No.

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH SCOTT GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

VERNA WEFALD
65 North Raymond Avenue, Suite 320
Pasadena, California 91103
Telephone: 626-577-2658
Facsimile: 626-685-2562
Email: verna@vernawefald.com

Counsel of Record

QUESTION PRESENTED

A criminal defense attorney has a duty to provide vigorous advocacy. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 655 (1984). The question presented is this:

Should a certificate of appealability issue because reasonable jurists would debate whether a criminal defendant was deprived of the effective assistance of appellate counsel when she failed to file a reply brief, waived oral argument, and refused to file a petition for rehearing or certiorari even though the Ninth Circuit held the defendant's Fourth Amendment claim was a "close call" and a third judge would have reversed but for a decision that was clearly distinguishable?

RELATED PROCEEDINGS

United States District Court, District of Hawaii

United States v. Gordon, CR-11-479-JMS

United States v. Gordon, 895 F.Supp.2d 1011 (2012)

Ninth Circuit Court of Appeals

United States v. Gordon, Ninth Circuit Nos. 13-10463; 18-17202; and 20-15820

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

No.

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH SCOTT GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner Kenneth Scott Gordon respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability ("COA"), filed on July 13, 2020. The order is unpublished.

OPINION BELOW

On July 13, 2020, the Court of Appeals denied a COA to appeal the denial of his 2255 motion. (Appendix A.)

JURISDICTION

On July 13, 2020, the Court of Appeals denied a COA. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and *Hohn v. United States*, 524 U.S. 236 (1998). This petition is due for filing on December 10, 2020. Order of March 19, 2020. Jurisdiction existed in the District Court pursuant to 28 U.S.C. §2255 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment (pertinent part)

"No person shall" .... "be deprived of life, liberty, or property without due process of law ...."

Sixth Amendment (pertinent part)

"In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense."

28 U.S.C. § 2253(c)

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–

> (B) the final order in a proceeding under section 2255 [28 USCS § 2255].
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Procedural history

On August 8, 2013, Petitioner was sentenced to 164 months after being convicted by a jury for methamphetamine trafficking. (CR 226, 227.)[1] On January 20, 2016, after the guidelines were reduced, the district court resentenced Petitioner to 151 months. (CR 261.)

On direct appeal, Petitioner's first attorney filed an *Anders*[2] brief. The Ninth Circuit granted counsel's request to withdraw and appointed new counsel who was to address, *inter alia*, whether the pretrial motion to suppress was properly denied. (2 ER 258-259.)[3] New appellate counsel filed an opening brief but wrote to the court that she would not be filing a reply brief. She also waived oral argument. The motion to suppress will be discussed in detail below.

On July 24, 2017, the Ninth Circuit affirmed Petitioner's conviction in a memorandum decision but said the suppression issue was a "close call." (Appendix F at 3.) Judge Paez concurred but wrote that he

---

[1] "CR" stands for Clerk's Record.

[2] *Anders v. California,* 386 U.S. 738 (1967) (there are no non-frivolous issues on appeal).

[3] "ER stands for the Excerpts of Record filed in Case No. 18-17202.

would have reversed but for *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015) which he believed was controlling. (Appendix F at 5.)

Counsel did not file a petition for rehearing or rehearing en banc. She also told Petitioner that if he wanted to file a petition for writ of certiorari she would have to move to withdraw because it would be frivolous. (1 ER 68.) Petitioner filed the cert petition *pro se*, which was denied.

On May 22, 2018, Petitioner timely filed a 2255 motion alleging, *inter alia*, that appellate counsel was ineffective for failing to file a reply brief, waiving oral argument, failing to file a petition for rehearing, and failing to file a cert petition. (Appendix E.) The district court held that that it did not have jurisdiction to rule on whether appellate counsel was ineffective because only the appellate court could grant any relief. However, the court issued a COA. (Appendix D.)

On appeal, Petitioner argued that the district court had jurisdiction to rule on appellate counsel's ineffectiveness and requested a remand for an evidentiary hearing. The government conceded that the district court had jurisdiction but also argued that appellate counsel was not ineffective. In the reply brief, petitioner argued in detail why appellate counsel was ineffective and failed to act as an advocate.

On December 13, 2019, the Ninth Circuit vacated the order denying the 2255 motion and remanded. It held that the district court had jurisdiction to rule on the claim because it could grant relief by vacating Petitioner's judgment of conviction. (Appendix C.)

