

No. 17 - _____

In The
Supreme Court of the United States

ESPIGMENIO HERNANDEZ, JR.,

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*

Espigmenio Hernandez, Jr.

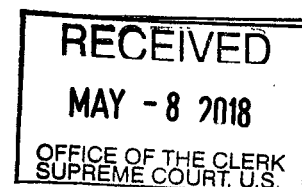
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QUESTIONS PRESENTED

- I. Whether the District Court erred in denying Mr. Hernandez's *Lafler* claim where it: 1) rejected the timely objection to the Magistrate's finding that Hernandez failed to meet his burden of proof at the hearing through application of an erroneously heightened standard of review, as the Court announced in its order denying relief: "Movant failed to show that the Magistrate Judge **abused his discretion** in finding the testimony of counsel McLeaish to be more credible than Movant;" and 2) failed to reconsider the Magistrate's credibility assessment after granting Mr. Hernandez's objection and correcting a fundamental error of historical fact which served as the foundation for that assessment?
- II. Whether the District Court erred in denying Mr. Hernandez's ineffective assistance of counsel at sentencing claim – predicated on counsel's failure to submit evidence in support of the veracity of defense witness Ramon Islas – where the Court violated the mandate of 28 U.S.C. §636(b)(1) by explicitly refusing to make *de novo* determination of the portions of the Magistrate's R & R addressing that claim and to which Mr. Hernandez's supplemental objections – filed untimely, but with the Court's permission – were directed?
- III. Whether the District Court erred in denying Mr.

Hernandez's ineffective assistance of counsel at sentencing claim – predicated on counsel's failure to submit evidence in support of his argument for a §5K2.12 departure – where the Court found, contrary to the evidence presented at the hearing and the law of sentencing mitigation, that such omission was a "reasonable" strategic decision?

PARTIES TO THE PROCEEDINGS

Petitioner, Espigmenio Hernandez, Jr., was the Defendant in the United States District Court for the Western District of Texas, Pecos Division, in USDC Case 4:11-cr-442-1, Movant in USDC Case 4:14-cv-88 in that court, and Appellant in the United States Court of Appeals for the Fifth Circuit in USCA Case No. 16-50830.

Respondent, United States of America was the named Plaintiff in the United States District Court for the Western District of Texas, Pecos Division, in USDC Case 4:11-cr-442-1, Respondent in USDC Case 4:14-cv-88 in that court, and Appellee in the United States Court of Appeals for the Fifth Circuit in USCA Case No. 16-50830. No other relevant parties are represented in the instant action.

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The Order of the United States Court of Appeals for the Fifth Circuit denying COA is unpublished and may be found at USCA Case No. 16-50830; *United States of America v. Espigmenio Hernandez, Jr.* (July 5, 2017) (Appendix - A1).

The Final Judgment and Order Adopting with Modification the Magistrate Judge's Report and Recommendation After *De Novo* Review and Denying a Certificate of Appealability of the District Court for the Western District of Texas at Pecos are unpublished and may be found at W.D.Tex. Case No.4:11-cv-88; *United States of America v. Espigmenio Hernandez, Jr.* (April 26, 2016) (Appendix - A3 & A4).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254 (1). The Fifth Circuit entered its order on July 5, 2017, App. A1, and this Petition was filed within 90 days of that order.

CONSTITUTIONAL & STATUTORY
PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Sixth Amendment. The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c), which states in pertinent part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

. . .

(B) the final order in a proceeding under section 2255.

. . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Mr. Hernandez will establish entitlement to Certificates of Appealability ("COA") to proceed on appeal from the district court's judgment and order denying his §2255 motion. Relevant to this application, Mr. Hernandez sought relief on grounds of ineffective assistance of counsel during plea negotiations ("*Lafler* claim") and during and in preparation for sentencing ("IAC sentencing"). As described herein, an evidentiary hearing was held on the *Lafler* claim and on one aspect of the IAC sentencing claim. This application concerns several errors of the District Court which contributed to the denial of Mr. Hernandez's §2255 claims and were utterly ignored by the Fifth Circuit's cursory denial of COA, as described below.

