IN THE SUPREME COURT OF THE UNITED STATES

PEDRO CARRASCO, Jr, aka
Pedro Carrasco,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

1. Is a criminal defendant deprived effective assistance of counsel as guaranteed by the Sixth Amendment when counsel knowingly withholds from the trial court information relevant to a dispositive pretrial motion before advising a criminal defendant to plead guilty, knowing that the defendant's plea agreement with the prosecution reserved the right to appeal the trial court's denial of the dispositive motion?

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No. _____

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

Petitioner, PEDRO CARRASCO, Jr. (hereinafter Carrasco) respectfully prays that a writ of certiorari issue to review the unpublished memorandum of the United States Court of Appeals for the Ninth Circuit entered on June 4, 2020, affirming the district court's order denying Carrasco's motion to suppress evidence and motion for reconsideration and/or for a *Framks* hearing,

OPINION BELOW

On June 4, 2020, the Ninth Circuit Court of Appeals entered an unpublished memorandum affirming the district court's order denying Carrasco's motion to suppress evidence, and motion for reconsideration and/or for *Franks* hearing. The unpublished

memorandum is attached in the Appendix (App.) at pages 1-3. The Ninth Circuit denied Carrasco's petition for rehearing on August 14, 2020. App. 4. This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution states:

> 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.

U.S. Const., amend. VI.

STATEMENT OF THE CASE

In April, 2016, Carrasco was charged in the United States District Court for Montana with drug trafficking, firearm and money laundering offenses. The government obtained the indictment following execution of a search warrant at his residence in Billings, Montana.

Carrasco eventually entered guilty pleas to conspiracy to distribute and possession with intent to distribute 500 or more grams of methamphetamine in violation of 21 U.S.C. § 846, and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956. The district court sentenced Carrasco to serve a total of 168 months in prison.

Carrasco's guilty pleas were conditional in accordance with Federal Rule of Criminal Procedure 11(a)(2). Rule 11(a)(2) allows criminal defendants to plead guilty while reserving in writing the right to appeal the district court's denial of certain specified pretrial motions.[1]

Carrasco reserved the right to appeal the districts denial of his motion to suppress evidence and the denial of his motion for leave to file a motion for reconsideration and/or for a *Franks* hearing. App. 64. These motions were filed by his first defense counsel, Lisa Bazant.

In the initial motion to suppress, Carrasco challenged the four-corners of the affidavit of probable cause. He maintained the affidavit failed to established probable cause to justify issuance of the search warrant for his home. App. 8-22. The finding of probable cause rested primarily from a recorded statement obtained by agents of the Drug Enforcement Agency (DEA) from a confidential source (CS). App. 34-39; and App. 116-252 (under seal).[2]

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[1] Rule 11(a)(2) states: "(a) Entering a Plea. ... (2) **Conditional Plea**. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." Fed. R. Crim. P. 11(a)(2).

The Ninth Circuit and other circuits require motions reserved for appeal under Rule 11(a)(2) dispose of the case either in the event that the district court's order denying such motion is reversed, or in the event the district court's order is affirmed. *United States v. Scott*, 844 F.2d 1163, 1165 (9th Cir. 1989); *United States v. Yasak*, 844 F.2d 996, 999 (7th Cir. 1989); *United States v. Wise*, 179 F.3d 184, 186 (5th Cir. 1999); *United States v. Bundy*, 392 F. 3d 641, 645-46 (4th Cir. 2004); and *United States v. Wong Ching Hing*, 867 F.2d 754, 758 (2d Cir. 1989).

[2] As part of the Appendix for this petition, Carrasco is providing documents under seal. These documents were filed under seal in the district court and under seal in Volume III of the Excerpts of Record in the Ninth Circuit. Those include: Exhibits for Defendant's Motion for Leave to file Motion to Reconsider and Brief in Support Thereof (App. 77-90); Reporter's Transcript of Ex Parte Hearing (App. 91-115); and Verbatim Transcription of [CS] interview on 2/7/2016 (App. 116-252).

On February 7, 2016, the CS was a passenger in a vehicle driven by Jose Santana-Selgodo that was stopped on I-90 in Montana by Montana State Police. App. 33. The police seized two and a half pounds of methamphetamine from a speaker located in the trunk of the vehicle during the traffic stop. This seizure lead to the CS's arrest. App. 33-35 and 116-34 (under seal).