On March 27, 2020, the district court denied the 2255 motion and held that appellate counsel was not ineffective. Petitioner had not shown that oral argument would have changed the outcome; a reply brief is not essential for appellate review; there is no constitutional right to counsel when seeking a petition for rehearing; and it was unlikely that en banc review would have been successful. (Appendix B.)

On appeal, Petitioner argued that a COA must issue because reasonable jurists could debate whether counsel in the direct appeal of Gordon's criminal conviction was ineffective under the Sixth Amendment when she failed to file a reply brief, waived oral argument, and failed to file a petition for rehearing en banc even though this Court said the Fourth Amendment issue was a "close call" The Ninth Circuit denied a COA. (Appendix A.)

B. The Ninth Circuit found the Fourth Amendment issue to be a "close call"

Prior to trial, Petitioner filed a motion to suppress the contents of a duffel bag and his wallet that were seized from him when he was arrested. After an evidentiary hearing, the motion was denied in a published decision. *United States v. Gordon*, 895 F.Supp.2d 1011 (2012).

Drug trafficker and daily methamphetamine user Richelle Higa was arrested on May 13, 2011, with four pounds of methamphetamine. She told DEA agents that she bought the drugs from codefendant Tyrone Fair. Couriers would be used to collect payment for the narcotics. Higa would hide the cash in boxes of macadamia nut candy. A courier was expected to arrive at Higa's residence on May 14, 2011, at 10:30 a.m. Agents set up surveillance and planted paper in the macadamia nut boxes to simulate the weight of currency. *Id.* at 1014.

When Petitioner arrived at Higa's apartment complex carrying a black duffel bag, he entered the apartment but stayed for only 30 seconds. He was videotaped inside the apartment taking the box of candy and placing it in the duffel bag. The duffel bag was hanging by a strap from his shoulder when he left the apartment. *Ibid.*

As Petitioner approached his parked car, four officers detained him. Officer Marumoto grabbed Petitioner's right arm and another officer grabbed his left arm. The black duffel bag was removed from Petitioner's shoulder and he was handcuffed. "After Petitioner was arrested and placed in handcuffs" Officer Rumschlag "immediately placed the bag on the ground and opened it." *Id.* at 1015. After confirming that the duffel bag contained the macadamia nut boxes Petitioner was taken to a law enforcement van. *Ibid.*

"As for timing, the removal of the bag from Petitioner, the arrest and handcuffing, and the search of the bag occurred contemporaneously" or "almost instantaneously" according to Rumschlag. *Ibid.* "As for proximity, the bag was within Petitioner's reaching distance at the time," as Rumschlag said it was "right behind where Petitioner was standing." *Ibid.*

It was undisputed that: "Petitioner was under the custody and control of law enforcement when Agent Rumschlag initially searched the bag. Petitioner offered no resistance to the arrest, and was surrounded by several officers." *Ibid.* There were no other persons at the scene deemed to be potential threats and no weapons were either observed or found at the scene or in the bag. *Ibid.* At the federal building Agent Rumschlag opened the bag,

conducted a more thorough search, and found the paper they had planted in the candy box. *Id*. at 1016.

The district court acknowledged that warrantless searches are *per se* unreasonable under the Fourth Amendment. Nevertheless, a search of the arrestee's person and the area within his immediate control, is permissible incident to a lawful arrest. *Id*. at 1018, citing e.g. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) and *Chimel v. California*, 395 U.S. 752, 763 (1969). Such warrantless searches are justified for the "twin purposes of finding weapons" that could be used or evidence that could be destroyed. *Id.* at 1019. The court observed that *"Gant* tethered the legality of a search incident to arrest to the *Chimel* justifications: officer safety and preservation of evidence." *Ibid*.

> If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-t-arrest exception are absent and the rule does not apply" .... That is, *Gant* refocused attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted.

Petitioner, 895 F.Supp.2d at 1019.

The court denied the motion to suppress finding that "even if Petitioner was under control of law enforcement officers, and even if he was immediately handcuffed, the bag was next to or near Petitioner when agent Rumschlag observed its contents." *Id.* at 1020. Even if a suspect has been

secured there was no bright line rule in assessing the lawfulness of the search. *Id.* citing *United States v. Shakir*, 616 F3d 315, 319(3rd Cir. 2010) ("If *Gant* is construed to forbid all container searches after a suspect is handcuffed or held by police it would effectively eliminate a major element of the search-incident-to-arrest doctrine.")

