Docket No:

UNITED STATES SUPREME COURT

United States,
Plaintiff-Respondent,

v.

Juan Gonzalez-Arias,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

1. Was there sufficient evidence of probable cause to establish a nexus between Mr. Gonzalez-Arias's drug trafficking activity and his home to justify searching his home?

2. Was Mr. Gonzalez-Arias's Sixth Amendment right to counsel violated when the District Court refused to appoint new counsel prior to Mr. Gonzalez-Arias's sentencing?

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JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Petitioner makes this petition based on the jurisdiction conferred by Article III Section 1 of the United States Constitution and Rule 10 of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question and conflicts with other decisions of the Supreme Court of the United States. This petition has been timely filed by March 19, 2020 from the opinion released on December 20, 2019

Appellate Jurisdiction. The Petitioner takes this appeal as of right in a criminal prosecution under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the district court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on January 24, 2018.

Original Jurisdiction. District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231. The indictment in this matter resulted in convictions of Mr. Gonzalez-Arias for violations of 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 846, and 21 U.S.C. § 841(a)(1)

PROVISIONS OF LAW

U.S.C.A. Const. Amend. IV (West 2020)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. VI (West 2020)

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 defense.

STATEMENT OF FACTS

On January 12, 2018, District Court Judge Leo T. Sorokin of the United States District Court for the District of Massachusetts sentenced Juan Gonzalez-Arias to 136 months. The sentence was the result of a prosecution brought after an extensive investigation into Mr. Gonzalez-Arias. Appendix hereinafter A at. 1. The indictment charged four counts: Count One was conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846, Count two distribution of heroin in violation of 21 U.S.C. § 841, Count Three distribution of heroin in violation of 21 U.S.C. § 841, and Count Four possession with intent to distribute heroin aiding and abetting in violation 21 U.S.C. § 841. A at 28-32. On January 9, 2017, as part of his Rule 11 plea proceeding, Mr. Gonzalez-Arias plead guilty to distributing more than one kilogram of heroin as part of his plea agreement with the Government. A at 18.

The Government provided the following factual basis for the plea: The defendant, Juan Gonzalez-Arias, was the leader of a drug trafficking organization, and that during the course of a long investigation, which included telephone intercepts, pole camera surveillance, and physical surveillance, Mr. Gonzalez-Arias was observed discussing a number of drug transactions and entering into a number of drug transactions. Specifically, on October 22nd of 2014, the defendant sold an undercover police officer 30 grams of heroin at a price of $70 per gram. The meeting was recorded and videotaped. On November 20th of 2014, Mr. Gonzalez-Arias sold another 30 grams of heroin to the undercover officer. It was similarly recorded. During the face to face meeting the defendant told the undercover that he, the undercover customer, should be purchasing at least 100 grams a week, and when the undercover pressed him for a better price, the defendant said he used to sell the heroin at $75 per gram, but has now lowered his price to

$70 per gram and said, " That's how I sell it, from one gram to one kilo." On or about March 26 of 2015, Mr. Gonzalez-Arias sold Mendez-Cruz, a co-defendant, 200 grams of heroin. The Government believes that the defendant entered into other transactions with Mr. Mendez. On July 12th of 2015, agents arrested the defendant and searched his home. They found a gun with two loaded magazines, almost 1.3 kilograms of heroin, packaging tape, ledgers, miscellaneous documents, identification cards, six cell phones, $30,088 in cash, plastic wrap, an electronic scale, dust masks, and metal plates and forms for a hydraulic kilo press. A at 128-129

On June 24, 2016, Mr. Gonzalez-Arias's counsel filed a motion to suppress evidence obtained as a result of the search and seizure in this case. A hearing to resolve that motion was held on September 8, 2016, and the District Court entered an order denying Mr. Gonzalez-Arias's motion on September 15, 2016. A at 16.

The Court considered the facts presented as part of the warrant application as the facts on which it resolved the Motion to Suppress: The Affidavit was submitted to Magistrate Judge David H. Hennessy on July 12, 2015. Based on the Affidavit's facts, Special Agent Hamelin stated he believed that Defendant used 264 East Haverhill Street, Apartment 18 ("the Target Location"), "not only as his residence, but also to stash and prepare narcotics for sale." Judge Hennessy issued a warrant based on the Affidavit the same day. Addendum *hereinafter* AD at 66-67

The Affidavit alleges the following facts: The Target Location was located on the third floor of a three-story brick apartment building. In March 2014, DEA agents in Boston initiated an investigation into a drug-trafficking organization led by Defendant. On October 22, 2014,

agents saw Defendant leave the Target Location and then, about ten minutes later, arrive at a pre-designated location to sell heroin to an undercover agent. AD at 67.

