25-5987

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

FRANCISO JAVIER OCHOA ANAYA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

FROM NINTH CIRCUIT COURT OF APPEALS

Mr. Franciso Javier Ochoa-Anaya # 78442-097

FCI-Lompoc/ 3901 Klein Blvd.

Lompoc, CA. 93436

QUESTION(S) PRESENTED

QUESTON NUMBER ONE:

Whether the district court and the Ninth Circuit abused its discretion by holding that Ground One, actual-innocence claim as to his Count Three, Possession of a Firearm in Furtherance of Drug Trafficking Crime was procedurally defaulted by failing to raise issue on direct appeal, thus, a COA should issue as the district court's holdings and the Ninth Circuit's affirmance conflicts with U.S. Supreme Court precedents in Dugger v. Adams, 489 U.S. at 401, 411 n. 6 (1989); and Smith v. Murray, 477 U.S. 478, 496 (1986) ?

QUESTION NUMBER TWO:

Whether the district court abused its discretion by failing to conduct an Evidentiary Hearing and the Ninth Circuit affirmance of that decision regarding Ground Two, ineffective assistance of counsel whether Count One, Conspiracy was fatally defective and his former attorney should have filed a pre-trial Motion to Dismiss Fatally Defective Indictment, thus, did this violate his Sixth Amendment rights ?

QUESTION NUMBER THREE:

Whether the district court abused its discretion by failing to conduct an Evidentiary Hearing and the Ninth Circuit affirmance of that decision regarding Ground Three, sentencing phase ineffective

assistance of counsel, thus, did this violate his Sixth Amendment rights of the U.S. Constitution ?

QUESTION NUMBER FOUR:

Whether the district court abused its discretion by failing to conduct an Evidentiary Hearing and the Ninth Circuit's affirmance of that decision regarding Ground Four, pre-plea ineffective assistance of counsel, thus, did this violate his Sixth Amendment rights of the U.S. Constitution ?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

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

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was April 18, 2025

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) in Application No. ___ A_____.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

[ ] For cases from **state courts:**

The date in which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PAGE NUMBER

STATEMENT OF THE CASE

On September 15, 2022, Petitioner Ochoa-Anaya's attorney Arturo Hernandez filed his 2255 Motion to Vacate (Doc. # 101). The Government filed their Response Brief on March 07, 2023 (Doc. # 110). In the end of February of 2024, Petitioner Ochoa-Anaya filed his pro se 2255 Reply Brief (after Attorney Hernandez abandoned his 2255 Proceedings), to conduct briefing schedule (Doc. # 116 and 117). On August 28, 2024, the district court denied Petitioner Ochoa-Anaya's 2255 Motion to Vacate without conducting an Evidentiary Hearing and declined to grant a Certificate of Appealability. A timely Notice of Appeal was filed and on April 18, 2025, the Ninth Circuit Court of Appeals denied Petitioner Ochoa-Anaya's request for a Certificate of Appealability without issuing a reason for such denial, thus, rendering it difficult for adequate higher court review by the U.S. Supreme Court in the case at bar.

Petitioner Ochoa-Anaya, asserts that he now petitions this Honorable U.S. Supreme Court to GRANT his Pro Se Petition for a Writ of Certiorari, thus, issuing a Certificate of Appealability as to Questions One, Two, Three, and Four or as this Supreme Court deems warranted in the case herein.

REASONS FOR GRANTING THE PETITION

Petitioner Ochoa-Anaya, acknowledges that a review on a writ of

certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted by this court only for compelling reasons, see Supreme Court Rule 10.

In the instant case, Petitioner Ochoa-Anaya respectfully request that this Court **GRANT** his pro se Petition for a Writ of Certiorari as to Questions Number One, Two, Three, and Four as relevant to question # 1, Mr. Ochoa-Anaya argues that a certificate of appealability should issue as it relates to Question Number One as he stands actually innocent of his Count Three, Possession of a Firearm in Furtherance of Drug Trafficking Crime and such claim was not procedurally barred not under the actual-innocence and miscarriage of justice exception. Regarding question # 2, Mr. Ochoa-Anaya argues that a certificate of appealability should issue as it relates to Question Number Two as Count One, Conspiracy was fatally defective and his former attorney provided him with ineffective assistance of counsel by failing to conduct legal research and failing to file a pre-trial Motion to Dismiss Fatally Defective Indictment in violation of his Sixth Amendment rights of the U.S. Constitution. Regarding question # 3, Mr. Ochoa-Anaya argues that a certificate of appealability should issue as it relates to to Question Number Three as the district court abused its discretion by failing to conduct an Evidentiary Hearing as to his sentencing phase ineffective assistance of counsel claim in which violated his

