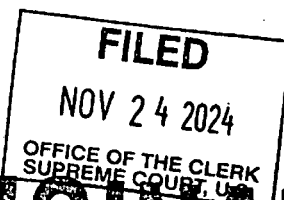


No. 26-5029



ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

URIEL J. ORTEGA

(Your Name)

— PETITIONER

vs.

UNITED STATES OF AMERICA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

URIEL J. ORTEGA Reg.# 16405-023

(Your Name)

Federal Correctional Institution P.O. Box 800
(Address)

Herlong, CA 96113

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Did the Ninth Circuit Court of Appeals err when it ruled that Appellant Ortega had not made a "Substantial showing of the denial of a Constitutional Right", and denied his request for a Certificate of Appealability.

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Buck v. Davis, 580 U.S. 100, 115 (2017)	
Hill v. Lockhart, 474 U.S. at 60, 106 S. Ct. at 371	
Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000)	
Martinez v. Shinn, 33 F.4th 1254, 1261 (9th Cir. 2022)	
McGill v. Shinn, 16 F.4th 666, 678 (9th Cir. 2021)	
McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)	
Miller-EL v. Cockrell, 537 U.S. 322, 337-38 (2003)	
Towery v. Schriro, 641 F.3d 300, 311 (9th Cir. 2000)	
United States v. Bridgforth, 441 F.3d 864, 871 (9th Cir. 2006)	
United States v. LEE, 582 U.S. 357, 367, 137 S. Ct. 1958 (2017)	
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STATUTES AND RULES

28 U.S.C § 2255	
21 U.S.C § 851	
21 U.S.C § 924(c)	
21 U.S.C § 802 (44)	

OTHER

§ 45-9-102(2) MCA	
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LIST OF PARTIES

- ☒ 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:

RELATED CASES

United States v. Ortega, No. 4:14-cr-00255-BLW-1
U.S. District Court for the Eastern District of Idaho
Judgment entered on 12/22/2015

United States v. Ortega, No. 15-30397
United States Court of Appeals for the Ninth Circuit
Judgment entered on 04/24/2017

Ortega v. United States, No. 4:17-cv-00529-BLW
U.S. District Court for the Eastern District of Idaho
Judgment entered on 09/01/2023

Ortega v. United States, No. 23-2321
United States Court of Appeals for the Ninth Circuit
Judgment entered on 6/28/24

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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

☒ 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,
☒ 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,
☐ 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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was JUN. 28, 2024.

☐ 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: AUG. 26, 2024, and a copy of the order denying rehearing appears at Appendix C.

☐ 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. § 1254(1).

☐ For cases from state courts:

The date on 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

The Sixth Amendment to the United States Constitution states, in relevant parts, that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Mr. Ortega is in custody serving a 264-month sentence at FCI Herlong, imposed by the district court after Mr. Ortega entered a guilty plea to one count of conspiracy to distribute a controlled substance.³ Cr. Dkt. 1. The indictment stemmed from a traffic stop, during which police discovered three firearms and 1.3 kilograms of methamphetamine in the car where Mr. Ortega was a passenger Cr. Dkt. 29, at 3.

Primarily at issue in this case is the performance of Nathan Rivera, an attorney retained to represent Mr. Ortega, although Mr. Ortega raised concerns with the performance of two other attorneys as well. Mr. Rivera substituted as counsel for the CJA attorney who represented Mr. Ortega through the suppression proceedings. Cr. Dkt. 24. Broadly summarized, Mr. Ortega submits that he wanted to proceed to trial but Mr. Rivera counseled him to accept a written plea agreement. Mr. Ortega argues, among other things, that he accepted the agreement based on (a) what turned out to be incorrect sentencing advice and guideline and criminal history calculations, (b) without understanding the possible deportation consequence of his change of plea, and (c) without his counsel having reviewed the discovery or plea agreement in detail with him.