On November 20, 2014, according to data from a global positioning system ("GPS") tracking device on Defendant's vehicle, Defendant left the Target Location and then, about 70 minutes later, arrived at the same pre-designated location to again sell heroin to the undercover agent. Shortly thereafter, Defendant traveled back to the Target Location. AD at 67.

On March 7, 2015, agents, through an authorized wiretap, heard Defendant call a restaurant and state that he had ordered food to be delivered to East Haverhill Street. Later, the restaurant called Defendant and informed him that the delivery person had arrived; Defendant said the delivery person should ring Apartment 18. AD at 67.

On March 27, 2015, investigators saw a co-conspirator of Defendant's park in the parking lot adjacent to the Target Location. After Defendant made a call that Special Agent Hamelin believed was an order for drugs the co-conspirator left the Target Location carrying a green bag. AD at 67.

On April 10, 2015, Defendant and a co-conspirator had a phone conversation in which, Special Agent Hamelin believed, Defendant explained that he was processing heroin for distribution. According to agents who were monitoring a telephone pole camera outside the Target Location and according to the GPS device on Defendant's vehicle, Defendant was at the Target Location during the phone call. Defendant told the co-conspirator to "give me five minutes," then two minutes later left the Target Location to meet the co-conspirator. Immediately after meeting the co-conspirator at a nearby location, Defendant returned to the Target Location. AD at 68.

On April 18, 2015, after telling a co-conspirator over the phone how much heroin he had to distribute – specifically, he said, "I perhaps have there about 200 to 300 pesos," meaning grams – agents saw Defendant leave the Target Location to meet the co-conspirator at a second location. Agents at the second location saw Defendant arrive carrying a white plastic bag. Id. Shortly after the co-conspirator left the second location, the police stopped him, found 103 grams of heroin in his left front pocket, and arrested him. AD at 68.

On June 9, 2015, Defendant and a co-conspirator agreed over the phone to meet so that Defendant could obtain a shipment of about ten kilograms of heroin. Agents then saw Defendant leave the Target Location and travel to a residence in Lawrence, Massachusetts, then leave that residence with the co-conspirator. In subsequent intercepted calls, Defendant told the co-conspirator that he had given the heroin to a different co-conspirator to test its quality. According to Special Agent Hamelin, it "is likely that [Defendant] brought the heroin he received from [the first co-conspirator] back to the Target Location before" giving it to the second co-conspirator. AD at 68.

From October 2014, when agents obtained authorization for the GPS device, until July 12, 2015, the date of the Affidavit, Defendant's vehicle had "been located daily and overnight, with few exceptions, in the parking lot of the Target Location." Moreover, from October 31, 2014, until July 12, 2015, Defendant was "seen daily in the parking lot near the Target Location." AD at 69.

Special Agent Hamelin, based on his training and experience as well as observations made during the investigation, believed that Defendant, "like many drug traffickers, has used his residence in furtherance of his drug trafficking activities, and that, among other things,

documentary and other evidence regarding those activities" would be found at the Target Location. AD at 69.

The Opinion from the Court of Appeals described Mr. Gaonzale-Arias's problems with his lawyers. By the time of the proceedings on the motion to suppress, Gonzalez-Arias had already gone through several lawyers. First, then-public defender William Fick represented Gonzalez-Arias at his first appearance. Next, Gonzalez-Arias retained Steven DiLibero, who replaced Fick. Then, in November 2015, John Verdecchia and Brian Quirk replaced DiLibero. In April 2016, both Verdecchia and Quirk withdrew to make way for Gleason, who stayed on the case until March 2017. Mr. Gleason and Mr. Gonzalez Arias continued to have problems until things deteriorated after the Rule 11 change of plea and Mr. Gonzalez-Arias asked for a court appointed lawyer. The judge held a prompt (March 29, 2017) hearing to discuss the request for new counsel. After talking with his client, Gleason elaborated that Gonzalez-Arias thought that Gleason "ha[d]n't been able to do anything for him" and "that the ten-year minimum mandatory [was] something that he could have gotten himself." The judge told him he couldn't appoint Fick, who was now in private practice, but (finding Gonzalez-Arias indigent) he agreed to appoint another lawyer from the federal public defender's office, Timothy Watkins. Seven more months passed. In the interim, Watkins changed jobs, and a third public defender, Scott Lauer, took over as lead counsel with a research and writing attorney, Samia Hossain, as co-counsel.

