ORAL ARGUMENT REQUESTED

Record No. 24-6133

United States Court of Appeals

for the

Tenth Circuit

JOSEPH ALLEN MALDONADO, *Petitioner*,

v.

UNITED STATES, *Respondent.*

Petition to Vacate, Set Aside, or Correct Sentence from the U.S. District Court for the Western District of Oklahoma, No. 1:21-cr-00048-SLP
(The Honorable Scott L. Park, U.S. District Judge)

OPENING BRIEF OF PETITIONER JOSEPH ALLEN MALDONADO

Roger Roots
John Pierce Law, P.C.
21550 Oxnard Street
3rd Floor PMB #172
Woodland Hills, CA 91367
(775) 764-9347
rroots@johnpiercelaw.com
Counsel for Petitioner Joseph Maldonado-Passage a/k/a Maldonado a/k/a Joe Exotic

DISCLOSURE CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO RULE 28(a)(1) AND RULE 16.1 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

A. **Parties and Amici:** This appeal arises from a criminal conviction of Defendant Appellant Joseph Maldonado a/k/a Joseph Maldando-Passage a/k/a Joseph Allen Maldonado a/k/a Joseph Allen Schreibvogel a/k/a Joe Exotic in the U.S. District Court for the Western District of Oklahoma. The Appellant / Defendant was the only Defendant charged in this particular case No. 1:21-cr-00048-SLP. The Complainant is the United States of America represented by the U.S. Attorney for the District of Oklahoma. There are no intervenors or amici known of.

B. **Rulings Under Review:** This is a 28 U.S.C. § 2255 petition to vacate, set aside, or correct the sentencing of the Defendant as part of an appeal from a judgment of conviction (entered January 23, 2020), after a jury trial May 25, 2019 to April 2, 2019 before the Honorable Scott Palk, and after the denial of his Rule 29 and Rule 33 motions. Mr. Maldonado seeks reversal of his conviction and sentence and requests a new trial in this matter. The denial of his 2255 petition in 18-cr-00227 and 24-cv-00048-SLP was entered on May 6, 2024.

C. **Related Cases:** This case has not been before this Court previously. Appellant is not aware of any related cases.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over MALDONADO'S criminal prosecution under 18 U.S.C. § 3231. This Court of Appeals has jurisdiction over this appeal of MALDONADO'S conviction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

Trial was held on April 12, 2023 through April 18, 2023. Sentencing occurred on July 19, 2023. The trial court denied MALDONADO'S Rule 29 and Rule 33 post-trial motions on July 18, 2023. Judgment was issued on July 27, 2023. Maldonado filed his Notice of Appeal on August 8, 2023. Because of the serious back-log in court reporter workload, apparently due to the influx of an unexpected, extra roughly 1,500 cases from January 6, 2021, events, the record was not complete in this Court of Appeals for a long time. The Clerk granted extensions until midnight August 9, 2024. Appellant relies upon local rules that paper copies be submitted only when directed, to avoid submitting bound paper copies before the Clerk might direct corrections or changes to the Opening Brief.

CERTIFICATE OF APPEALABILITY

The District Court denied a certificate of appealability.

Perhaps oddly, however, 28 U.S.C. § 2253 authorizes an appeal when *EITHER* the District Court judge or the Circuit Court appeals panel issues a certificate of appealability:

> **(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> **(b)** There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> **(c)**
>
> **(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> **(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.
>
> **(3)** The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Where the precedents are somewhat tortured is where an appellant did not seek a certificate of appealability from the trial court or where the appeal is from a State court. Here, however, neither are difficulties. Therefore, Appeallant requests a certificate of appealability from this Court.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err by asserting that Defendant Maldonado must prove what his attorney would have presented if not ineffective?
2. Did the District Court err by failing to recognize constitutionally deficient assistance of counsel alone, *per se*, as requiring acquittal or a new trial?
3. Where Defendant Maldonado challenges ineffective assistance of counsel for refusing to investigate Maldonado's case and refusing to consult with Maldonado about his defense (insisting that the attorney will try the case his way and refusing to listen to the Defendant) and for failing to call witnesses in Maldonado's defense, is it sufficient for the Government or the Court to merely recite the allegations of the prosecution? That is, the *gravamen* of the Petition is that the record is lacking the testimony and evidence which his counsel failed to present in his defense. Therefore, the fact that the record does not include what ineffective assistance of counsel failed to submit cannot be the measure of ineffective assistance of counsel.
4. Where Defendant Maldonado is charged in Counts 9, 11, 12, and 17 of the Indictment with unlawfully selling tiger cubs to Ivan Brown and then allegedly falsifying documents about it is Ivan Brown a necessary and indispensable witness?
5. Without Ivan Brown's testimony, must the charges against Maldonado in Counts 9, 11, 12, and 17 be dismissed as unproven?