Mr. Ortega did sign the plea agreement and appeared at change of plea proceedings. The proceedings continued over two separate hearing dates because Mr. Ortega expressed confusion about the proceedings and was concerned that he had been unable to talk to his counsel about the questions he had before the first hearing. At the second hearing, he entered a guilty plea. *See* Cr. Dkt. 31, 32.

A few weeks after Mr. Ortega entered his guilty plea, the district court granted Mr. Rivera's motion to withdraw as counsel and appointed a new attorney, Kelly Kumm, as CJA counsel. Cr. Dkt. 35, 36. About six weeks after appearing in the case, Mr. Kumm filed a motion to withdraw Mr. Ortega's guilty plea.⁴ Cr. Dkt. 36, 50. Mr. Ortega asked to withdraw his plea for various reasons, including that Mr. Rivera had (1) miscalculated his criminal history points and overstated the potential sentence if he proceeded to trial; (2) failed to advise him there would be a potential sentencing enhancement for possession of a firearm; and (3) neglected to ensure Mr. Ortega understood he was pleading guilty to a conspiracy to distribute the drug methamphetamine. *Id.* at 1-2.

The district court conducted a hearing on the Motion to Withdraw the Guilty Plea right before the sentencing hearing, and the matters spanned over two proceedings. Cr. Dkt. 61, 63, 64. The sentencing hearing was continued, in part, to allow the probation officer to correct an error in the drug quality and base offense level calculation. Cr. Dkt. 61.⁵ During these proceedings, the court denied Mr. Ortega's request to withdraw his guilty plea and sentenced him to 264 months in prison --- a below-guidelines sentence obtained by variances.

To reach this sentence, the district court started at a level 34 base offense

⁴ One of Mr. Ortega's claims is that his counsel should have filed the motion to withdraw his guilty plea sooner.

⁵ There are four versions of the Presentence Report in the record. Cr. Dkt. 38, 40, 43, 59.

level, using the quantity of actual methamphetamine under U.S.S.G. § 2D1.1(c)(3), added two point enhancements for the presence of a firearm (§ 2D1.1(b)(1)) and obstruction of justice (§ 3C1.1),⁶ and declined to apply the acceptance of responsibility reduction. The resulting offense level of 38, with a criminal history category of IV,⁷ yielded a guidelines range of 324 to 405 months.⁸ Civ. Dkt. 52 at 5-6.

Mr. Ortega appealed, despite an appeal waiver contained in his written plea agreement. Cr. Dkt. 29 at 7-8; 66, 90. On direct appeal, he argued that his plea was not knowing and intelligent because his attorney did not inform him of all the terms and he did not understand the Sentencing Guidelines, particularly those related to his criminal history and role in the offense. *See United States v. Ortega*, Ninth Circuit Case No. 15-30397, Opening Br., Dkt. 23 at 3. The Ninth Circuit determined the record did not support Mr. Ortega's argument that his plea was involuntary and it dismissed the appeal because of the plea agreement's appeal waiver provision. The Court also declined to address Mr. Ortega's claim for ineffective assistance of counsel on direct appeal. Cr. Dkt. 90.

⁶ At sentencing, the Court overruled objections made by Mr. Ortega's new counsel (Kelly Kumm) to the firearm enhancement and the obstruction-of-justice enhancement. *See* Cr. Dkt. 82, Sent. Tr., at 20:10 to 25:25.

⁷ The district court granted a two-category reduction to the criminal history category, going from a VI to an IV. Cr. Dkt. 61.

⁸ Ortega's offense level increased by five levels because the district court concluded he had obstructed justice and failed to accept responsibility.