The district court also found that *United States v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993) was binding as "even after *Gant*, courts continue to follow *Nohara* and similar caselaw involving handcuffed defendants." *Petitioner*, at 1021 (citations omitted). If *Gant* prohibited a search incident to arrest whenever a suspect is handcuffed, this would expose the police to an unreasonable risk of harm. Therefore, under the totality of circumstances, the search of the bag was lawful. *Ibid.*

The memorandum decision affirmed Petitioner's conviction but observed that the suppression issue was a "close call." (Appendix F at 4.)

> *First*, the district court properly denied Petitioner's motion to suppress evidence from the duffel bag and wallet. Law enforcement agents searched he duffel bag within seconds of Petitioner being handcuffed. *United States v. Camou*, 773 F.3d 92, 938 (9th Cir. 2014) (internal quotation marks omitted) (quoting *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004)0; see also *United States v. Cook*, 808 F.3d 1195, 1997, 1199-1200 (9th Cir. 2015) (upholding search of a backpack after a suspect was handcuffed where there were reasonable security concerns); *United States v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993) (upholding search of a bag two to three minutes after the suspect was handcuffed and seated in an apartment hallway).

> Unlike the suspect in *Arizona v. Gant*, Petitioner was "within reaching distance" of the duffel bag when it was first searched. 556 U.S. 332, 351 (2009). Although a **close call**, the initial search was lawful. Further, the district court's conclusion that the duffel bag remained in the uninterrupted control of law enforcement was not clearly erroneous. Petitioner points to no evidence that anyone other than law enforcement had access to the duffel bag after he was arrested. As to the wallet, Petitioner stipulated that officers would testify the wallet was taken from his person at the time of his arrest. He also stipulated that the wallet was then transported to DEA headquarters. The district court properly relied on these stipulations in finding the search of the wallet was lawful. *See United States v. Passaro*, 624 F.2d 938, 944 (9th Cir. 1980).

(Exhibit 1 at 3-4.)

Judge Paez wrote a concurring decision stating:

> I agree with the majority in full. I write separately only to clarify that I **would reverse** the denial of the motion to suppress, in accordance with *Arizona v. Gant*, 556 U.S. 332 (2009) and our decision in *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014), if not for *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015). On similar facts as here, the court in *Cook*, concluded that the dual purposes of the search-incident-to-arrest doctrine were sufficiently served to uphold the search. Although, in light of *Gant* and *Camou*, I would not have concluded the same, I view *Cook* as controlling here.

(Appendix F a 5.)

REASONS FOR GRANTING THE WRIT

A COA SHOULD ISSUE AS REASONABLE JURISTS WOULD DEBATE WHETHER THE SIXTH AMENDMENT WAS SATISFIED WHEN APPELLATE COUNSEL DID NO MORE THAN FILE AN OPENING BRIEF IN A MERITORIOUS CASE

As noted above, the district court denied the 2255 motion finding that reply briefs, oral argument, and petitions for rehearing are essentially irrelevant. (Appendix B.)

A. Standard for granting COA

To obtain a COA under § 2253(c), the petitioner must make a substantial showing of a denial of a constitutional right such that reasonable jurists could debate whether the issue should have been resolved differently. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The threshold COA inquiry is not "coextensive with a merits analysis" but asks only if the decision is debatable among jurists of reason. *Buck v. Davis*,___ U.S. ___, 137 S.Ct. 759, 774, 197 L.Ed.2d 1, citing *Miller-El v. Cockrell*, 537 U. S. 322, 327, 348 (2017).

This is the perfect case to illustrate why the mere filing of an opening brief does not satisfy appellate counsel's obligation to provide vigorous advocacy under the Fifth and Sixth Amendments.

B. A criminal defense attorney has a duty to act as an advocate and require the prosecution's case to survive the crucible of meaningful adversarial testing

At the outset it is important to stress that a criminal defense attorney's first duty is to provide vigorous advocacy.

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. (Citation.) From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Strickland v. Washington, 466 U.S. 668, 688 (1984), citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) and *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

The criminal defense attorney's "overriding mission" is "vigorous advocacy of the defendant's cause." *Strickland*, at 689. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 655 (1984).