Sixth Amendment rights of the U.S. Constitution. Regarding question # 4, Mr. Ochoa-Anaya argues a certificate of appealability should issue as it relates to Question Number Four as the district court abused its discretion by failing to conduct an Evidentiary Hearing as to pre-plea ineffective assistance of counsel claim in which violated his Sixth Amendment rights of the U.S. Constitution. Consistent with 28 U.S.C. 2253 (c) (2), and U.S. Supreme Court precedents in **Slack** and **Miller-El,** thus, Franciso Javier Ochoa-Anaya is entitled to issuance of a Certificate of Appealability as to Questions 1, 2, 3, and 4, in the matter herein.

QUESTION NUMBER ONE:

Whether the district court and the Ninth Circuit abused its discretion by holding that Ground One, actual-innocence claim as to his Count Three, Possession of a Firearm in Furtherance of Drug Trafficking Crime was procedurally defaulted by failing to raise issue on direct appeal, thus, a COA should issue as the district court's holdings and the Ninth Circuit's affirmance conflicts with U.S. Supreme Court precedents in Dugger v. Adams, 489 U.S. at 401, 411 n. 6 (1989); and Smith v. Murray, 477 U.S. 478, 496 (1986) ?

In the instant case, Petitioner Ochoa-Anaya, asserts that the district court abused its discretion by failing to conduct an Evidentiary Hearing as to Franciso Javier Ochoa-Anaya potentially colorable claim of

actual-innocence in which the district court held to be procedurally barred by not raising claim on Direct Appeal.

The district court "procedurally ruling" was wrong or debatable as Mr. Ochoa-Anaya did not procedurally default his actual-innocence claim regarding Count Three, Possession of a Firearm In Furtherance of Drug Trafficking Crime in which he stands "actually innocent" of his conviction and sentence in the case herein. Contrary to the district court's procedural bar ruling, however, that decision conflicts with U.S. Supreme Court precedents in Dugger v. Adams, 489 U.S. at 401, 411 n. 6 (1989) (If one is "actually innocent" of the sentence imposed, a federal habeas court can excuse the procedural default to correct a fundamentally unjust incarceration); and Smith v. Murray, 477 U.S. 478, 496 (1986) (The Supreme Court implied that the actual innocence exception may apply to non-capital sentencing cases: We reject the suggestion that the principles of Wainwright v. Sykes [cause and prejudice requirements in cases of procedural default] apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws. We similarly reject the suggestion that there is anything "fundamentally unfair" about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination.) (emphasis added).

To be convicted of 18 U.S.C. 924 (c) (1), Mr. Ochoa-Anaya must have committed a **federal drug trafficking crime, as required by 18 U.S.C. 924 (c) (2)**, however, as the result of Conspiracy to Distribute in violation of 21 U.S.C. 846, is not a federal "drug trafficking crime" in which is the predicate crime charged within Count Three of his Indictment. See Appendix C. The Fourth and Tenth Circuit Court of Appeals have held that Conspiracy to Distribute in violation of 21 U.S.C. 846, utilizing the categorical approach is not a "drug trafficking crime." See United States v. Norman, 935 F.3d 232 (4th Cir. 2019); and United States v. Martinez-Cruz, 836 F.3d 1305, 1308-1314 (10th Cir. 2016). The Controlled Substance Act, 21 U.S.C. 801 et seq., prohibits the **manufacture and distribution of various drugs, including marijuana. The Controlled Substance Act prohibits a violation of 21 U.S.C. 841 (a) (1),** see United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483, 490 (2001). The Fourth Circuit Court of Appeals held that in light of the U.S. Supreme Court's Ruling in **Descamps,** 133 S. Ct. 2276 (2013), that Naughton's Section 924 (c) (1) conviction must be vacated. See United States v. Naughton, 621 Fed. Appx. 170, 178 (4th Cir. 2015)
(The Fourth Circuit held that: "In light of the U.S. Supreme Court's Ruling in **Descamps v. United States,** 133 S. Ct. 2276 (2013), the Fourth Circuit held that Conspiracy to Commit Sex Trafficking does not categorically qualify as a crime of violence, we vacate Naughton's

