to enhance Petitioner's Guidelines had lied about a material fact, it is reasonable to believe that the Court would then discount other claims by Solis that tended to implicate Petitioner in conduct that raised his Guidelines score. *See, e.g., Chruma v. Bosarge*, Case No. 15-0132-WS-N, (S.D. Ala. June 8, 2016) 2016 U.S. Dist. LEXIS 74560, at *12 (When "a jury that believes a

witness has testified falsely about any material point [it] is entitled to disbelieve the witness as to other points").

Petitioner raised all of these issues with the 5th Circuit Court of Appeals. That Court responded with a summary denial of the COA, holding that "[t]o obtain a COA, DeLeon Rios must make 'a substantial showing of the denial of a constitutional right.' Where a district court has rejected a claim on the merits, a movant 'must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'. DeLeon Rios has not made the requisite showing."

## REASONS FOR GRANTING THE WRIT

Petitioner raises a question of substantial significance to the over 14,569 habeas corpus cases filed annually in United States district courts. Administrative Office of U.S. Courts, *U.S. District Courts–Prisoner Petitions Filed by Nature of Suit* (September 30, 2023).[1] The question of what minimal explanation requests for COAs deserves is

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[1] *See* https://www.uscourts.gov/sites/default/files/data_tables/jff_4.6_0930.2023.pdf (last visited October 3, 2024).

one of substantial importance to these petitioners, and – given the number of persons involved and the criticality of the Fifth Amendment liberty interest these petitioners seek to vindicate, is a matter of transcendent national importance.

**Appellate courts have an obligation to provide sufficient explanation for denying a certificate of appealability to enable a petitioner to seek meaningful review of that decision**

To obtain a COA, a petitioner must make a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate "that reasonable jurists could debate whether [] the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (*quoting Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)).

In determining whether to grant a COA, the inquiry is limited to a "threshold examination that 'requires an overview of the claims in the habeas petition and a general assessment of their merits'." *Smith v. Dretke*, 422 F.3d 269, 273 (5th Cir. 2005), *citing Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). The fact that a COA may issue does not

mean the petitioner will be entitled to ultimate relief. Rather, "the question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 537 U.S. 342. "A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 537 U.S. 337.

At the COA stage, the appellate court is not to "apply the deferential AEDPA standard of review to examine the merits of the habeas petition." *Smith, supra, citing Miller-El, supra* at 537 U.S. 342. Rather, the court's task in considering whether to grant a COA is to determine whether the movant has "demonstrated 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'." *Smith, supra, quoting Miller-El, supra* at 537 U.S. 327 and *Slack, supra* at U.S. 529 U.S. 484.

In *Buck v. Davis*, 580 U.S. 100 (2017), a case involving this Circuit, the Supreme Court cautioned against engaging in too much of a merits analysis during the COA phase of a proceeding:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. 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." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims... "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

*Id.*, at 580 U.S. 124, *quoting Miller-El*, *supra* at 537 U.S. 327, 334.

On the merits, an appellate court is to perform a "threshold inquiry regarding" the underlying claim, *Pabon v. Mahanoy*, 654 F.3d 385, 393 (3d Cir. 2011), "without 'full consideration of the factual or legal bases adduced in support of th[at] claim[],'" *Buck*, *supra* at 580 U.S. 115, quoting *Miller-El*, *supra* at 537 U.S. 336.

It is well established that a district court must provide adequate explanation of its reasoning to enable meaningful appellate review. *See SEC v. Barton*, 79 F.4th 573, 579 (5th Cir. 2023), quoting *Gonzalez v. Assoc. Health & Welfare*, 55 Fed.Appx. 717 (5th Cir. 2002) ("Although we cannot say the court abused its discretion by denying prejudgment interest, the district court's failure to explain its reasoning frustrates

meaningful appellate review"); *In re Volkswagen of America, Inc.*, 545 F.3d 304, 310 n.4 (5th Cir. 2008) (*en banc*) ("[A] decision calling for the exercise of discretion "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review," quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

This case provides the Supreme Court with an opportunity to direct that the same standards should govern appellate decisions such as the Fifth Circuit's order in this case. The Fifth, after all, has developed an unfortunate habit of denying COAs with a peremptory statement of what the petitioner alleges followed by the same "cookie-cutter" language employed here. In the first nine days of October 2024 alone, the Circuit has used the same language to deny COAs in at least 16 cases (and those are just those that are reported in LEXIS. *See, e.g. United States v. Valdez-Villalobos,* Case No. 24-10143, 2024 U.S. App. LEXIS 25529 (5th Cir. Oct. 9, 2024); *United States v. Watts*, Case No. 24-30249, 2024 U.S. App. LEXIS 25515 (5th Cir. Oct. 7, 2024); *United States v. Mason*, Case No. 24-60136, 2024 U.S. App. LEXIS 25226 (5th Cir. Oct. 4, 2024); and *Mitchell v. Lumpkin*, Case No. 24-10250, 2024 U.S. App. LEXIS 25484 (5th Cir. Oct. 8, 2024).