C. A petitioner must show both deficient performance and prejudice

Ineffective assistance of counsel claims are governed by the standards set forth in *Strickland*, 466 U.S. at 687, which require a showing of both deficient performance by the attorney and resulting prejudice to the defense. "The defendant must show that counsel's performance fell below an objective standard of reasonableness." *Id*. at 688. The defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689.

As to prejudice, the defendant must show that there is 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." *Strickland v. Washington*, 466 U.S. at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686.

D. The Ninth Circuit's downplaying of the importance of handcuffs warranted rehearing en banc.

In *Chimel v. California*, 395 U.S. 752, 753 (1969), this Court discussed the chaotic state of the search-incident-to-arrest jurisprudence before holding that the warrantless search of Chimel's entire three bedroom house, garage, and attic, after he was arrested for burglary, violated the Fourth Amendment. The Court clarified that after an arrest, "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons" he might use to "resist arrest or effect his escape." *Id.* at 763. It is also reasonable to search the arrestee's person for evidence that might be concealed or destroyed. *Ibid*. "The search here went far beyond the petitioner's person and the area from which he might have obtained either a weapon or something that could have been used as evidence against him." *Id.* at 769.

Forty years later, in *Arizona v. Gant*, 556 U.S. 332 (2009), this Court upheld the Arizona Supreme Court's finding that a search was unconstitutional. Gant was arrested for driving with a suspended license, "handcuffed, and locked in the back of a patrol car," when police officers searched his car where they discovered cocaine in the pocket of a jacket. *Gant*, at 335. The Arizona Supreme Court held that neither *Chimel* nor *New*

York v. Belton, 453 U.S. 454 (1981) justified the warrantless search because "Gant could not have accessed his car to retrieve weapons or evidence at the time of the search." *Gant* at 335.

This Court reiterated that under *Chimel*, a search incident to arrest may only include the area within the arrestee's "immediate control" "from which he might gain possession of a weapon or destructible evidence." *Gant*, at 339. "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Ibid.*

Post-*Gant*, the Ninth Circuit upheld the warrantless search of a backpack, "which was right next to Cook," two minutes after he had been arrested for drugs. *Cook*, 808 F.3d at 1197. After Cook was ordered on the ground at gunpoint and then handcuffed, a crowd gathered. Even though there were three officers near Cook and three by Cook's car, the officers were "concerned that additional, unidentified coconspirators or others might interfere if they continued to attract attention." *Ibid.* Officers found no weapons in the backpack. They "moved Cook and the backpack to a more secluded restaurant parking lot a few blocks away." *Ibid.* There, officers did a more thorough second search and found ziplock bags containing drugs. *Ibid.*

On appeal, Cook challenged only the initial search, recognizing that if that search was valid, the second warrantless search was permitted "so long as the backpack remained in the legitimate uninterrupted possession of the police." *Cook* at 1198-1199, relying on *United States v. Burnett*, 698 F.2d 1038, 1049 (9th Cir. 1983). The Ninth Circuit agreed with Cook that his position face down on the ground with his hands cuffed behind his back was a "highly relevant fact in determining whether the search was justified." *Id.* at 1199. However, the search was both quick and cursory as well as spatially and temporally incident to the arrest. *Id*. at 1200.

The Ninth Circuit distinguished *Gant* who was arrested for driving with a suspended license, while Cook was arrested for felony drug offenses. Also Gant was in a locked patrol car while Cook's backpack was within reaching distance. The fact that Cook was handcuffed was significant but not dispositive because "handcuffs do fail on occasion." *Id*. citing *United States v. Sanders*, 994 F.2d 200, 209 (9th Cir. 1993). "We cannot say here that there was no reasonable possibility that Cook could break free and reach for a backpack next to him." *Cook*, at 1200.

Not only did *Sanders* predate *Gant* by 16 years, but the Ninth Circuit failed to mention that the search for weapons was on Sanders' *person*,

not a backpack that had been taken from him; and a gun was found in Sanders' right jacket pocket. *Sanders* at 202.

Cook, 808 F.3d at 1200, also cited *United States v. Shakir*, 616 F.3d 315, 321 (3rd Cir. 2010) which upheld a warrantless search when Shakir was handcuffed and two officers were also holding him down. Police searched a duffel bag at Shakir's feet. They were concerned that his accomplices were nearby. Here again, *Shakir* relied on *Sanders* to emphasize that "handcuffs are not fail-safe." 616 F.3d at 320.[4]

At a minimum, appellate counsel should have filed a petition for rehearing en banc urging the Ninth Circuit to review whether *Cook* conflicted with *Gant*. *Gant* did not even remotely indicate that handcuffs were devices that might fail. Nor was there any suggestion in Petitioner's case that the handcuffs could have failed. Moreover, the duffel bag was on the ground *behind* him when he was handcuffed.

