

No. 17-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DAMON ANTONIO GONZALEZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

CHRISTOPHER A. CURTIS
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET RM. 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753

QUESTION PRESENTED FOR REVIEW

I. Whether the Petitioner's guilty plea was unknowing and involuntary made, and violated Due Process and Petitioner's right to counsel, when he had not been informed that his sentence would be based upon uncharged conduct that occurred outside the time period alleged in the indictment and the time period in the stipulated facts and was conduct that was not disclosed in pretrial discovery prior to the entry of the guilty plea ?

PARTIES

Damon Antonio Gonzalez is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented..	ii
Parties..	iii
Table of Contents..	iv
Index to Appendices..	v
Table of Authorities..	vi
Opinion Below..	1
Jurisdictional Statement..	1
Guideline Provision Involved..	1
Statement of the Case..	3
Reasons for Granting the Writ..	6
Conclusion..	9

INDEX TO APPENDICES

- Appendix A Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit
- Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas

TABLE OF AUTHORITIES

CASES

Page No.

<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969).	6
<i>Brady v. Maryland</i> , 397 U.S. 742 (1970).	6
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938).	6
<i>McCarthy v. United States</i> , 394 U.S. 459 (1969).	6
<i>Pallida v. Kentucky</i> , 559 U.S. 356 (2010).	8
<i>United States v. Booker</i> , 543 U.S. 220 (2005).	5
<i>United States v. Carr</i> , 740 F.2d 339 (5th Cir. 1984).	3
<i>United States v. Damon Antonio Gonzalez</i> , 715 Federal Appx.404, 2018 WL 1371130 (March 16, 2018).	1
<i>United States v. Diaz</i> , 516 Fed. Appx. 358 (5th Cir. 2013).	4, 7
<i>United States v. Guerra</i> , 94 F.3d 989 (5th Cir. 1995).	4, 7
<i>United States v. Herbert</i> , 813 F.3d 551 (5th Cir. 2015).	5
<i>United States v. McKnight</i> , 570 F.3d 641 (5th Cir. 2009).	4, 7
<i>United States v. Rhine</i> , 583 F.3d 878 (5th Cir. 2009).	5
<i>United States v. Rivera</i> , 898 F.2d 442 (5th Cir. 1990).	4, 5, 7
<i>United States v. Ruiz</i> , 536 U.S. 622 (2002).	6

FEDERAL STATUTES

21 U.S.C. § 841(b)(1)(B).	3
21 U.S.C. § 846	3
28 U.S.C. § 1254(1).	1

UNITED STATES CONSTITUTION

U.S. Const. Amend. V.	2, 6
U.S. Const. Amend. VI.	2, 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Damon Antonio Gonzalez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Damon Antonio Gonzalez*, 715 Fed. Appx.404, 2018 WL 1371130 (March 16, 2018), and is provided in the Appendices to the Petition. [Appx. A]. The judgment of conviction and sentence was entered by the district court on June 26, 2017, and this judgment is included in the Appendices as well [Appx. B].

JURISDICTIONAL STATEMENT

The Fifth Circuit affirmed the district court's judgment on March 16, 2018. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND SENTENCING GUIDELINES INVOLVED

Federal Rule of Criminal Procedure provides for the following:

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

The Fifth Amendment to the United States Constitution provides:

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution 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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court¹

Mr. Gonzalez was indicted for one count of possession with intent to distribute a controlled substance, 50 grams or more of a substance containing methamphetamine, in violation of 21 U.S.C. 846 and punishable pursuant to 21 U.S.C. § 841(b)(1)(B) (5-40 years) (*see* ROA.29-20), and plead guilty to the same, (*see* ROA.44-49). Mr. Gonzalez pleaded guilty pursuant to a written plea agreement in which the government agreed to make a binding recommendation for a sentence of no more than 240 months. (ROA.182). Gonzalez also waived his right to appeal with limited exceptions (ROA.184). One of the exceptions was to challenge the voluntariness of his plea. (ROA.184). The Pre-sentence report (PSR) found that Gonzalez's Total Offense level was a 41. His criminal history category was a category III. His advisory imprisonment range was 360 months to Life (Limited by statute to 480 months.) (ROA.207). Gonzalez filed a motion to withdraw his guilty plea. (ROA.57-61). After conducting a hearing prior to sentencing, the district court denied the motion, addressing each of the seven factors in *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984). (ROA.127-137). The district court sentenced Gonzalez to 240 months. (ROA.176).