According to the affidavit of probable cause the CS told the DEA that the CS, the driver, Jose Luis Santana-Selgado and another passenger of the vehicle "were transporting the methamphetamine seized from the vehicle from the Prosser, Washington area to Billings, Montana." App. 35.[3] The affidavit states"[t]he CS said that the methamphetamine was going to be delivered to Pedro CARRASCO, Jr." *Id.*

In the initial motion to suppress, Carrasco claimed that the "the affidavit was based on information from a confidential source (CS) that was not reliable." App. 15. In denying the motion, the district court stated, "[b]ecause the confidential source provided much of the information in the affidavit, the Court analyzes the reliability prong first, which in turn impacts the remaining prongs." *Id.*

The district court found that affidavit described the CS as having first-hand knowledge of the criminal activity. The district court also found that the CS's information was an admission against penal interest, and therefore, reliable. App. 16-18. The district court wrote:

> CS's first-hand knowledge of Carrasco's drug trafficking out of his home, including exchanging large amounts of methamphetamine for thousands of dollars, was enough to provide

[3] The district court's ordering denying the motion to suppress evidence and the affidavit of probable cause for the search warrant application were originally filed under seal in the district court. The Ninth Circuit entered an order unsealing Volume II of the Excerpts of Record original filed under seal. Therefore, these two documents are filed publically due to the unsealing in the Ninth Circuit. App. 5

Judge Orsty with probable cause....

> CS's admission to participating in the methamphetamine distribution ring - a statement against his/her penal interest - - adds further credibility to his/her story.... CS's information about his/her participation in the drug trafficking - - delivering a pound of methamphetamine to Carrasco's home, and using methamphetamine with Carrasco and his family members - - is the same information that incriminates CS. And even though CS's admission occurred after his/her arrest, it still buttresses the reliability of his/her information.....
>
> Finally, while some of CS's information was hearsay, the hearsay information he/she provided was with respect to a drug conspiracy CS has already implicated him/herself in. Accordingly, CS's reports that Carrasco ordered drugs from Mexico and recently shot of a gun to scare away drug debt collectors possesses sufficient indicia of reliability. The Court finds that the information is reliable.

App. 18-19 (citations omitted).

After the district court denied the initial motion to suppress, Bazant received a printout of the CS's criminal history from the government. App. 55 & 80-87 (under seal). Bazant then filed a motion for leave to reconsider and/or motion for a *Franks* hearing.[4] App. 54-61.

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[4] The Court in *Franks v. Delaware* held,

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

The affidavit of probable cause described CS's criminal history as consisting of "a history of theft, forgery, and trespassing." App. 35. Carrasco maintained that the affidavit of probable cause omitted the true extend of CS's criminal history which was material to the finding of the CS's reliability. App. 55-58. The criminal history printout shows five felony theft convictions and five felony forgery convictions out of Washington state. App 81 (under seal).

Carrasco also claimed that the district court's finding that the "CS's report[] that Carrasco ordered drugs from Mexico and recently shot of a gun to scare away drug debt collectors possesses sufficient indicia of reliability" was undercut by his cellular phone records. The affidavit states,

> The CS stated that, on February 6, 2016, the CS and LUIS SANTANA SELGADO contacted Pedro CARRASCO, Jr. on CS's cellular phone. During the phone conversation, CARRASCO, Jr. stated that GARCIA and "MARCO" sent members of their drug trafficking organization to Billings to collect the money owed to them by CARRASCO, Jr. The CS heard that they were unable to collect the money from CARRASCO, Jr. CARRASCO, Jr. informed LUIS SANTANA SELGADO and the CS that he pointed a firearm at them and had them leave his residence.

App. 38-39.

Carrasco filed his phone records to show that his cellular phone did not have contact with CS's phone on February 6, 2016. App. 89. He insisted this undermined CS's credibility and was a material omission in the affidavit. App. 59-60.

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438 U.S. 154, 155-56 (1978). The Ninth Circuit has extended *Franks* to "inaccuracies or omissions wich were material to the finding of probable cause..." *Unites States v. Stanert*, 762 F.2d 775, 780 (9th Cir. 1985).

In addition, the CS's statement reflects that the DEA agents seized the CS's phone before seeking the search warrant. DEA agents received CS's consent to search the phone. App. 245-46. DEA agents could have easily corroborated the CS's statement from the phone had that call actually taken place on February 6, 2016.