A. Facts and Proceedings in the Courts Below

Plea Negotiations, Trial & Sentencing

On December 15, 2011, Petitioner Espigmenio Hernandez, Jr. ("Mr. Hernandez") was indicted along with three codefendants, for aiding and abetting the possession with intent to distribute of more than 100 kilograms but less than 1,000 kilograms of marijuana. On December 21, 2011, the Government filed a Notice of Enhanced Penalty under 21 U.S.C. §851, notifying Mr. Hernandez the Government sought an enhanced sentence due to Hernandez's previous conviction in cause number M0-02-CR-116(1), which was also for aiding and abetting the possession with intent to distribute 100 kilograms or more of marijuana. As a

result of the enhancement, Mr. Hernandez's statutory minimum sentence was increased to 120 months.

The Government offered Mr. Hernandez a plea agreement, which would have required him to plead guilty to the indictment, admit the accuracy of the Government's factual basis and enhancement, and waive his right to appeal or collaterally attack his conviction. In exchange, the Government would agree to recommend Mr. Hernandez receive a three-level reduction for acceptance of responsibility. As a result of counsel's failures Mr. Hernandez rejected the plea agreement and proceeded to trial.

Mr. Hernandez's jury trial was held on March 2, 2012. That same day, the jury found him guilty of Count One, Aiding and Abetting Possession with Intent to Distribute Marijuana.

The Presentence Investigation Report ("PSR"), held Mr. Hernandez responsible for 1,212 kilograms of marijuana, twice as much as was attributed to him in the Government's proposed factual basis. That amount of marijuana corresponded to a base offense level of 32. The PSR also recommended that Mr. Hernandez's offense level be adjusted upward by five levels due to his role in the offense and criminal livelihood, resulting in a total offense level of 37.

At Mr. Hernandez's sentencing hearing, he objected to the PSR for the following reasons:

1. The drug quantity, for purposes of relevant conduct, should have been 606 kilograms instead of 1,212 kilograms;
2. Hernandez should not receive an upward adjustment for a leadership role; and,
3. Hernandez should not receive an upward adjustment for engaging in a pattern of criminal activity.

In response, the Government argued that Mr. Hernandez should receive an upward adjustment for obstruction of justice by suborning perjury at trial. The sentencing court overruled the first two of these objections, to drug quantity and to leadership role, in part. The sentencing court did sustain Mr. Hernandez's objection to the pattern of criminal activity. After all adjustments, Mr. Hernandez's total offense level was 34, which at criminal history category II, triggered an advisory guideline range of 168 to 210 months' imprisonment. After rejecting Mr. Hernandez's request for a downward departure for duress, the sentencing court imposed a 210-month sentence.

*The Motion(s) to Modify Under §3582 &
Vacate Under §2255*

On November 17, 2014, following an unsuccessful direct appeal to the United States Court of Appeals for the Fifth Circuit, Mr. Hernandez filed a Motion to Reduce Sentence pursuant to 18 U.S.C. §3582(c)(2), which the sentencing court granted on April 13, 2015. The sentencing court again imposed sentence at the top of the applicable guideline range of imprisonment, reducing Mr. Hernandez's sentence to 168 months' imprisonment.

On December 5, 2014, Mr. Hernandez filed a Motion to Vacate, pursuant to 28 U.S.C. §2255, along with a Verified Memorandum Brief in Support and Motion to Expand the Record with attached exhibits. Two of Mr. Hernandez's §2255 claims are relevant to this petition:

GROUND THREE:

ESPIGMENIO HERNANDEZ, JR., WAS
DENIED THE EFFECTIVE ASSISTANCE
OF COUNSEL DURING THE PLEA
NEGOTIATION STAGE AND WITH
RESPECT TO THE DECISION TO PLEAD
GUILTY OR PROCEED TO TRIAL.