Cook was also distinguishable for other reasons. When officers searched Cook's backpack, two firearms had already been recovered from Cook's co-conspirator's house; Cook was arrested in front of that house; and a

---

[4] These cases also beg the question as to why officers would leave a bag right next to a handcuffed defendant if they were concerned about officer safety, handcuff failure, and the destruction of evidence. It is more than likely that the officers have no concerns about their safety or destruction of evidence and are just too lazy to get a warrant.

crowd had gathered. Thus, "under the totality of circumstances, we conclude that the search of Cook's backpack was reasonable and valid incident to arrest." *Cook* at 200. By contrast, there were no similar concerns when Petitioner was arrested. No one else was around and he was compliant. Officer safety was simply not an issue.

E. A cert petition would not have been frivolous

Downplaying the significance of handcuffs would also have been grounds for a non-frivolous cert petition.[5] As *Chimel* and *Gant* demonstrate, the Supreme Court often updates and clarifies Fourth Amendment law. *Gant* scrutinized both *Chimel* and *Belton* at length. Appellate counsel should have filed a cert petition on grounds that the memorandum decision conflicted with *Gant*.

Rather than act as an advocate, appellate counsel actually notified this Court that Gordon's intention to file a petition for writ of certiorari violated Supreme Court rules, necessitating her withdrawal. (2 ER 396.) But of course, if the memorandum decision was a "close call" and the concurring judge would have reversed under *Gant* but for *Cook*, a cert

---

[5] Under Rule 10(c), the Supreme Court will consider granting a cert petition 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."

petition would not have been frivolous. Although it is true that cert petitions are rarely granted, Gordon's chances were not helped by his own lawyer telling the court that his petition was frivolous.

F. By waiving oral argument before the appellate court had even decided whether it was unnecessary, appellate counsel failed to require the prosecution's case to survive meaningful adversarial testing

By waiving oral argument before the Ninth Circuit had even decided whether it was unnecessary appellate counsel in effect told the Court that she thought Petitioner's appeal was a loser. This is hardly the vigorous advocacy envisioned by *Strickland* and *Cronic*.

Federal judges frequently extol the virtues of oral argument. For example, Eighth Circuit judge Myron Bright wrote in a law review article:

> In my opinion, oral argument is an essential component of the decisionmaking process, and plays an important role in assisting the appellate judge in reaching a decision ....
>
> The argument can isolate and clarify the core issues. [Vague points, complex points, and points that were simply overlooked] may become evident during oral argument. Most significantly, oral argument provides the attorney with his or her only opportunity to face and speak directly to the judges about the case and the contentions made by counsel.
>
> Chief Justice William Rehnquist stated, during a penal discussion on oral advocacy:

> You could write hundreds of pages of briefs, and, you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process.
>
> The ability to face the court directly provides the litigant with a better opportunity to inform the judges of the litigant's position and the impact that a particular decision will have on the individual parties. Cold, printed words convey little in regard to the sense of urgency under which a party may be operating.

Bright, "The Power of the Spoken Word: In Defense of Oral Argument," 72 Iowa L.Rev. 35 at *36 (1986).

It cannot be overemphasized that if the memorandum decision found the Fourth Amendment issue to be a "close call" and if the concurring judge would have reversed but for *Cook*, it is more than likely that the panel did indeed wish to hear oral argument. Zealous advocacy at oral argument might well have tipped the balance in Petitioner's favor.

G. Appellate counsel's failure to file a reply brief was deficient performance

Not addressing something in a reply brief may be seen as a concession. *See e.g. United States v. Eric B.,* 86 F.3d 869, 879, n.21 (9th Cir. 1996) ("It may be inferred that counsel for appellant concedes that this right of privacy argument is suspect, since appellant's reply brief dropped all reference to this issue.")

Appellate counsel wrote Petitioner a letter stating that she did not file a reply because the government responded "using the same case law." (1 ER 59.) This was inaccurate, however, as the government relied on *Nohara* (2 ER 355) which the memorandum decision also relied on (2 ER 391) but which was not mentioned in the opening brief.