The day after the judge shot down the attempt to withdraw the plea, Lauer and Hossain wrote the judge that there'd been a "substantial breakdown in the attorney-client relationship" and asked to withdraw as Gonzalez-Arias's lawyers so the judge could appoint a new one. The judge held a hearing on the motion two days later. At the start, the judge excused the government

from the room so Gonzalez-Arias and his attorneys could speak freely about their private communications. After the government left, Gonzalez-Arias complained that Lauer had refused his request to appeal the plea decision before sentencing.9 The judge, however, was unimpressed. He explained that Lauer's refusal was reasonable ("if not an indisputably . . . correct judgment"), since he couldn't appeal the plea decision before the end of the case. And even if Lauer "responded negatively" about Gonzalez-Arias's "idea of withdrawing the guilty plea," he was just being honest: it was a "hard motion" and not "a slam dunk." So the judge had no "concern. . . that the federal defenders" were providing "anything less than zealous advocacy" (he called their plea-withdrawal motion "superbly done," "well documented," "well researched," and "an excellent piece of craftsmanship") and spied no issue that "would prevent [Gonzalez-Arias and his] lawyers from working together in this case." That all said, the judge denied the motion for new counsel.

A week later, though, Gonzalez-Arias went rogue; he appealed the guilty plea decision himself — an appeal which, sure enough, we later dismissed for lack of appellate jurisdiction. So eighteen days before the scheduled sentencing, Lauer and Hossain renewed their motion to withdraw. The judge held another ex parte hearing the day before the scheduled sentencing.

First, Lauer updated the court: Gonzalez-Arias "ha[d] lost confidence" in him and suggested he was "colluding with the prosecution." Speaking for himself, Gonzalez-Arias added that he and Lauer did not "see eye to eye on the situation" and that he didn't "want [Lauer] to have anything more to do with [his] case." Asked why he and Lauer weren't "getting along," Gonzalez-Arias said that they could never agree: he'd tried to show Lauer holes in the government's case against him, but Lauer responded that he'd already "signed the plea" and

"c[ouldn't] do anything more now." Since all they "did was argue about the plea," they hadn't had time to review the PSR.

The judge didn't buy it. First, he reminded Gonzalez- Arias that Lauer had, in fact, filed the motion to withdraw the plea, and that the judge had denied it. He told Gonzalez-Arias that based on "the history in this case" (Gonzalez-Arias's issues with his previous lawyers), he was "not likely to appoint another lawyer to represent [him]." So Gonzalez-Arias could either stick with Lauer and Hossain or, the judge said, "there's the possibility that you could represent yourself." The judge then explained the implications of going pro se. "What's left in your case before me is this: your sentencing," he began. He had already explained how sentencing (and the guidelines) worked before Gonzalez-Arias pled guilty. Now, he reviewed what would happen at the sentencing hearing: that "whether [he was] represented by counsel or not," Gonzalez-Arias and the government could object to the PSR, the judge would "resolve . . . every objection that's made," and after that, he would "hear arguments about what's the appropriate sentence." While on that topic of sentencing, the judge followed up on the PSR issue. Lauer confirmed that the "breakdown in communication [had] prevented a serious conversation about [the PSR]," though after more questions, he clarified that Gonzalez-Arias had "reviewed the [PSR] independently" and pointed out "certain things" he disagreed with.

Then, they had this exchange:

> **The Court**: All right. So Mr. Gonzalez-Arias, the first question is . . . do you wish Mr. Lauer and Ms. Hossain to continue as your lawyers, or not? What do you want as to them?

Mr. Gonzalez-Arias: Now, do you want to know what my objections to continuing with them [sic], or do you want to know why I want to do it alone?

The Court: I want to know whether you want them as your lawyers or not.

Mr. Gonzalez-Arias: No, I do not want them, definitely.

The Court: All right. If I discharge them as your lawyers, do you want to represent yourself, or are you asking me to appoint another lawyer?

Mr. Gonzalez-Arias: I do not want to represent myself.

Gonzalez-Arias then rehashed his issues with prior lawyers. But the judge repeated that he was "not going to appoint a new lawyer for [Gonzalez-Arias]." In his view, the problem was not that Gonzalez-Arias was "oil and water with one particular lawyer" many of the "issues [he] raise[d] relate[d] to earlier lawyers [he] had," and they would not be "fixed by having another lawyer." Rather, the problem was that Gonzalez-Arias was "not listening to Mr. Lauer," and granting the request would only delay sentencing. As the judge later explained, "If I appoint a new lawyer, I can't proceed with sentencing tomorrow. I have to give that lawyer some reasonable period of time to read the [PSR] and talk to Mr. Gonzalez-Arias, and to then file objections with the Court."

So the judge gave Gonzalez-Arias three choices: (a) he could hire his own lawyer; (b) he could discharge Lauer and Hossain and "represent[ ] yourself" with them as "standby lawyers" (he confirmed that Gonzalez-Arias knew what that meant); or (c) he could "proceed with them as [his] lawyers."

Mr. Gonzalez-Arias: Could it be option (d)?

The Court: What's (d)?

Mr. Gonzalez-Arias: Appoint me another lawyer, Your Honor.

The Court: You can ask for (d), yes. And I give you kudos, you'd be a good lawyer. Because even though I've told you that I'm not appointing another lawyer, you came back to me and asked again.

