

No. 9-8467

ORIGINAL

IN THE

U.S. DISTRICT COURT FILED MAY 04 2020

SUPREME COURT OF THE UNITED STATES

MARCH TERM 2020

JUAN PETIS McLENDON

Petitioner,

vs.

UNITED STATES

Respondent,

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

Petition for Writ of Certiorari

Juan P. McLendon

D.O.C. No. #472408

Maryland Correctional Institution - Hagerstown

18601 Roxbury Road

Hagerstown, MD. 21746

Question Presented

Does a failure to obtain a dismissal without prejudice under the Speedy Trial Act constitute STRICKLAND "prejudice," when the mandatory language of Title 18 U.S.C. §§ 3161-3174 et seq. requires dismissal?

Question 1

Parties

The Petitioner, Juan Petis McLendon, is a pre-trial detainee at Maryland Correctional Institution - Hagerstown, located in Hagerstown Maryland.

The Respondent is the United States of America, represented by the Solicitor General of the United States, located at the Department of Justice, 950 Pennsylvania Avenue, N.W., Room # 5614, Washington, D.C. 20530-0001.

These are the parties to the preceding in the lower court whose judgment is sought to be reviewed in this Court.

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DECISIONS BELOW

The decision granting an extension of time within which to file a petition for a writ of certiorari is attached as Appendix **A-1** to this petition.

The decision of the United States Court of Appeals for the District of Columbia Circuit is attached as Appendix **A-2**.

The order of the United States Court of Appeals for the District of Columbia Circuit is attached as Appendix **A-3**.

The decision of the United States District Court for the District of Columbia is attached as Appendix **A-4**.

The order of the United States District Court for the District of Columbia is attached as Appendix **A-5**.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 10, 2019. A copy of that order is attached as Appendix **A-3** to this petition. Jurisdiction is conferred by Title 28 U.S.C. §§ 1254 and 2255(d).

An application for an "Extension of time" within which to file a petition for a writ of certiorari was filed by this Petitioner on February 21, 2020. On March 3, 2020, Justice Thomas extended the time for Petitioner to file a writ of certiorari to and including May 8, 2020. The letter granting an extension of time within which to file a petition for a writ of certiorari is attached as Appendix

A-1 to this petition. Supreme Court Rule 13.5.

The Petitioner has no assets to speak of and is unable to retain counsel to pursue his claims "On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" and is pursuing this petition for a writ of certiorari as a "Pro se" Petitioner.

The Petitioner is legally disadvantaged and should be held to a less stringent standard than an attorney.

This Petitioner hereby moves the Supreme Court of the United States to protect his Due Process rights.

HAINES vs. KERNER, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). This petition should be read

to "raise the strongest argument" as in ERICKSON vs. PARDUS, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007).

The Supreme Court has the power on certiorari review in criminal cases to notice plain error not assigned or specified, if errors are obvious or if they otherwise affect fairness, integrity, or public reputation of judicial proceedings.

STUBER vs. UNITED STATES, 370 U.S. 717, 82 S. Ct. 1287, 8 L. Ed. 2d 798 (1962).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VI to the United

States Constitution, which provides:

"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."

Constitutional Amendment VI is enforced by Title 18

U.S.C. §§ 3161-3174 et seq., "The Speedy Trial Act" hereinafter

known as the "S.T.A.", which provides generally that a

defendant must be tried within 70 days of the latest of

either the filing of an indictment or information or the first

appearance before a judge or magistrate (Title 18 U.S.C.

§§ 3161(c)(1) et seq.), but the "S.T.A." excludes from this time the delay resulting from any pre-trial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion (Title 18 U.S.C. § 3161(h)). In deciding whether to dismiss an indictment or information with or without prejudice as a sanction for violations of the Act, a District Court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under § 3162

(Title 18 U.S.C. §3162(a)(2)). The "S.T.A." does not have permissive dismissal requirements. The "S.T.A." has mandatory dismissal requirements.