GROUND FOUR:

ESPIGMENIO HERNANDEZ, JR., WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS SENTENCING AND AS A RESULT OF COUNSEL'S FAILURE TO ADEQUATELY PREPARE AND INVESTIGATE IN PREPARATION FOR HERNANDEZ'S SENTENCING.

The Government filed its Response in Opposition on May 8, 2015. Mr. Hernandez then filed his Reply to the Government's Response on May 28, 2015. The matter was then referred to a magistrate judge. The magistrate judge then ordered an evidentiary hearing on May 15, 2015. The magistrate judge invited the parties to submit any supplemental briefing necessary, and while Mr. Hernandez responded, the Government did not.

On August 13, 2015, the magistrate judge held an evidentiary hearing. At this hearing, Mr. Hernandez was represented by retained counsel Tom Morgan, who called Hernandez, his mother, former counsel Mr. McLeaish, and a friend of Hernandez's common-law wife as witnesses. The Government presented no additional evidence.

On September 8, 2015, the magistrate judge issued his report and recommendation (“R & R”), suggesting that all claims raised in Mr. Hernandez’s §2255 motion be denied. On September 24, 2015, Mr. Hernandez filed timely objections to the R & R. [App. F]. Then, on November 6, 2015, Mr. Hernandez filed a motion for leave to supplement objections to the R & R. [App. G].

On April 26, 2016, the district court issued an order and judgment adopting with modification the magistrate judge’s R & R and denying COA. [App. B & C]. Mr. Hernandez filed a timely notice of appeal from that order and judgment. [App. D].

Mr. Hernandez filed a motion with supporting brief, requesting COA from the U.S. Court of Appeals for the Fifth Circuit on July 28, 2016. *Hernandez v. United States*, No. 16-50830 (5th Cir.). Mr. Hernandez claimed entitlement to COA on the same issues presented in this petition:

1. Whether the District Court erred in denying Mr. Hernandez’s *Lafler* claim where it: 1) rejected the timely objection to the Magistrate’s finding that Hernandez failed to meet his

burden of proof at the hearing through application of an erroneously heightened standard of review, as the Court announced in its order denying relief: “Movant failed to show that the Magistrate Judge **abused his discretion** in finding the testimony of counsel McLeaish to be more credible than Movant;” and 2) failed to reconsider the Magistrate’s credibility assessment after granting Mr. Hernandez’s objection and correcting a fundamental error of historical fact which served as the foundation for that assessment?

2. Whether the District Court erred in denying Mr. Hernandez’s ineffective assistance of counsel at sentencing claim – predicated on counsel’s failure to submit evidence in support of the veracity of defense witness Ramon Islas – where the Court violated the mandate of 28 U.S.C. §636(b)(1) by explicitly refusing to make *de novo* determination of the portions of the Magistrate’s R & R addressing that

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2. Whether the District Court erred in denying Mr. Hernandez's ineffective assistance of counsel at sentencing claim – predicated on counsel's failure to submit evidence in support of the veracity of defense witness Ramon Islas – where the Court violated the mandate of 28 U.S.C. §636(b)(1) by explicitly refusing to make *de novo* determination of the portions of the Magistrate's R & R addressing that

claim and to which Mr. Hernandez's supplemental objections – filed untimely, but with the Court's permission – were directed?

3. Whether the District Court erred in denying Mr. Hernandez's ineffective assistance of counsel at sentencing claim – predicated on counsel's failure to submit evidence in support of his argument for a §5K2.12 departure – where the Court found, contrary to the evidence presented at the hearing and the law of sentencing mitigation, that such omission was a "reasonable" strategic decision?

On July 5, 2017, the Fifth Circuit denied COA, generally noting that Mr. "Hernandez has not shown that jurists of reason could disagree with the district court's rejection of these ineffective assistance of counsel claims." *App. A, A-2*.

The instant petition is timely submitted, within 90 days of the Fifth Circuit's July 5, 2017, order denying COA, pursuant to Rule 13, Rules of the Supreme Court.

