

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

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OFFICE OF THE CLERK

20-5385

JUDY HARMON, PETITIONER

v

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

JUDY HARMON

Pro Se

Reg # 17940-042

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**ORIGINAL**

## QUESTION PRESENTED

Whether there appears to be a disparity within the Sister Circuits use of jurisdictional powers and discretion, ruling over Ineffective Assistance of Counsel claims, causing constitutional violations which may promote undue harm to a defendant facing procedural default, thus losing rights to an effective direct appeal?

## II

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3. Jones v United States 582 Fed Appx 845 5th District  
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4. Massaro v United States 538 U.S. 500, 123 S. Ct  
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5. Strickland v Washington 466 US 668 104 S. Ct 2052,  
80 L. Ed 2d 674, 104 S. Ct 2052 (1984)
6. United States v Colon Torres 382 F 3d 76 1st Cir  
(2004)
7. United States v Marshall 946 F 3d 591 (District of  
Columbia 2019)
8. United States v Mohammed 693 F 3d 192 District of  
Columbia (2011)
9. United States v Monzon U.S. District Lexis 11203  
2nd Cir (2001)
10. United States v Reyes 606 Fed Appx. 177 5th Cir  
(2015)

OTHER AUTHORITIES

Memorandum - James M. Cole, Deputy Attorney General to  
all Federal Prosecutors dated October 14, 2014

"Justice Denied" Americas Continued Neglect of Our  
Constitutional Right to Counsel.

- Report of the National Right to Counsel Committee.  
(April 2009).

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at No 18-60273 Document 00515358399

## JURISDICTION

The Judgment of the Court of Appeals was entered on 3/25/20. Petitioner submits a Writ of Certiorari to the Supreme Court timely on 6/22/20. The Jurisdiction of this Court is invoked under 28 U.S.C §)1254(1)

## STATUTORY PROVISIONS INVOLVED

USCS, Constitutional Amendments 6, 14

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 previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

### STATEMENT

There has been a unresolved conflict between courts as to which degree claims of ineffective counsel shall be reviewed. Generally circuit court will not hear claims of ineffective counsel on direct appeal, absent compelling circumstances, leaving no other avenue for a defendant to raise claims except by 2255 Habeas Corpus.

Before Massaro a conflict was created. District courts were improperly denying claims of ineffective counsel that were not argued on direct appeal following precedent of the 2nd Circuit Billy Eko v United States 8F.3d.111,(1993) US App Lexis 27745.

In Massaro v United States 538 U.S. 500, 123 S CT 1690, 155 L. Ed 2d 714(2003) The Supreme Court addressed some issues causing procedural default and held that "A Petitioner may bring an ineffective assistance of counsel claim whether or not the Petitioner could have raised the claim on direct appeal" id at 509.



However the issue has not been addressed as to when both the District Court and Court of Appeals abuses its discretion, not properly resolving claims of ineffective counsel. The defendants' Sixth Amendment rights are being violated if not afforded an Evidentiary Hearing at any stage of proceedings when properly brought before the lower courts. A defendant is prejudiced and not offered Due Process if one has no adequate means to be heard as to ineffective claims in the lower courts, on direct appeal, when the record is sufficient to permit appellate review; prejudice is further caused by creating a procedural bar on other constitutional claims as well.

The issues are now outstanding as to (1) when the Court of Appeals should hear arguments of ineffective counsel on direct appeal and (2) what powers the Court of Appeals should use to ensure that a defendant rights were not violated in District Court by the courts failure to impose a full and fair opportunity to obtain an adjudication of unresolved issues with appointed counsel.

Judy Harmon v United States shows abuse of discretion of the lower Courts, when it erroneously failed to address the merits of claims of ineffective assistance counsel due to the following of general rule channelling a defendant to a 2255 Habeas.

The Petitioner, Judy Harmon has raised several claims of ineffective assistance at various stages of litigation and has not been afforded hearing adjudication or resolution of any claims.

1. After displeasure with Attorney while defendant was on pretrial release defendant made phone call to counsel requesting that she withdraw that resulted in Attached Exhibit #1, Appendix C August 1, 2017 Motion for Leave to Withdraw.
2. Counsel then failed to diligently investigate case stating there are no non frivolous issues on Direct Appeal and filed an Anders Brief. The Court of Appeals found that she did not address all issues in her brief and ordered counsel to complete a Supplemental Brief on issues not addressed, such as conflict between

pronouncement and judgment. See Exhibit #2, Appendix C, February 14, 2019.

3. During and after filing of counsels Supplemental Anders Brief ordered by the Court, the Defendant filed several motions to the Court, her own pro se Supplemental Brief, and letters dissatisfied with counsels performance. (See Appendix C).

Exhibit #3 Letter to Counsel dated September 26, 2018, Exhibit #4 Emergency pro se Motion to Relief appointed counsel of her duties; Conflict of Interest October 5, 2018,

Exhibit #5 Motion of Objection to Defense Attorney McCray letter dated October 10, 2018,

Exhibit #6 Response to Attorney McCray's Anders Brief/Motion to withdraw as counsel October 23, 2018.