Mr. Gonzalez-Arias: Right.

The Court: And the answer is, no, I'm not appointing another lawyer. And let me explain why. You're entitled to know why. Elaborating, the judge added that the "timing of th[e] request" showed "gamesmanship" by Gonzalez-Arias to delay the case and avoid facing his sentence. He repeated that the problem was not with Gonzalez-Arias's lawyers, who had been "excellent," but with Gonzalez-Arias, who simply didn't agree with their advice. So (the judge continued) "[t]he question is how do you want to proceed? With them as standby counsel, sitting there next to you, or do you want them to be your lawyers?" He'd explained that "it's not a good idea to represent yourself" because "[t]he law is complicated, and there are a lot of rules. And you're not familiar with those rules." "And you can get good advice from people who are lawyers . . . and generally, it's not wise for defendants to represent yourself." "So you know, there's an expression in America you may have heard: The person who has himself for a client, has a fool for a lawyer." Gonzalez-Arias responded:

Mr. Gonzalez-Arias: It's a tough situation, Your Honor, because, yeah, I didn't want them as counsel, but I was expecting to get another lawyer, because I'm not a lawyer, I don't know the law. I don't know the argument I'm going to make here about my case as a

lawyer, because I don't know the law. So I'm in a tough situation. I'm pretty much pushed to really keep them on my case, so they can make the argument, whatever they can make. . . .

The Court: Well if you want, you can do this: You can discharge them, have them as standby. [The Court explained again how sentencing, objections, and the guidelines worked.] And you could either have them tell you what objections they think that you ought to make . . . or you could have them make it on your behalf, even though they're standby. . . . Why don't we proceed that way. That way you're in charge, and they can do as much or as little as you want them to do. And your objection to my not appointing you a new lawyer is preserved; that is, that means that by proceeding the way I've just described, you're not waiving any rights that you have to complain about my decision to not give you a new lawyer. Do you understand?

Mr. Gonzalez-Arias: Yes, sir.

The Court: Okay.

Mr. Gonzalez-Arias: That's fine.

After that 45-minute conversation, the judge called the government back in and explained what happened. "It would be fair to say," he said, "that Mr. Gonzalez-Arias is very committed to his position . . . that he would like Mr. Lauer and Ms. Hossain to be discharged from representing him . . . and that he does not wish to proceed pro se [and] wishes me to appoint him a new lawyer"; but since there wasn't good cause to appoint new counsel, "the best way to proceed [was] they [Lauer and Hossain] should be discharged and serve as standby counsel." So Gonzalez-Arias was now "representing himself." Though given the

chance to weigh in("**The Court**: So is there something that you wish to raise before these proceedings conclude today?"), Gonzalez-Arias took no issue with the judge's summary and only asked for more time to prepare for sentencing. At the government's urging, the court granted a three-week continuance to give Gonzalez-Arias more time to prepare.

When the time came for sentencing, the judge recapped that "[a]t [Gonzalez-Arias's] request that [he] didn't want Mr. Lauer to represent [him] anymore, [the judge had] discharged [Lauer] as [his] lawyer" and "directed that he be standby counsel." And Gonzalez-Arias proceeded to represent himself at the hearing. But he conferred with Lauer, and when requested, the lawyer chimed in at various points: first, to argue that the judge should not increase the guideline range based on the gun found in Gonzalez Arias's apartment (since "the firearm . . . ha[d] not been connected to Mr. Gonzalez-Arias by way of any forensic evidence, fingerprints, DNA, or the like," and the surveillance never caught him carrying it), and second, to argue for a sentence at the mandatory minimum (reviewing Gonzalez-Arias's background and potential "to work, to teach, to coach [baseball] in the Dominican Republic").

ARGUMENT

QUESTION ONE

I. This is an important federal question involving the Fourth Amendment and the difference between the states in the circuits on the sufficiency of the nexus between the criminal activity and place to be searched to justify a warrant to search the suspects home.

This Court has not addressed the quantum of evidence necessary to establish a link between criminal activity and the location to be searched. The Court has, however, indicated

that such a link is necessary to a valid warrant: “The critical element in a reasonable search is not that the owner of the property is suspected of crime, but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.” *Zurcher v. Stanford Daily*, 436 U.S. 547 553 (1978). While *Zurcher* never explicitly identifies the necessary nexus between the criminal activity and the place to be searched, it did explicitly identify the Sixth Circuit’s rule that required probable cause to believe the evidence would be located at that specific place as the measure for a valid warrant. Despite this Court’s endorsement of that probable cause requirement, the circuits in the United States Court of Appeals and the State courts of last resort disagree as to what constitutes probable cause to believe that evidence will be found at the home of a person suspected of drug trafficking.