REASONS FOR GRANTING THE WRIT

The lower courts' denial of COA is in tension with this Court's holdings, interpreting the statutory mandate that a COA be granted if the petitioner makes "a substantial showing of the denial of a constitutional right." *28 U.S.C. §2253(c)(1)*. Specifically, this Court has held that in order to make a substantial showing, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable of wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). As this Court emphasized in *Miller-El v. Cockrell*, when considering issuance of a COA, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931, 949 (2003).

For this reason, and those discussed more fully herein, *certiorari* should be granted.

ARGUMENT

I. Certiorari Should Be Granted Because Mr. Hernandez has Made a Substantial Showing of Denial of his Right to the Effective Assistance of Counsel During Plea Negotiations and with Respect to the Decision to Plead Guilty or Proceed to Trial.

This Court's precedent is clear: a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. Thus, "a prisoner seeking COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and 28 U.S.C. § 2253(c)(2)). "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." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). A COA is not contingent upon proof "that some jurists

would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after COA has been granted and the case received full consideration, that petitioner will not prevail.” *Miller-El*, 537 U.S. at 338.

In sum, the touchstone is “the debatability of the underlying constitutional claim [or procedural issue], not the resolution of that debate.” *Id.*, at 342; *see also id.* at 348 (Scalia, J., concurring) (recognizing that a COA is required when the district court’s denial of relief is not ‘undebatable’). Applying this standard in *Buck*, this Court reversed the Fifth Circuit’s denial of COA in the context of a Rule 60(b) motion seeking relief from judgment denying habeas relief, explaining that the question for the Court of Appeals was not whether Buck had shown that his case is extraordinary; it was whether jurists of reason could debate that issue. *Buck*, 137 S.Ct. at 773-75.

A. The Constitutional Claim

In his §2255 motion and supporting memorandum brief, Mr. Hernandez showed that he

was deprived of the effective assistance of counsel during plea negotiations and with respect to the decision to plead guilty or proceed to trial. The United States conceded that Mr. Hernandez's showing on this claim mandated an evidentiary hearing, and the magistrate judge promptly ordered that such hearing be scheduled.

During the hearing, the testimony of Mr. Hernandez and his former counsel, Michael McLeaish differed on several aspects of their communication concerning plea negotiations. Relevant to this petition, Mr. Hernandez testified that he was never advised and did not know that he could plead guilty to the indictment and receive the benefits of acceptance of responsibility and the lesser drug quantity (606 kilograms of marijuana).

Q. Mr. Hernandez, did Mr. McLeaish ever tell you that he'd had a third option, which is to plead straight up to this indictment, and that you could then receive either 2 or 3 points for -- accept responsibility without having to debrief? Did Mr. McLeaish tell you that?

A. No, sir. The only thing is, he told me that either I cooperated or, if not, I was looking at a very severe time. And he never gave me the third option of just pleading guilty and accepting the responsibility of my offense.

Q. Okay. Now you read the factual basis said there were 606 kilograms of marijuana, didn't you?

A. Yes, sir.

Q. All right. So he never told you the option three, you could plead straight up, and the drug quantity and the type of drugs; marijuana, 606 kilograms. He never mentioned that to you?

A. No -- no, sir.

App. E, A-46 - A-47.

Mr. McLeaish did not dispute this testimony.

See Id., A-113 – A-114 & A-118 – A-119. This is particularly relevant because Mr. Hernandez testified that he was unwilling to put his family in harm's way by cooperating with the Government.

Q. But isn't it true you told him you did not -- had no interest in pleading guilty?

A. No, I didn't -- I didn't tell him that. I told him that I was not going to cooperate.

Q. And you didn't want to cooperate because it would implicate family; isn't that correct?

A. That I wasn't going to cooperate because of fear for my -- for my family. Yes, sir.

Q. And it would implicate family as well; correct?

A. Excuse me?

Q. It would also -- you'd be weaseling

out or squealing on family members who are involved in the drug business; isn't that correct?

A. I just feared that they would kill or hurt any of my family members, sir. They're killing people in Ojinaga for \$300 day and night, so I would fear -- I was fearful.