6. Is there any possible legitimate litigation strategy for Maldonado's counsel not to call Ivan Brown as the core central witness where counsel knew that the prosecution did not believe Ivan Brown would help the prosecution, and did not call him themselves?
7. Where Maldonado was accused of selling protected tiger cubs to Ivan Brown of Brown Zoo is it ineffective assistance of counsel not to call Ivan Brown as a defense witness who would testify that the allegation is false? See Proffer of Ivan Brown at Doc. 12 of the 2255 Motion in the District Court.
8. Would a diligent attorney have interviewed the party to whom his client is alleged to have sold tiger cubs whether or not the Defendant suggested it?
9. Where the evidence in the record clearly states that Maldonado is accused of unlawfully selling tiger cubs to the Brown Zoo owned and operated by Ivan and Nancy Brown as husband and wife, may the District Court distract and deflect from the failure to interview or call as witnesses *either* Ivan or Nancy Brown by the straw man argument that Nancy Brown signed for the delivery of the lot of animals from the delivery driver John Finlay. Is the failure of defense counsel to interview or call either spouse who jointly owned the Brown Zoo excused by Nancy Brown signing for the delivery?
10. The Government claims in response that Defendant did not suggest Ivan Brown as a defense witness. Where Defendant is being prosecuted for selling tiger cubs to Ivan Brown is it ineffective assistance of counsel not to call Ivan Brown who would testify that it did not happen whether or not Defendant

suggested it? Isn't the purchaser an obvious witness?

11. Is it ineffective assistance of counsel to defend a prosecution under the Endangered Species Act without understanding the subject matter of the case? That is, where an attorney is not ethically permitted to take a case for which he is not qualified does this count as ineffective assistance of counsel?
12. Where Defendant was accused of selling tiger cubs protected under relevant provisions of the ESA was it ineffective assistance of counsel not to put on evidence and witnesses that the tiger cubs were not covered under the ESA, both as to type and because relevant restrictions apply to tigers in the wild, not bred in captivity? The express purpose of the ESA provisions is to maximize reproduction in the wild.
13. Where Defendant Maldonado sold his zoo to Jeff Lowe previous to the events at issue, was it ineffective assistance of counsel not to put on evidence and witnesses that Defendant Maldanodo no longer owned the G.W. Exotic Animal Park in Wynnewood, Oklahoma and its tigers at the time he allegedly "sold" animals he no longer owned.
14. Where the District Court believed that Maldonado testified that the November 2016 transaction "could have been" a sale, was it ineffective assistance of counsel not to put on evidence or witnesses that Maldonado did not own the animals in November 2016, accounting for his answer that the transaction "could have been" a sale and testified "I didn't sell anything and I didn't collect a dime for myself, no. It all went in [Mr. Lowe's] bank account"

Since the answer makes no sense except on remembering that Mr. Lowe had purchased G.W. Exotic Animal Park, was counsel required to follow up and ask what does that mean?

15. Does Maldonado's testimony that the transaction "could have been" a sale mean that Maldonado does not actually know because the transaction was between Jeff Lowe and Ivan Brown, not with Maldonado?

16. Does effective assistance of counsel universally require an attorney to work successfully with clients of different professional styles or experiences, whether the precision of accountants, stock brokers, or executives or field workers, farm workers, or zoo keepers? Is it ineffective assistance of counsel to be unable to adapt to cultural styles?

17. Was failing to explore testimony by delivery transport driver Finlay that Finlay gave money from the transaction to Maldonado "who put it in his bank account" – as the District Court believed in the May 6, 2024, Order – ineffective assistance of counsel where (1) Finlay could not know what Maldonado did with the money and was therefore his testimony was inadmissible under Rules 602 and 403 of the Federal Rules of Evidence"\c-4 and (2) since Maldonado sold the G.W. Exotic Animal Park to Lowe the testimony does not reveal the ultimate recipient of the money, nor who owned the animals sold, nor who was the principal in the transaction? Where money was "parked" is not competent evidence of who if anyone sold tiger cubs to Ivan Brown (if at all). In fact, Ivan Brown's definitive rejection that

Maldonado sold him tiger cubs is likely based on the fact that Maldonado is not the person who sold him any of the animals in that time period. It was someone else, like Jeff Lowe.

18. Where the question was whether a diligent attorney taking time to be familiar with the case and Maldonado's defense would have interviewed and called as a defense witness Ivan Brown – whom the prosecution did not call – about whether Defendant Maldonado did any of the things alleged by the prosecution, did the District Court err in focusing on the technicalities of Brown's affidavit rather than whether there was sufficient reason for diligent counsel to pursue calling Ivan Brown as a defense witness? Is the proper question whether the affidavit is admissible evidence in the record or whether counsel should have pursued Ivan Brown's testimony?
19. Where Ivan Brown's statement completely exonerates Defendant Maldonado in every respect on every element of the charged crimes under Counts 9, 11, 12, and 17, at least, and the question was whether a diligent attorney taking time to be familiar with the case and Maldonado's defense would have interviewed and called as a defense witness Ivan Brown did the District Court err in not finding prejudice to Maldonado and ineffective assistance of counsel by defense counsel failing to call Brown as a defense witness?
20. Did the District Court err in not treating the affidavit, technically correct or not, as a proffer and convene an evidentiary hearing?
21. Is there any aspect of the charges against Maldonado that Brown's proposed

testimony would not completely and totally refute, Brown being the one with whom Maldonado allegedly transacted?

22. Since Ivan Brown did not testify, must the District Court or this Court now dismiss Counts 9, 11, 12, and 17 as not proven on a failure of proof in the absence of Ivan Brown's testimony?

23. Where the District Court in considering ineffective assistance of counsel by referred to "The Government has provided sworn affidavits from Defendant's trial counsel, William Early and Kyle Wackenham," is this not *per se* ineffective assistance of counsel for attorneys to violate privileged attorney-client communications and attorney work product privilege?