The government wrote: "The district court concluded that even if Petitioner was handcuffed shortly before Agent Rumschlag actually made his initial search of the bag, the court would still uphold the search as incident to his arrest." (2 ER 355, citing *United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1993). Because appellate counsel did not cite *Nohara* in the opening brief, vigorous advocacy warranted that it be addressed in a reply brief.

It cannot be overemphasized that *Nohara* was decided 16 years before *Gant*. The primary issue in that case was whether Nohara had a reasonable expectation of privacy in the hallway outside his apartment in a high security building. 3 F.2d at 1240. Agents had gone to Nohara's apartment and knocked on the door. When he opened the door, another agent saw that Nohara was holding a glass pipe with white residue, recognizable as methamphetamine. Nohara was also holding a black bag. Nohara was arrested and handcuffed. While he was seated on a chair in the hallway

agents searched the black bag and found an ounce of methamphetamine. *Id.* at 1240-1241.

The Ninth Circuit held that Nohara did not have a reasonable expectation of privacy in the apartment hallway. The search of the black bag was justified as incident to an arrest. The bag was in his immediate control because Nohara was holding it when he opened the door. The court found that although the bag was taken from Nohara and he was handcuffed this was of no moment. Id. at 1243.

Nohara, however, cannot be reconciled with *Gant*. Once the bag was taken from him and he was handcuffed it goes without saying that the bag was no longer in his immediate control. He could not possibly have reached for a weapon or destroyed any evidence in the bag.

The memorandum decision also cited *Nohara* as "upholding search of a backpack after a suspect was handcuffed where there were reasonable security concerns." (2 ER 391.) It is highly likely that the panel relied on *Nohara* because appellate counsel failed to argue how this case was no longer valid after *Gant*.

H. Had appellate counsel done more than just file the opening brief, there is a reasonable probability of a different result

Given that the Ninth Circuit found the issue to be a "close call," and Judge Paez would have reversed but for *Cook*, a petition for rehearing en banc might well have been granted and the decision reversed. At a minimum, there was more than a reasonable probability of a different result. Certainly confidence in the outcome is undermined.

The Tenth Circuit, on similar facts, recently ruled that a suppression motion should have been granted. (Exhibit at 4 at 164-169, citing *United States v. Knapp*, 917 F.3d 1161 (10th Cir. 2019). Knapp called police to report a theft in a grocery store. After police responded and caught the thief, they determined that Knapp had an outstanding warrant. They found her in the driver's seat of parked pickup truck. When they told her they had to arrest her, she "voluntarily retrieved her pursue from the back seat." *Id.* at 1163. Back inside the grocery store, Knapp asked a friend to take her purse so she would not have to take it to jail. Suspicious, the officer refused to let the friend take it or let Knapp leave it in her truck. *Ibid.*

After Knapp refused to let officers search her purse, they cuffed her hands behind her back. *Id.* at 1164. The officers walked Knapp to the patrol car. Knapp stood in front of the hood facing officer Foutch. Officer

Parker placed the purse on the hood of the patrol car. Knapp stood near the bumper of the patrol car about three feet from the purse which was on the hood near the windshield. When Foutch told Knapp she would be committing a felony if she brought drugs into a jail, she responded that there was a pistol in the purse. At that point the officers searched the purse and found the pistol. Three officers were present when this was done. *Ibid.*

Knapp was charged with being a felon in possession of a firearm. She moved to suppress the firearm and her statement. The government argued the search was incident to a lawful arrest. *Ibid.* The district court said the case presented a "difficult choice" but reasoned that since Knapp was three feet away from the purse she could have gained access. *Ibid.*

On appeal Knapp argued that the search was not incident to arrest because the police chose to put Knapp in proximity to her purse, but, in any event, she could not have accessed the purse's contents at the time of the search. *Ibid.* The Tenth Circuit reversed,[6] finding that searches within an

[6] The Assistant Federal Public Defender, who represented Knapp on appeal, filed a reply brief and appeared at oral argument. See Tenth Circuit docket for Case No. 18-8031. On remand to the district court, the government dismissed the indictment with prejudice. (CR 109, Case No. 17 CR 207, D. Wyoming.)

arrestee's immediate control must be justified on a case-by-case basis by the need to disarm or to preserve evidence. *Id.* at 1165.