conviction under Section 924 (c), and remand the remaining convictions to the district court for resentencing. We **VACATE** Naughton's conviction on Count 2, for brandishing a firearm during a crime of violence of 18 U.S.C. 924 (c). Accordingly, we remand the remaining convictions to the district court for resentencing.); Davis v. United States, 417 U.S. 333, 346 (1974) (a subsequent interpretation of the statute, under which he was convicted establishes that his conviction is **INVALID,** thus, there can be no doubt that, such circumstances inherently results in a complete miscarriage of justice); and Thompson v. United States, 2020 U.S. Dist. LEXIS 67583 (N.D. Tex., Apr. 17, 2020) (The 5th District Court **GRANTED** 2255 Motion to Vacate after the Government argued procedural bars (as to Thompson's unlawful conviction), however, the Court held that: The Court finds that Thompson was convicted under indictment that did not charge a valid offense, and that he is actually innocent of the charged offense. Under these circumstances the miscarriage of justice applies, and Thompson's collateral-review waiver is not enforceable.) (emphasis added).

Petitioner Ochoa-Anaya states that the U.S. Supreme Court should grant a Certificate of Appealability as to Question Number One as he stands "actually-innocent" of Count Three, Section 924 (c) conviction and sentence as it is debatable amongst jurists of reason. See Fernandez v. United States, No. 21-12915 (11th Cir. Aug. 13, 2024) (The

Eleventh Circuit held without deciding that Attempt and Conspiracy to Possess Cocaine with the intent to distribute are not valid predicate drug trafficking predicates to trigger a conviction under 18 U.S.C. 924 (c) (1) (A)).

Furthermore, Mr. Ochoa-Anaya, contends that as there being no factual basis for his conviction as to Count Three, thus, he stands **ACTUALLY INNOCENT** of his conviction and sentence for Possession of a Firearm in Furtherance of Drug Trafficking Crime in which required the district court to impose a five-year mandatory penalty crime in which violates his due process of law and the eighth amendment rights of the U.S. Constitution. See Dretke v. Haley, 541 U.S. 386, 397 (2004) (Because, as all parties agree, there is no factual; basis for respondent's conviction as a habitual offender, it follows inexorably that respondent has been denied due process of law.). The district court procedurally ruling is wrong or debatable as to Mr. Ochoa-Anaya's colorable actual-innocence claim in the case herein. Consistent with the U.S. Supreme Court precedents in **Slack and Miller-El,** thus, a Certificate of Appealability must issue as to Question Number One in the situation herein. See **Slack,** 529 U.S. 473, 484 (2000).

QUESTION NUMBER TWO:

Whether the district court abused its discretion by failing to conduct an Evidentiary Hearing and the Ninth Circuit affirmance of

that decision regarding Ground Two, ineffective assistance of counsel whether Count One, Conspiracy was fatally defective and his former attorney should have filed a pre-trial Motion to Dismiss Fatally Defective Indictment, thus, did this violate his Sixth Amendment rights ?

The Sixth Circuit has held that: "We have observed that a Section 2255 petitioner's burden for establishing an entitlement to an evidentiary hearing is relatively light." Smith v. United States, 348 F.3d 545, 551 (6th Cir. 2003). The district court's decision whether to hold an evidentiary hearing on a Section 2255 motion is reviewed under the abuse of discretion standard. Arredondo v. United States, 178 F.3d 778, 782 (6th Cir. 1999).

The district court denied relief as to Ground Two, without conducting an evidentiary hearing by holding as follows:

"Movant contends the Indictment (Doc. 9) is fatally defective regarding Count One Conspiracy to Distribute Controlled Substance (Methamphetamine), violation of 21 U.S.C. 846, 841 (a) (1), and 841 (b) (1) (A) because it contains an open-ended conspiracy start date, thus lacks factual particularity.