24. Should the privileged statements be stricken from consideration in the case?

25. Should the violations of privilege by Maldonado's prior defense attorneys have led the District Court to question their statements on motivation?

26. Where the District Court analyzes that "More importantly, there is no indication that Defendant ever told his trial counsel that the alleged cub sales did not take place," did the District Court err because that communication would have to have been privileged attorney-client communications?

27. Does the attorney-client privilege belong to the client or the lawyer?

STATEMENT OF THE CASE

Defendant was tried before a jury on May 25, 2019 to April 2, 2019 with the Honorable Scott Palk presiding. Judgment was entered January 23, 2020, in the U.S. District Court for the Western District of Oklahoma. Maldonado appealed.

The same Judge Palk had previously presided over extensive civil but related litigation between animal rights gadfly Carole Baskin, including awarding Baskin a judgment of $1 million against Maldonado even though Baskin and Moldonado had no relationship and had never been in privity or interacted in any way except that Baskin systematically harasses all private zoos indiscriminately and purports to "rescue" tigers and lions through her activist organization "Big Cat Rescue" and had hired a man to infiltrate Maldonado's G.W. Exotic Animal Park, pretend to work for Maldanado, while actually spying on Maldonado, conspiring with external enemies of the Maldonado private zoo and generally sabotage the G.W. Exotic Animal Park. Engaging in corporate espionage, Baskin coordinated with government agencies to bring factually deficient and *ultra vires* investigations, audits, and citations. For these attacks upon Maldonado, Judge Palk awarded Baskin $1 million.

In other words, the criminal prosecution took place against a backdrop of Judge Palk's extensive exposure to the case and Palk's pre-judgment of the matters at issue. Judge Palk knew that Maldonado no longer owned G.W. Exotic Animal Park because of the $1 million civil judgment awarded in favor of Carole Baskin. Judge Palk knew that Maldonado could not have sold tiger cubs to Ivan and Nancy Brown that did not belong to Maldonado, but to the new owner of the G.W. Exotic

Animal Park, Jeff Lowe. Judge Palk knew that allegations that Maldonado sold animals from a private zoo Maldonado no longer owned would require testimony by the alleged purchaser Ivan and Nancy Brown, husband and wife, as to whom they contracted with (being Jeff Lowe, the new owner of the zoo) and the testimony of the new owner Jeff Lowe. Judge Palk knew that when Maldonado testified that the November 2016 transaction "could have been" a sale, this was because Maldonado no longer owned the G.W. Exotic Animal Park because Judge Palk had awarded Baskin a $1 million judgment against Maldonado. Judge Palk knew that Maldonado was not being evasive or coy, but accurately answering within the limits of his personal knowledge of any agreement between Jeff Lowe and the Brown Zoo operated by Ivan and Nancy Brown. Maldonado was clearly emphasizing that he did not know what Jeff Lowe and Ivan and Nancy Brown agreed to. Notably, John Finlay – not Maldonado – delivered a group of animals to the Brown Zoo. Maldonado did not.

In other words, an effective defense could easily have defeated the prosecution against Moldonado. But Moldonado did not receive an effective defense.

On January 16, 2024, Joseph Maldonado moved under 28 U.S.C. § 2255 to set aside, vacate, or correct sentencing on convictions of Counts 9 and 11 (selling certain types of tiger cubs born in the wild, which the tiger cubs in question where neither) and 12 and 17 (falsifying documents of the sale under the Lacey Act) of the Indictment in Criminal Case No. 18-cr-00227-SLP.

Maldonado specifically based his motion on ineffective assistance of trial

counsel for a number of reasons, including trial counsel's stern refusal to consult with or listen to anything on any topic from Maldonado, failure to understand or investigate the facts of the case, inability to understand the nuances of the Endangered Species Act, and failure and refusal to interview or call defense witnesses. As a result, trial counsel failed over Maldonado's objection to respond to false allegations, effectively conceding falsehoods made in his case.

Maldonado was accused of having Carole Baskin murdered. Small problem though. She was alive, and had not suffered any attempt of any kind on her life. Baskin's continued drama included allowing the false accusations to fester until it became untenable to continue to pretend. It became impossible to continue the buzz that she had been murdered when in fact she was perpetuating a hoax.

Adding to the drama and complexity, Joe Exotic and his private zoo of exotic animals G.W. Exotic Animal Park became the subject of a reality TV show "Tiger King" and a later series "Joe v. Carole" after her faked death became public and a curiosity. Such shows thrive on drama, twists and turns, and surprises.

After Maldonado sold the G.W. Exotic Animal Park to Jeff Lowe, Maldonado continued to work in transition for Jeff Lowe. But Maldonado consistently and repeatedly clashed with Lowe's employee Allen Glover. The two were in constant and extreme hostility, yelling at each other. Moldanado reports Allen Glover as being frequently intoxicated. When the topic arose of Maldonado wanting Allen Glover to leave the zoo, Allen Glover responded that he would return to North Carolina if someone would cover his $3,000 in expenses for the move. Maldonado

agreed to loan Allen Glover $3,000. Allen Glover agreed to repay the $3,000 to the zoo when he started receiving Social Security in North Carolina.