After an unsuccessful direct appeal, Mr. Ortega filed a pro se motion under 28 U.S.C. § 2255, alleging ineffective assistance of trial and appellate counsel, as summarized below. First, Mr. Ortega alleged that before he pleaded guilty, attorney Nathan Rivera was ineffective because he:

(1) provided grossly inaccurate sentencing information, Civ. Dkt. 1 at 3; Civ. Dkt. 7-2 at 4;

(2) failed to provide critical discovery for Mr. Ortega to make an informed decision about whether to proceed to trial, Civ. Dkt. 1 at 3; Civ. Dkt. 7-2 at 21;

(3) failed to correctly advise him about the deportation consequences of a guilty plea, Civ. Dkt. 1 at 4; Civ. Dkt. 7-3, at 32;

(4) operated under a conflict of interest related to the payment of legal fees by Mr. Ortega's aunt, Civ. Dkt. 7-3 at 41-48;

(5) improperly advised Mr. Ortega to enter into a plea agreement, even though Mr. Ortega did not understand the terms, *id.* at 49; and

(6) failed to warn Ortega of a potential two-level firearm enhancement, Civ. Dkt. 7-4, at 68.

Ortega also asserted that his next attorney, Kelly Kumm, performed deficiently by:

(1) not promptly filing a motion to withdraw Ortega's guilty plea and otherwise failing to protect Ortega's interests in connection with the withdrawal

motion, *see* Civ. Dkt. 7-4, at 52;

(2) failing to adequately challenge the obstruction-of-justice sentencing enhancement, *id.* at 59;

(3) failing to object to the government's alleged breach of the plea agreement, *id.*, at 65;

(4) failing to adequately object to the firearm enhancement, *id.*, at 68; and

(5) failing to review or provide lab reports detailing the purity levels of the methamphetamine at issue in this case, *see* Civ. Dkt. 15, at 1.

Finally, Ortega claimed that appellate counsel Steven Thompson performed deficiently by failing to adequately address the obstruction-of-justice enhancement on appeal. *See* Civ. Dkt. 7-4, at 59.

The district court denied all claims made related to the performance of attorneys Kelly Kumm and Steven Thompson, Civ. Dkt. 52, and then held an evidentiary hearing on the issue of whether Mr. Rivera provided ineffective assistance by overstating the potential mandatory minimum sentence, seriously underestimating the predicted sentence upon a guilty plea, and providing incorrect information on the deportation risk. Civ. Dkt. 107; Tr., at 4. After this evidentiary hearing, the district court denied all claims raised in Mr. Ortega's § 2255 Motion and entered a Judgment denying relief. Civ. Dkt. 112, 113. In doing so, the court made the following factual findings:

- (1) Rivera advised Ortega that if he were not a citizen, he would be deported if he pleaded guilty to either charge in the indictment.
- (2) Rivera informed Ortega that he would face a 25-year, mandatory-minimum sentence if he stood trial and was convicted on either charge in the indictment. In making that prediction, however, Rivera was accounting for the fact that the prosecutor had threatened to seek two enhancements if Ortega decided to stand trial: (1) he would file an information under 21 U.S.C. § 851 subjecting Ortega to enhanced punishment based upon his prior drug conviction; and (2) he would seek a superseding indictment including a firearm charge under 18 U.S.C. § 924(c). These two enhancements would have increased the mandatory minimum to 25 years. If, on the other hand, Ortega pleaded guilty to either charge in the indictment, the prosecutor agreed not to seek the enhancements.
- (3) Before Ortega pleaded guilty, Rivera explained how he had calculated the 25-year mandatory minimum Ortega could potentially face if he stood trial. In other words, Rivera explained to Ortega that if he decided to proceed to trial, the prosecutor intended to (1) seek a superseding indictment alleging a charge under 18 U.S.C. § 924(c) and (2) seek enhancements based upon his prior drug conviction under the process outlined in 21 U.S.C. § 851. Rivera further explained that Ortega could avoid these potential enhancements by pleading guilty to one of the charges in the indictment.
- [(4)] Before Ortega was sentenced, Rivera advised Ortega that he could face around seven to nine years in prison. But Rivera made that prediction in the context of Ortega having agreed to render substantial assistance to the government. And although Ortega never actually provided substantial assistance, he agreed to do so when he pleaded guilty.