"An indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7 (c) (1)). An indictment is sufficient if it "(1) contains

the elements of the offense charged and fairly informs a defendant of the charge against him which he must defend and (2) enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." United States v. Lazarenko, 564 F.3d 1026, 1033 (9th Cir. 2009). Regarding the legal sufficiency of an indictment charging conspiracy, the Ninth Circuit holds "[a]n indictment under 21 U.S.C. 846... is sufficient if it allegedly violated, even if it fails to allege or prove any specific overt act in furtherance of the conspiracy." United States v. Forrester, 616 F.3d 929, 940 (9th Cir. 2010) (quoting United States v. Tavelman, 650 F.3d 1133, 1137 (9th Cir. 1981).

In Forrester, the defendant argued the indictment was insufficient because it failed to specify a beginning date for the conspiracy. The Ninth Circuit explained, "although an indictment cannot be completely open-ended,... an indictment that specifies an end date is sufficient to apprise defendants of the charges and enable them to prepare a defense." **Forrester,** 616 F.3d at 941. Moreover, an "uncertainty regarding a conspiracy's beginning and ending dates does not render an indictment fatally defective so long as overt acts alleged in the indictment adequately limit the time frame of the conspiracy." (Id). An indictment will be held sufficient if it "tracks the words of the statute charging the offense" such that it "contains the elements of the offense charged and fairly informs the [accused] of the charge

against which he must defend." United States v. Davis, 336 F.3d 920, 922 (9th Cir. 2003). Movant's argument is analogous to **Forrester.** Movant and co-defendant Victoria Rodriguez were charged with Conspiracy to Distribute Controlled Substance (Methamphetamine), violation of 21 U.S.C. 841, 841 (a) (1), and 841 (b) (1) (A). The indictment contains the following language: "beginning at a time unknown to the Grand Jury, but no later than on or about September 3, 2019, and continuing to on or about September 5, 2019, that date being approximate and inclusive, in the County of Stanislaus,... did knowingly and intentionally agree with each other and other individuals known and unknown to the Grand Jury to distribute a controlled substance in violation of [21 U.S.C. 846 and 841 (a) (1)]." (Doc. 9 at 1-2.) Movant's indictment tracks the language of the conspiracy statute, identifies a location and co-conspirator, alleges the purpose of the conspiracy, alleges a start day, and alleges an end date to the conspiracy. The Court finds Movant's indictment legally sufficient.

The district court decision is wrong or debatable as to his Ground Two, ineffective assistance of counsel claim as to Count 1, Conspiracy being fatally defective as the result of the district court relying upon the Ninth Circuit's Ruling in **Forrester** to hold that Mr. Ochoa-Anaya's Indictment was legally sufficient, however, his case is distinguishable as no overt acts were charged within Ochoa-Anaya's Count 1,

Conspiracy, see Attachment C. Thus, Petitioner Ochoa-Anaya, asserts that the Ninth Circuit's Ruling in United States v. Cecil, 608 F.2d 1294, 1296-97 (9th Cir. 1979) (the Ninth Circuit REVERSED due to the Insufficiency of the Indictment as to Count II he was charged as follows: That beginning on or before July 1975, and continuing thereafter until October, 1975, in the District of Arizona and elsewhere, LEONARD SILAS JOHNSON, FELIX DAN CECIL, DONALD LEE SCHAFFER, IVA LEE THUNDERCLOUD, LYNN RICHARD JOHNSON, RANDY DARRELL THOMAS, WARREN ARTHUR HAGGARD, KENNY ROBERT JAMES, SILAS BLAINE JOHNSON, TONY JOHNSON, and LIONEL JOHNSON, named herein as defendants, did knowingly and intentionally conspire and agree together and with each other and with various other persons both known and unknown to the Grand Jury to commit offenses in violation of Title 21, United States Code, Section 841 (a) (1).

It was the object of said conspiracy that one or more of the co-conspirators would possess with intent to distribute and would distribute quantities of marijuana, a Schedule 1 controlled substance, in violation of Title 21, United States Code, Section 841 (a) (1). All in violation of Title 21, United States Code, Section 846.

The Ninth Circuit Court of Appeals held that Cecil's Indictment failed to provide "the substantial safeguards" specifically holding

that the indictment fails to state any other facts and circumstances pertaining to the conspiracy or any overt acts done in furtherance thereof; and more importantly, the indictment fails to place the conspiracies within any time frame. The language "beginning on or before July 1975, and continuing thereafter until on or after October, 1975," is open-ended in both directions.