Amendment VI is also analyzed based on a criminal defendant's right to the assistance of reasonably effective counsel under the Supreme Court's "effective-assistance" test under STRICKLAND vs. WASHINGTON, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

"The Sixth Amendment entitles a criminal defendant to the assistance of 'reasonably effective' counsel. . . . Reversal due to ineffective assistance is warranted only if a defendant satisfies Strickland's familiar two-prong inquiry. First, a defendant must show that his 'counsel's representation fell below an objective standard of reasonableness'. . . . Second, a defendant must also show a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.' . . . On the first

prong, counsel is ineffective if counsel's acts or omissions fall 'outside the wide range of professionally competent assistance' based on 'prevailing norms of practice' and the 'facts of the particular case viewed as of the time of counsel's conduct'. . . The second prong of the Strickland analysis, prejudice, requires a decision on the merits of the Speedy Trial Act issue. . . "United States of America v. Deonte Marshall, 669 F.3d 288, 293 (D.C. Cir. 2011) (quoting STRICKLAND vs. WASHINGTON, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Surmounting STRICKLAND'S high bar is NEVER an easy task. An "ineffective-assistance" claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the STRICKLAND standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. With respect to prejudice from

ineffective assistance of counsel, a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. The "effective-assistance" test is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments.

CONCISE STATEMENT OF THE CASE

The Petitioner, Juan Petis McLendon, was indicted on September 15, 1998, in a six-count indictment filed under case no. #98-320. The Petitioner was arraigned on September 18, 1998, and held without bond. Maria Jankowski, an attorney from the Federal Public Defender's Office, was appointed to represent the Petitioner.

On September 24, 1998, a superseding twelve-count indictment was filed.

On October 2, 1998, the Petitioner was arraigned on the superseding twelve-count indictment that was filed on September 24, 1998. Harry Tun, Esq., entered his

appearance as the Petitioners retained counsel. A trial date for January 6, 1999, was set.

On October 15, 1998, Harry Tun, Esq., filed a motion to withdraw as Petitioner's retained counsel.

On October 22, 1998, Maria Jankowski, Esq., was re-appointed as Petitioners court appointed counsel.

Then on November 23, 1998, Maria Jankowski, Esq., withdrew as counsel for the Petitioner and James Rudasill, Esq., was appointed as court appointed counsel for the Petitioner. A trial date was reset for January 13, 1999.

On November 23, 1998, the attorney for the Government, Andrew J. Kline, and Petitioners attorney James Rudasill, both stated they would be ready for trial.

On or about January 4, 1999, the District Court became concerned that the "S.T.A." Time Limits and Exclusions had been violated.

On or about January 7, 1999, the attorney for the Government, Andrew J. Kline, returned an identical indictment under case no. #99-011. The indictment in case no. #98-320 was the same as the new indictment under case no. #99-011.

The District Court scheduled a status hearing on January 8, 1999.

On January 8, 1999, the District Court addressed its concerns that the "S.T.A." had been violated.

Petitioners attorney, James Rudasill, stated he could

probably be ready for trial on January 14, 1999. James Rudasill was not ready to proceed with the trial date of January 13, 1999, because of the Petitioner's need for Rule 16 discovery, in which, the Government had not voluntarily provided to the Petitioner. ¹ The District Court arraigned the Petitioner on the new indictment under case no. #99-011. A status hearing was set for February 19, 1999, along with alternative trial dates.

On January 21, 1999, the District Court entered an Order directing the parties to present their respective speedy trial calculations to the District Court. The District

¹ The lack of Rule 16 discovery is what led the Petitioner to fire his previous counsel, Maria Jankowski, Esq., and Harry Tun, Esquire. (See Petitioner's original \$2255 motion filed on October 6, 2005, with exhibits under "Ground one" in the District Court)

Court Order also stated that the period of time from January 8, 1999, until the trial date of February 22, 1999, would be tolled from the "S.T.A." clock.

On February 2, 1999, Petitioner's trial counsel, James Rudasill, filed a "Motion to Dismiss Due to Violation of the Speedy Trial Act's Seventy-Day Rule," pursuant to Title 18 U.S.C. § 3161(c)

(1). The Petitioner requested that the District Court dismiss with prejudice both indictments pending against him.

On February 10, 1999, the United States Attorney, Andrew J. Kline, moved the District Court to dismiss only case no. # 98-320 without prejudice, arguing that even if there were a violation of the "S.T.A.", case no. # 98-320 should be dismissed without prejudice.

On or about February 23, 1999, the District Court denied Petitioner's motion to dismiss under the "S.T.A." and granted the Government's motion to dismiss indictment no. #98-320 and proceeded to trial under the same identical charges under indictment no. #99-011.

The Petitioner was tried three times. The jury in the first trial, held from February 23, 1999, to March 12, 1999, found the Petitioner not guilty on counts ten through twelve, the District Court granted a motion to dismiss count nine, and declared a mistrial for counts one through eight.