Id., A-84 – A-85.

Mr. McLeaish and Mr. Hernandez both agree that McLeaish advised Hernandez to “debrief” each time he mentioned the plea agreement, to the extent that Hernandez came to believe that the only way he would benefit from pleading guilty would be if he also cooperated. *Id.*, A-64, A-107 – A-108. Mr. Hernandez specifically emphasized counsel’s failure to advise him of the potential sentencing benefits of pleading without cooperation.

Q. Is there anything you have not revealed to the Court which you want to reveal to the Court about the plea negotiations or what you and Mr. McLeaish talked about

before the jury trial began?

A. Just -- just that I didn't -- I never -- I never saw the plea agreement. If I would have seen it, I would have -- I would have pled guilty and that I -- I didn't -- I didn't -- *he never explained to me that I -- that I could benefit from just pleading guilty, not -- not just that I had to cooperate.*

Q. Okay. So you understand an option was just to plead straight up without the plea agreement but with a factual basis of 606 kilograms of marijuana; right?

A. Yes, sir.

Q. And that's what you'd like to have the option to do now; correct?

A. Yes, sir.

Q. And you'd plead true, again, to the enhancement information, won't you?

A. Yes, sir
Id., A-64.

Mr. McLeaish forthrightly conceded that he pressed for Mr. Hernandez to cooperate each time he mentioned the plea.

A. Well, again, this is just based on memory: I wanted him to plead guilty and debrief. And I want to make that clear: He's right, and I told him several times I thought he needed to debrief. And he would not. . . And I continued to try and get him to debrief, every meeting we had.
Id. A-107 – A-108.

At the conclusion of the hearing, Mr. Hernandez's counsel, Mr. Morgan made a strong argument for how the evidence presented met the standard for ineffective assistance of counsel under controlling precedent. *Id.*, A-114 – A-120. The magistrate judge's report and recommendation ("R & R") rejects this argument and Mr. Hernandez's claim based on counsel's failure to advise him of the sentencing benefits of pleading "straight up" as a

result of a mistake of fact, which the district court corrects, but the consequences of which permeate the court's credibility assessment, which the district court fails to reweigh. Specifically, the magistrate judge found in relevant part:

Essentially, Movant complains that Mr. McLeaish pressured Movant into pleading guilty by . . . failing to advise Movant that he could plead guilty without cooperating with the Government (E.T. at 39:40). Yet, Movant has offered no reason why the Court should believe this assertion is true. While Mr. McLeaish admits he strongly encouraged Movant to cooperate with the Government in the hope of obtaining a § 5K1.1 Motion, (see D.E. 157-1), ***Movant was aware that he could plead guilty without cooperating with the government because he did that precise thing in a previous case. United States v. Hernandez, MO: 2-CR-116 at D.E. 33, D.E. 36.*** Movant's self-serving and unsubstantiated complaints about the advice he received from Mr. McLeaish is insufficient to prove ineffective

assistance of counsel. See *United States v. Brent*, 532 F. App'x 477, 478 (5th Cir. 2013) (per curiam) (not selected for publication) (finding a petitioner's "conclusory allegation" that he would have accepted a different plea offer but for his attorney's advice was "insufficient to establish prejudice"). It appears that Movant—with the benefit of hindsight—regrets his decision to take his chances at trial rather than accept the Government's plea agreement. However, Movant's dissatisfaction with his guideline sentence is not a basis for finding that Mr. McLeaish performed deficiently or that Movant suffered any prejudice. Movant's ineffective assistance of pretrial counsel claims are without merit and should be denied. App. C, A-13 – A-14 (emphasis added).

Mr. Hernandez timely objected to this recommendation:

2. The Magistrate ignores a major basis as to how the ineffective assistance of counsel was committed, namely, that

Michael McLeaish did not inform the Movant of the third option, to-wit: to plead guilty "straight up" to the indictment and not sign a plea agreement, and the Movant objects to this critical omission. The other two options were (a) to go to jury trial or, (b) to plead guilty, sign a plea agreement, and cooperate by debriefing with narcotics officers.