Thus, the Ninth Circuit REVERESED holding specifically: "The requirement that an indictment contain a few basic factual allegations accords defendants adequate notice of the charges against them and assures them that their prosecution will proceed on the basis of facts presented to the grand jury. Such a requirement burdensome nor unfair to the prosecuting authorities. Accordingly, we reverse.") (emphasis added).

Consistent with the Ninth Circuit's Ruling in **Cecil,** thus, as the result of Mr. Ochoa-Anaya's Count 1, Conspiracy Indictment failing to place him on notice of a specific start date and failing to place him on notice of a specific end date and fails to list any overt acts done in furtherance thereof it is fatally defective in violation of his Fifth and Sixth Amendment rights of the U.S. Constitution. See **Cecil,** 608 F.2d 1294, 1296-97 (9th Cir. 1979). In **Cecil,** the Ninth Circuit Court of Appeals relied upon this Court's Rulings in **Russell** and **Hamling.**

This inquiry must focus upon whether the indictment provides

"the substantial safeguards" to criminal defendants that indictments are designed to guarantee. Russell v. United States, 369 U.S. 749, 768, 82 S. Ct. 1038. Pursuant to this purpose, an indictment must furnish the defendant with a sufficient description of the charges against him to enable him to prepare his defense, to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury, to enable him to plead jeopardy inform the court of the facts alleged so that it can determine the sufficiency of the charge. Russell v. United States, 369 U.S. 749, 768 n. 15, 771, 82 S. Ct. 1038.

To perform these functions, the indictment must set forth the elements of the offense charged and contain a statement of the facts and circumstances that will inform the accused of the specific offense with which he is charged. Hamling v. United States, 418 U.S. 87, 117-18 (1974).

Petitioner Ochoa-Anaya, is in fact entitled to a Certificate of Appealability being **GRANTED** as to Question Number Two as he was deprived of his Sixth Amendment Rights of the U.S. Constitution by his former attorney failing to file a pre-trial Motion to Dismiss Fatally Defective Indictment as to Count 1, Conspiracy and the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing, thus, it is debatable amongst jurists of reasons that he was denied his constitutional rights, see **Slack,** 120 S. Ct. at 1603-04 (2000).

QUESTION NUMBER THREE:

Whether the district court abused its discretion by failing to conduct an Evidentiary Hearing and the Ninth Circuit affirmance of that decision regarding Ground Three, sentencing phase ineffective assistance of counsel, thus, did this violate his Sixth Amendment rights of the U.S. Constitution ?

The district court holds that Ochoa-Anaya's sentencing phase ineffective assistance of counsel claim was no showing of deficient performance and actual prejudice. See Appendix A. However, the Sentencing Transcripts paint a different picture as the district court had to advise Attorney Martinez of the local rules and that no formal objections were made to the PSR. See Appendix D. It should be noted that Attorney Martinez filed a three-page Sentencing Memorandum, see Attachment E, in which fails to articulate any applicable case law to support his request for a "downward departure" pursuant to USSG 5K2.0, however, after the U.S. Sentencing Guidelines were rendered "advisory" a request for a "downward variance" should have been requested. The Seventh Circuit have considered harsh conditions of confinement as a valid factor supporting a shorter custodial sentence, see United States v. Spano, 476 F.3d 476, 479 (7th Cir. 2007). **During the COVID-19 pandemic the Government were actually recommending to federal judges that criminal**

defendants receive "downward variance" based upon the COVID-19 pandemic and the harsh conditions of confinement. See United States v. Estrada, 2021 U.S. Dist. LEXIS 80602, 2021 WL 1626309 (S.D. Cal. Apr. 27, 2021) (the court departed from Guideline range of 46-57 months and imposed a non-guideline sentence of 24 months in part due to conditions of confinement were particularly harsh during the pandemic); and United States v. Dones, 2021 U.S. Dist. LEXIS 243953, 2021 WL 6063238, at * 5 (D. Conn., Dec. 22, 2021) ("the Court will reduce Mr. Done's sentence [from a term of 100 months] to a term of sixty months to reflect the extraordinary conditions to which he has been subjected.").

Petitioner Ochoa-Anaya, states that as it relates to his former attorney's Sentencing Memorandum omits a Formal Objection to Section 2D1.1 (b) (16).