On March 17, 1999, the Government's Attorney filed a fifteen count superseding indictment against the Petitioner, with additional counts that were known before jeopardy attached,

relating back to facts the Government was aware of well in advance before Jeopardy attached, pertaining to the Petitioners Rule 16 Discovery request.

A second jury trial was held from July 8, 1999, to July 27, 1999, and the District Court declared a mistrial sua sponte.

From January 4, 2000, to January 10, 2000, the third and final jury trial was held. The jury found the Petitioner guilty on all counts.

On February 22, 2002, the Petitioner was sentenced by the District Court to 235 months of incarceration with a period of supervised release of ten years.

On direct appeal to the United States Court of Appeals for the District of Columbia Circuit, appellate counsel for

the Petitioner, Kenneth D. Auerbach, argued the sole issue that the District Court abused its discretion when it denied the Petitioner's motion for a mistrial after a government witness testified that he found ammunition in Petitioner's bedroom. See United States v. McLendon, 378 F.3d 1109, 1110 (D.C. Cir. 2004).

The Circuit Court for the District of Columbia held the District Court did not abuse its discretion when it denied the motion and affirmed the Petitioner's conviction and sentence.

On October 6, 2005, the Petitioner filed a "Pro Se Motion to Vacate, set aside, or Correct Sentence under Title 28 U.S.C. § 2255." In the motion, the Petitioner raised numerous issues in Grounds 1 thru 11 of his filing. From October 6, 2005, until the year 2014, the Petitioner's § 2255 motion sat

idle on the District Court's docket. During this period the District Court granted several sentencing reductions in light of ongoing changes to the sentencing guidelines regarding crack cocaine offenses.

On November 1, 2011, the Petitioner was released from incarceration, based on changes to the sentencing guidelines regarding crack cocaine offenses which were applied retroactively. The Petitioner was granted immediate release. The Petitioner was asked by court appointed counsel to withdraw a number of his pending grounds in his Title 28 U.S.C. §2255 motion while under duress from the use of anti-psychotropic medication.

On June 9, 2014, the District Court granted the

Petitioner's motion for return of property but affirmed his conviction and sentence, holding that Petitioner could not show Strickland prejudice resulting from counsel's alleged failures because, even if there was a violation of the "S.T.A.", the trial court would have dismissed the case without prejudice, allowing the Government to re-indict and re-prosecute the Petitioner on the same charges. See Appendix

A-4.

On or about November 29, 2016, the District Court re-issued the Order denying the Petitioner's motion to vacate, set aside, or correct sentence, which re-opened the time for the Petitioner to note his appeal to the Court of Appeals for the District of Columbia Circuit.

On December 8, 2016, the Petitioner filed a notice of appeal from the denial of his \$2255 motion.

On January 20, 2017, the Petitioner's attorney, Howard B. Katzoff, filed a motion for a Certificate of Appealability.

On October 25, 2018, the District Court granted the Petitioner's motion for a Certificate of Appealability with respect to two issues:

1.) Ineffective assistance of trial and appellate counsel;

and

2.) for violations of the Speedy Trial Act.

On April 5, 2019, counsel for the Petitioner, Howard B. Katzoff, filed a brief seeking review of the District Court

denying Petitioners motion to Vacate, Set aside, or Correct sentence under Title 28 U.S.C. § 2255 pertaining to Petitioners ineffective assistance of counsel claim raised in that motion in the District Court.

On December 10, 2019, the United States Court of Appeals for the District of Columbia Circuit affirmed in full the District Courts decision, without reaching the merits of the "S.T.A." violation by holding that Petitioners "failure to obtain a dismissal without prejudice under these circumstances constitutes Strickland prejudice, and we hold that it does not . . . WE assume without deciding that the STA was violated, and that trial and appellate counsel were deficient in failing to properly argue or advance that violation." See Appendix **A-2**.

BASIS FOR FEDERAL JURISDICTION

This case raises a Federal question of the application and interpretation of the second prong, "prejudice," under STRICKLAND vs. WASHINGTON, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), when applied to the "S.T.A.". "The second prong of the Strickland analysis, prejudice, requires a decision on the merits of the Speedy Trial Act issue. . . ." SEE United States of America v. Deonte Marshall, 399 U.S. App. D.C. 231, 236 (D.C. Cir. 2011). The District Court had jurisdiction under Title 28 U.S.C. § 2255(a) and having issued a Certificate of Appealability, the United States Court of Appeals for the District of Columbia Circuit had jurisdiction pursuant to

Title 28 U.S.C. §§ 1291 and 2255(d).