REASONS FOR GRANTING THE PETITION

II. Standards for Issuing a COA

This Court may issue a COA upon a “substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). However, whether a court should grant a COA “is a threshold inquiry that ‘is not coextensive with a merits analysis.’” *Martinez v. Shinn*, 33 F.4th 1254, 1261 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 584 (2023) (quoting *Buck v. Davis*, 580 U.S. 100, 115 (2017)). Thus, the COA inquiry is less exacting than the merits inquiry. *See Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003) (“[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.”); *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (“In non-capital [and] capital cases, the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus.”); *Towery v. Schriro*, 641 F.3d 300, 311 (9th Cir. 2000).

At the COA stage, this Court asks “only if the District Court’s decision was debatable.” *Martinez*, 33 F.4th at 1261 (citations and internal quotation marks omitted). To meet this standard, Mr. Ortega “must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.” *Id.* (citations and internal quotation marks omitted).

Applying these standards, Mr. Ortega submits that the Court should issue a certificate of appealability on the issue of whether he received ineffective assistance of counsel in connection with his decision to enter a guilty plea, including counsel's advice regarding how his criminal history category would be calculated, the possible sentencing ranges at trial compared with after a plea agreement, the deportation consequences of pleading guilty, and the appellate waiver of most claims and other contents of the plea agreement.

III. Argument

The Supreme Court has said that the Sixth Amendment "right to counsel is the right to the effective assistance of counsel," *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Mr. Ortega meets the requirements for a COA because his underlying §2255 motion states a valid and debatable claim of the denial of a constitutional right, his Sixth Amendment right to the effective assistance of counsel at all stages of his criminal proceedings. Accordingly, Mr. Ortega respectfully requests that this Court grant a COA to prevent the denial of his constitutional rights.

Mr. Ortega also asks the Court to consider all his attorneys' actions and "conduct as a whole to determine whether [they were] constitutionally adequate." *McGill v. Shinn*, 16 F.4th 666, 678 (9th Cir. 2021) (citation and internal quotation marks omitted). Separating "counsel's alleged errors in a proceeding into different

questions and considering whether to issue a COA as to each error ‘distort[s]’ the ineffective assistance of counsel inquiry.” *Id.* (citation omitted). Instead, consideration of whether to grant a COA should be made “at a higher level of generality” so the Court can consider counsel’s performance in the context of the entire proceeding. *Id.* (citation and internal quotation marks omitted).

A. Jurists of reason could find it debatable whether Mr. Rivera provided ineffective assistance and the questions raised in this case are adequate to deserve encouragement to proceed further.

As described above, Mr. Ortega argued that Mr. Rivera provided ineffective assistance for several reasons, and also raised a cumulative ineffective claim, asking the court to consider all the circumstances taken together. The district court described three key errors Mr. Ortega relied on that “ultimately prompted him to plead guilty when he otherwise would have insisted on a trial”:

The first error deals with the risks of standing trial. Ortega says Rivera overstated this risk by telling him that he faced a 25-year mandatory minimum if he were convicted on either charge, when, in fact, he actually would have faced a 10-year mandatory minimum. The remaining alleged errors deal with the other side of the ledger—the risks of pleading guilty. Ortega says Rivera understated these risks by telling him he wouldn’t be deported if he pleaded guilty and by telling him that his expected guidelines range was much lower than the actual guidelines range and the sentence he actually received.

Civ. Dkt. 15.

1. Counsel’s Advice Related to the Potential 25-Year Mandatory Minimum Sentence Ortega Would Face if he Stood Trial

Mr. Rivera testified that the United States Attorney threatened, if the case

proceeded to trial, to seek an enhancement of the mandatory minimum under 21 U.S.C. § 851¹¹ and bring a § 924(c) firearm charge. If supported by the circumstances, these actions would have yielded a 25-year mandatory minimum with the enhancement and the stacking of the Section 924(c) conviction. Civ Dkt. 112 at 16. As the district court explained, “to perform competently, Mr. Rivera would need to look into both issues to determine if Mr. Ortega could truly face a 25-year mandatory minimum, or if these were empty threats.” *Id.* at 17. Instead though, Mr. Rivera “simply relied on the prosecutor’s assertions.” *Id.* The district court determined though that Mr. Ortega was not prejudiced by counsel’s failure because there was “a qualifying felony [in Montana for the §851 enhancement] and . . . ample evidence to bring a § 924(c) charge.” *Id.* at 18.