Yet the prosecutors alleged that Moldonado hired a man for murder-for-hire whom he could not stand (the feeling being mutual) and was constantly in conflict with, whom Moldonado accused of often drinking too much, in whom he placed no trust. These allegations should have been the subject of much laughter in the U.S. Attorney's Office before tossing them in the trash, that a person would hire one of his most hostile enemies to commit a murder for hire requiring skill, tact, discretion, and loyalty.

However, a tape recording emerged of Maldonado spinning a tale of how they would pretend to fight with Allen Glover and fire Allen Glover and then hire him back later and deny any involvement with actions by Glover. This was ambiguous at best because it never identified what the purpose of this might be, there being several possibilities. And none of the details ever happened. Jeff Lowe never fired Allen Glover. None of the events about purchasing burner cell phones ever happened. The disconnect between the conversation and any real-world event described in it renders it insufficient to overcome the possibility on a beyond a reasonable doubt standard that the conversation was simply farm hands joking or teasing the person recording the conversation (as being not trusted).

Yet defense trial counsel did not push back, oppose, or argue against these severe weaknesses of the prosecution. What should have been an easy win based on the absurdity of the allegations, was instead mishandled by not questioning them.

To complete the abbreviated "who's who" overview, John Finlay served as truck driver, specialized for the transport of animals with relevant transport vehicles. Finlay made two trips delivering animals from the zoo then owned by Jeff Lowe to Brown Zoo owned by both Ivan and Nancy Brown. Prosecutors and the Court improperly relied upon testimony by John Finlay who only drove the animal carrier truck and had no real of the transaction, in violation of Rule 602 of the Rules of Evidence, which requires personal knowledge to testify. As the driver of the transport of a group of animals, Finlay would not be privy to the nature of any supposed sale.

Finally, Maldonado attempted to get his attorneys to understand that under the Endangered Species Act, pertinent parts, the sale of tiger cubs born in captivity is not covered by the Act because that portion is geared toward encouraging reproduction in the wild and also that the type of tigers were not endangered under the application of the ESA. His attorneys did not understand the ESA and did not endeavor attempt to understand it.

SUMMARY OF THE ARGUMENT

The District Court significantly erred in a variety of ways in it is Order of May 6, 2024, Document 2, posted in Case 5:24-cv-00048-SLP denying relief under 28 U.S.C. § 2255. If the many errors may be explained simply, the District Court disregarded the denial of constitutionally-provided effective assistance of counsel as its own reason to grant relief under 28 U.S.C. § 2255. The District Court judge

instead decided the Petition on the basis of whether harmful error was proven beyond a reasonable doubt to have occurred.

Thus, Moldonado's Petition was decided on the basis of whether mistakes of his counsel would have incontrovertibly changed the outcome of the trial on the affected Counts in totality resulting in an acquittal, rather than on the basis of whether Moldonado was denied a fair trial as required under U.S. Constitutional requirements.

Because the question of an appeal is whether the trial court erred, it is useful here to analyze the Court's Order point by point:

A. At the top of page 11, the Order reveals its fundamental error: The trial judge asserts that

> "In any event, the motion again ignores the most fundamental issue: that this proposed testimony is contrary to the theory of defense presented at trial and supported by Defendant's testimony. Thus, Defendant has failed to demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

But the trial court restates exactly the meaning of ineffective assistance of counsel. Presenting a deficient "theory of defense" and failing to support a proper "theory of defense" by the facts, evidence, and witnesses, ***is the ineffective assistance of counsel.***

It is difficult to know what to make of this. What "unprofessional errors" might we be considering if not a poor choice in light of the facts of

the "theory of the defense presented at trial?" Wearing a wrinkled suit? Commenting on the prosecution's fashion choices? Talking over the judge? What unprofessional errors would matter other than failing to present and prove a convincing theory of the defense?

Is not choosing a persuasive "theory of defense" the *sine qua non"* of effective assistance of counsel?

Of equal weight is supporting the most effective "theory of defense" with persuasive evidence. Counsel suggests that despite frequent concerns about cumulative evidence, no testimony or document is ever cumulative until the point sought to be proved is believed and accepted beyond all reasonable doubt. If one more witness or one more exhibit might change the jury's conclusion to reach certainty, then the additional witness or exhibit is never cumulative or never "enough." Throwing a minimalist presentation up against the wall and hoping something sticks is not effective assistance of counsel. That is, hope is not a plan.

Thus, the failure to provide sufficient evidence to support the theory of defense is also *per se* ineffective assistance of counsel.

B. In fact, however, at the top of Page 3, the District Court cites to the Transcript Tr. at 959:23-960:14 where Moldonado testified that the November 2016 transaction "could have been" a sale."

However, the trial Court plainly erred in categorizing this as "conceding" the point rather than clarifying that Moldonado lacked

personal knowledge. The Court could not interpret the statement as meaning that there was a sale rather than clarifying that ***the prosecution would need to ask the people actually involved – Lowe and the Browns.***

C. At the bottom of page 2, the Order claims that "when asked about the two cubs on direct examination, Defendant did not dispute that the Brown's Zoo transactions were sales." But in fact --

D. In the immediate next sentence at the top of page 3, the Order admits that

> "Instead, he claimed that the zoo – and by extension, Mr. Lowe – sold the cubs. See id. at 961:6-8 ("Jeff, the owner of the zoo, sold those."); *id.* at 963:8-9 ("I didn't sell anything and I didn't collect a dime for myself, no. It all went to [Mr. Lowe's] bank account.").