(1) Petitioner Ochoa-Anaya, asserts that consistent with the Federal Rules of Criminal Procedure-Rule 32 (i) (3) (A), the failure to object to uncontradicted findings and recommendations in the PSR may result in a waiver of the claim, see United States v. Hilgers, 560 F.3d 944, 948 n. 4 (9th Cir. 2009). Attorney Martinez failed to make a Formal Objection as to U.S.S.G. 2D1.1 (b) (16) two-level enhancement, thus, U.S.S.G. 2D1.1 (b) (16) (A), i, ii, and iii, requires more than a statement that Appellant asked girlfriend for assistance

in weighing and packing methamphetamine, thus, had Formal Objection been lodged to the PSR the government bears the burden of proving facts that support a sentencing adjustment by a preponderance of the evidence. See United States v. Job, 851 F.3d 889, 905-06 (9th Cir. 2017).

Attorney Martinez failed to file formal objections to the PSR. There could be no strategy behind this. Bringing up objections at sentencing where the district court has no opportunity to carefully review the objections cannot be said to lack prejudice to Ochoa-Anaya. As one thing is clear, Attorney Martinez was unprepared to represent Mr. Ochoa-Anaya at sentencing. Although the district court entertained Attorney Martinez's belated objection at sentencing, this does not mitigate the fact that sentencing phase counsel denied Ochoa-Anaya informed and effective representation at sentencing. The record is clear on this. See Appendix D. The fact that defense counsel put forth an off the cuff objection, does not erase the fact that the objection was not formally asserted to the district court such that the district court could thoroughly review and analyze the objection. More importantly, Attorney Martinez could not be characterized as competent in the overall representation of Mr. Ochoa-Anaya at sentencing.

Mr. Ochoa-Anaya never admitted that he used "fear, impulse, friendship, affection, or some combination thereof to involve another

individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise."

The application of U.S.S.G. 2D1.1 (b) (16) (A), i., ii., and iii., requires more than a statement that Mr. Ochoa-Anaya asked his girlfriend for assistance in weighing and packaging methamphetamine. There was no record or evidence showing that Mr. Ochoa-Anaya used fear, impulse, affection, friendship, or a combination of these two involve his girlfriend. There was no record or evidence that Mr. Ochoa-Anaya's girlfriend received only little or no compensation for her efforts. Nor was there any indication that Mr. Ochoa-Anaya's girlfriend had only minimal knowledge of the scope and structure of the enterprise. A contrary inference is more rational. There is no basis upon which to hold the belief that Attorney Martinez in the district court strategically failed to raise this formal objection, especially when it was clear that Attorney Martinez in the district court admittedly unprepared to competently represent Mr. Ochoa-Anaya at sentencing.

Effective counsel would have timely filed his Formal Objection to the Presentence Investigation, or at least sought relief from the district court to file his Formal Objections out of time. By not timely

filing Formal Objections to the Presentence Investigation Report, and by not seeking to file the Formal Objections out of time, this denied a full review of the belated objection to a Two (2) level increase in the offense level pursuant to U.S.S.G. Section 2D1.1 (b) (16) (A) i, ii and iii. As the district court mentioned, the district court had not reviewed the issues relating to the objection prior to the sentencing hearing; and that the district court was not presented with any evidence to support Attorney Martinez's objection.

Effective and prepared counsel would have timely filed his formal objections to the PSR. Moreover, effective and prepared counsel would have made the appropriate formal objection to the application of U.S.S.G. 2D1.1 (b) (16) (A) i, ii., and iii, since there was no evidence to support the application of this guideline. See United States v. Iaquinta, 719 F.2d 83, 85-86 n. 5 (4th Cir. 1983) (The Fourth Circuit held that: "Sentencing is a critical stage of trial at which a defendant is entitled to effective assistance of counsel, and a sentence imposed without effective assistance must be vacated and reimposed to permit facts in mitigation of punishment to be fully and freely developed.). (2) Failing to object to the district court failing to consider all the Section 3553 (a) factors- in fact one 18 U.S.C. 3553 (a) factor in which should have raised by Attorney Martinez is that there exist a vast disparity in sentencing among co-defendants as Mr. Ochoa-Anaya's

Guideline Range was 262-327 months of imprisonment and an additional 60 months consecutively, thus, he was ultimately sentenced to 252 months as to Count One and additional 60 months as to Count Three. However, co-defendant Victoria Rodriguez (2) received a 30 month term of imprisonment in which created an unwarranted sentencing disparity in violation of 18 U.S.C. 3553 (a) (6). See United States v. Carter, 560 F.3d 1107, 1121 (9th Cir. 2009) (collecting cases listing various considerations that warrant disparate co-defendant sentences).