Mr. Ortega argued that he did not have a qualifying felony for Section 841/851 purposes, asserting that his Montana conviction should be considered a misdemeanor. Regardless, he believed his counsel should have obtained records from the Montana case to make an independent determination, instead of relying on the prosecutor’s assessment. *See* Civ. Dkt. 107, Tr. at 107 (asking Mr. Rivera if he tried to find the Montana charging information or obtain other records from the case).

¹¹ The district court noted that the enhancement is under 21 U.S.C. § 841, but the parties have consistently referred to it as one under Section 851. Civ. Dkt. 112 at 18 n.4.

The conviction at issue was under Montana Code § 45-9-102(2), which at the time said that a person convicted on a second or subsequent offense of possession of 60 grams or less of marijuana “is punishable by a fine not to exceed \$1,000 or by imprisonment in the county jail for a term not to exceed 1 year or in the state prison for a term not to exceed 3 years or both.” Civ. Dkt. 112 at 20 (quoting Mont. Code Ann § 45-9-102(2)). “Because the provision includes a one-to-three-year sentence range, it ‘wobbles’ between a misdemeanor and a felony.” *Id.* The court determined that the Montana court treated Mr. Ortega’s conviction as a felony, for several reasons, including that “a Montana district court denied Ortega’s pro se petition for expungement of his conviction [in November of 2019], explaining that even if expungement were available, it could only expunge misdemeanor convictions and thus would be ‘unable to expunge Ortega’s felony conviction.’” Civ. Dkt. 112 at 23 (quoting Civ. Dkt. 91-3, at 1 (emphasis added)).

Mr. Ortega argued that a later Montana district court decision in the same case should be considered persuasive. That decision was issued on January 13, 2023 and granted a second Petition for Expungement, made upon Mr. Ortega’s averment that he possessed just 10 grams of marijuana in the 2013 offense. Civ. Dkt. 109-1 at 1-2. The Montana court noted that that state had provided no information contradicting Mr. Ortega’s claim about the amount of marijuana and the file information was “ambiguous” on the issue. *Id.* Although this expungement

was based on a recent Montana statute allowing expungement when a sentence has been completed for an act that now is punishable by a lesser sentence, Section 16-12-113, MCA, *see id.* at 2, Mr. Ortega submits this order indicates his conduct fell to the misdemeanor side of the original statute of conviction because of the amount involved. He also argues the district court improperly dismissed his argument that the Montana conviction should be treated as a misdemeanor pursuant to the reasoning of *United States v. Bridgeforth*, 441 F.3d 864, 871 (9th Cir. 2006) and similar cases.

2. *Counsel's Predicted Sentence if Mr. Ortega Pleaded Guilty*

Mr. Ortega has alleged that Mr. Rivera made several errors in calculating the guideline range and criminal history category, which resulted in a "grossly" inaccurate sentencing prediction. Civ. Dkt. 7-2 at 4-20. The district court determined that this "claim fails at the outset because even if Rivera provided an inaccurate sentencing prediction, he did not combine that prediction with erroneous advice regarding the likely effects of going to trial." Civ. Dkt. 27. Mr. Ortega submits that a significant error in calculating his criminal history category, offense level, and guideline range, should suffice, without the need for an incorrect assessment of the potential sentence after a trial.

First, although the district court found that Mr. Ortega was not prejudiced by Mr. Rivera's assessment of the potential sentence after a trial – which occurred in

part by his failure to investigate Mr. Ortega's prior convictions to determine if he had a qualifying Section 841/851 felony – Mr. Ortega also argued that his counsel was inefficient because he failed to provide critical discovery to assist Mr. Ortega in making an informed decision about whether to proceed to trial. Civ. Dkt. 1 at 3; Civ. Dkt. 7-2 at 21-31; Civ. Dkt. 107 at 25.¹² Thus, Mr. Ortega did not receive adequate advice on the merits of going to trial that he could assess with access to the discovery in the case and consider along with the sentencing assessments.

