No._____

IN THE
SUPREME COURT OF THE UNITED STATES

CESAR ARCE HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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(a) **QUESTIONS PRESENTED**

I.

Does a Sixth Amendment claim of ineffectiveness of assistance of counsel during pretrial proceedings survive a general waiver of the right to appeal in a plea agreement?

II.

Does an indigent defendant have a constitutional or statutory right to continuity of previously appointed counsel absent a finding of "interests of justice" as required under the Criminal Justice Act?

(b) PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

(c) TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATUTES **PAGE**

Petitioner Cesar Arce-Hernandez respectfully requests that a Writ of Certiorari be issued to review the Order and Denial of the United States Court of Appeals for the Ninth Circuit entered on September 20, 2018, and on January 18, 2019, respectively.

(d) ORDERS BELOW

The district court's order granting the defendant's Motion To Continue Trial and granting additional time to prepare for trial is attached as "Appendix "C". The district court's order granting Defendant's Motion To Withdraw is attached as "Appendix "D". The court of appeals' Order granting a government dispositive Motion To Dismiss in light of the appeal waiver is attached as Appendix "". A second Order denying reconsideration is attached as Appendix "F".

The above referenced orders are unreported.

(e) JURISDICTION

The United States District Court for the District of Arizona had jurisdiction pursuant to 18 U.S.C. § 3231. The Order of the United States Court of Appeals for the Ninth Circuit was based on 18 U.S.C. § 1291. It was entered on September 20, 2018. Reconsideration was denied on January 18, 2019.

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

(f) STATUTES SET OUT VERBATIM

18 USC § 3006A. ...

(b)Appointment of counsel. --Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person intitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate judge or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate judge or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel or when other good cause is shown.

(c) Duration and substitution of appointments. A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person is financially able to obtain counsel, or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate judge or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate judge or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(g) CONCISE STATEMENT OF THE CASE

Brief Nature of the Case:

Petitioner's original counsel was appointed under the Criminal Justice Act. He informed the district judge that he needed additional time to receive and review discovery, conduct an investigation, and to properly prepare this matter for trial. (CR14). The next day, he filed a First Motion to Withdraw as Attorney. (CR15). The withdrawal motion did not provide any factual basis nor was it signed by the petitioner. It did not state appellant's position. Appellant was not present. The district judge did not conduct an evidentiary hearing nor did he make a determination whether the "interests of justice" would authorize the substitution of one CJA attorney for another as required by 18 USC § 3006A(c). In short, withdrawal was granted without any basis or inquiry and a substitute CJA lawyer was appointed. (CR17). The matter then went to change of plea before Magistrate Judge John Z. Boyle based on a plea agreement which contained an appeal waiver provision. (CR20). Hon. G. Murray Snow accepted the plea agreement and imposed a twenty-one month sentence followed by thirty-six months of new supervised release. (CR32). The court also revoked appellant's supervised released and imposed a disposition of 15 months to run consecutively to the 21-month sentence. (CR53).

A timely appeal was filed. Petitioner argued that after appointment of an attorney to effectively assist him an attorney-client relation was formed and preparations for trial were underway. The representation was abruptly terminated without notice to him and without determination of the "interests of justice" required by the CJA statute. The government responded with a Motion to Dismiss based on the appeal waiver. A three-judge motions panel granted the government requested dismissal citing circuit precedent that petitioner "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea". (Dkt 26). A subsequent Motion for Reconsideration was likewise denied. (Dkt29).

(h) ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

Circuit precedent that an appeal waiver in a plea agreement prevents all independent claims, such as ineffective assistance, is contrary to this Court's decision in Garza v. Idaho, 139 S.Ct. 738 (2019).

The reality of the federal criminal justice system is that it is "for the most part a system of pleas, not a system of trials. *Lafler v. Cooper, 132 S.Ct. 1376 (2012)* quoting *Missouri v. Frye, 132 S.Ct. 738 (2012)*. During pretrial stages and in plea negotiations the constitution guarantees the effective assistance of counsel. *Lafler*, supra, at 1383 quoting *McMann v. Richardson, 397 U.S. 759 (1970)*.

Another reality of the criminal justice system is that almost all plea agreements contain an appeal waiver provision which is intended to insulate the prosecutor from any review by a higher court. In *Garza v. Idaho, 139 S.Ct. 738 (2019)*, this Court rejected the identical ruling of a state supreme court that "once a defendant waives his appellate rights, he no longer has a right to an appellate proceeding at all". (139 S.Ct. at 751-752). This court concluded in *Garza* that an appeal waiver provision is not "a monolithic end to all appellate rights" and ruled that "no appeal waiver serves as an absolute bar to all appellate claims". (Id 744). There, an appointed attorney's failure to file a requested Notice of Appeal was ruled to be ineffective assistance under the Sixth Amendment. Despite the waiver, it survived the appeal waiver since it is one of the claims that "nevertheless remain" despite the waiver. (Id.747).