Finally, Carrasco claimed that the affidavit intentionally omitted the material fact that Santana Selgado "said the methamphetamine belonged to him." And, "[m]ost importantly, contrary to CS's information, Santana said they were to deliver the methamphetamine to the Pelican Truck Stop in Laurel [Montana] - not to [Carrasco's home], as indicated in the Search Warrant Application." App. 60.[5]

The district court rejected all three grounds. The district court concluded that "Carrasco already argued that "what is missing from the affidavit is the true extent of the CS's criminal history ... [and] this court considered and rejected the argument." App. 25. Likewise, the district court described the phone records as "an old argument." "Carrasco already argued in his first motion that the phone call itself was 'incredible.'" App. 25-26. The district court did not address Santana Selgado's statement that the drugs were destined for a truck stop in Laurel, Montana. The district court concluded, "[n]o evidentiary hearing is necessary." App. 26.

After this ruling, new counsel, Wendy Holton, was appointed to replace Bazant. Carrasco later filed a *pro se* motion to remove Holton. App. 91-115. His grievance centered on Holton's refusal to file a second motion for a *Franks* hearing. App. 94.

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[5] At the hearing on the motion to suppress, Agent Grayson testified that Santana Selgado told the arresting officers that the "drugs were going to Laurel Pelican truck stop." The agent agreed that this information was "contrary to what [the] cooperating source says." App. 52.

After a recent review of the CS's audio statement given to law enforcement on the day of CS's arrest, Carrasco believed there were "a lot of falsehoods in the search warrant, a lot of inconsistencies and incorrect information." App. 95-96. He thought there was sufficient contradictory information between the CS's statement and the search warrant affidavit to justify a *Franks* hearing. *Id.*

Carrasco informed the district court that Holton was discussing plea bargains. App. 97. He was concerned that a plea bargain would bar him from appealing, and "this new information would be lost to [him] on an appeal." *Id.*

Holton informed the district court that she and Carrasco had disagreements about the appropriateness of seeking a *Franks* hearing. App. 100-04. The district court inquired,

> [s]o the contradictions that Mr. Carrasco sees between the statements in the application for the search warrant and maybe the statements the CS made, the recorded statements, you're aware of those, but in your professional opinion they don't rise to the level that would -- that he would prevail on the *Franks* hearing. Is that a fair statement?

App. 103-04. Holton responded, "that's fair ... [y]es."

Although Carrasco felt "strongly" about seeking a *Franks* hearing, Holton felt "strongly" that it was in Carrasco's best interest to accept a plea bargain. App. 104. She informed the district court that the proposed plea bargain included a reservation of his right to appeal the district courts "rulings on the suppression" motions, however, Carrasco was "concerned that the record [for appeal] isn't complete." App. 102.

Holton suggested that documents relevant to issuance of the search warrant and the CS's statement be filed under seal. App. 101. She reasoned that this material "would be available for

[Carrasco's] appellate attorney or on post conviction if he chose to go that route" and this would "resolve this impasse" *Id.* Holton also suggested that the district court "allow [Carrasco] to represent himself for the purposes of filing a *Franks* motion ..." so that "everything [is] on the record." App. 103.

Carrasco eventually pleaded guilty pursuant to the conditional plea agreement. App. 62. Rather than file a second motion for *Franks* hearing based on the CS's statement, second counsel filed a motion to permit the filing of the search warrant and a transcript of the CS's statement "conventionally and under seal." App. 74-75. The motion asserted that "this will ensure that appellate counsel have access to the materials." App. 74. The district court granted the motion. App. 76. Carrasco appealed to the Ninth Circuit.

Carrasco claimed on appeal that counsel Holton was ineffective for failing to file a second motion for a *Franks* hearing based on substance of the CS's statement. This failure prevented him from having a complete record relating to the request for a *Franks* hearing in the district court.

Carrasco pointed out material statements made by the CS that contradicted information in the affidavit of probable cause. The CS spent much of the statement denying knowledge of illegal drugs in the speakers located in the car during the traffic stop.

For example, during the recorded statement, DEA Agent Herd asked CS if the "dope that's in the car [was] given to Santana Salgado (sic)." App. 183 (under seal). The CS responded, "honestly, I don't know. I didn't see the dope handed to either him or ... I never see it handed out." App. 183-84 (under seal). Agent Heard asked, "[w]ho would be giving it to him?" The CS replied, "Honestly, that's what I don't know." App. 184 (under seal).