Thus the trial Court contradicted itself, in the official Order, in the reasons for its Order denying the 28 U.S.C. § 2255 Petition. Maldonado *did not* concede that the transaction was a sale. The trial Court knew that. The trial Court based its Order on the above quote, in part.

Therefore, the Court knew that it is false that effective assistance of counsel would not have fully explored and proven that the prosecutor's assumptions and guesses were inaccurate.

Furthermore, the trial Court knew and based its official Order upon the fact that the Defendant did not concede that there were any sales. In

context, the wording of Maldonado's testimony must unavoidably mean: He did not know. They could have been sales, but he doesn't know.

E. At the bottom of page 2, the Order concedes "At trial, the defense presented evidence that the Brown's Zoo sales occurred ***after Jeff Lowe assumed ownership of GWEAP.*** "

F. At the bottom of Page 1, the Order recites that *(emphases added):*

> "On November 16, 2016, GWEAP employee John Finlay was given a delivery form for one ***of the zoo's*** tiger cubs. He loaded the animal into his car, drove to Illinois, ***and delivered the club to the Brown's Zoo, which was operated by Ivan and Nancy Brown.***"

In Footnote 1, the District Court acknowledged that Finlay testified that he did not know who filled out the forms "for the two cub sales at issue here." (Moreover, in fact, the documents show a group of animals were delivered each time.)

However the trial Court recites, believed, and decided on the basis of the fact that the tiger cubs were *THE ZOO's* tiger cubs – not Maldonado's property.

But the trial Court knew that Moldonado at that point in time did not own "THE ZOO" – Jeff Lowe did.

Moroever, the trial Court recites, believed, and decided on the basis of the fact that *both* Ivan *and* Nancy Brown owned and operated Brown's zoo.

Therefore, the trial Court acknowledges actually knowing that the transaction was between the G.W. Exotic Animal Park then owned by Jeff Lowe and Ivan and Nancy Brown.

Therefore, the conviction of Maldonado under Counts 9, 11, 12, and 17 must be dismissed where there was no competent evidence of the sale, where neither Ivan or Nancy Brown nor Jeff Lowe were called by ineffective defense counsel – nor by the prosecution – to testify to this transaction.

G. Ivan Brown – concededly operating Brown's Zoo *jointly* with Nancy Brown who was present and signed for delivery – proferred that he would testify that there was no sale and the transaction was not with Maldonado. The trial Court quibbled over the technical form of Brown's affidavit, but did not hold an evidentiary hearing or further inquire, nor direct that the technical errors be addressed before proceeding.

H. The Order at the bottom of Page 7 and top of Page 8 that

> "With respect to prejudice, for example, Defendant makes the bare assertions that Mr. Brown's proposed testimony would have 'negated the accusations contained in courts 9 and 11," and 'negated the prosecutor's proof of counts 12 and 17."

However, this and related statements are error. Verbosity is not the legal standard. The proof of prejudice is so obvious and clear that it can be stated succinctly and quickly. If the alleged transaction was

between the owner of the G.W. Exotic Animal Park and the Brown Zoo owned and operated by Ivan Brown and Nancy Brown, no prosecution could be sustained without calling the owner of the Park – then Jeff Lowe – and at least one of the Browns. The Court should have dismissed the counts and not allowed them to go to the jury. It does not take many words to say decisively that the two contracting parties are necessary witnesses to proving anything about that transaction.[1]

I. Similarly, the Court on pages 8 to 9, cites to privileged statements of Moldonado's attorneys and their team and investigators – *per se* ineffective assistance of counsel if not worse. However, it is so abundantly obvious that the attorneys would need to interview the contracting parties (Lowe and the Browns) concerning the transactions of which Maldonado was charged that the client did not need to tell the attorneys how to do their jobs. Whatever witnesses Maldonado suggested were obviously other than the parties to the main transaction at the heart of those criminal counts.

J. The Order near the top of page 9 suggests that privileged communications should appear on the record. This is clearly untrue.s

[1] It is true that one or all of those parties might have invoked the Fifth Amendment but the remaining evidence could not have convicted Maldonado.

K. There was no competent evidence that selling non-endangered tigers born in captivity are governed by the Endangered Species Act, nor did ineffective defense counsel challenge that assumption.

L. Finally, the trial Court highlights the error in the denial of the Petition succinctly:

> "The jury, unconvinced by this testimony, found Defendant guilty on all nineteen remaining charges, including the four stemming from the Browns Zoo sales."

But this is the wrong standard, and therefore reversible error. The question is that through ineffective assistance of counsel, the Defendant and the jury was deprived of an effective and complete presentation. Therefore, it is irrelevant whether the jury convicted on an inadequate presentation and a failure to call pertinent witnesses.

ARGUMENT

A. STANDARD OF REVIEW

A court of appeals reviews *de novo* matters of interpretation of law. *See United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014). Yet Courts are urged to interpret laws, if possible and reasonable, so as to avoid constitutional invalidity. For example, an interpretation that only the Secret Service can declare a restricted area under 18 U.S.C. §1752 (which did not occur on or about January 6, 2021) is required to save the statute from being void for vagueness and from reaching an

absurd result.

The standard of review for exclusion of Defendant's evidence or inclusion of Government evidence objected to is an abuse of discretion standard. However, discretion is not unguided but requires faithfulness to law and logic.