The Supreme Court has judicial discretion to review, on a writ of certiorari, under Title 28 U.S.C. § 1254; Supreme Court Rule 10(a) when "a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Courts supervisory power;" and under Supreme Court Rule 10(c) when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

DIRECT AND CONCISE ARGUMENT FOR ALLOWANCE OF THE WRIT

A. United States Court of Appeals Decision Calls for an EXERCISE of this Courts Supervisory Power

The decision of the United States Court of Appeals for the District of Columbia Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the United States District Court for the District of Columbia, as to call for an EXERCISE of this Courts supervisory power.

The United States District Court for the District of Columbia held "[t]he [District] Court need not consider 'cause' if the [Petitioner] fails to establish 'actual prejudice'".

... [Petitioner] is unable to meet this standard because he has not shown that, had the alleged STA violation been successfully raised, it would have resulted in anything other than dismissal without prejudice and subsequent re-indictment by the government." SEE Appendix **A-4**. The "S.T.A." does not have permissive dismissal requirements. The "S.T.A." has mandatory dismissal requirements. The exercise of this Courts supervisory power is necessary because the District Court, in an attempt to reconstruct the events of the "S.T.A." violation in the Petitioners case, made a ruling that related back using hindsight. The District Court in deciding the Petitioner's §2255 motion made a ruling that "related back" to the pre-trial phase in the year of 1999 to determine the correctness of the ruling it made

(the District Court) in 2016 on collateral review. It appears the District Court made its bifurcated ruling based on a procedural bar also, but the ruling's indicate a decision on the merits. The District Courts decision on the merits is wrong. Without reversing and remanding the Petitioners case back to the District Court pre-trial, the District Court on collateral review abused its discretion and refused to follow the mandatory language of Title 18 U.S.C. §§ 3161 and 3162(a)(2). Thus making the "S.T.A." self-contradictory to its mandatory language. The District Court does not have the discretion to ignore the mandatory dismissal requirements of the "S.T.A.". "The Speedy Trial Act. . . confines the exercise of that discretion more narrowly, mandating dismissal of the indictment upon

violation of precise time limits, and specifying criteria to consider in deciding whether to bar reprosecution." UNITED STATES vs. TAYLOR, 487 U.S. 326, 343-44, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988).

Then the United States Court of Appeals for the District of Columbia Circuit so far departed from the accepted and usual course of judicial proceedings, as to sanction such a departure by the United States District Court for the District of Columbia, as to call for an exercise of this Courts supervisory power. The United States Court of Appeals for the District of Columbia Circuit sanctioned and held "WE ASSUME without deciding that the STA was violated, and that trial and appellate counsel were deficient in failing to properly argue or

advance that violation." SEE Appendix **A-2**. The decision of the United States Court of Appeals reflects it was not based on their view of the merits. This Court has held "[t]he purpose of the Speedy Trial Act of 1974, as amended in 1979 and in 1984, 18 U.S.C. § 3161 et seq. (1982 Ed and Supp II) [18 U.S.C.S. § 3161 et seq.], is to quantify and make effective the Sixth Amendment right to a speedy trial. S. Rep. No. 96-212, p. 6 (1979); S. Rep. No. 93-1021, p. 1 (1974). To this end, the Act entitles a criminal defendant to dismissal of the charges pending against him if he is not brought to trial within 70 days of his initial . . . indictment. 18 U.S.C. §§ 3161(c), 3162 [18 U.S.C.S. §§ 3161(c), 3162]. "HENDERSON vs. UNITED STATES, 476 U.S. 321, 333, 90 L. Ed. 2d 299, 106 S. Ct. 1871 (1986)." The

