

No:

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

MIGUEL GUERRERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should a writ of certiorari be granted to determine whether the District Court erred in not granting an evidentiary hearing when the record before the court did not establish that Guerrero's issues did not warrant any relief?

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Second Circuit and the United States District Court for the Southern District of New York.

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

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *Guerrero v. United States*, Docket No: 17-2094 and is reprinted as Appendix A to this petition.

The opinion in the denial of Petitioner's Title 28 U.S.C. § 2255 is an unpublished opinion in *Guerrero v. United States*, No. 1:15-CV-7282-GHW, 2017 U.S. Dist. LEXIS 60923 (S.D.N.Y. Apr. 20, 2017) and is reprinted as Exhibit B to this petition.

STATEMENT OF JURISDICTION

The Second Circuit's denial of Petitioner's Title 28 U.S.C. § 2253 was entered on January 2, 2018.

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS, TREATIES,
STATUTES AND RULES INVOLVED**

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

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

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 laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE FACTS

1. Overview of the Offense

On March 30, 2017, an indictment was filed, charging Guerrero with one count of conspiracy to distribute and possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. § 846. On April 11, 2007, a superseding indictment was filed, charging Guerrero and three co- conspirators (Reuben Alvarez, Alfred Glover, and Douglas Bond) with conspiracy to distribute and possess with intent to distribute at least five kilograms of cocaine and at least fifty grams of cocaine base, *i.e.*, crack.

On November 19, 2008, Guerrero's trial counsel ("Trial Counsel") filed a motion to suppress certain physical evidence and voice identification testimony. The motion sought the suppression on Fourth Amendment grounds of a variety of evidence that had been seized from Guerrero's vehicle, his person, and his home. The motion also sought the suppression of testimony concerning the identification of Guerrero's voice, arguing that any such testimony would be the result of an "unnecessarily suggestive voice show-up." Trial counsel expanded the scope of the motion to also include the voluntariness of written consent that Mr. Guerrero had given to the search and downloading of his cell phones. After a hearing the lower court denied the suppression motion.

After a seven-day trial, the jury returned a verdict, finding Guerrero guilty on the sole count of the Indictment. The PSR calculated Guerrero's Sentencing Guidelines range from 360 months to life imprisonment, with a mandatory minimum of 120 months' imprisonment. The court adopted the factual recitations contained in the PSR and noted that the PSR "correctly calculates the Sentencing Guideline range as 360 months in prison to life, based on a total offense level of 42 and a criminal history category of I. There is, in addition, a mandatory minimum sentence of 120 months in prison." The Court imposed a below-Guidelines sentence of 240 months' imprisonment to be followed by a five-year term of supervised release.

Guerrero appealed and on October 21, 2013, the Second Circuit entered a summary order affirming Mr. Guerrero's conviction. *United States v. Guerrero*, 541 F. App'x 80 (2nd Cir. 2013). Guerrero did not petition the United States Supreme Court for a writ of certiorari. A Title 28 U.S.C. § 2255 and request for a certificate of appealability were denied.

This timely request for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10 CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

I. SHOULD A WRIT OF CERTIORARI BE GRANTED TO DETERMINE WHETHER THE DISTRICT COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING WHEN THE RECORD BEFORE THE COURT DID NOT ESTABLISH THAT GUERRERO'S ISSUES DID NOT WARRANT ANY RELIEF

The district court's ruling required the granting of a certificate of appealability to address whether the matter should proceed further. Failing that, this Court has the authority to grant Guerrero the relief raised on his several ineffective assistance of counsel claims that required an evidentiary hearing to develop the record further.

a. Failure to Move to Inspect Grand Jury Minutes

Guerrero argued on his Title 28 U.S.C. § 2255 that counsel was ineffective for failing to review the grand jury minutes of Victor Tavaréz. Tavaréz was a co-defendant who testified against Guerrero pursuant to a cooperation agreement with the Government. Trial counsel should have requested the grand jury transcripts to ascertain the veracity of the testimony of Tavaréz, that would have led to a prosecutorial misconduct allegation and possible dismissal of the indictment.

A court may authorize disclosure "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). The District Court alleged that Guerrero cannot show that present specific information as to what he would

have raised in his defense had the transcripts been released. The problem with the court's position is that the transcripts were never "released" in the first place.

There were no means to review the transcripts since no request to release them was ever sought. It was based on counsel's ineffectiveness and lack of performance that the request for the transcripts was never made in the first place. See, *United States v. Barret*, 824 F. Supp. 2d 419, 446 (E.D.N.Y. 2011); (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)) ("But first, the defendant must satisfy a heavy burden of showing that 'compelling necessity' outweighs countervailing public policy in order to disturb the presumption of the 'indispensable secrecy of grand jury proceedings.'") Absent counsel's request, the court cannot find Guerrero at fault for counsel's inaction.

b. Failure to Request Tavaréz's Prior Statements

Following that same angle, Counsel had an obligation to request the statements that Tavaréz made at the time of his arrest and review those statements with Guerrero. The Court reasoned since the Government provides these documents as part of discovery, that Guerrero cannot show prejudice. Guerrero is alleging that this compliance never occurred. The record does not disprove this allegation, to the contrary, the court acknowledges that it cannot verify or disprove the accuracy of Guerrero's statements requiring a hearing:

"Because this Court did not preside over Mr. Guerrero's trial, and the trial took place nearly eight years ago, this Court lacks access to the records necessary to

determine conclusively whether the Government voluntarily produced Rule 26.2 and § 3500 material. The Court notes, however, that the Government states in its response to Mr. Guerrero's § 2255 motion that it "produced all statements which Guerrero was entitled to review." ("Answer") at 10.