3. The Movant's testimony is that Michael McLeaish did not inform him at all of his right to plead "straight up" to the indictment. The testimony of Michael McLeaish was that he generally told clients of the third option, namely, to plead "straight up" to the indictment, but that he had no recollection at all that he did so, in this case, in advising the Movant. Thus, there was hardly any evidence that the Movant knew he could plead straight up. The Movant objects to the Report and Recommendation of the Magistrate in holding that McLeaish did provide the effective assistance of counsel when there is almost no

evidence that McLeaish informed the Movant of his right to plead straight up. Indeed, McLeaish testified that he kept telling the Movant to plead guilty and cooperate by debriefing, which has nothing to do with the third option of pleading "straight up".

4. When reviewing the testimony of Michael McLeaish and that of the Movant's testimony at the evidentiary hearing, Movant objects to the Magistrate's finding that the testimony of the Movant is not credible.

5. The Report and Recommendation of the Magistrate, namely, that the Movant, in 2003, pled guilty straight up, without a Plea Agreement, in Cause No. M0-02-CR-116, is not accurate. Indeed, the Movant did sign a Plea Agreement, which was filed on February 27, 2003. A true and correct copy of this 2003 Plea Agreement is attached hereto and incorporated by reference. Also attached is the Pre-Sentence Report, likewise revealing the

Movant did, indeed, sign a Plea Agreement in M0-02- CR-116.

Thus, the Movant objects to the Magistrate stating that the Movant was aware he could plea straight up because he did so in 2003, when he did not do so. App. F, A-127 – A-128 (emphasis added).

The district court granted the objection in part, but did not consider the effect that the mistake of fact would necessarily have on the magistrate judge's credibility determinations. App. C, A-18 – A-19. The district court's April 26, 2016 Order states:

The Magistrate Judge ignores a major basis for how the ineffective assistance of counsel was committed, namely, that Michael McLeaish did not inform Movant of the third option: to plead guilty "straight up" to the indictment and not sign a plea agreement. [docket number 182 at 2].

The Magistrate Judge found that this claim "can also be dismissed" because it relied "almost entirely on Movant's own

testimony, which the Magistrate Judge does not find to be credible." [docket number 180 at 10]. *Movant appears to be correct insofar as he states he did not plead "straight up" to the indictment in his prior federal drug case, M0-02-CR-116. Nonetheless, the Magistrate Judge believed counsel McLeaish's testimony concerning what he normally did in a case over Movant's testimony about what he claimed happened in this case.* At the evidentiary hearing, the Magistrate Judge viewed and assessed the demeanor of all the witnesses. The Magistrate Judge found that the witnesses' demeanor, combined with their possible motivations, weighed against Movant's credibility. *See Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980) (discussing the deference given to a judge who conducted an evidentiary hearing based a habeas corpus claim and the process of credibility determination based upon hearing and observing witness testimony).

The Magistrate Judge was able to ascertain the credibility of Movant from his demeanor on the stand as well as what he testified to, which this Court cannot second-guess based on the record before it. *That the Magistrate Judge relied on the fact that Movant had plead "straight up" before, in M0-02-CR-116, does not change his ultimate reliance on the credibility determination regarding Movant.* After *de novo* review, this Court overrules Movant's objection and will adopt the Magistrate Judge's R&R on this point insofar as it is based on a credibility determination about counsel McLeaish versus Movant and not on the basis of Movant's prior guilty plea in M0-02-CR-116.

Id.

B. The Lower Courts' Resolution is Debatable

The district court's resolution of this claim is debatable for two reasons. First, because the district court explicitly applied an erroneously heightened

than apply the deferential abuse of discretion standard, the district court was required to consider Mr. Hernandez's showing *de novo*, in light of his timely objection. "Under the plain language of 28 U.S.C. §636(b)(1), Fed. R. Civ. P. 72(b), and all relevant cases, a district judge must engage in *de novo* review where a party has objected to a magistrate's decision." *United States v. Wilson*, 864 F.2d 1219, 1222 (5th Cir. 1989); *see also Louis v. Blackburn*, 630 F.2d 1105 (5th Cir. 1980); *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352 (5th Cir. 1980). The Fifth Circuit's denial of COA utterly ignored the debatability of the application of this improperly heightened standard.