In *Buck v. Davis, supra,* the Supreme Court's detailed opinion reversing the 5th Circuit's denial of a COA was based on a short yet more detailed opinion than the cookie-cutter COA Application denial issued in this case. *Buck v. Stephens*, 623 Fed.Appx 668, 669 (5th Cir. 2015) (denial provided several holding specific to the case, *i.e.* "[e]ven if the Texas Attorney General initially indicated to the inmate that he would have been resentenced, his decision not to follow through was not extraordinary").

Concurring in *Sochor v. Florida*, 504 U.S. 527 (1992), Justice O'Connor wrote that

> the Court does not hold that an appellate court can fulfill its obligations of meaningful review by simply reciting the formula for harmless error... An appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion. In *Clemons* v. *Mississippi*, 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990), for example, we did not hesitate to remand a case for 'a detailed explanation based on the record' when the lower court failed to undertake an explicit analysis supporting its 'cryptic,' one-sentence conclusion of harmless error. *Id.*, at 753. I agree with the Court that the Florida Supreme Court's discussion of the proportionality of petitioner's sentence is not an acceptable substitute for harmless error analysis, see *ante*, at 539-540, and I do not understand the Court to say

> that the mere addition of the words "harmless error" would have sufficed to satisfy the dictates of *Clemons*.

*Sochor, supra* at 504 U.S. 541 (O'Connor, J., concurring).

Petitioner argued that his defense attorneys were ineffective at sentencing by failing to produce Oyervides, and he provided evidence of Oyervides' grossly inconsistent and unprompted statements made after Petitioner's sentencing to support his showing.

Likewise, Petitioner showed that his attorneys planned to call attorney Guerra to testify at Petitioner's sentencing. Mr. Guerra would have convincingly contradicted falsehoods told to the Government by witness Solis to support Guidelines enhancements applied to his Total Offense Level.

Finally, Petitioner argued that reasonable jurists could easily conclude that the District Court erred in denying and mischaracterizing the kidnapping issue. The District Court said, "The record shows that Oyervides was kidnapped because he was an active participant in the drug trafficking organization for which defendant was a leader." *Order, supra* at 2023 U.S. Dist. LEXIS 145994, *10. Petitioner argued the

record was bereft of such evidence, and that defense counsel was deficient to permit it to go unchallenged.

The District Court held that the kidnapping "is precisely the type of 'uncharged conduct' that U.S.S.G. § 5K2.21 contemplates." The Court argued that "[i]t was not necessary that the Government show that defendant himself actually kidnapped Oyervides or was personally involved in the kidnapping," but nevertheless relied on the kidnapping in determining the seriousness of the offense conduct and Petitioner's culpability for it.

A reasonable jurist would find it beyond debate that application of § 5K2.21 requires that the conduct underlying a criminal charge that was either dismissed or not brought against a defendant. *See United States v. Woods,* Case No. 23-20059 5th Cir. Dec. 7, 2023) 2023 U.S. App. LEXIS 32420, at *7 (A § 5K2.21 upward departure applies when the conduct at question is the defendant's). Not even Oyervides, who curried favor with the government to the extent of a 14-month sentence) ever suggested that Petitioner had any role in his kidnapping other than to pay money to secure his release. The District Court's reliance on § 5K2.21 should demonstrate to a jurist of reason that the use of

Oyervides' kidnapping to paint Petitioner as violent was baseless and prejudicial.

Petitioner argued that his attorneys should have had the witnesses available to address this, as they intended to do.

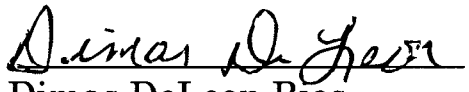
The Circuit disagreed that Petitioner's argument raised an issue that reasonable judges could debate, but its COA *Order* is so bereft of detail that there is nothing that permits a reader to so much as conclude that Petitioner's COA Application was read, let alone judged. In fact, the Circuit provided not so much as a dependent phrase that indicated the reasons it believed that any of these issues should not be deemed to be worthy of exploration on appeal.

## CONCLUSION

Appellate courts, like district courts, owe *habeas* litigants seeking a COA at least a minimal explanation of why reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." It doesn't have to be much, but it should provide more than the formulaic incantation that this Circuit invokes to deny COA applications, sufficient to enable meaningful review on rehearing or before this Court.

WHEREFORE, this *Petition* should be granted, and this matter should be set for briefing on the issue raised. The statements of fact herein are true, under penalty of perjury.

Executed October 9, 2024



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