Id. Order at p. 13-14.

The record is inconclusive as to whether the 3500 material was actually provided and its Guerrero's position that it was not. The lower court could not rely on the government's unsworn statements of compliance as a substitute for an evidentiary hearing. *See Machibroda v. United States*, 368 US 487 (1962) (AUSA's sworn statement cannot defeat the right of an evidentiary hearing; *Scott v. United States*, 349 F.2d 641 (6th Cir. 1965); *United States v. White*, 366 F.3d 291 (4th Cir. 2004)(AUSA's unsworn statements are not evidence); *United States v. Kelly*, 790 F.2d 130 (DC Cir. 1986)(unsworn statements by AUSA may not be used as a substitute for an evidentiary hearing in connection with a post-conviction motion.

This court must agree whether the statements were actually released to defense counsel or not, before reaching a conclusion on the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

c. Counsel's Failure to Adequately Investigate

Guerrero further argues that Trial Counsel was ineffective in failing to fully investigate certain facts necessary to adequately cross-examine Tavarez. Specifically, he alleged that Trial Counsel “did not investigate all the facts concerning” an incident that took place in New Rochelle and about which Tavarez testified. The analysis for ineffective assistance of counsel arising from an alleged failure to investigate facts necessary to adequately impeach a witness on cross-examination is considered under the familiar *Strickland* standard. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (applying Strickland to claims of ineffective assistance of counsel as a result of a failure to investigate mitigating evidence).

The court concluded, without a hearing, that Guerrero cannot establish any “specific facts that could have been discerned from further investigation that would have aided in his defense, much less that would have undermined confidence in the jury’s verdict in light of the strength of the evidence presented to the jury as a whole.” The decision is premature. It is not until after a hearing where the court can review the demeanor of the witnesses, can the court make a credibility determination. In denying Guerrero’s allegations without a hearing, was premature. The court was required to inquire from counsel what investigations if any, he undertook in preparation for trial. Then after an explanation, can the court

make a final determination on the merits. As the court noted, “a single, serious error may support a claim of ineffective assistance of counsel.” *Id. Kimmelman v. Morrison*, 477 U.S. 365 (1986).

As such, this court must agree that the granting of an evidentiary hearing is required to further develop the record and permit the matter to proceed.

d. Counsel was ineffective for his failure to adequately impeach Tavaréz

In yet another allegation against counsel, Guerrero argued that counsel was ineffective for failing to impeach Tavaréz. The court determined that was considered a trial strategy and therefore, not ineffective. The decision was in error. Counsel did not offer an explanation as to why Tavaréz was not impeached. The district court should not be allowed to offer defenses for counsel not raised in the pleadings. The court was required to address an evidentiary hearing and reach the merits of the claims.

e. Failure to File a Motion to Suppress Wiretap Phone Conversations

Not only was counsel ineffective for the allegations raised herein, he was ineffective for failing to file a motion to suppress the wiretaps after being requested to review and file the same. The court determined that Guerrero’s counsel did in fact file a motion to suppress, which is correct, but did not challenge the suppression of the recorded phone conversations from the wiretap. The court did not explain in the denial of the § 2255, why counsel was not ineffective in failing

to challenge the wiretaps. There is no explanation why counsel did not pursue this avenue of defense. The legal basis to challenge the recordings could have been addressed by challenging the affidavit used to secure the warrant, however, no one pursued that avenue.

The granting of a writ of certiorari will allow this court to develop the record to see if counsel was ineffective in his failure to pursue the available defense during the trial.

f. Sentencing Counsel Ineffectiveness.

Sentencing Counsel was ineffective in failing to object to the drug quantity and an aggravating role enhancement used to calculate his offense level under the Sentencing Guidelines and by failing to object to the use of sentencing on facts that had not been found by a jury beyond a reasonable doubt. Although the Court explains the reasoning for reaching the drug quantity as it did, there were still no jury-determined facts to support such a sentence. Neither does the record support the Court's logic that counsel followed a strategy at sentencing in not addressing the drug quantities and focusing only on the sentencing memorandum, thus not preserving the issue for appeal. There is no logic to require Guerrero to show that the court would have granted the objection in order to be successful on his § 2255. All that is required is a reasonable probability of a different outcome, a probability sufficient to undermine confidence in the proceedings.

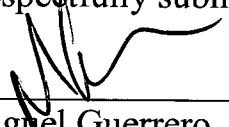
As such, this court must agree that the granting of a writ of certiorari is required to develop the record as to what strategy if any was being followed by sentencing counsel.

CONCLUSION

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

Done this 11, day of March 2018

Respectfully submitted,



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