

18-6593
No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

Supreme Court, U.S.
FILED

SEP 07 2018

OFFICE OF THE CLERK

SIGIFREDO MOLINA-VARELA - Petitioner,

v.

UNITED STATES OF AMERICA - Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Sigifredo Molina-Varela
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QUESTION PRESENTED

- I. DID THE DEFENSE COUNSEL'S FAILURE TO FILE A MOTION FOR SEVERANCE CREATE A SIGNIFICANT PREJUDICE AGAINST THE PETITIONER THEREBY CONSTITUTING INEFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT.

LIST OF PARTIES

1. United States of America
2. Sigifredo Molina-Varela

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT**

PRAYER

Your Petitioner, Sigifredo Molina-Varela, respectfully prays that a writ of certiorari be issued to review the unpublished Opinion of the United States Court of Appeals for the Tenth Circuit issued June 12, 2018. The Court's mandate issued on August 6, 2018.

OPINION BELOW

On June 12, 2018, the United States Court of Appeals for the Tenth Circuit entered its Order and Judgement denying Molina's appeal of the United States District Court for the District of Wyoming's denial of Molina's motion pursuant to 28 U.S.C. § 2255. United States v. Molina-Varela, No. 17-8068 (10th Cir. 2018). On August 6, 2018, the mandate for this case issued. Copies of both documents are provided as Appendix A.

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates Amendment VI to the Constitution of the United States, which provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense. At issue here, specifically, is Molina's right to **effective** assistance of counsel at the trial stage.

STATEMENT OF THE CASE

Mr. Molina was indicted in the Federal District of Wyoming on January 15, 2013. Following a Jury Trial, Molina was convicted of Conspiracy to Distribute a Controlled Substance, Methamphetamine, in violation of 21 U.S.C. §§ 846, and 841(a)(1) and (b)(1)(A) as well as Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c) (1)(A).

The five-day jury trial began on May 8, 2013. Prior to trial, Molina's defense counsel filed a motion in limine on May 6, 2013, asking the district court to exclude Molina's confession. The motion was heard outside of the presence of the jury on the first day of trial, and at the commencement of the second day of trial, the Court ruled that Molina's confession was admissible. (see: Case No. 2:13-CR-0004 (D.Wy. 2013)).

On July 26, 2013, after being found guilty, Molina was sentenced to 120-months imprisonment on the distribution count and 60-months on the fire-arm count to run consecutive to the distribution sentence for a total term of imprisonment of 180-months. The district court entered the Judgement and Commitment on July 29, 2013. (Id.).

Molina filed a timely notice of appeal in the Tenth Circuit Court of Appeals, challenging the trial court's denial of his motion to suppress inculpatory statements made to law enforcement officers after his arrest. (see: United States v. Molina-Varela, 576 Fed. App'x. 771 (10th Cir. 2014)).

The Tenth Circuit affirmed the lower court's decision on August 13, 2104. (Id.).

A petition for Writ of Certiorari to this Court was filed on or about October 23, 2014. This Court denied same on December 1, 2014. (see: Varela v. United States, 135 S.Ct. 733 (2014)).

Molina then filed a pro se Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on December 11, 2015, arguing various grounds of ineffective assistance of counsel. (see: Case No. 2:15-CV-002233-SWS (D.Wy. 2017)). The petition was denied on August 16, 2017. (Id.).

An application for Certificate of Appealability (COA) was filed on

29 August, 2017. The Tenth Circuit denied Molina's application for COA on 12 June, 2018, with a mandate following on 6 August, 2018. (see: Case No. 17-8068 (10th Cir. 2018)).

The instant petition follows.

STATEMENT OF FACTS

The following statement of facts is taken from the Tenth Circuit's Order and Judgement:

Mr. Sigifredo Molina-Varela went to trial with his wife as a codefendant on criminal charges of conspiracy and possession of a firearm in furtherance of a drug felony. 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846; 18 U.S.C. § 924(c)(1)(A). Mr. Molina-Varela was convicted on these charges and unsuccessfully moved to vacate his conviction based on ineffective assistance of counsel. He appeals, arguing that his trial attorney was ineffective by failing to move for severance. We reject this argument.

In his motion to vacate, Mr. Molina-Varela alleged that his trial attorney had failed to file any substantive pretrial motions. There, however, Mr. Molina-Varela did not identify any motions that he thought should have been filed. He waited to do so until his reply brief, where he identified eight types of motions that he thought should have been filed. One of these was a motion for severance. But even in his reply brief, Mr. Molina-Varela did not explain to the district court why his attorney should have filed a motion for severance. Thus, a threshold issue is whether Mr. Molina-Varela forfeited the argument in district court. For the sake of argument, we may assume that the issue was preserved.

If the issue had been preserved, we would consider whether Mr. Molina-Varela had shown ineffective assistance of trial counsel. To prevail,

Mr. Molina-Varela had to prove that his attorney's representation was deficient and prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). Representation is deficient if it falls "below an objective standard of reasonableness." Id. at 688.

