

No. 19-5126

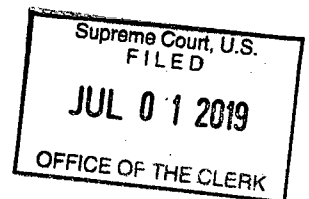
IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

JESUS M. GARCIA — PETITIONER
(Your Name)

VS.

TAMMY FERGUSON, PHOENIX — RESPONDENT(S)
SUPERINTENDENT
ON PETITION FOR A WRIT OF CERTIORARI TO



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

PETITION FOR WRIT OF CERTIORARI

JESUS M. GARCIA, HX-8073

(Your Name)

P.O. BOX 244

(Address)

COLLGEVILLE, PA 19426-0244

(City, State, Zip Code)

NONE

(Phone Number)

QUESTION(S) PRESENTED

ISSUE 1:

DID THE DISTRICT COURT AND APPEALS COURT ERR IN DENYING APPELLANT RELIEF ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DO TO COUNSEL'S FAILING TO OBJECT TO THE INTRODUCTION OF ILLEGALLY-OBTAINED WIRETAP.

LIST OF PARTIES

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

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

OFFICE OF THE ATTORNEY GENERAL
16th FLOOR, STRAWBERRY SQ.
HARRISBURG, PA 17120

TAMMY FERGUSON, PHOENIX
SUPERINTENDENT
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A-B to the petition and is

☒ reported at No. 18-3611; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

☒ reported at No. E.D.Pa.Civ. 3:14-cv-2214; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

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☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 1, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 28, 2019, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

THE INSTANT PETITION IS TIMELY FILED. JURISDICTION IS ALSO AT 28 U.S.C. §1257(a).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

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.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III of the United States Constitution provides in pertinent part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The Supremacy Clause of Article VI of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.Const.,art. III, 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C.1254(1):

Section 1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 2. By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On november 6, 2008, following a three days Jury trial, Garcia Jesus, was found guilty on the folling charges: Eight(8)counts of possession with intent to deliver cocaine; Two(2)counts of criminal conspiracy-aiding possession with intent to deliver; Two(2)counts of criminal use of a communication facility; and Two(2)counts of currupt organization-employee; and Two(2)counts of conspiracy to violate 911 b1, 911 b2, and 911 b3.

Subsequently, on January 28, 2009, Appellant was sentence to an term of twenty-five(25) to fifty-two(52) years incarceration.

On February 26, 2009, Appellant appealed his conviction and judgment of sentence. As a result, on February 2, 2010, the Superior Court of Pennsylvania (hereinafter, "Superior Court") affirmed Appellant's conviction, but remanded his case for resentence.

Accordingly, a resentencing hearing was held on May 5, 2010, whereby Appellant was resentenced to an aggregate of twenty-five(25) to forty years imprisonment.

Thereafter, on May 10, 2010, Appellant filed a motion to modify sentence, which the trial court denied the same day.

On May 28, 2010, the Appellant filed a notice of appeal of judgement of sentence. Subsequently, on May 9, 2011, the Superior Court affirmed the trial court's decision.

Thereafter, Appellant filed an appeal with the Pennsylvania Supreme Court, on April 10, 2012, the Supreme Court denied Appellant petition for allowance of appeal.

On April 30, 2012, Appellant filed a pro se, petition under

the post-conviction relief act (hereinafter, PCRA)

Subsequently, counsel was appointed by the Court to represent Appellant during collateral review. Thus, on September 12, 2012, the Appellant filed a counseled amended P.C.R.A. petition. On November 26, 2012, a (P.C.R.A.) hearing was conducted.

Thereafter, the trial court issued its order and opinion on March 13, 2013, denying Appellant relief. Accordingly, a notice of appeal was filed on April 11, 2013. On February 18, 2014, the Superior Court affirmed the trial court's order.

On March 18, 2014, Appellant filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. On September 10, 2014 the Supreme Court denied.

On November 18, 2014, was filed a Writ of Habeas corpus in the Middle District of Pennsylvania, that was denied on November 13, 2018, then Appellant filed for a Certificate of Appealability under 28 U.S.C §2353(c)(I) to the Third Circuit Court of Appeals that was denied on May 1, 2019. And now we are before this Honorable Supreme Court.