Secondly, due to the District Court's failure to reconsider the credibility assessment after excluding the Magistrate's error of fact – which necessarily caused the Magistrate to disbelieve Mr. Hernandez's testimony, because had Hernandez previously pled guilty "straight-up" then his testimony that he was unaware of the option was false. This error of fact infected the Magistrate's credibility assessment and required a reassessment which did not occur, due in part to the erroneously applied abuse of discretion standard.

The district court's resolution of this claim is

based on an error of law – application of the erroneously heightened standard of review – and a failure to consider the effect that the Magistrate Judge's error of fact had on his credibility assessment.

These facts and circumstances, at a minimum, make the threshold showing that requires a COA. The lower courts denial of COA is a direct result of the lower courts' failure to adhere to this Court's precedent.

II. Certiorari Should Be Granted Because Mr. Hernandez has Made a Substantial Showing of Denial of his Right to the Effective Assistance of Counsel in Connection with his Sentencing

A. The Constitutional Claim

In his §2255 motion and supporting memorandum brief, Mr. Hernandez claimed that he was deprived of the effective assistance of counsel during sentencing and as a result of counsel's failure to adequately prepare and investigate in preparation for sentencing. Relevant to this petition, Mr. Hernandez identified two acts or omissions of counsel

as deficient performance. Counsel's failure to: 1) develop and present available evidence supporting a §5K2.12 departure; and 2) present evidence supporting the veracity of defense witness Ramon Islas' testimony concerning statements Sean Russell made to Islas. Mr. Hernandez argued that "there is a reasonable probability that, absent counsel's errors in preparation for, and at Mr. Hernandez's sentencing, Mr. Hernandez's sentence would have been less severe." The United States opposed this claim but suggested that an evidentiary hearing was necessary, at least as it related to counsel's failure to "present evidence supporting a U.S.S.G. §5K2.12 departure."

On May 14, 2015, the Magistrate Judge ordered that this subpart of the claim would be considered at an evidentiary hearing, but posited that the remaining portion of the claim was mooted by the sentence modification granted Mr. Hernandez by the sentencing court. The order invited the parties to submit a supplemental brief should they disagree.

On June 1, 2015, Mr. Hernandez submitted a supplemental brief, arguing – as relevant to this petition – that his claim that counsel was ineffective for failing to "present evidence supporting the veracity of defense witness Ramon Islas," was not mooted by

the subsequent modification of his sentence, because that modified sentence "remains contaminated by the taint of his attorney's ineffectiveness at, and in preparation for, his original sentencing," in that the sentencing court was not disabused of the notion that Hernandez "probably" obstructed justice by suborning perjury.

Although this aspect of the claim was not addressed at the evidentiary hearing, the Magistrate Judge's R & R addressed it not as a mooted claim, but found that: "Movant has not pointed to what evidence Mr. McLeaish should have sought to introduce to support Mr. Islas's testimony, much less provided any evidence for the Court to review." App. C, A-14.

Mr. Hernandez filed a supplemental objection to this finding, stating it "overlooks and is contradicted by the evidence Movant cited in his verified memorandum brief, which establishes that Mr. Islas testified accurately to the number of levels that the United States would seek to reduce Mr. Russell's offense level, long before Russell's sentencing. DE# 136, pp. 35-37. The accuracy of Mr. Islas's testimony on this key point supports the veracity of Islas's testimony in that Russell discussed testifying against Movant, completely rebuts the United States'

argument that Russell did not know he would be testifying at the time Russell was housed at the same jail as Islas, and adds credence to Islas's testimony that Russell told him that he would testify falsely for that exact level of reduction." App. G, A-136 – A-137.