Exhibit #7, August 13, 2019.

The 5th Circuit acknowledged that Harmon filed responses showing other issues of merit. The Court then ordered counsel to refile a brief, again, on the merits, challenging the drug quantity attributed to Harmon.

The Court of Appeals did not properly resolve these matters. After ordering counsel to refile Appeal Brief, due to several errors (See Appendix C, Exhibits 8; Failure to comply with Fed R App P. 32(g)(1) and 27(d)(2)(A), 9; Insufficient Brief, 10; Direction on ECF Filing Rule 31.1, Standard E.1), 11; Incorrectly Filing Brief under Civil Procedure. The Fifth Circuit failed to relief counsel despite overwhelming evidence of deficient performance.

Had the issues been heard, the appeals court would have become aware that the matters were not properly addressed in District Court. The only record in District Court is an ex parte proceeding, See Exhibit 12 Appendix C. A hearing was conducted without the defendant and the District Court denies relief of counsel without addressing Harmons' issues. Also Exhibit #13 Appendix C; Harmon's request to counsel inquiring proceeding minutes as to ex parte "withdrawl as counsel" hearing.

District Court denied relief of counsel although counsel admittedly stated (Exhibit #1 Caption #6) "After firm attempts to resolve the issues, the undersigned counsel takes position that she cannot provide effective representation..."

Although Ineffective Assistance of Counsel claims are best brought first before the District Court through a motion for new trial or via collateral relief so as to permit development of a sufficient record for appellate consideration. When a District Court fails to resolve all constitutional claims there stands a violation of Sixth Amendment rights; *Clisby V Jones* 960 F 2d 925(11th Cir 1992)(en banc). In *Clisby* a violation occurred when the Court failed to resolve claims in the habeas corpus. However any claims of ineffective counsel should be subject to review of merit regardless of what stage of proceedings it is argued.

#### REASONS FOR GRANTING PETITION

There is an acknowledged conflict among the Circuit Courts as to when a party should be entitled to an evidentiary remand for further factual development on claims of Ineffective Assistance of Counsel.

The 1st, 2nd, 5th & 11th, and District of Columbia Circuits have set precedent and recognized that it is necessary to review a defendant's claims of Ineffective Counsel. *United States v Monzon* U.S. District Lexis 11203: 2nd Cir (2001); *United States v Colon-Torres* 382 F 3d 76 1st Cir (2004); *United States v Mohammed* 693 F 3d 192 (2011) District of Columbia; *Jones v United States* 582 Fed Appx 845 (2014 5th District) see memorandum from James M. Cole, Deputy Attorney General to all Federal Prosecutors (Oct 14, 2014). If a claim alleges issues that may be meritorious; a remand is proper, on direct appeal if the District Court record is factually undeveloped.

The remaining circuits; have no standing or

current precedent as to the review of ineffective claims, but follow the general rule and preference of the Supreme Court, that claims of ineffective counsel should channelled through 2255 Habeas Corpus id. at 910-11(citing Massaro v United States 538 U.S. 500, 123 S Ct 1690 155 L. Ed 714 (2003))

The Fifth Circuit uses an unusual resolution indifference when it choses to remand some cases and informally resolve others. In United States v Reyes 606 Fed Appx 177 (5th Cir 2015) the Court States "although Sixth Amendment claims of ineffective assistance of counsel are generally resolved on collateral review, the United States Court of Appeals for the Fifth Circuit has previously vacated a conviction and remanded to the district court on direct appeal where the record demonstrated that counsel had an actual conflict of interest but was insufficient to determine whether such conflict adversely impacted the proceedings."

The Fifth Circuit causes further disparities, as it is the only Court that has attempted to informally resolve the issues of ineffective counsel by using an Order to demand counsel to correct, amend, or properly readdress issues of merit on Direct Appeal.

In both *United States v. Harmon* and *United States v. Reyes*, (5th Cir 2015) the court issued an Order "Motion to withdraw DENIED, and counsel is ORDERED to file a brief on the Merits See Exhibit #7 Appendix C

In *Reyes* the court ordered defendants appellate counsel, which was separate from trial; to refile brief and argue ineffective assistance of previous counsel. In *Harmon* the defendant was represented at trial and on appeal by the same counsel. There were unaddressed issues on conflict of interest at every stage of proceedings. The court used the same informal redress procedures in both these cases. The decision shows prejudice, disparity, and indifference when it failed to resolve *Harmon's* issues of ineffective counsel on Direct Appeal as in *Reyes*.



Now the question remains, has the Fifth Circuit overlooked the protections of the Sixth Amendments when on direct appeal (1) It failed to rule on Defendants Ineffective counsel claims when the record was sufficient or ripe for determination. Or (2) It failed to remand to District Court when the record on appeal was insufficient and the District court failed to properly address claims or develop a record?

Not affording a defendant proper allocation as to ineffective assistance claims will cause a procedural bar. Although the Supreme court in Massaro ruled that a Defendant can raise claims of ineffective counsel whether or not it was raised on direct appeal. The following problems still lie:

1) A proper record is undeveloped therefore the time it takes for a 2255 hearing causes prejudice, misconstrued facts, delay in response by counsel.