When asked how Santana knew Carrasco wanted drugs, the CS said Santana "didn't say." App. 227 (under seal). The agent asked CS if Santana reached out to Carrasco or if Carrosco contacted Santana. App. 228 (Under Seal). The CS said, "I am not sure." *Id.* CS also said, "they talk on the phone, but ... I didn't even know Santana had a phone." *Id.*

The agent then asked the CS, "[h]ow much dope was supposed to come to [Carrasco] on this trip?" The CS responded, "[h]onestly, I don't know." App. 230 (under seal). When the agent asked about Santana's plan, the CS said, "it sounded like he wanted to stay, and he wanted to hold onto it, and he wasn't going to give it all to him at one time." *Id.* The agent asked, "[s]o Santana's going to hang in Billings and just kind of give him a little bit at a time...[?]" *Id.* The CS responded, "I believe it was the other guy that came with us." App. 230-31 (under seal).

The agent discussed the methamphetamine found in the "speaker box" of the car. App. 232 (under seal). The CS said, "like I said, I don't know." *Id.* The CS explained that she did not see any drugs put in the car because the CS was inside the house helping Tony's mother cook food. App. 232-33 (under seal). CS told Agent Herd, "[t]hey're not telling me everything." App. 233 (under seal). The CS continually denied directly knowing that drugs were in the car. App.. 233-40 (under seal). CS concluded this part of the interview saying, "I knew ... that [Santana] wanted to bring [Carrasco] something. I didn't know that he had it to bring though. I did not know that." App. 240 (under seal).

Agent Herd asked the CS whether Carrasco was expecting the three of them to "arrive in Billings." App. 241 (Under Seal). The CS responded, "they never tell him exactly. They don't talk to much on the phone." App. 242 (under seal).

After the CS repeatedly denied knowing Santana had any drugs in the car, the agent asked the CS a hypothetical about what would occur once the three arrived in Billings. *Id.* The CS answered, "we would go into the house, and Santana would get in, and he would talk to him ... and the would look at the dope, and [Carrasco] would say try it and see if you like it. And then depending on how good ...., he would start to shell out the money." *Id.*

The CS's denials of knowledge of illegal drugs in the car contradicted the affidavits assertion that the CS reported, "the CS, ... SANTANA-SELGADO and GARCIA CARDENAS were transporting the methamphetamine seized from the vehicle from the Prosser, Washington area to the Billings area ... [and] that the methamphetamine was going to be delivered to ... CARRASCO...." App. 35. The CS's continual denial of knowledge of the methamphetamine also contradicts the district court's finding that the CS admitted "participating in the methamphetamine distribution ring - a statement against his/her penal interest..." which the district court found "add[ed] further credibility to [CS's] story." App. 18. Throughout the interview, the CS continually distanced his/her conduct from illegal activity.

Carrasco requested the Ninth Circuit to remand his case to the district court to review the contents of the CS's statement in combination with his original grounds raised for a *Franks* hearing. A remand would allow the district court to determine whether a *Franks* hearing was justified based on review of all the facts, including the CS's statement.

The Ninth Circuit affirmed the district court's denial of first counsel's motion to reconsider and/or for a *Franks* hearing. The court of appeals concluded that any omissions by the agent in the affidavit on the grounds that were raised were not material to probable cause. App. 2.

The Ninth Circuit declined to address the issue of ineffective assistance of counsel for Holton's refusal to request a *Franks* hearing based on the CS's statement. It reasoned that "the [trial court] record rarely reveals *why* counsel acted as they did." *Id.* (emphasis in original). The Ninth Circuit concluded that "the present record contains little evidence about why Carrasco's counsel did not file a second motion for reconsideration[,]" and it could not "evaluate his counsel's effectiveness on this record." *Id.*

Carrasco filed a petition for rehearing in the Ninth Circuit. He claimed the panel overlooked that fact that Holton refused to present the CS's statement to the district court to support a *Franks* hearing, while at the same time, she was advising Carrasco to enter a conditional guilty plea that reserved his right to appeal the district court's denial of a *Franks* hearing. DktEntry 71-1. The Ninth Circuit denied rehearing. App. 4.