One side of the split requires nothing more than probable cause to believe that a person is a drug trafficker to justify the search of that suspected persons home. The Seventh Circuit has articulated this position:

> Indeed, despite the occasional name switching, there was no confusion as to materially outcome-determinative facts: Zamudio participated in the drug-trafficking conspiracy; he lived at 64 N. Tremont Street; and, based on Agent Bates’s training and experience, drug traffickers store drug-related items at their residences. This was enough to create a fair probability that Zamudio’s home contained evidence of a crime.

United States v. Zamudio, 909 F.3d 172 175 (7th Cir. 2018). The inference that a drug trafficker’s home will contain evidence alone fails to meet the probable cause standard described in *Zurcher*. The required probable cause is not the related to the suspect but must be connected to the location. To allow this broad transfer of probable cause that a crime was committed by a person to the location to be searched greatly diminishes the protection required by the Fourth Amendment.

The other side of the split requires more specific evidence of the nexus between the criminal activity and the location to be searched. The Sixth Circuit requires a more significant factual basis for the nexus:

> The Government argues that the magistrate judge was entitled to infer that evidence of drug trafficking would be found at Brown's residence because he was a known drug dealer. We have acknowledged that "[i]n the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. Jones,* 159 F.3d 969, 975 (6th Cir. 1998) (citation omitted). Thus, in some cases, we have permitted judges to infer a fair probability of finding evidence in a residence even though the affidavit did not state that such evidence had been observed directly. *See, e.g., id.* at 974-75. We have never held, however, that a suspect's "status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in his home." *United States v. Frazier,* 423 F.3d 526, 533 (6th Cir. 2005). Rather, we have required some reliable evidence connecting the known drug dealer's ongoing criminal activity to the residence; that is, we have required facts showing that the residence had been used in drug trafficking, such as an informant who observed drag deals or drug paraphernalia in or around the residence. *Compare Jones,* 159 F.3d at 974-75 (finding probable cause to issue a warrant where confidential informant made drug purchases from defendant, was at defendant's residence during monitored drag transactions, and observed defendant in possession of cocaine), *United States v. Ellison,* 632 F.3d 347, 349 (6th Cir. 2011) (inference was proper because reliable confidential informant had "observed someone come out of [the defendant's] residence, engage in a drug transaction, and then return into the residence"), *and Berry,* 565 F.3d at 339 ("Although a defendant's status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in defendant's home, there is support for the proposition that status as a drag dealer plus observation of drug activity near defendant's home is sufficient to establish probable cause to search the home." (internal citation omitted)), *with Frazier,* 423 F.3d at 532 (infer*384ence was not proper because affidavit failed to establish informants' reliability and informants had not "witnessed [the defendant] dealing drugs from his [new] residence," just his old residence).

United States v. Brown, 828 F.3d 375, 383-84 (6th Cir. 2016). The Sixth Circuit's position offers more protection to the extent that the inference that evidence of drug trafficking will be at the drug trafficker's home itself is not sufficient for the nexus requirement. The problem, though, is determining what additional information is necessary to meet the nexus requirement.

The additional information in Mr. Gonzalez-Arias's case did not satisfy the nexus requirement.

II. The United States Court of Appeals for the First Circuit has applied a standard that requires that requires too insignificant of a connection between the suspect drug trafficking and Mr. Gonzalez-Arias home.

The First Circuit has previously given some weight to the inferences that a law enforcement official makes in drawing inferences about where a suspected drug dealer might keep evidence of his or her crime. *United States v. Ribeiro*, 397 F.3d 43 (1st Cir. 2005). However, that weight cannot be without limits. This case is distinguished from this Court's holdings in cases like *Ribeiro* on its facts. Unlike in *Ribeiro* and similar cases, 1) there was only the most tenuous evidence linking Mr. Gonzalez-Arias to the apartment that was actually searched rather than just some unit in the building; 2) the evidence of controlled buys had grown stale, with the most recent purchase of narcotics happening over 7 months before the warrant was executed; and 3) despite arguable evidence that Mr. Gonzalez-Arias was engaged in the drug trade, there was no direct evidence that Mr. Gonzalez-Arias was engaged in the drug trade at 264 East Haverhill Street, Apartment 18 in the time period leading up to the search being executed.

It is notable that in *Ribeiro*, a case where agents had confirmed the Defendant's address using public records databases and made no fewer than seven controlled buys in which the Defendant was followed from his home to the deal, and in which the most recent controlled purchase occurred only 4 days prior to the execution of the warrant, the Government essentially conceded that it did not have probable cause to search the Defendant's home for drugs. *Id.* at 47. This on the strength of facts tying the drug-related activity much more closely to the Defendant's confirmed residence.

The Government has argued that it has evidence of long-time trafficking activity by Mr.