The standard of review for challenges to criminal convictions based on the sufficiency of the evidence is: "considering the evidence in the light most favorable to the government, the court seeks to determine 'only whether any reasonable jury could find guilt beyond a reasonable doubt.'" *United States v. Harrison*, 931 F.2d 65, 71 (D.C. Cir. 1991); *U.S. v. Elias*, 976 F.2d 1445 (D.C. Cir. 1992).

However, Maldonado contends that where the Government has offered no evidence on a particular point necessary to a resulting conviction, reversal is mandatory without exception, deference, or further analysis. For example, where the Government's evidence does not actually contradict or meet the Defendant's evidence, but passes like ships in the night, or is irrelevant to an element that must be proven, then it must be treated as a complete absence of evidence.

Legal errors in the sentencing process are reviewed de novo. *Thorne v. United States*, 46 A.3d 1085, 1089 (D.C. 2012). "We must be satisfied that the defendant's sentence 'reflect[s] an individuated judgment as to the balance of deterrence and rehabilitation applicable in [his] case.'" *Id.* (citing *Coles v. United States*, 682 A.2d 167, 170 (D.C. 1996)).

B. GOVERNING LAW

A federal prisoner may collaterally attack his conviction if, inter alia, his

"sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). The prisoner may seek relief for a violation of his Sixth Amendment rights by alleging he received ineffective assistance of counsel. See *United States v. Cockerham*, 237 F.3d 1179, 1181 (10th Cir. 2001). The well-established framework set forth in *Strickland v. Washington,* 466 U.S. 668 (1984), governs Defendant's ineffective assistance of counsel claim.

To establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation was deficient because it "fell below an objective standard of reasonableness," and (2) that his counsel's "deficient performance prejudiced the defense." Id. at 687–88. With respect to the first prong, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *United States v. Holder*, 410 F.3d 651, 654 (10th Cir. 2005). To establish prejudice, a defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." See *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687).

As to prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 693). The defendant bears the burden to establish both deficiency and prejudice. See *Weaver v. Massachusetts*, 582 U.S.

286, 299 (2017)

However, the Court's reliance on *Strickland* where a convicted murder sought the same state-level collateral attack as here 28 U.S.C. § 2255 is misplaced. There the U.S. Supreme Court stressed the diligent and effective advocacy of Strickland's attorney in aggressive pre-trial motions until (best crystallized by the Syllabus) "He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders" and counsel felt hopeless about being able to save his client from the death penalty.

Furthermore, while the Defendant Strickland represented he had no significant criminal history, in fact he did. The High Court recited that he waived a Pre-Sentence Investigative Report because the PSIR would have emphasized and amplified the gruesome nature of Strickland's crimes and the fact that his criminal history was more extensive than Strickland argued on sentencing to the Court. Accordingly, "Counsel decided not to present, and hence not to look further for, evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." And: "Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's 'rap sheet.'" *Id.*

Thus *Strickland* does not present ineffective assistance of counsel at all but a very vigilant and painstaking representation walking through a mine field not of

counsel's making. The only similar and relevant circumstance was that Strickland proferred in that 14 friends and family proffered that they would have testified favorably as character witnesses. But the trial judge (not viewed as harsh in sentencing) had already indicated that on the evidence of the crimes character evidence would not alter a judgment of death.

The majority opinion implies that an evidentiary hearing might be appropriate. And:

> * * * The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F.2d 1243 (1982).
>
> The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of *Rose v. Lundy,* 455 U. S. 509 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is "a matter of comity, rather than a matter of jurisdiction," and hence admitted of exceptions. The court agreed with the District Court that this case came within an exception to the mixed petition rule. 693 F.2d at 1248, n. 7.
>
> Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Id.* at 1250. The court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. *Id.* at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective

> because counsel breached his duty to investigate nonstatutory mitigating circumstances.
>
> The court agreed that ***the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options***. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he amount of pretrial investigation that is reasonable defies precise measurement." *Id.* at 1251. Nevertheless, putting guilty plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial. If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. *Id.* at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. "

Strickland, 466 U. S. at 679 – 680

> For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U. S. 759, 397 U. S. 771, n. 14 (1970).
>
> * * *
>
> **In giving meaning to the requirement, however, we must take its purpose -- to ensure a fair trial -- as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.**

Strickland, 466 U. S. at 686 *(emphasis added).*

It might be noted that the U.S. Supreme Court after exploring with difficulty the various options and approaches eschews formulaic or technical standards or any

presumption of regularity and focus instead on pure substance: Was the trial in fact fair? None of the hostility to the complaint appears in *Strickland*.

Searching for clear rules although warned by precedent we are unlikely to find them, we belabor a little more from *Strickland* than we might otherwise do:

> These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.,* ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed.1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. *See United States v. Decoster,* 199 U.S.App.D.C. at 371, 624 F.2d at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. ***The purpose is simply to ensure that criminal defendants receive a fair trial.***

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Strickland, 466 U. S. at 688-689 *(emphasis added).* So again the governing principle is that the criminal Defendant – in fact – actually received a fair trial.