Attorney Martinez should have argued within the Sentencing Memorandum that the advisory guideline range is "greater than necessary" and too draconian, and the purpose of sentencing is satisfied by a sentence below the guidelines consistent with 18 U.S.C. 3553 (a) (2). See United States v. Stockton, 968 F.2d 715, 721 (8th Cir. 1992); United States v. Andruska, 964 F.2d 640, 646-47 (7th Cir. 1992); and United States v. Harrington, 947 F.2d 956, 964 (D.C. Cir. 1991).

(3) Petitioner Ochoa-Anaya, states that his ex-lawyer failed to request a "downward variance" in light of the U.S. Supreme Court's Ruling in Dean v. United States, 137 S. Ct. 1170 (2017), thus, federal courts have exercised discretion and imposed a "downward variance" to 1 day for the underlying predicate crime, see USA v. Italo Sanders,

Case No. 1:19-cr-00152-WCG-1 (E.D. WI., May 6, 2020); and Thomas v. United States, 2021 U.S. Dist. LEXIS 99041 f.n. 3 (Dist. AZ., May 25, 2021) (In light of **Dean (2017),** the district court **REDUCED** Thomas's sentence from 49.5 years to 42 years.) (emphasis added).

As the result of the "advisory" Guideline Range being 262-327 months as to Count One, and the district court imposed a non-guideline of 10 months below his Guideline Range if Attorney Martinez would have been prepared and conducted adequate legal research; and made a professional presentation by supporting applicable case law to support each point there is a reasonable probability that absent his former attorney's 'deficient performance' Mr. Ochoa-Anaya's 312-month federal sentence would have been at least 30 days or more shorter in which amounts to ineffective assistance of counsel in violation of his Sixth Amendment rights. See **Glover,** 531 U.S. 198, 203-04 (2001) (authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, jurisprudence suggests that any amount of actual jail time has U.S. Const. amend VI significance.); and United States v. Brim, 148 Fed. Appx. 619, 620-621 (9th Cir. 2005) (the Ninth Circuit recognized citing **Glover** that: "any additional time served as a result of deficient performance by counsel is prejudicial.") (emphasis added).

Petitioner Ochoa-Anaya, asserts that this U.S. Supreme Court should **GRANT** a Certificate of Appealability as to Question Number Three, as the question of whether he was deprived of his Sixth Amendment Rights of the U.S. Constitution at the sentencing phase and the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing, see **Smack,** 347 F.3d 533, 540-41 (3rd Cir. 2003), as it is debatable amongst jurists of reason of a denial his sixth amendment constitutional rights, see **Slack,** 120 S. Ct. at 1603-04 (2000) (emphasis added).

QUESTION NUMBER FOUR:

Whether the district court abused its discretion by failing to conduct an Evidentiary Hearing and the Ninth Circuit's affirmance of that decision regarding Ground Four, pre-plea ineffective assistance of counsel, thus, did this violate his Sixth Amendment rights of the U.S. Constitution ?

The district court denied Ground Four by relying heavily on the Rule 11 Plea Colloquy and the terms written in the Plea Agreement, see Appendix A, however, the Change of Plea Transcripts reflect that Mr. Ochoa-Anaya plead guilty on Friday, June 12, 2020, in the heart of COVID-19 Pandemic. Remarkedly, Petitioner's former attorney utilized a non-certified Spanish Interpreter to read the Plea Agreement to Mr. Ochoa-Anaya at the county jail prior to entry of the guilty plea

through video conference in fact errors were made on the Plea Agreement, see Appendix F. Attorney Martinez violated 28 U.S.C. 1827 (d) (1), of the Interpreter's Act in which rendered his Guilty Plea entered "unknowingly and unintelligently" entered, thus, **VOID** in violation of his due process of law rights. See United States v. Murguia-Rodriguez, 815 F.3d 566, 569 (9th Cir. 2016); and Boykin v. Alabama, 395 U.S. 238, 243-44 & f.n. 5 (1969) (Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and therefore **VOID.**).