Carrasco now requests that the Court grant his petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The Court should resolve the question of whether a criminal defendant is deprived effective assistance of counsel as guaranteed by the Sixth Amendment when counsel knowingly withholds from the trial court information relevant to a dispositive pretrial motion before advising a criminal defendant to plead guilty, knowing that the defendant's plea agreement with the prosecution reserved the right to appeal the trial court's denial of the dispositive motion. The Ninth Circuit's decision runs contrary to prior decisions from the Court, and resolving the question promotes uniformity and consistency in the application of the Court's decisions involving the Sixth Amendment right to effective assistance of counsel.

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684 (1984). Moreover, "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment....' *Id.* at 684-85.

The Sixth Amendment "right to counsel is the right to effective assistance of counsel." *Id.* at 686. "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.* In order to establish ineffective assistance of counsel,

> [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. Thus, *Srickland* requires a two pronged approach: (1) the court must examine counsel's performance to determine if it was deficient; and (2) if deficient, the court must determine if the defendant was prejudiced by the deficient performance. *Id.*[6]

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[6] The Court in *Strickland* did not set out a singular approach to deciding a claim of ineffective assistance. *Id.* 697. "[A] court need not determine whether counsel's performance was deficient before examining prejudice suffered by a defendant as a result of the alleged deficiencies." *Id.* "The object is not to grade counsel's performance." *Id.*

In relation to the performance prong, *Stickland* requires measuring counsel's representation on"an objective standard of reasonableness." *Id.* at 688. It is the defendant's burden to show that counsel fell below that objective standard. *Id.* Courts "must be highly deferential" to counsel's performance. *Id.* at 689. Courts must resist the temptation of "second-guess[ing] counsel's assistance after conviction or adverse sentence." *Id.* Therefore, *Strickland* demands that "a court deciding an actual ineffectiveness claim [] judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.[7]

"A convicted defendant making a claim of ineffective assistance must identify acts or omissions of counsel that alleged not to have been the result of reasonable judgment." *Id.* The reviewing "court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The Court in *Strickland* examined whether counsel failed in the duty to investigate mitigating evidence for the death penalty phase of a capital murder trial after the defendant pleaded guilty to three capital murder charges that occurred during the course of robberies. *Id.* at 691 and 698-99. The defendant claimed that counsel was ineffective for failing to seek a continuance to obtain psychiatric evidence, to mount a challenge to the State's medical experts, to obtain a presentence report, and to obtain good character evidence, as mitigation for the

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[7] For example, in *Harrington v. Richter,* the Court rejected a claim of ineffective assistance. 562 U.S. 86, 107 (2011). In that case, the Court evaluated whether defense counsel was ineffective for failing to seek blood stain and blood type experts for trial in a murder and attempted murder prosecution. *Id.* at 96. The Court concluded that seeking these experts "was far from a necessary conclusion that this was evident at the time of trial." *Id* at 107. The Court said, "[r]eliance on 'the harsh light of hindsight' to cast doubt on a trial that took place more than 15 years ago is precisely what *Strickland* ... [sought] to prevent." *Id.*

sentencing hearing. *Id.* at 675.

The Court emphasized that "counsel has a duty to investigate or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Counsel opted against seeking a psychiatric report to keep the State from admitting "psychiatric evidence of its own." *Id.* at 673. Counsel withheld requesting a presentence report to avoid undermining the defendant's claim that he had "no significant history of criminal activity." *Id.*

In examining the performance prong, the Court concluded that the challenged conduct was not unreasonable. *Id.* at 698. Defense "counsel made a strategic choice to argue the extreme mental distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes." *Id.* at 699.

The Court later applied *Strickland* on a claim that counsel was ineffective for failing to request discovery that would have uncovered grounds for a meritorious motion to suppress illegally seized evidence in a rape prosecution. *United States v. Kimmelman v. Morrison*, 477 U.S. 365 (1986). The Court concluded that counsel's failure to seek discovery "was not based on 'strategy,' but on counsel's mistaken beliefs that the State was obligated to take the initiative and turn over all inculpatory evidence to the defense...." *Id.* at 385. Thus, "[v]iewing counsel's failure to conduct any discovery from his perspective at the time he decided to forego that stage of trial preparation and applying a 'heavy measure of deferrence,' ... to his judgment," the Court found "counsel's decision unreasonable, that is contrary to prevailing professional norms." *Id.*

Stickland was applied on a claim that counsel was ineffective for failing to pursue a motion to suppress the defendant's confession before advising the defendant to accept a plea offer to a lesser offense of felony-murder to avoid a potential capital prosecution. *Premo v.*

Moore, 562 U.S. 115 (2011). In that case, the Court found that advising the defendant to plead guilty to a lessor crime without first filing a motion to suppress his confession was "adequate under *Strickland*...." *Id.* at 124. Defense counsel's explanation that suppression of the confession "would have been futile," in light of other admissible confessions the defendant made to other State witnesses, was not be unreasonable. *Id.* at 126-27.