Strickland also touches on the counter-vailing concern that "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence …." However, what Maldonado complains of is his disagreements <u>*before and during*</u> the actual trial – not second-guessing after the fact. Maldonado complains that before and throughout the trial his trial counsel refused to listen or consult, depriving him of any meaningful participation in his defense. This is not the benefit of hindsight. Moldonado complained of his trial counsel's minimalistic, uninformed, and ill-targeted defense of him as wrong at the time. He argued at the

time with trial counsel. At the time, counsel flat refused to listen to him even "listen" as meaning merely understanding the facts, details, and nature of his case.

In *Harrington v. Richter*, 562 U.S. 86, 104 (2011), the High Court dealt with much more obscure claims that Richter

> "claimed his counsel was deficient for failing to present expert testimony on serology, pathology, and blood spatter patterns, testimony that, he argued, would disclose the source of the blood pool in the bedroom doorway. This, he contended, would bolster his theory that Johnson had moved Klein to the couch. He offered affidavits from three types of forensic experts…."

This possible evidence is far closer to actually exonerating evidence but also a few steps removed in terms of what expert witnesses to hire and call and what they might have shown. Richter re-filed in federal court and "The Court of Appeals granted rehearing en banc and reversed the District Court's decision. See *Richter* v. *Hickman*, 578 F. 3d 944 (2009)." Ultimately, the Supreme Court explained:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." 466 U. S., at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.,* at 689. The challenge's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.
>
> With respect to prejudice, a challenge must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* at 694. It is not

enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687.

28 U.S.C. § 2255 provides that:

> **(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> **(b)** Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> **(c)** A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> **(d)** An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> **(e)** An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

> **(f)**A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> > **(1)** the date on which the judgment of conviction becomes final;
> >
> > **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> >
> > **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

C. APPELLANT ENTITLED TO 28 U.S.C. § 2255 RELIEF

An Accused has the right "to have the Assistance of Counsel for his defense." U.S. Const. amend VI. This is the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The purpose of this right is to allow "the accused to require the prosecution to survive the crucible of meaningful adversiral testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984); See also, *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

The Supreme Court has emphasized the importance of fact development in criminal cases:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the

> system depend on full disclosure of all the facts within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974). Such fact development cannot take place without investigation. Thus, defense counsel's duty to investigate rests on the recognition of pretrial investigation as "perhaps, the most critical stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). *See, Powell v. Alabama*, 287 U.S. 45, 57 (1932). Adversarial testing requires thorough exploration of defenses as to both guilt and potential penalties and also investigation into the prosecution's case. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). To provide effective assistance of counsel consistent with the Sixth Amendment, defense counsel has an independent duty to investigate the case.

D. APPELLANT RELIES UPON SUMMARY OF ARGUMENT

The trial Court's Order is unusually specific as to the matters at issue here and Appellant argues that the error where the trial Court was misguided are apparent. Therefore, this Brief could either chronicle them in detail in the Summary of the Argument or in the Argument. Since they were presented in the Summary, counsel does not feel it is good to be purely repetitious.

E. APPEALS COURT MUST CONSIDER WHAT IS NOT IN THE RECORD

Although it is not easy, where Defendant Maldonado challenges ineffective assistance of counsel for refusing to investigate Maldonado's case and refusing to consult with Maldonado about his defense (insisting that the attorney will try the

case his way and refusing to listen to the Defendant) and for failing to call witnesses in Maldonado's defense, the record would not be expected to contain what ineffective counsel failed to include. The *gravamen* of the Petition is the testimony his counsel failed to present and evidence the attorney failed to submit in his defense. While the Court must consider the context and other evidence, the mere failure of certain witnesses and evidence to show up in the record is the point.

F. IVAN BROWN IS A NECESSARY WITNESS

Where Defendant Maldonado is charged in Counts 9, 11, 12, and 17 of the Indictment with selling tiger cubs to Ivan and Nancy Brown and then falsifying documents about those transactions, Ivan Brown or Nancy Brown are a necessary and indispensable witness. That is, the Court could not sustain a conviction of Maldonado without their testimony.

G. EFFECTIVE COUNSEL WOULD NOT NEED TO BE TOLD TO CALL IVAN BROWN

A diligent attorney have interviewed the party to whom his client is alleged to have sold tiger cubs whether or not the Defendant suggested it. Much of the trial Court's Order is based on whether or not Maldonado explicitly told his attorneys and investigators to interview and call Ivan Brown. This is upside down. While clients can be enormously consequential in their own defense, and can provide substantial information, attorneys play a crucial role in understand what evidence and which witnesses will be important and relevant for the defense against the charges a client faces. It is untenable that counsel should need to be told that the actual parties allegedly entering into the transaction for the sale of tiger cubs are obvious and essential witnesses.

Without Ivan Brown's testimony, the charges against Maldonado in Counts 9,

11, 12, and 17 be dismissed as unproven.

H. NO LEGITIMATE LITIGATION STRATEGY FOR NOT CALLING WITNESSES

There was no possible legitimate litigation strategy for Maldonado's counsel not to call Ivan Brown as the core central witness because counsel knew that the prosecution was not calling Brown. Therefore, Brown did not believe Ivan Brown would help the prosecution. Against this, the value of Brown cannot be overcome.

I. COMPETENCE IN DEFENDING AGAINST THE ENDANGERED SPECIES ACT AFFECTS EFFECTIVE ASSISTANCE OF COUNSEL

While no or almost no attorneys are experienced in all areas of the law, an attorney may not take on a case which requires knowledge or expertise the attorney does not have. Implied in Rule 2.4 of Oklahoma's Rules of Professional Conduct. It is ineffective assistance of counsel to defend a prosecution under the Endangered Species Act without understanding the highly-specialized subject matter.