Gonzalez-Arias, and that this should give rise to an inference that inculpatory material will exist at his residence, relying on a line of cases stemming from the decision in *United States v. Feliz*, 182 F.2d 82, 86 (1st Cir. 1999). While evidence of long-time trafficking may increase the odds that inculpatory material exists in a suspected trafficker's residence, that inference must still be supported by other evidence. Even taken together, however, the evidence that the Government presents to support that inference paints a picture that is hazy at best of what may have gone on in that apartment.

The Government has also argued at in the District Court that the search in this case was authorized because it sought evidence of immigration violations. Presumably, then, the drug evidence recovered would be admissible under the "plain view" and "good faith" doctrines. Even under this argument, however, there is likewise only a bare inference to support the existence of a criminal nexus between 264 East Haverhill Street, Apartment 18, Lawrence, Massachusetts and the immigration violations alleged.

As discussed above, there is insufficient evidence that the target location was Mr. Gonzalez-Arias's "residence" supporting an inference that he stored immigration documentation there. At the outset, the Defense concedes that, in practice, Mr. Gonzalez-Arias had a degree of control over Apartment 18 sufficient to give rise to a constitutionally protected privacy interest. This does not, however, mean that the affidavit presented evidence of Mr. Gonzalez-Arias's residence, such as would support an inference that he kept immigration paperwork there. The inference that an individual will keep immigration paperwork at every apartment from which he or she orders takeout is a difficult one.

A "residence" is different than something like a "stash house" in the drug context. The

word presumes a level of familiarity and comfort with a location such that they might keep deeply personal items, such as family heirlooms and sensitive identity documents there. Signs of residence include personal items, the delivery of mail and bills, and the location of family members. The Government did not confirm any of these things, relying, again, on a single call to order food in order to establish "residence" at that one apartment. Even assuming, arguendo, that the Government's affidavit established continuing ties to that building and apartment, such ties do not arise to the level of a "residence" required to draw the inference that immigration documents would be kept there.

The inference is further problematic, because it is being drawn by Special Agent Hamelin, a DEA agent, on the basis of his training and experience. While there may be some intersection between the work of the DEA and agencies such as Immigration and Customs Enforcement, it is a false equivalence to consider all special agents equal in all specialized areas of law enforcement. SA Hamelin lacks the experience in immigration matters to draw necessary conclusions based upon training and experience, and his conversations with immigration agents should not be sufficient to give him the training and experience required to make the inferences upon which this affidavit relies.

The application for a search warrant in this case specifically requests two particular categories of records: Storage Unit Records and Real Estate Records. There is no support in the affidavit that such records would be found at this location, or that these records would pertain to criminal, rather than non-criminal activity. In fact, the term "storage unit" does not appear even once in any paragraph justifying this request within the affidavit. There is certainly no particularized discussion of why the Government believed that storage unit and real estate

records were located at the target location specifically and how these records fit into the alleged criminal enterprise Mr. Gonzalez-Arias conducted. Nonetheless, authorization to search for these records was granted verbatim to the Government's request. The harm of this is not speculative: a search for "keys" leaves no container safe from Government rummaging. It permits entry into even the smallest physical space. It also led, in part, to the confiscation of extensive paperwork from the target location.

III. This case is an excellent vehicle to resolve the conflict between the various circuits of the United States Court of Appeals and the courts of last resort of the States in such a way that more appropriately considers the constitutional significance of a person's home.

This is case is an excellent vehicle for resolution of the question presented. First, the opinion below only identified the suggestion that the home was the hub on the drug trafficking pointing to calls or circumstances that agents or the court interpreted as drug trafficking activities. Second, this suggestion falls short of probable cause because the suggestion is itself not verified by any direct evidence that these suggestions involved drugs. Finally, the nexus requirement encompasses more than the searches at issue in this case would establish an appropriate standard for the search of a home resolving a circuit split.

QUESTION TWO

I. This is an important federal question involving the Sixth Amendment and the right to the assistance of counsel.

Mr. Gonzales-Arias had a long-protected Sixth Amendment right to counsel while the Government prosecuted the indictment against him. This right has been continually endorsed over the last 45 years:

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall

> enjoy the right . . . to have the Assistance of Counsel for his defense." We have construed this to mean that, in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.

Gideon v. Wainright, 372 U.S. 335, 340 (1963). Throughout the prosecution, Mr. Gonzales-Arias was denied this right. Although the Court initially appointed Counsel from the Federal Defender's Office, he withdrew when Mr. Gonzalez-Arias hired an attorney to represent him. The retained counsel withdrew within a short time. Mr. Gonzalez-Arias hired a replacement lawyer but became dissatisfied with that lawyer because of his performance at the suppression stage of the proceedings and the change of plea proceedings. The Court re-appointed Counsel from the Federal Defender's Office but that lawyer soon left for a position in Washington D.C.. Two other attorneys from the Federal Defender's office took over the case but their relationship with Mr. Gonzales-Arias was dysfunctional. Unfortunately, the District Court became impatient with Mr. Gonzales-Arias and refused to appoint another lawyer.