The Criminal Justice Act provides for both the duration and substitution of panel attorneys appointed under the Act. The duration is for "every stage of the proceedings from his initial appearance ... through appeal..." 18 USC § 3006A(c). Substitution of "one appointed counsel for another may occur at any stage of the proceedings but the standard is that the court determine that such substitution is "in the interests of justice". This court has ruled in *Martel v. Clair, 565 U.S. 648*

(2012) that the statutory "interests of justice" standard applies equally to capital and non-capital cases.1 It ruled that "As all circuits agree, courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer ... the trial court clearly has a responsibility to determine the reason for the defendant's satisfaction". (132 S.Ct. at 1288).

The decision in this case also conflicts with *United States v. Gonzales-Lopez, 548 U.S. 140 (2006)*. That decision recognized a defendant's Sixth Amendment right to continuity of the attorney-client relationship with retained counsel of defendant's choice. Defendant Gonzales-Lopez was deprived of a proceeding with his own lawyer. Such right was denied because the disqualification of a defendant's chosen counsel was erroneous. Here, petitioner was erroneously deprived of a proceeding which never took place; namely, a trial or plea with his own assigned counsel with whom he had formed an attorney-client relationship. He did not seek to choose any particular attorney but was abruptly denied the right to continue with his court-chosen appointed attorney who was acting properly in preparation for a trial. A right to continuity of counsel is quite different from the right to choose a counsel in the first instance. The common scenario in federal court is that appointed counsel files a timely Notice of Appeal

1 Local General Order 16-22 adopted the Criminal Justice Plan as required by 18 USC § 3006A. It confines the court's authority to appoint more than one attorney to a non-capital case only" in an exceptional case" and "in the interest of justice".

then the prosecution invokes its waiver clause to deprive the criminal defendant of any direct review or collateral review of his ineffective assistance claim. In this case, as in *Garza*, the claim that remained was that his counsel was constitutionally ineffective. In Garza it was for failure to file a requested notice of appeal. Here, petitioner's claim is that he was deprived of the continuity of assistance from his court-appointed counsel because a substitution was granted without consideration of the "interests of justice" and without notice to the person most concerned – namely, the defendant-petitioner. It is well established that the Sixth Amendment right to effective assistance of counsel applies during the plea-bargaining process. *Tollett v. Henderson, 411 U.S. 258 (1973)*. But, the government effectively insulates itself from any attempt to remedy a situation of ineffective assistance via its broad, general, non-specific waiver. this court should rule whether ineffective assistance during plea bargaining is effectively foreclosed by an appeal waiver.

Precedent in the court of appeal is well established that as long as an appeal waiver is "knowing and voluntary" a defendant "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" For instance. *United States v. Harris, 628 F.3d 1202, 1205 (9th Cir. 2011)*;*United States v. Medina-Carrasco, 815 F.3d 457, 459 (9th Cir. 2016)*(appellate waiver that covers "any aspect of the defendant's sentences" is valid and enforceable); *United States v. Watson, 582 F.3d 974, 986*

(9th Cir. 2009)(upholds broad waiver of appeal rights); and *United States v. Joyce, 357 F.3d 921, 923 (9th Cir. 2004)*(waiver upheld which included any aspect of the sentence imposed). However, if there is a deprivation of the proper assistance of counsel, how can it possibly be that a waiver is both "knowing and voluntary?

Recent decisions of this Court recognize a defendant's right to be in charge of the major aspects of his litigation since it is the defendant's case and not the attorney's case. For instance, in *McCoy v. Louisiana, 138 S.Ct. 1500 (2018)* this Court ruled that" the decision whether to admit guilt or to argue innocence at trial is "reserved for the client". This court referenced: "the fundamental legal principle that a defendant must be allowed to make his own choice about the proper way to protect his own liberty". (Id.1508). And, *Jae Lee v. United States, 137 S.Ct. 1958, 1966-7 (2017)*(decision to proceed to trial with "no bona fide defense, not even a weak one" is a decision to be made by the defendant).

CONCLUSION

For an indigent defendant, his attorney is chosen by the court but after being so chosen a defendant should have a correlative right of choice whether to continue the attorney-client relation with that court-chosen attorney. For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

DATED: April 12, 2019.

/s/ Atmore Baggot
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