Second, as the United States Supreme Court noted in *Lee v. United States*, “there is more to consider than simply the likelihood of success at trial.” 582 U.S. 357, 367, 137 S. Ct. 1958, 1966–67 (2017). The Court explained:

The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. . . . When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years.

Id. Here, a letter in the record from Mr. Rivera to bar counsel regarding a complaint filed by Mr. Ortega noted that Mr. Ortega was “fixated on the 14-year sentence and he would argue with me saying the DWP convictions should not count.” Civ. Dkt. 90-5 (Rivera 5-22-17 letter); Civ. Dkt. 107, Tr. at 72. This

¹² Mr. Ortega told the court at the hearing on Mr. Rivera's Motion to Withdraw that Mr. Rivera had not shown him the evidence other than a couple of minutes of a video. Civ. Dkt. 79 at 4 (sealed transcript).

indicates that Mr. Ortega was concerned about the possibility of a 14-year sentence, and would have been unlikely to anticipate the 22-year sentence he ultimately received.

The district court relied on other grounds to label as unpersuasive Mr. Ortega's argument that Mr. Rivera provided ineffective counsel when predicting the sentence Mr. Ortega might receive upon a guilty plea. Civ. Dkt. 112 at 28. Mr. Ortega testified that Rivera initially predicted a 14-year sentencing range,¹³ but when he turned down a plea deal, Rivera lowered that prediction to seven to nine years, to persuade Ortega to plead guilty. *Id.* Mr. Ortega believes that, considering the 22-year sentence he ultimately received, Mr. Rivera's seven-to-nine year prediction¹⁴ grossly mischaracterized the likely outcome of pleading guilty. *Id.*

The court agreed "that during his representation of Ortega, Rivera advised Ortega that his sentence could fall below the 10-year mandatory minimum," but

¹³ A letter from Mr. Rivera to Mr. Ortega is in the record, was cited by the district court, and states: "Given our discussion about your past criminal history and the current charges, you are looking at a potential sentence in the 14 year range, with the possibility of the judge departing below the guidelines ranges during sentencing. Although that does not happen often, this agreement at least does not foreclose the possibility, but at least allows you to avoid those heavy mandatory minimum enhancements." Civ. Dkt. 90-1 (May 11, 2015 Letter).

¹⁴ This prediction appears to be based partly on misapprehensions about what convictions on Mr. Ortega's record would count toward his criminal history. *See, e.g.,* discussion at Civ. Dkt. 107, Tr. at 41-44. The record is unclear about what Mr. Rivera advised Mr. Ortega about the criminal history calculation. *See, e.g.,* Civ. Dkt. 107, Tr. at 72. It appears the probation officer conducting the presentence investigation report may have advised Mr. Rivera, in error, that some of Mr. Ortega's driving offenses would not count toward his criminal history. *Id.* at 105.

found that Mr. Rivera “made that prediction in the context of Ortega agreeing to provide substantial assistance to the government.” Civ. Dkt. 28 (citing Rivera Dec., Civ. Dkt. 38-5, ¶ 6). However, Mr. Ortega has repeatedly asserted that he had no intention of cooperating and did not fully understand the agreement. *See, e.g.*, Civ. Dkt. 107, Tr. at 27-28, 119. He explained that counsel told him that the cooperation language was standard or general language in the form and he also said he would not want to cooperate because it would put his life in danger. *See id.* at 28, 51. The district court did not find this statement credible, but it warrants noting that there is no indication in the record that Mr. Rivera scheduled a cooperation debrief with the Government or that a debrief for cooperation purposes ever occurred. If the cooperation was the key to reducing the lengthy sentence Mr. Ortega faced, counsel could have followed up to ensure he had the opportunity to earn that reduction.