At no time during the prosecution did Mr. Gonzales-Arias assert a desire to represent himself, but the District Court choose to leave the two lawyers from the Federal Defender's Office as standby counsel. While the Supreme Court recognizes right to represent one's self, and the concept of standby counsel, Mr. Gonzales-Arias made no assertion to such a right:

> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant - not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; 16 and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of

> trial strategy in many areas. Cf. Henry v. Mississippi, 379 U.S. 443, 451 ; Brookhart v. Janis, 384 U.S. 1, 7 -8; Fay v. Noia, 372 U.S. 391, 439 . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Faretta v. California, 422 U.S. 806, 820-21 (1975). *Farrette*, required the waiver of the right to counsel be knowing and intelligent. The United States District Court Bench Book provides advice on how waivers of counsel should be conducted that includes an inquiry into the defendant's knowledge of the law, the consequences of a conviction, and a warning about the dangers of representing one's self. Mr. Gonzales-Arias was clear that he neither understood the law nor wanted to represent himself. Even in the face of the District Court's refusal to appoint another replacement counsel, he still asked for the specific option of having a new lawyer appointed to represent him.

The Supreme Court has categorically stated a policy that favors the full right to counsel, even over the right to represent one's self. The Supreme Court has rejected the proposition that one has a constitutional right to represent one's self during appeal:

> It has since been recognized, however, that an indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel, see *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). Thus, an individual's decision to represent himself is no longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation; rather, it more likely reflects a genuine desire to " 'conduct his own cause in his own words.' " *Faretta,* 422 U. S., at 823 (footnote omitted). Therefore, while *Faretta* is correct in concluding that there is abundant support for the proposition that a right to self-representation has been recognized for centuries, the original reasons for protecting that right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need—although not always the desire—for self-representation.

Martinez v. Court of Appeal, 528 U.S. 152, 161 (2000). The District Court appointed Mr. Gonzales-Arias's former attorneys as standby counsel despite this clear policy against representing one's self. The District Court did not explain this hybrid arrangement with emphasis the significance of waiving the right to counsel, but instead minimized the role of counsel by telling Mr. Gonzalez-Arias he would be able to say anything he wanted at sentencing. Not only was the District Court going against the explicit policy against waiver, it failed to address waiver of the right to counsel in any serious way.

The Ninth Circuit requires a showing of a viable claim as means of triggering an evidentiary hearing on the adequacy of the counsel's representation. In the Ninth Circuit it would not be necessary for Mr. Gonzalez-Arias to show more than a viable claim:

> We've determined Crandell has stated a viable claim. "[P]ersons accused of crime are `entitled to the effective assistance . . . of counsel' acting `within the range of competence demanded of attorneys in criminal cases.'" *Cooper v. Fitzharris,* 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc) (quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)). Failure to do anything at all during the first two months of representing a defendant in a capital case may or may not have fallen within this range. We note that this entire period transpired prior to the preliminary hearing, a proceeding that often serves as a discovery vehicle for the defense. Yet there is the possibility of prejudice from such inaction, as memories fade and evidence is lost or destroyed. The lawyer's delay might have been perfectly normal, or it might not. We're in no position to tell. We can only say that the two-month delay is unusual enough within our experience to raise doubts about the lawyer's competence.

Crandell v. Bunnell, 25 F.3d 754, 755 (9th Cir. 1994). The Panel in Mr. Gonzalez-Arias's case did not require an evidentiary hearing and affirmed the District Court. The District Court spent its time lauding his then counsel, explaining it was gamesmanship, but not accounting for the fact that guilt was established there was no immediate concern for the sentencing. This was not a case that required victims or elaborate hearing to establish drug quantity. It was however a

situation where communication became a problem when Counsel was unable to resolve Mr. Gonzalez-Arias's problems with their attempt to withdraw his plea.

II. The United States Court of Appeals for the First Circuit failed to apply the proper waiver standard and forced Mr. Gonzalez-Arias to chose between no counsel and inadequate counsel.

The First Circuit's established standard for the waiver of the right to counsel was not addressed by the District Court in this case. Mr. Gonzalez-Arias's waiver in this case was not clear and unequivocal:

> First, "the constitutional right of self-representation necessarily entails a waiver of the constitutional right to be represented by counsel. The waiver must be clear and unequivocal; otherwise, a court should not deprive defendant of his right to counsel. Second, the right to counsel is, in a sense, the paramount right; if wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed pro se. Accordingly, we think that requiring an express waiver of the former right before recognizing the latter is a defensible procedure. Third, although we do not require a specific warning by the court or formulaic waiver by the accused, the court must determine the nature of the waiver, as well as its clear and unequivocal election: When a defendant refuses to waive his right to counsel, while demanding to proceed pro se, the trial court will find it hard to know which constitutional right is being asserted, and which is being waived, especially since the right to an attorney is in effect until waived, while the alternative right to self-representation is not in effect until asserted.