The Court applied *Strickland* where a criminal defendant claimed counsel was ineffective for failing to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). The Court recognized the longstanding principle that counsel is ineffective if counsel fails to file a notice of appeal after being explicitly instructed to do so by the defendant. *Id.* The Court then reviewed the question of whether counsel is ineffective if the defendant does not clearly convey the desire to file an appeal to counsel. *Id.*

Flores-Ortega rejected circuit courts' authority that required counsel to file a notice of appeal, unless the defendant expressly declined an appeal. *Id.* at 478. This prior circuit law required counsel in all instances to consult with the defendant about the desire to appeal. *Id.*

Instead of adopting this "bright-line" approach, the Court held "that counsel has a constitutional duty to consult with the defendant about an appeal" in two delineated scenarios. *Id.* at 480. First, counsel must consult with a defendant about appeal if "a rational defendant would want to appeal (... because there are non-frivolous grounds for appeal)." Second, counsel must consult about an appeal if "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* This approach "take[s] into account all the information

counsel knew or should have known." *Id.*[8]

Strickland was also applied where a criminal defendant claimed that counsel failed to file a notice of appeal after the defendant demanded an appeal be filed in spite of having executed a valid waiver of appeal in his plea agreement. *Garza v. Idaho*, – U.S.–, 139 S. Ct. 738 (2019). *Garza* held that where "a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the defendant's express instruction." *Id.* at 746.

Each of the cases cited in this petition made their way to the Court through state prisoner habeas corpus proceedings. This case sits in a different procedural posture. Carrasco raised this issue on direct appeal after his sentence following a conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2). Because of this, the Ninth Circuit held that the ineffective assistance of counsel claim was premature and should be raised in a federal prisoners habeas corpus proceeding brought under 28 U.SC. § 2255. App. 2. However, the cases cited in this petition support the grant of this petition based on the facts already settled in the record of this case.

This case presents somewhat of a hybrid between *Kimmelman* and *Premo*, cases involving counsel's failure to file pretrial motions, and *Flores Ortega* and *Garza*, cases involving

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[8] In relation to a guilty plea, the *Flores-Ortega* recognized that "a guilty plea reduces the scope of potentially appealable issues..." *Id.* Ordinarily, "such a plea may indicate that the defendant seeks an end to judicial proceedings." However, the Court also recognized, that "[e]ven in cases when the defendant pleads guilty, the court must consider factors as whether the defendant received the sentence bargained for or waived some or all appeal rights." *Id.*

This case presents a different situation. Carrasco reserved his right to appeal the district court's denial of his motion for reconsideration and/or for *Franks* hearing. Counsel Holten knew that Carrasco would be appealing the denial of the *Franks* hearing, yet declined to present material information for the trial court to consider before allowing Carrasco to enter the conditional guilty plea.

counsel's failure to file a notice of appeal. Holton's failure to file a second motion for a *Franks* hearing based on the CS's statement deprived Carrasco of full consideration of the *Franks* issue in the district court on that motion. Consequently, the failure to file a second motion for *Franks* hearing based on the CS's statement prevented the Ninth Circuit from having a complete trial court record on the issue Carrasco reserved in his conditional plea.

The record indicates that Holton consulted with Carrasco about the issue. The ex parte hearing reflects the substance of that consultation. App. 99-104 (under seal). The record shows Holton reasonably understood that Carrasco wanted the CS's statement to be part of the trial court record in relation to the *Franks* issue he reserved for appeal. App. 102 (Carrasco "is concerned that the record isn't complete"); *see e.g*, *Flores-Ortega*, 528 U.S. at 480 ("this particular defendant reasonably demonstrated to counsel that he was interested in appealing."). Yet, she declined to file a second request for a *Franks* hearing in the trial court.