The District Court granted permission, allowing Mr. Hernandez to submit such supplemental objection, but applied a heightened standard. The only other reference to the supplemental objection was the cursory statement: "After due consideration, the Court is of the opinion that the portions of the Magistrate Judge's R&R, to which neither side objected, *or to which Movant objected untimely, were neither clearly erroneous nor contrary to law and should, therefore, be adopted.*" App. C, A-5.

After taking testimony at the evidentiary hearing concerning whether counsel was ineffective for failing to present evidence to support a §5K2.12 downward departure, the Magistrate Judge found that: "Mr. McLeaish's strategic choice not to present evidence in support of this theory was perfectly reasonable." *Id.*, A-16. Mr. Hernandez timely objected to this finding based on the evidence presented at the hearing and because the finding was based on analysis of whether that evidence supported duress as a defense

to the offense, as opposed to a sentencing mitigator. *App. F, A-130*. (“In finding Mr. McLeaish’s actions at sentencing reasonable, the Magistrate’s Report and Recommendation cites Movant’s affidavit as a sign that Mr. McLeaish had no evidence to present to warrant a downward variance under § 5K2.12. However, the Report focuses, incorrectly, on the *entire* offense. ‘A showing of serious coercion and duress not amounting to a complete defense may still play a role at sentencing to permit a downward departure.’ *United States v. Torres-Landrua*, 783 F.3d 58, 67 (1st Cir. 2015).”). The District Court rejected this objection, agreeing with the Magistrate’s Report that the failure to present evidence was a reasonable strategic decision and rejecting the argument that an incomplete showing of coercion or duress was present because “[m]ovant wholly failed to [meet the non-precedential *Torres-Landrua* standard] with his presentation at the evidentiary hearing.” *App. C, A-23 – A-26*.

B. The Lower Courts’ Resolution is Debatable

The District Court’s resolution of this claim is debatable in two respects. First, the District Court violated the mandate of 28 U.S.C. §636(b)(1) by refusing to make *de novo* determination of the portions of the Magistrate’s R & R to which Mr. Hernandez’s

supplemental objections were directed. Secondly, the District Court's determination that counsel's failure to present evidence in support of his request for a §5K2.12 departure constituted a "reasonable" strategic decision is contrary to the evidence presented at the hearing and the law of sentencing mitigation.

Once the District Court granted Mr. Hernandez leave to supplement his objections, *de novo* review of those portions of the Magistrate's R & R to which he objected was mandated by statute. Title 28, United States Code §636(b)(1) states in pertinent part: "[a] judge of the court **shall** make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Mr. Hernandez filed a formal motion seeking leave of the court to file supplemental objections to the Magistrate's R & R which the District Court granted. *App. A-5*. The District Court then announced that it would not apply the *de novo* standard of review, as required under the statute, but rather would apply the heightened standard usually applicable when no objection is filed. *Id.* The District Court's application of this heightened standard is more than debatable, it is simply wrong, and Mr. Hernandez is entitled to a COA to appeal this issue.

The District Court's determination that counsel's failure to submit evidence in support of his argument for a §5K2.12 downward departure was a "reasonable" strategic decision is contrary to the evidence presented at the hearing and the law of sentencing mitigation. The District Court misapprehended the record, which demonstrates that evidence of serious coercion and duress existed, and misapplied the law to the extent that it rejected the viability of such showing – while not rising to the level of a complete defense – as a basis for sentencing mitigation. The District Court's resolution of this claim is thus debatable, and deserving of encouragement to proceed further.

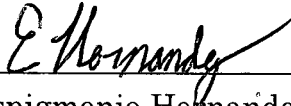
CONCLUSION

For all the foregoing reasons, Mr. Hernandez has made a substantial showing of a denial of a constitutional rights and shown that the lower courts' rulings to the contrary are debatable. At a minimum, reasonable jurists could so conclude, which means that a COA must issue. This Court's review is warranted to correct the lower courts' failures to adhere to its precedent.

Dated: September 21st, 2017.

Respectfully submitted,

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