The court first held that the search was not of Knapp's person, such as a weapon concealed on her clothing or pockets. *Id.* at 1166. By contrast, "visible containers in an arrestee's hand such as Ms. Knapp's purse are best considered to be within the area of an arrestee's immediate control" and thus governed by *Chimel v. California*, 395 U.S. 752 (1969). *Knapp*, 917 F.3d at 1167. Because the purse was not concealed under or within her clothing and was easily separable from her person, the arresting officers had no authority to search its contents pursuant to *United States v. Robinson*, 414 U.S. 218, 234 (1973) (when probable cause to arrest, officer authorized to search arrestee's person for weapons and a cigarette package containing heroin). *Knapp*, at 1168.

Turning to the question of whether the search was justified by the need to preserve evidence or the need to disarm Knapp, the court noted that the principles of *Arizona v. Gant*, 556 U.S. 332, 344 (2009) apply to more than just automobiles. *Knapp*, 917 U.S. at 1168. Applying both *Gant* and *Chimel*, the court held it was "unreasonable to believe Ms. Knapp could have gained possession of a weapon or destructible evidence within her purse at the time of the search." *Ibid.*

The court looked to the following factors: (1) whether an arrestee is handcuffed; (2) the relative number of arrestees and officers present; (3) the relative positions of the arrestees, officers, and the place to be searched; and (4) the ease or difficulty with which the arrestee could gain access to the searched area. *Id.* at 1168-1169.

> Here, not only were Ms. Knapp's hands cuffed behind her back, Officer Foutch was next to her, and two other officers were nearby. Moreover, the purse was closed and three to four feet behind her, and officers had maintained exclusive possession of it since placing her in handcuffs.

Knapp, 917 F.3d at 1169.

The court relied on *United States v. Leo*, 792 F.3d 742, 750 (7th Cir. 2015) which held that a backpack was not in the defendant's immediate control after an investigatory stop when his hands were cuffed behind his back and the backpack was no longer in the defendant's possession. The Seventh Circuit reasoned it was "inconceivable that" the defendant "would have been able to lunge for the bag, unzip it, and grab the gun inside." *Ibid.*

The *Knapp* decision is on point to Gordon's case. Although it came down two years after the disposition of Gordon's appeal and it is not a Ninth Circuit decision, it demonstrates that had Gordon been afforded the vigorous advocacy he was constitutionally entitled to, there is a reasonable probability this Court's decision would have been different. Certainly the

Knapp decision undermines confidence in the outcome. *Strickland*, 466 U.S. at 694.

I. A COA must be granted because the issue of whether appellate counsel was ineffective is debatable among jurists of reason.

As discussed above, there is a serious question as to whether this Court's memorandum decision denying relief on the Fourth Amendment claim was correct. *Nohara* and *Cook* are easily shown to be inconsistent with *Gant*. *Knapp* is directly on point and illustrates why the memorandum decision was wrong.

To fulfill her duty to act as an advocate, appellate counsel should have filed a reply brief to point out why *Nohara* was no longer valid after *Gant*. To provide vigorous advocacy she should not have waived oral argument, particularly when she failed to file a reply brief. And, when this Court said the issue was a "close call," and when Judge Paez would have reversed but for *Cook*, the refusal to file a petition for rehearing en banc to point out why *Cook* cannot be reconciled with *Gant* was deficient performance. Appellate counsel failed utterly to require the prosecution's case to survive meaningful adversarial testing. Had Petitioner been afforded the zealous advocacy to which he was entitled under the Sixth Amendment, there is a reasonable probability of a different result. *Strickland, Cronic.*

The district court's decision finding that appellate counsel was not ineffective is debatable among jurists of reason. *Buck v. Davis*. Not only was the memorandum decision wrongly decided, but the district court failed to recognize that reply briefs, oral argument, and petitions for rehearing and certiorari, are important weapons in the criminal defense attorney's arsenal to wage the adversarial battle that the Sixth Amendment expects will take place.

The lower courts are in dire need of guidance as to what appellate counsel must do to provide the vigorous advocacy to ensure that the prosecution's case survives the crucible of meaningful adversarial testing.

CONCLUSION

For the reasons expressed above, petitioner respectfully requests that a writ of certiorari issue to review the order of the Ninth Circuit Court of Appeals.

Date: November 29, 2020 Respectfully submitted,

VERNA WEFALD

Counsel of Record