Objective reasonableness is a "highly deferential" standard. Grant v. Royal, 886 F.3d 874, 903 (10th Cir. 2018) (quoting Byrd v. Workman, 645 F.3d 1159, 1168 (10th Cir. 2011)), applic. for reh'g. filed (May 23, 2018) (No. 14-6131). Under this standard, we engage in two presumptions. First, we presume that Mr. Molina-Varela's trial counsel provided adequate assistance and acted reasonably in exercising professional judgment. Id. Second, we presume that in a conspiracy trial, the alleged co-conspirators should be tried together. United States v. Clark, 717 F.3d 790, 817 (10th Cir. 2013); United States v. Pursley, 577 F.3d 1204, 1215 (10th Cir. 2009). These dual presumptions preclude relief on the ineffective-assistance claim.

If Mr. Molina-Varela's attorneys had moved for a severance, they would have had to overcome the presumption favoring a joint trial on the conspiracy charges. In the face of this presumption, Mr. Molina-Varela does not

- * tell us how his trial attorney could have overcome this presumption or
- * identify any prejudice from a joint trial with his wife.

Mr. Molina-Varela contends that severance was appropriate because

- * he had left the conspiracy more than a year prior to his arrest and
- * events post-dating his withdrawal from the conspiracy should not have been used against him.

But Mr. Molina-Varela confessed that he had received shipments as part of the conspiracy only about three months prior to arrest. In light of this

confession, Mr. Molina-Varela's trial counsel could reasonably have viewed a motion for severance as futile.

Mr. Molina-Varela argues that he was under the influence of drugs while confessing. But his attorney had already argued unsuccessfully for suppression of the confession on this basis. In light of the district court's decision not to suppress the confession, the trial attorney could reasonably have decided not to move for a severance. As a result, we conclude that Mr. Molina-Varela has not shown that his attorney's representation was deficient.

BASIS OF JURISDICTION IN THIS COURT

Pursuant to 28 U.S.C. § 1254(1), this Court shall have jurisdiction over the decision of the United States Court of Appeals for the Tenth Circuit in the matter of United States v. Sigifredo Molina-Varela, No. 17-8068 (10th Cir. 2018) (unpubl.), a copy of which appears at Appendix

BASIS FOR GRANTING THE WRIT

The Sixth Amendment to the Constitution of the United States entitles a criminal defendant to counsel. Counsel must be effective for that constitutional right to be satisfied. (see: Washington v. Strickland, 466 U.S. 668, 687 (1984)). Strickland sets out a two-prong test to determine whether counsel was ineffective: (a) a defendant must show "that counsel's representation fell below an objective standard of reasonableness," and (b) that this performance "prejudiced the defense." *Id.* at 687.

In its Order and Judgment, the Tenth Circuit Court of Appeals states that Mr. Molina's attorney "would have had to overcome the presumption favoring a joint trial on the conspiracy charges." (CA No.17-8068, P.3).

The Court then goes on to state that Mr. Molina failed to argue how his trial attorney could have overcome this presumption, or identify any prejudice from a joint-trial with his wife. *Id.*

The investigation into this conspiracy began several months prior to Mr. Molina's involvement. Originally, the investigation only centered on Mr. Molina's wife who had dealings with a government informant. This informant had wore a "wire" (recording device) while dealing with Mrs. Molina. For reasons unknown to Mr. Molina, the investigation was abandoned to some extent and did not resume until Mr. Molina returned to his home and began his own involvement in a conspiracy.

It is Mr. Molina's belief that had his trial attorney sought to sever his trial from that of his wife the incrimatory evidence used to convict her could not have also been used to convict him.

The appellate court's holding that Mr. Molina should have presented legal arguments showing how a trained attorney was to have overcome the presumption favoring a joint trial is unrealistic.

Mr. Molina is a Mexican immigrant with no formal education and absolutely no education in matters of criminal law. He was completely at the mercy of his trial counsel and it wasn't until he began his own research into his case with the assistance of other inmates more experienced in legal matters, did he come to realize that there were problems with his representation.

Unfortunately, Mr. Molina's family, without his knowledge, contacted a "pro se habeas corpus" firm who advertised in a prison legal magazine. It was this firm who authored the original § 2255, and it was this firm who gave such a flimsy argument in support of the severance motion.

While there is no legal recourse for a defendant who receives

"ineffective assistance" in a habeas corpus matter, the fact still remains that Mr. Molina's trial attorney failed to make the adversarial process meaningful. Molina's attorney did not fulfill his duty to investigate all reasonable lines of defense. (see: Nyugen v. Reynolds, 131 F.3d 1340, 1345 (10th Cir. 1997)). (see also: United States v. Cronic, 466 U.S. 648, 658-59 (1984)(counsel is expected to subject prosecution's case to meaningful adversarial testing)).

CONCLUSION

This Court should grant certiorari, and vacate the Order and Judgment of the Tenth Circuit with directions to remand Mr. Molina's case to the district court vacating the conviction and sentence of Mr. Molina-Varela and set the matter for further proceedings.

Respectfully submitted,

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