Gonzalez argued in his motion to withdraw his guilty plea that his sentence was based upon relevant conduct from 2014. His indictment alleged conduct that began in January 2015 and continued through December 2016. (ROA.59). Likewise, Gonzalez's factual resume stipulated the offense occurred in 2015 and 2016. (ROA.59). Gonzalez argued that this information was not presented to the grand jury and he argued that this conduct was not considered by Gonzalez when he decided to plead guilty. (ROA.60). Gonzales also pointed out

¹ For the convenience of the Court and the parties, Petitioner has included citations to the page number of the record on appeal in the court below.

that the 2014 conduct was not known to the prosecutor at the time the case was presented to the grand jury (and apparently was also not known at the time that discovery was provided to Gonzalez). *See* (ROA.60-61). However, this information found its way into the pre-sentence report (PSR) and resulted in a drastic increase to the appellant's offense level. *See* (ROA.60-61).

C. The Appeal

On appeal, counsel filed a letter brief raising the argument that the use of the 2014 information, having not been disclosed to Gonzalez or a part of the offense he pleaded guilty to, rendered his guilty plea unknowing and involuntary. Counsel filed a letter brief and a motion for summary affirmance because this issue had been foreclosed by Fifth Circuit precedent, citing *United States v. Rivera*, 898 F.2d 442 (5th Cir. 1990) (“The consequences of a guilty plea, with respect to sentencing, mean only that the defendant must know the maximum prison term and fine for the offense charged. As long as the [defendant] ‘understood the length of time he might possibly receive, he was fully aware of his plea consequences.’”); *see also United States v. Diaz*, 516 Fed. Appx. 358, 360 (5th Cir. 2013) (Defendant's plea was not involuntary even though the government and defendant intended for the sentencing to be based on 213.6 kilograms of marijuana but the PSR held the defendant responsible for additional marijuana). The defendant only need be advised of the maximum term of imprisonment in order for a guilty plea to be knowingly and voluntarily entered regarding the potential prison term. *See United States v. Guerra*, 94 F.3d 989, 995 (5th Cir. 1995); and *United States v. McKnight*, 570 F.3d 641, 649 (5th Cir. 2009).

In the letter brief, Counsel argued that Gonzalez's guilty plea was not voluntary and knowing and therefore, his Fifth Amendment Due Process rights and his Sixth Amendment right to counsel were violated. Counsel also argued that the involuntary and unknowing nature of the plea violated Gonzalez's Fifth and Sixth Amendment rights to grand jury indictment and jury trial.

On March 18, 2018, the Fifth Circuit entered an order recognizing that “his arguments regarding the voluntariness of his plea and ineffective assistance of counsel are squarely foreclosed

by Fifth Circuit law, *see, e.g., United States v. Rivera*, 898 F.2d 442, 447 (5th Cir. 1990). Regarding the argument that the use of the 2014 information violated Gonzalez’s right to grand jury indictment and jury trial, the court of appeals likewise recognized that those arguments had also been foreclosed by this Court and the Fifth Circuit, citing *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Herbert*, 813 F.3d 551, 564 (5th Cir. 2015); and *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009). (See Appendix A).

REASONS FOR GRANTING THE PETITION

This Court should grant review to determine whether a defendant’s Fifth Amendment Due Process rights and Sixth Amendment right to effective assistance of counsel are violated when he enters a guilty plea unaware that his sentence will be determined based on conduct that was not committed within the time period of the indictment and was not disclosed in pretrial discover prior to the entry of the guilty plea.

A. The Law of this Court

A defendant who enters a guilty plea waives several constitutional rights, “including his privilege against compulsory self-incrimination, his right to a trial by jury, and his right to confront his accusers.” *McCarthy v. United States*, 394 U.S. 459, 466 (1969). “For this waiver to be valid under the Due Process Clause, it must be ‘an intentional relinquishment or abandonment of a known right or privilege.’” *Id. Quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

“Consequently, if a defendant’s guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is therefore void.” *McCarthy v. United States*, 394 U.S. 459, 466.

“Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is “voluntary” and that the defendant must make related waivers “knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.” *United States v. Ruiz*, 536 U.S. 622, 629 (2002), *quoting Brady v. Maryland*, 397 U.S. 742, 748 (1970); and *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

B. The case law in the Fifth Circuit

The argument raised by Gonzalez in his motion to withdraw his guilty plea – that his plea was not knowingly entered because he had no disclosure or notice that his sentence would be based upon conduct from 2014 – has been foreclosed by Fifth Circuit precedent. *See United States v. Rivera*, 898 F.2d 442 (5th Cir. 1990) (“The consequences of a guilty plea, with respect to sentencing, mean only that the defendant must know the maximum prison term and fine for the offense charged. As long as the [defendant] ‘understood the length of time he might possibly receive, he was fully aware of his pleas consequences.’”); *see also United States v. Diaz*, 516 Fed. Appx. 358, 360 (5th Cir. 2013) (Defendant’s plea was not involuntary even though the government and defendant intended for the sentencing to be based on 213.6 kilograms of marijuana but the PSR held the defendant responsible for additional marijuana). The defendant only need be advised of the maximum term of imprisonment in order for a guilty plea to be knowingly and voluntarily entered regarding the potential prison term. *See United States v. Guerra*, 94 F.3d 989, 995 (5th Cir. 1995); and *United States v. McKnight*, 570 F.3d 641, 649 (5th Cir. 2009).

C. Discussion

In the present case, Gonzalez filed a motion to withdraw his guilty plea. One of the basis for his desire to withdraw his guilty plea was that his sentencing guidelines advisory imprisonment range of 360- to Life was based upon conduct from 2014. This conduct was not within the time period alleged in his indictment nor within the stipulated facts. Arguably, his guideline imprisonment range would have been considerably less than the 20 year sentence Gonzalez received if the 2014 conduct had not been included. From the record, it appears this 2014 conduct was not disclosed to Mr. Gonzalez or his attorney before he entered his guilty plea.²

² It also appears from the record that the government did not come into possession of this 2014 conduct until it was discovered by the probation officer in preparation for the PSR. *See* (ROA.60).

Gonzalez contends that Due Process requires him to be allowed to withdraw his guilty plea in this situation because there was no way – even with the closest possible assistance of counsel – that he could have known that his sentence was going to be calculated using relevant conduct that was not included in the indictment or the factual resume and was not disclosed in pre-trial discovery. When Gonzalez entered his guilty plea, there was no way for him to know that one of the consequences of his plea was that conduct from 2014, a period of time outside the scope of the indictment he pleaded guilty to, would be used to enhance his imprisonment range to 360 to Life.

The Fifth Circuit precedent wholly fails to address the reality that in a situation like this, a defendant's guilty plea lacks the necessary level of knowing and understanding to satisfy the constitutional standard of Due Process. Gonzalez contends that this Court should grant certiorari to answer this important question. It would seem that a case like Mr. Gonzalez's, where a defendant's advisory imprisonment range and ultimately his sentence, is based upon conduct that was neither included in the indictment or the factual stipulation and was not disclosed to the defense prior to the guilty plea, implicates the same or similar concerns as those in *Pallida v. Kentucky*, 559 U.S. 356 (2010). That is, making sure the defendant entering a guilty plea fully understands the consequences of his plea. In the alternative, the failure to provide the information that would be used to drastically increase Gonzalez's advisory imprisonment range to 360 months to Life, either through the charging instrument, the stipulated facts or even pretrial discovery, denied Mr. Gonzalez his effective assistance of counsel. *See id.*

Accordingly, this Court should grant review to decide whether Mr. Gonzalez's guilty plea violates the principles of Due Process and the right to counsel in a situation where he entered a guilty plea not knowing that conduct outside of the time period in his indictment would be used to calculate his advisory imprisonment range.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari* and ultimately reverse the judgment below, so that the case may be remanded to the district court to allow the Petitioner to withdraw his guilty plea. He prays alternatively for such relief as to which he may be justly entitled.

Respectfully submitted this 14th day of June, 2018.

/s/ Christopher A. Curtis

CHRISTOPHER A. CURTIS
Counsel of Record

Federal Public Defender's Office

Northern District of Texas

819 Taylor Street, Room 9A10

Fort Worth, Texas 76110

(817) 978-2753

Texas Bar Number 05270900