

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD LUGO

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD LUGO
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QUESTION PRESENTED

1. Whether Appellate Counsel's ineffectiveness deprived petitioner of his right to his direct appeal.

LIST OF PARTIES

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

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28 U.S.C. § 2255(a)

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/order below.

ORDER/OPINION BELOW

The order/opinion of the United States court of appeals appears at Appendices A and B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 9, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 12, 2018, and a copy of the order denying rehearing appears at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

FIFTH AMENDMENT

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

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253(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 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).

28 U.S.C. § 2255(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.

STATEMENT OF THE CASE

Petitioner asserts that appellate counsel's defective performance had a prejudicial effect on his right to direct appeal, resulting in the denial of his right to have a direct appeal perfected by adequate counsel. Thereby depriving him of his right to direct appeal. Upon making this substantial showing of the denial of his constitutional right to direct appeal, the Second Circuit had a responsibility to issue a certificate of appealability, so that this matter could have been properly resolved within the mandates of the United States Constitution.

The district court had improvidently denied petitioner's motion under 2255 for the reinstatement of his direct appeal, wherein appellate counsel's failure to perfect the appeal had denied him of the constitutional right to a direct appeal. As such, for the district court to have denied petitioner's 2255 motion after finding that appellate counsel was ineffective in that counsel's performance was defective but that such deficiency was not prejudicial, the district court had erroneously found that prejudice was not presumed under such circumstances.

That court stated that "[m]ore important, [petitioner was] unable to identify any meritorious claim that his counsel should have pressed on appeal." However, at sentencing petitioner had objected to the court applying the preponderance of the evidence analysis in finding him culpable for the offense of discharging a firearm in furtherance of a crime of violence in violation of 18 U.S.C. 924(c)(1)(A)(iii), where the jury's verdict did not support that finding. Petitioner had preserved this issue for appellate review, however appellate counsel did not raise the issue.

After petitioner had made a substantial showing of the deprivation of his constitutional right to direct appeal to the Second Circuit, that court had a responsibility to issue a certificate of

appealability so that the matter of petitioner being denied his right to direct appeal could be properly addressed.

REASONS FOR GRANTING THE WRIT

Petitioner pointed out to the Second Circuit that the district court acknowledged that “a petitioner is not required to ‘demonstrate the merit of a hypothetical appeal’ in order to restore his direct appeal.” The Second Circuit in *Carranza v. United States*, 794 F3d 237, 241 (2d Cir. 2015), held that “failure to file an appeal or failure to perfect an appeal deprives the defendant of more than a fair judicial proceeding; that deficiency deprives the defendant of the appellate proceeding altogether.” Therefore, where counsel completely forfeits the appellate proceeding, “‘prejudice will be presumed’ ” and the “‘defendant is entitled to a new appeal without showing that his appeal would have likely merit.’ ” *Id.*, quoting *Campusano v. United States*, 442 F3d 770, 773 (2d Cir. 2006).

The right to direct appeal has been implemented in the federal system, which is a right that is made available to persons, like petitioner, who has been subjected to a “District Court’s judgment of conviction in a criminal case.” *Rodriguez v. United States*, 395 U.S. 327, 329-30 (1969)(“[A]ppeal from a District Court’s judgment of conviction in a criminal case [] is ... a matter of right.”), quoting *Coppedge v. United States*, 369 U.S. 438, 441 (1962). The right to direct appeal is no dependent on whether the appellant would be successful on appeal, therefore, the deprivation of this right is not subject to the harmless error analysis. *Rodriguez*, 395 U.S. at 330. Moreover, “the appellant is entitled to aid of counsel unless he insists on being his own.” *Hardy v. United States*, 375 U.S. 277, 278.

Since petitioner was supposedly represented by counsel, he had a guaranteed right to have effective assistance of counsel on his appeal. *See Kimmelman v. Morrison*, 477 U.S. 365, 377 (1969)(Petitioner “is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the [appeal] is fair.”); *Strickland v. Washington*, 466 U.S. 668, 685 (1984)(“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results.”).

The district court held that since petitioner could not identify any meritorious issues for counsel to raise on appeal, he had not established that counsel’s deficient performance had amounted to that of prejudice. However, it is the consensus that the denial of one’s right to direct appeal is not contingent upon the merits of any claim that counsel could have raised that would have resulted in a different outcome. *See Gomez v. United States*, 2013 U.S. Dist. LEXIS 43475 (Appellate counsel Uzmah Saghir’s performance “fell below an objective standard of reasonableness” resulting in dismissal of appeal. Relying on Second Circuit’s holding in “*McHale v. United States*, 175 F3d 115, 119 (2d Cir. 1999)(citing *Rodriguez v. United States*, 395 U.S. 327, 330 (holding that petitioner need not show likelihood of success on appeal to show prejudice because, regardless of merits, he has been deprived of right to appeal.”)).

Direct appeal is a matter of right that is an extension of the adversarial process. So much so that petitioner was entitled to representation by competent counsel on direct appeal. *See Restrepo v. Kelly*, 178 F3d 634, 639 (2d Cir. 1999)(“ ‘The right to be represented by counsel on direct appeal … is among the most fundamental of rights.’ [A]ctual or constructive denial of the

assistance of counsel' ... in the first appeal ... is constitutional error.") Quoting *Penson v. Ohio*, 488 U.S. 75, 84-85, 88 (1988).

Petitioner asserts that appellate counsel's defective performance deprived him of his right to direct appeal as a matter of law since it denied actual access to the "appellate proceeding altogether." The issue whether counsel's deficient performance warrants the presumption of prejudice is itself "debatable amongst jurists of reason." As such, the Second Circuit had a responsibility to issue a certificate of appealability since the appeal "deserved encouragement to proceed further," wherein petitioner "has made a substantial showing of the denial of his constitutional right" to have a direct appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Buck v. Davis*, 580 U.S.____, (2017); *Jae Lee v. United States*, 582 U.S.____ (2017).

CONCLUSION

The petition for a writ of certiorari should be granted.

July 6, 2018

Respectfully submitted,



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