HOUSE OF REPRESENTATIVES Report on the 1975 House bill that enacted section 3162 - and it was the House bill that was subsequently enacted by both chambers of the Congress - appears to treat indictment and trial dismissals identically, requiring that in either case the defendant file a motion to dismiss and providing that he waives the right to dismissal if he does not so move before his trial begins. . . . In the event that the time limits of the bill, subject to the various exclusions, are not met, the court on motion of the defendant may dismiss the . . . indictment against the individual. This sanction applies to . . . the period . . . between indictment and trial. . . . [The Court] has observed that section 3162(a)(2) serves two unrelated purposes. . . . 3162(a)(2) assigns the role

of spotting violations of the [S.T.A.] to defendants - for the obvious reason that they have the greatest incentive to perform this task. . . . by requiring that a defendant move before the trial starts. . . . both limits the effects of a dismissal without prejudice. . . . and prevents undue defense gamesmanship. "United States of America v. Tyrone Hines, 694 F.3d 112, 118-19 (D.C. Cir. 2012) (quoting ZEDNER vs. UNITED STATES, 547 U.S. 489, 502-03, 126 S. Ct. 1976, 164 L.Ed.2d 749 (2006)). When a defendant's right under the "S.T.A." is violated "the court is obliged to REVERSE the convictions and remand the [case] to the district court with instructions to dismiss the indictment. SEE Zedner, 126 S. Ct. at 1989-90. The district court shall, in the first

instance, determine whether to dismiss the [indictment] with or without prejudice." *United States of America v. Sanders*, 376 U.S. App. D.C. 127, 133 (D.C. Cir. 2007).

B. Conflicts with Relevant Decisions of the Supreme Court

The holding of the United States Court of Appeals for the District of Columbia Circuit that "we assume without deciding that the S.T.A. was violated, and that trial and appellate counsel were deficient in failing to properly argue or advance that violation" conflicts with relevant decisions of the Supreme Court.

In *STRICKLAND vs. WASHINGTON*, 466 U.S. 668,

104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) the Court at that time established a two-part test to determine whether an attorney provided "reasonably effective" assistance of counsel. First, a petitioner must show that his "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second and most importantly, a petitioner must also show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"To succeed on a claim of ineffective assistance of counsel, [a petitioner] must show both that (1) 'counsel's performance was deficient,' such that it 'fell below an objective standard of reasonableness,' and that (2) 'the deficient performance prejudiced the defense.'" *United States of America v. Cross*, 249 F. Supp. 3d 339, 346

(D.C. Cir. 2017) (quoting STRICKLAND vs. WASHINGTON, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)). Whether first focusing on the "prejudice" test under STRICKLAND, or first focusing on the "deficient performance" test, the result is the same concerning the Petitioner, "the Speedy Trial [Act does not] call for a flexible or tailored remedy." BETTERMAN vs. MONTANA, ___ U.S. ___, 194 L.Ed. 2d 723, 736-37, at n.6. "The purpose of the Speedy Trial Act of 1974, as amended in 1979 and in 1984, 18 U.S.C. § 3161 et seq. (1982 ed and Supp II) [18 U.S.C.S. §§ 3161 et seq.], is to quantify and make effective the Sixth Amendment right to a speedy trial. S. Rep. No. 96-212, p. 6 (1979); S. Rep. No. 93-1021, p. 1 (1974). To this end, the Act entitles a criminal defendant to dismissal of the charges

pending against him if he is not brought to trial within 70 days of his initial . . . indictment. "HENDERSON vs. UNITED STATES, 476 U.S. 321, 333, 90 L.Ed. 2d 299, 310-11, 106 S.Ct. 1871 (1986). The Petitioner does not have to show prejudice from the denial of a timely trial under the "S.T.A." in order to obtain any relief because there is no basis for such a requirement either in the text or in the legislative history of the "S.T.A.". SEE 120th Congressional Record 41774-41775, 41778, 41793-41795 (1974). The only "prejudice" required to be evaluated by the "S.T.A." is left to the district court's "guided discretion" during the pre-trial phase when the district court considers prejudice to the defendant only when deciding whether the indictment should be dismissed with or without prejudice, pursuant to Title 18 U.S.C. § 3162(a)(2),

with neither remedy having priority. UNITED STATES vs. TAYLOR, 487 U.S. 326, 101 L.Ed. 2d 297, 108 S.Ct. 2413 (1988).

C. Importance of the Question Presented

The Petitioners case presents an important question on the interpretation of the second prong, "prejudice," under STRICKLAND vs. WASHINGTON, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), when the "S.T.A.", which requires dismissal before trial, has been violated, the Petitioner on collateral review cannot receive the benefit of the mandatory dismissal requirement of the "S.T.A.'s" mandatory language. This important question needs to be settled by this Court.

The question presented is of great public importance because

it affects the administration of justice and the administration of the "S.T.A." to the public. Specifically, defendants in criminal cases.