REASONS FOR GRANTING THE PETITION

The Appellant avers that trial counsel was ineffective for failing to object to the introduction of illegally-obtained wiretap evidence, by the commonwealth, which ultimately led to Appellant's conviction. Therefore, in order to establish that trial counsel was ineffective, the claim of ineffective assistance of counsel is governed under the standard of STRICKLAND VS. WASHINGTON, 466 U.S. 668 (1984), which holds: "to obtain a reversal of conviction, the Appellant must prove "First, that counsel's performance fell below an objective standard of reasonableness, and "Second, that counsel's deficient performance prejudiced the Appellant resulting in an unreliable or fundamentally unfair outcome of the proceeding."

Additionally, the Pennsylvania wiretapping and electronic surveillance act (Hereinafter "Wiretap Act") elucidates that the Act intercepting a wire, electronic, or oral communication is illegal. 18 PA.Cons.Stat. §5703. However, the wiretap act sets forth several exceptions to this rule. §5704. For instance, wiretapping and electronic surveillance is lawful so long as all of the parties involved have consented to such recording or where one(1) party, working on behalf of law enforcement, has voluntarily consented to said wiretapping. §5704(4).§5704(2)(II).

This Honorable Court has instructed that because the [wiretap] act focuses on the protection of privacy, its provisions must be construed strictly. The courts has emphatically stated that for the

purposes of 18 [PA.Cons.Stat.] §5704(2)(II), one's consent must be given voluntarily in order for the governmental action to be lawful. BUMPER VS. NORTH CAROLINA, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1987); Also the Court has stated in UNITED STATES VS. REYNA, 218 F.3d. 1108, 1112 (9th Cir. 2000)(Failure to secure approval of Attorney general prior to making application for judicial authority to wiretap renders court authority invalid).

Furthermore, where there is an issue as to the voluntariness of a person's consent, each case must be determined from the totality of the circumstances.

In the case at bar, the commonwealth's purchase witness, Cesar Jaen, confidential informant was facing a potential thirty(30) to forty(40) years incarceration term for five(5) counts of delivery of cocaine, one(1)count possession with the intent to deliver cocaine, one(1)count possession with the intent to deliver marijuana, one(1)count criminal conspiracy, and one(1)count criminal use of a communication facility. (Jury trial, November 4, 2008), N.T. at 10/14, 36-38, 43-44, 61-64, 72, 95-99, 101-104, 111-114).

However, if Mr. Cesar Jaen "chose" to assist law enforcement, the Attorney General's Office would consider a modification of his sentence. Thus, Mr. Cesar was essentially coerced into assisting law enforcement and thereby allegedly consenting to the wiretapping of conversations between himself and Appellant. As such, the confidential informant's consent was not voluntary; hence, making such evidence

derived therefrom illegally-obtained as set forth by the doctrine of the fruit of the poisonous tree.

Furthermore, the wiretap act has provisions which must be met in order for the doctrine's latter exclusion to be legal. §5704(2)(II) As such, the wiretap act clearly stipulates:

[...] However, no interception under this paragraph shall be made unless the Attorney General or a deputy Attorney General designated in writing by the Attorney General, or the District Attorney, of the County wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; However, such interception shall be subject to the recording and record keeping requirements of section §5714(a) (Relating to recording of intercepted communication) and that the Attorney General, Deputy Attorney General, District Attorney or assistant District Attorney authorizing the interception shall be the custodial of recorded evidence obtained therefrom. §5704(2)(II)

In the instant case, the Commonwealth's witness, Agent Ronald Diller, merely, merely testified about the "safeguards" that law enforcement employ when they utilize confidential informants. (Jury trial N.T., at 8-9) at no point during the trial was evidence introduced to show that the Attorney General's Office had submitted a written document regarding the use of wiretap interception in the case at hand. UNITED STATES VS. REYNA, supra.

In this case, there was no evidence offered to suggest that Mr. Cesar had voluntarily given his consent to the wiretapping. As such, trial counsel should have objected to the introduction of said evidence, however, he did not do so; and thus, Appellant's claim has merit. Also was no reasonable basis for trial counsel to not object to the introduction of the illegally-obtained wiretap evidence, and Appellant alleges entrapment.