Where Defendant was accused of selling tiger cubs protected under relevant provisions of the ESA it was ineffective assistance of counsel not to put on evidence and witnesses that the tiger cubs were not covered under the ESA, both as to type and because relevant restrictions apply to tigers in the wild, not bred in captivity? The express purpose of the ESA provisions is to maximize reproduction in the wild.

J. EMPHASIZING THAT DEFENDANT HAD SOLD HIS ZOO

Where Defendant Maldonado sold his zoo to Jeff Lowe previous to the events at issue, it was ineffective assistance of counsel not to put on evidence and witnesses that Defendant

Maldanodo no longer owned the G.W. Exotic Animal Park and its tigers at the time he allegedly "sold" animals he no longer owned.

K. "COULD HAVE BEEN A SALE" MEANS LACK OF KNOWLEDGE

Where the District Court believed that Maldonado testified that the November 2016 transaction "could have been" a sale, it was ineffective assistance of counsel not to put on evidence or witnesses that Maldonado did not own the animals in November 2016, accounting for his answer that the transaction "could have been" a sale and testified "I didn't sell anything and I didn't collect a dime for myself, no. It all went in [Mr. Lowe's] bank account." Since the answer makes no sense except on remembering that Mr. Lowe had purchased G.W. Exotic Animal Park, counsel required to follow up and ask what does that mean? Counsel was required to emphasize that it meant Maldonado had no personal knowledge.

L. UNSOPHISTICATED CLIENTS ARE ENTITLED TO THE SAME LEGAL ASSISTANCE AS OFFICE WORKERS

effective assistance of counsel requires attorneys to work successfully with clients of different professional styles or experiences, whether the precision of accountants, stock brokers, or executives or field workers, farm workers, or zoo keepers. Is it ineffective assistance of counsel to be unable to adapt to cultural styles.

M. LACK OF PERSONAL KNOWLEDGE OF JOHN FINLAY

Failing to explore testimony by delivery transport driver Finlay that Finlay gave money from the transaction to Maldonado "who put it in his bank account" was ineffective assistance of counsel where (1) Finlay could not know what Maldonado did with the money and was therefore his testimony was inadmissible under Rules 602 and 403 of the Federal Rules of Evidence and (2) since Maldonado sold the G.W. Exotic Animal Park to Lowe the testimony does not reveal

the ultimate recipient of the money, nor who owned the animals sold, nor who was the principal in the transaction? Where money was "parked" is not competent evidence of who if anyone sold tiger cubs to Ivan Brown (if at all). In fact, Ivan Brown's definitive rejection that Maldonado sold him tiger cubs is likely based on the fact that Maldonado is not the person who sold him any of the animals in that time period. It was someone else, like Jeff Lowe.

N. TECHNICAL COMPLIANCE OF AFFIDAVIT NOT AN EXCUSE TO ADEQUATE INQUIRY

The District Court erred in focusing on the technicalities of Brown's affidavit rather than whether there was sufficient reason for diligent counsel to pursue calling Ivan Brown as a defense witness? Is the proper question whether the affidavit is admissible evidence in the record or whether counsel should have pursued Ivan Brown's testimony? Similarly, the Court should have inquired further as to Ivan Brown's proffer of testimony, ordering a proper affidavit if any would be provided and/or testimony.

The District Court erred in not finding prejudice to Maldonado and ineffective assistance of counsel by defense counsel failing to call Brown as a defense witness. The District Court erred in not treating the affidavit, technically correct or not, as a proffer and convene an evidentiary hearing.

O. VIOLATION OF PRIVILEGES

Where the District Court in considering ineffective assistance of counsel referred to "The Government has provided sworn affidavits from Defendant's trial counsel, William Early and Kyle Wackenham," is this not *per se* ineffective assistance of counsel for attorneys to violate privileged attorney-client communications and attorney work product privilege? The

privileged statements be stricken from consideration in the case? The violations of privilege by Maldonado's prior defense attorneys should have led the District Court to question their statements on motivation.

Moreover, the District Court analyzed that "More importantly, there is no indication that Defendant ever told his trial counsel that the alleged cub sales did not take place." However, the District Court erred because that communication would have to have been privileged attorney-client communications. The attorney-client privilege belongs to the client not the lawyer.

CONCLUSION

For all the foregoing reasons, Appellant Joseph Maldonado respectfully requests that the Court grant his Petition for relief under 28 U.S.C. § 2255.

Dated: October 3, 2024

Respectfully Submitted,

By: */s/ Roger Roots*
Roger Roots
John Pierce Law, P.C.
21550 Oxnard Street
3rd Floor PMB #172
Woodland Hills, CA 91367
(775) 764-9347
rroots@johnpiercelaw.com
Counsel for Petitioner Joseph Maldonado-Passage a/k/a Maldonado a/k/a Joe Exotic

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief

complies with the type-volume limitation because it contains 9,241 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(a)(1), of the permissible 13,000 words. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: October 3, 2024

/s/ Roger Roots
Roger Roots

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on October 3, 2024, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: October 3, 2024

/s/ Roger Roots
Roger Roots