The Rule 11 Plea Colloquy reflects that Mr. Ochoa-Anaya's highest grade of education is sixth grade; the district court never explained the elements of the offense and the Government never stated upon the record the evidence that existed to establish each element of the offense or the critical term of the Plea Agreement all which is required by the Federal Rules of Criminal Procedure-11 (b) (1) (G); 11 (b) (3); and 11 (c) (2), thus, failure to comply with the strict compliance of Rule 11, renders his guilty plea unknowingly and unintelligently entered and **VOID.** See Boykin v. Alabama, 395 U.S. 238, 243-44 & f.n. 5 (1969).

Part I.

Mr. Ochoa-Anaya states that he argued that his former attorney failed to discuss the **evidence** as it bears on the "essential elements" in

which was never discussed specifically as his Rule 11 Plea Colloquy. See Smith v. United States, 348 F.3d 545, 552 (6th Cir. 2003) (The Sixth Circuit Court of Appeals held that: "On the other hand, the attorney has a clear obligation to fully inform her client of the available options. We have held that the failure to convey a plea offer constitutes ineffective assistance, see **Griffin,** 330 F.3d at 734, but in the context of the modern criminal justice system, which is driven largely by the Sentencing Guidelines, more is required. A criminal defendant has a right to expect at least that his attorney review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available. In system dominated by sentencing guidelines, we do not see how sentence exposure can be fully explained without completely exploring the ranges of penalties under likely guideline scoring scenarios, given the information available to the defendant and his lawyer at the time. See United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992) (observing that "the Sentencing Guidelines have become a critical, and in many cases, dominant facet of federal criminal proceedings" such that "familiarity with the structure and basic content of the Guidelines (including the definition and implications of career offender

status) has become a necessity for counsel who seek to give effective representation."). The criminal defendant has a right to this information, just as he is entitled to the benefit of his attorney's superior experience and training in the criminal law.") (bold emphasis added).

Part II.

Mr. Ochoa-Anaya, contends that his ex-lawyer failed to adequately and fully explain the disparity between pleading guilty versus going to Jury Trial, thus, such amounted to 'deficient performance' in the situation herein. In fact, the only benefit of acceptance of the Government's Plea Agreement impacted Mr. Ochoa-Anaya's sentencing exposure was by ensuring him to receive the three-levels for Acceptance of Responsibility. Thus, it appears the disparity between pleading guilty and proceeding to Jury Trial consisted of an "advisory" Guideline Range of 262-327 months of imprisonment plus a consecutive 60 months of imprisonment versus proceeding to Jury Trial an "advisory" Guideline Range of 360-Life plus a consecutive 60 months of imprisonment. Therefore, Mr. Ochoa-Anaya, states that had he been adequately and fully advised of the disparity of sentencing exposure of eight years and two months difference it would have changed his decision-making process, thus, rendering his Guilty Plea "unknowingly and

unintelligently" entered, thus, VOID in violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution. See Smith v. United States, 348 F.3d 545, 553 (6th Cir. 2003) (On the other hand, the attorney has a clear obligation to fully inform her client of the available options. A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, and **explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available.**); and Boykin v. Alabama, 395 U.S. 238, 243-44 & f.n. 5 (1969) (Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Id., at 466) (emphasis added).

The district court abused its discretion by failing to conduct a prompt Evidentiary Hearing as to Ochoa-Anaya's colorable Ground Four claim of pre-plea ineffective assistance of counsel to deny without fully investigating this claim conflicts with Harris v. Nelson, 394 U.S. 286 (1969); and Blackledge v. Allison, 431 U.S. 63 (1977). The Government did not request an Affidavit from his former defense

counsel, thus, in these instances Mr. Ochoa-Anaya is entitled to the opportunity to fully develop his claim at an Evidentiary Hearing. See United States v. Goodman, 590 F.2d 705 (8th Cir. 1979); and McAleney v. United States, 539 F.2d 282 (1st Cir. 1976) (emphasis added).

Petitioner Ochoa-Anaya, asserts that the U.S. Supreme Court should **GRANT** a Certificate of Appealability as to Question Number Four, as the question of whether he was deprived of his Sixth Amendment Rights of the U.S. Constitution at the pre-plea stage and the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing, see **Smith,** 348 F.3d 545, 551 (6th Cir. 2003), as it is debatable amongst jurists of reason of a denial his sixth amendment constitutional rights, see **Slack,** 120 S. Ct. at 1603-04 (2000) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Francisco Javier Ochoa-Araya

Date: 07/14/25