The trial counsel ineffectiveness had unduly prejudiced Appellant's Constitutional Rights Sixth and Fourteenth Amendments. But for trial counsel's ineffectiveness, the verdict outcome would have likely been different.

For the foregoing reasons, Appellant's Constitutional Rights and Due Process of Law have been infringed by trial counsel's ineffectiveness when trial counsel failed to object to the introduction of illegally-obtained wiretapping evidence.

According any interception by law enforcement officers not carried out in accordance with the exceptions of section §5704 subjects all resulting evidence to suppression under the statutory exclusionary rule in section §5721.

Wherefore, the above fore-mentioned reasons, facts, and law, Appellant has clearly shown that Attorney General and law enforcement has violated the Wiretap Act, by using an unauthorized wiretap and therefore trial counsel was ineffective for not object to the introduction of illegally-obtained-of-the wiretap.

The Appellant requested that all recordings and evidence obtained through these illegal unauthorized wiretaps and/or recordings be quashed/suppressed and conviction reversed and remand either for a new trial and/or all indictment quashed and Appellant be discharged or whatever is appropriated to this Honorable Supreme Court to do.

Moreover, the lower courts rulings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Courts proceedings. See STRICKLAND, supra., MARTINEZ VS. RYAN, 132 S.Ct. 1309,1315 (2012); TREVINO VS. THALER, 133 S.Ct. 1911,1921 (2013).

This Honorable Court in Martinez Justice Kennedy, stated that the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the person charged. E.G. POWELL V. ALABAMA, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed 158 (1932)("The defendant requires the guiding hand of counsel at every step in the proceeding againg him witout, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence")

In the case at bar, effective counsel preserves claims to be considered on appeal, E.G. FED.RULE.CRIM.PROC.52(b), Consequently, the Appellant was denied a fair trial and effective assistance of trial counsel under the U.S. Constitution, Amend. 6th, incorporating Amend. 14th.

More importantly, the verdicts are not reliable because the Appellant's entire trial was premised upon lies and deceit of the Commonwealth, which is contrary to the rudimentary demands of justice in our maturing society.

Moreover, in order to resolve the ineffectiveness claim, this Court must first determine whether the underlying constitutional

claim has arguable merit. Appellant's present to the District Court accompanying Memorandum of Law addressing both this prong - as well as the prejudice prong of the Strickland, test, both of which are discussed in detail in Appellant's Memorandum.

The Appellant has fully briefed the claim that admitting the wiretap implicating appellant, violated appellant's sixth and fourteenth amendments. There is no real dispute whether trial counsel had a reasonable strategic basis for failing to object.

The only real dispute in this case centers on whether this Wiretap violation prejudiced appellant under Strickland. This Court in Strickland "prejudice" analysis is not an outcome-determinative test. Strickland, 466 U.S. at 693 - 94. The question is not whether representation by effective counsel would have actually changed the verdict or the sentence, nor even whether representation by effective counsel would "more likely than not" have changed the result. Id. Instead, prejudice is established when confidence in the outcome is undermined because of counsel's deficiencies, i.e., where there is a "reasonable probability" that the outcome might have been different. Id. at 694. "This standard is not a stringent one. It is less demanding than the preponderance [of the evidence] standard." The failure of trial counsel to exclude the wiretap fully incriminating appellant with most damaging of testimony meets the requisite standard under Strickland. There is a "reasonable probability" that the outcome would have been different had this inadmissible evidence not reached the jury.

For the past 150 years, this Honorable Court has had explicit jurisdiction over claims that a prisoner sentenced by a state court was being held in violation of the Constitution of the United States and over 70 years ago that power was extended to collateral proceeding on habeas review. FELKER V. TURPIN, 518 U.S. 651,663-664 (1996)(citing WAKEY V. JOHNSTON, 316 U.S. 101 (1942)(percurian); BROWN V.ALLEN, 344 U.S. 443 (1953).

CONCLUSION

For the foregoing reasons, Writ of Certiorari should be granted in this matter to resolved these questions of exceptional importance.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JESUS M. GARCIA, PRO SE,

Date: JUNE 30, 2019