(2) When counsel is ineffective and fails to raise constitutional violations caused on the defendant, those constitutional claims are barred by procedural default to argue on 2255 Habeas Corpus, thus the Defendant rights have been grossly violated and the defendant is left with only alternative to argue ineffective counsel.

A defendant should be afforded their rights to preserve any and all claims of constitutional violations which counsel failed to raise on appeal. The Circuit Courts are not in agreement on defendants rights to a pro se supplemental brief and majority will rarely be heard. Thus the defendant has no fair avenue to be heard with due process except by involuntary force to resort to a 2255 Habeas Corpus (pro se; without counsel or advise and lengthy delays) to a district whom originally failed proper hearing of claims for Ineffective Counsel.

### CONCLUSION

Although some circuits have remanded to develop a proper record such as the District of Columbia, the 1st, 2nd, 5th and 11th Circuits, many will not remand except on a Habeas petition. However the United States court of appeals of the District of District of Columbia thoroughly addresses this issue and states "United States court of appeal for the District of Columbia circuit remands colorable and previously unexplored claims of ineffective assistance rather than dismissing in favor of collateral review under 28 USCS 2255. The appealate court may do so because the US Supereme Court has expressed a prefernce, but not mandated, that ineffective claims be channeled through collateral proceedings in the District Courts. But this court has never held that any claim of ineffective assistance of counsel, no matter how conclusory or meritless, automatically entitles a party to an evidentary remand.

Majority of the Circuits are unable to rationalize Supreme Courts "preference". While it is logical that not every conclusory or meritless claim should not be entitled to remand. The Sister Circuits are left in confusion on the limitations of channelling claims of Ineffective Counsel and when a defendant's Sixth Amendment Rights will be evoked.

The Fifth Circuit caused defendant to be subject to extreme disparity of standards when it set precedent stating remand to the District Court is proper on Direct Appeal where the record demonstrated actual conflict (Reyes 2015), then failed to relieve Harmon of counsel. Prejudice was caused; resolving claims by giving counsel several chances to rectify and correct deficient performance. Harmon's appellate counsel is the same as trial counsel if the circuit court felt that the conflict could not be heard on appeal, the case should have been remanded to District Court.

Instead, the Court declined to remand when the record conclusively showed the defendant was entitled to relief. Only when the record clearly shows that the claim is meritless, or when no further factual development is needed, the court may dispose of the claim without remanding." *United States v Marshall* 946 F3d 591 (District of Columbia 2019).

It will take further litigation to solve all the issues defendants face being represented by less than adequate counsel.

The Supreme Court has subjected defendants to the narrow standards noted in *Strickland v Washington* 466 US 668 (1984). However the Strickland test does not protect one from evidence not on the record or protections from counsel who is incompetent. Perhaps the Supreme Court now needs to take a "hard look" at issues presented in "Justice Denied" Reports of the Notional Rights to Counsel Committee (2004)

The Committee addresses many issues on the State

and local level but reflect mirrored issues within the federal jurisdiction as well. The Committee noted "the Strickland two-pronged test for determining ineffective assistance of counsel has been harshly criticized, proven to be difficult to apply, and has led to appellate courts affirming convictions that should be unacceptable in a society that genuinely values due process of law. In addition, the Strickland standard has made it possible during more than three decades for state and local jurisdictions to underfund indigent defense services, as this report and many others have amply demonstrated. The Committee, therefore, calls for the Strickland standard to be replaced by a straightforward test: has the accused received "competent" and diligent" representation, as required by the rules of professional conduct adopted by the legal profession? When defense counsel has failed to meet this requirement, thereby justifying discipline under professional conduct rules, surely defendants have not received the effective assistance of counsel under the Sixth Amendment.

The Committee goes on to say "...for counsel "to bring to bear such skill and knowledge as well render the trial a reliable adversarial testing process.

"Competence" and "skill and knowledge" is the language of the rules of professional conduct. As in Justice Marshall's dissent in Strickland, "you cannot determine prejudice to the defendant because the evidence of injury to the defendant may be missing from the record because of the incompetence of defense counsel".

("Justice Denied", pg 212-213).

These discussions are noted in the commentary from the Committees Recommendation 22, which states:

Defense lawyers who provide representation in appellate and post conviction cases organizations that advocate as amicus curiae should urge the United States Supreme Court and state Supreme Courts to adopt a test for ineffective assistance of counsel that is substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation

Although Harmon is confident she can pass the Strickland test there is a high questionability if the Strickland test should be amended to consider the training, competency and actual performance of counsel, taking into consideration that ineffective counsel can bar a defendant from developing a proper record which would show prejudice. Taking all facts into consideration this Court should undoubtedly find that had Harmon had sufficient representation the proceeding would have been different.

The Petitioner Harmon now request Certiorari to clarify the Supreme Court "preference to challenge claim in a 2255 Habeas and address other issues herein to set precedent for the lower courts; when one should remand for proper factual development on the record as to ineffective assistance of counsel claims, and how should one safeguard protections of the defendants Sixth Amendment Rights?