The district court also concluded that Mr. Rivera could not be faulted for failing to predict the five-level difference in offense levels related to the court’s acceptance of responsibility and obstruction of justice sentencing decisions. Civ. Dkt. 29. Mr. Ortega submits that if the discovery included information indicating obstruction occurred, it is something counsel could have predicted when reviewing the Sentencing Guidelines and considering potential enhancements stemming from relevant conduct. Mr. Ortega explained at the evidentiary hearing that there was

information about possible obstruction provided in the discovery he ultimately received from Kelly Kumm. Civ. Dkt. 107 at 25-27. Also, Mr. Rivera had advised Mr. Ortega he “would receive a total three-point reduction for acceptance”. Civ. Dkt. at 83.

Finally, the district court determined that it did “not need to resolve all aspects of the dispute related to Rivera’s sentencing predictions because during the change-of-plea hearing, [it] plainly and repeatedly advised Ortega that he faced a 10-year, mandatory-minimum sentence of imprisonment and that he could be sentenced to up to life in prison.” Civ. Dkt. 112 at 7. However, the claim here is that Mr. Rivera’s sentencing calculations induced Mr. Ortega to sign the plea agreement and show up at the hearing to enter a guilty plea. He is entitled to advice from his counsel on the sentencing and other issues. This Court has explained that “the government’s performance in including provisions in the plea agreement, and the court’s performance at the plea colloquy, are simply irrelevant to the question whether *counsel’s* performance fell below an objective standard of reasonableness.” *United States v. Rodriguez-Vega*, 797 F.3d 781, 787 (9th Cir. 2015) (emphasis in original) (discussing counsel’s failure to advise client about removal/deportation).¹⁵

¹⁵ The Second Circuit also has considered, “counsel . . . should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed” *Purdy v. United States*, 208 F.3d 41, 45 (2d Cir. 2000)

3. *Advice Regarding Deportation*

The district court explained that Mr. Rivera “was obligated to advise Ortega that if he was indeed a non-citizen, his removal would be a virtual certainty.” Civ. Dkt. 112 at 30. There was nothing in writing from Mr. Rivera to Mr. Ortega on the deportation issue. So, the district court considered conflicting evidence provided by Mr. Rivera and Mr. Ortega, and found “that Rivera advised Ortega that if he were not a citizen of this country, he would be deported if he pleaded guilty to either crime alleged in the indictment.” Civ. Dkt. at 31. Mr. Ortega believes his evidence should be credited and would like the opportunity to submit additional argument on the factual findings and legal determinations of this claim on appeal.

4. *Evidence of Mr. Ortega’s Consistent Desire to Withdraw his Guilty Plea*

Courts should “look to contemporaneous evidence to substantiate a defendant’s expressed preferences” about how he would have pleaded but for his attorney’s deficiencies. *Lee v. United States*, 582 U.S. 357, 369, 137 S. Ct. 1958, 1967 (2017). Here, Mr. Ortega consistently and timely sought to withdraw his guilty plea, shortly after the change of plea hearing and up through sentencing. Unlike the petitioner *Hill v. Lockhart*, 474 U.S. 52, who did not allege in his habeas petition that --- had counsel correctly informed him about his parole eligibility date

(internal citations omitted) citing *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir.1998) (“[K]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.”) (internal quotation marks omitted).

--- "he would have pleaded not guilty and insisted on going to trial," *see* 474 U.S. 52, 60, 106 S. Ct. 366, 371 (1985) (denying habeas petition based on ineffective assistance of counsel claim); here, Mr. Ortega did allege that he would have insisted on going to trial. Civ. Dkt. 107, Tr. at 31-32. Mr. Ortega placed "particular emphasis" on the potential sentence in deciding whether or not to plead guilty. *See Hill*, 474 U.S. at 60, 106 S. Ct. at 371. Thus, the cumulative effect of counsel's deficient advice induced him to enter a guilty plea when he would have gone to trial had he known how off base his counsel's sentencing assessment was.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Uriel Ortega

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