United States v. Betancourt-Arretuche, 933 F.2d 89, 92 (1st Cir. 1991). The District Court proposed standby counsel as a means of getting around Mr. Gonzalez-Arias's legitimate concerns about his counsel, who seemingly refused to listen to or take the time necessary to understand his complaints. At no time during the colloquy did Mr. Gonzalez-Arias say that he wanted to represent himself or that he would waive his right to counsel. At best, Mr. Gonzalez-Arias was forced to acquiesce to standby counsel when the judge refused to appoint a new attorney to represent him.

The First Circuit did not honor its articulated preference for Counsel that disfavors any hybrid arrangement. The Court has previously authorized courts to disregard the defendant's attempts to act as counsel when the right to counsel has not been waived:

> Washington was represented at trial by counsel. He did not seek leave to proceed in some sort of hybrid arrangement with counsel or to proceed entirely *pro se. Cf. United States v. Betancourt-Arretuche*, 933 F.2d 89, 92 (1st Cir. 1991) (waiver of right to counsel must be, *inter alia*, knowing and intelligent as well as clear and unequivocal). At most, his filing of a *pro se* motion (in fact, more than one) while he was still represented by counsel — and evidently happily so-constituted a sort of implicit request to be treated as co-counsel. But district courts have "discretion to deny hybrid representation outright." *United States v. Nivica*, 887 F.2d 1110, 1121 (1st Cir. 1989); *see also Betancourt-Arretuche*, 933 F.2d at 95 (stating that defendant could have "utilize[d] some sort of hybrid representation *if* it were approved by the court" (emphasis added)). In *Nivica*, this court explained: An indigent defendant has a sixth amendment right to appointed counsel, and a corresponding right to proceed without counsel, but these are mutually exclusive. A defendant has no right to hybrid representation. That is not to say that hybrid representation is foreclosed; rather, it is to be employed sparingly and, as a rule, is available only in the district court's discretion. 887 F.2d at 1121 (citations omitted). Moreover, had Washington sought leave to act as co-counsel, the district court would have had discretion to "place reasonable limitations and conditions upon the arrangement." *Id.; see also United States v. Gomez-Rosario*, 418 F.3d 90, 96-99 (1st Cir. 2005). In this case, the district court was not required to accept Washington's *pro se* motion at all. The court acted within its discretion in striking the motion.

United States v. Washington, 434 F.3d 7, 16 (1st Cir. 2006). The problem in this case is that the District Court could not relieve the Federal Defenders Office of responsibility without finding a waiver and then fashion a hybrid arrangement designed to give the appearance of Sixth Amendment effective assistance of counsel. It was not enough for the District Court to be willing to appoint standby counsel, in the circumstance where the court recognized a problem in the attorney client relationship but would not appoint new counsel. Mr. Gonzalez-Arias was entitled to new counsel.

Several Circuits have held that standby counsel is not a substitute for the Sixth

Amendment right to counsel. The Fifth Circuit, the Sixth Circuit, and Seven Circuit have all indicated standby counsel insufficient without a valid waiver of the right to counsel. See *United States v. Virgil*, 444 F.3d 447, 453 (5th Cir. 2006) the presence of standby Counsel is not enough to fulfill the Sixth Amendment requirement when a defendant request counsel; Also *United States v. Sandl*es, 23 F.3d 1121, 1127 (7th Cir. 2001) "While the court acted appropriately in both circumstances, even the capable assistance of standby counsel during trial cannot function as a substitute for a detailed inquiry into a defendant's decision to waive his constitutional right to counsel." The District Court erred when it fashioned standby counsel as a remedy for Mr. Gonzalez-Arias's problems with his attorney's representation.

III. **This case is an excellent vehicle to resolve the split between the First Circuit and the Ninth on what is required before the district courts is free to treat a defendant's legitimate complaints about counsel as a waiver of the right to counsel.**

The Sixth Amendment right to counsel is among the most important to our system of justice and the function of the adversarial system. While its importance may need to submit to the right to represent oneself, it should not be waived involuntarily. That is what happened in this case. The record lends itself to a final resolution of what is now a split between the First and Ninth Circuits. Moreover, the This Court should clearly require actual counsel and not standby counsel whenever there is not voluntary waiver.

CONCLUSION

The Supreme Court Should review the conclusion of the United States Court of Appeals for the First Circuit and Grant this petition for writ of certiorari.

Dated at Portland, Maine this 19th day of March, 2020.

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