Guidance on the question presented is also of great importance to collateral review petitioners because there is no case in which a court has held counsel's failure to obtain a dismissal without prejudice under the "S.T.A." is sufficient to constitute STRICKLAND "prejudice." See Sylvester v. United States, 868 F.3d 503, 511-12 (6th Cir. 2017); United States v. Rushin, 642 F.3d 1299, 1309-10 (10th Cir. 2011) (citing Chambliss v. United States, 384 F. App'x 897, 899 (11th Cir. 2010)) (unpublished); United States v. Thomas, 305 F. App'x 960, 964 (4th Cir. 2009) (unpublished); United States v. Fowers, 131 F. App'x 5, 6-7 (3rd Cir. 2005) (unpublished); Campbell v. United States, 364 F.3d 727, 730-31 (6th Cir. 2004);

United States v. Jackson, 22 F. App'x 396, 398 (6th Cir. 2001) (unpublished); United States v. Theurer, 36 F.3d 1099, 1994 WL 420072, at *7 (7th Cir. Aug. 11, 1994) (unpublished table opinion); Harvey v. United States, 850 F.2d 388, 402-03 (8th Cir. 1988). These cases, supra, have no precedential effect and most are unpublished. There is no clarifying or precedential decision on the question presented by the Petitioner. This has resulted in collateral review petitioners who have had an "S.T.A." violation pre-trial not having the indictment dismissed while on collateral review, the case remanded back in front of the trial court putting the petitioner back in the status of a pre-trial defendant, and then having the district court as a trial court determine whether dismissal will be "with" or "without" prejudice to reprosecution based on "prejudice" as it relates to Title 18 U.S.C. § 3162(a)(2).

and the mandatory language of the "S.T.A."

The question's importance is enhanced by the fact that the lower courts have misinterpreted UNITED STATES vs. TAYLOR, 487 U.S. 326, 108 S.Ct. 2413, 101 L.Ed. 2d 297 (1988). In TAYLOR this Court at that time held "[t]he [S.T.A.] legislative history indicates that prejudice to the defendant should also be considered before re prosecution is barred, and that the decision to dismiss with or without prejudice is left to the district court's guided discretion, with neither remedy having priority." TAYLOR, 487 U.S. at 326. "[B]ecause] the absence of prejudice is not dispositive." Id. at 341. Hence, the "S.T.A." does not require a finding of "prejudice" as it relates to STRICKLAND "prejudice," the "S.T.A." mandates dismissal of the indictment upon violation of precise time limits, and specifying

criteria to consider in deciding whether to bar reprosecution.

TAYLOR, 487 U.S. at 344. The District Courts decision to dismiss without prejudice cannot be made in hindsight and relate back in an attempt to reconstruct the events of this Petitioner's "S.T.A." violation that occurred pre-trial over two decades ago. A reversal and remand to the District Court making the Petitioner a pre-trial defendant is required first.

Clearly, the District Court abused its discretion in its ruling when it held that the Petitioner had "to show actual prejudice resulting from the alleged S.T.A. violation." The District Court on collateral review conducted the "cause-and-prejudice" analysis without turning to the merits. The District Court ruled the Petitioner was procedurally barred from raising an S.T.A. violation without turning to the

merits of Petitioners "ineffective-assistance" of counsel claim. The District Court then incorrectly applied STRICKLAND "prejudice" to the "S.T.A.'s" mandatory dismissal requirements and held even if "the alleged S.T.A. violation been successfully raised [pre-trial or on direct appeal], it would have resulted in anything other than dismissal without prejudice and subsequent re-indictment by the government." The use of such a standard by the District Court is incorrect and conflicts with MASSARO vs. UNITED STATES, 538 U.S. 500, 507-09, 123 S.Ct. 1690, 155 L.Ed. 2d 714, 722-23 (2003). "It is a better use of judicial resources to allow the district court on collateral review to turn at once to the merits. . . . We do hold that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in

a later, appropriate proceeding under 2255."

This Court should provide guidance by correcting these misinterpretations and making clear that the "S.T.A.'s" mandatory language as stated in TAYLOR must be followed even on collateral review; that STRICKLAND "prejudice" and the "S.T.A.'s" finding of prejudice are different; and the Petitioners' claims are not procedurally barred as stated under MASSARO.

CONCLUSION

For the reasons stated above, the Petitioners writ of certiorari should be granted.

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