Instead, Holton suggested that a copy of a transcript of the CS's recorded statement be filed for counsel on appeal. App. 101-02. Alternatively, Holton suggested that the district court permit Carrasco to represent himself to file a second motion for a *Franks* hearing to make a complete record before his appeal. App. 103.

Rather than seek a second motion for *Franks* hearing, the district court granted Holton's motion to file the CS's statement under seal for Carrasco's appeal lawyer. App. 74-76. Holton's conduct deprived Carrasco of his ability to seek a *Franks* hearing in the district court on the information in the CS's statement.

Consequently, this conduct affected Carrasco's ability present this information on direct appeal in the Ninth Circuit. Holton believed that Carrasco's appellate counsel could use the CS's

statement on direct appeal. App. 101; *see e.g.*, *Kimmelman*, 477 U.S. at 385 ("Counsel's failure to request discovery ... was not based on 'strategy,' but on the mistaken beliefs that the State was obligated to take the initiative and turn over all of its inculpatory discovery..."). The Ninth Circuit rejected Carrsco's attempt to use the CS's statement in his direct appeal. App. 2.

After a defendant identifies acts or omissions by counsel that the defendant claims were ineffective, a reviewing "court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside a range of professionally competent assistance." *Strickland*, 466 U.S. at 690. When "making that determination the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*; *see also*, *Kimmelman*, 477 U.S. at 384 (same). In this regard, the Ninth Circuit's opinion strays from the teachings of *Strickland.*

Holton's decision to withhold CS's statement from the trial court to consider in determining whether to grant a *Franks* hearing, denied Carrasco the adversarial testing process *Srickland* requires for effective assistance of counsel under the Sixth Amendment. Under *Strickland* and its progeny, Carrasco maintains counsel's failure to put the CS's statement through adversarial testing process in the trial court for determination of whether a *Franks* hearing fell below standards of professional reasonableness and norms, and establishes the deficient performance *Strickland* requires.

Because the Ninth Circuit concluded that Carrasco's ineffective assistance claim was premature, it did not reach the issue of prejudice under *Strickland.* Counsel's refusal to present relevant information in the trial court on a dispositive pretrial motion counsel knows will be the subject of the defendant's appeal meets the standards required for establishing prejudice. In this

regard, the Ninth Circuit's refusal to address this issue on direct appeal runs contrary to prior decisions of this Court.

Strickland recognizes that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. 466 U.S. at 691. Thus, *Strickland* held that "the appropriate test for prejudice" requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The Court expressly applied "the same two-part standard" from *Strickland* "to ineffective assistance claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). When a defendant claims that counsel's ineffective assistance influenced the decision to plead guilty, "the defendant must show that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. Carrasco is not claiming that, but for Holton's error, he would have insisted on going to trial. He claiming the Holton's deficient conduct prevented him from fully vetting his request for a *Franks* hearing in the district court, thereby, affecting his direct appeal.

The prejudice inquiry in this case falls somewhere between *Kimmelman* and *Flores-Ortega.* In *Kimmelman*, where the allegation was the failure to file a suppression motion, the Court concluded it had an insufficient record to determine the prejudice prong and remanded the case for that determination. 477 U.S. at 390. The Court observed that "[n]o evidentiary hearing has ever been held on the merits of respondent's Fourth Amendment claim." Alternatively, the Court observed that the defendant on remand "may be unable to show that absent the [illegally]

seized evidence there is a reasonable probability that the trial judge would have a reasonable doubt as to his guilt." *Id.* at 391. Therefore, the Court affirmed the Third Circuit's remanded to the district court to determine whether the defendant could show prejudice. *Id.*

Kimmelman supports the proposition that a remand to the district court is appropriate. That would allow the district court in this case to determine if a *Franks* hearing is justified. The district court could either grant a hearing after review of the CS's statement, or deny a hearing. If the motion to suppress is denied after an evidentiary hearing, or if the district court denies a *Franks* hearing after review of the CS's statement, Carrasco would then have ability to appeal on a complete record.

In *Flores-Ortega*, the Court held "that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." 528 U.S. at 484. Carrasco meets the test in *Flores-Ortega*.

Carrasco made it clear to counsel that he wanted an appeal that included the CS's statement in relation to his request for a *Franks* hearing. Holton's refusal to move for a *Franks* hearing based on the CS's statement left Carrasco without a complete trial court record. As a result, counsel's conduct deprived him meaningful appellate review of that statement on direct appeal to the Ninth Circuit.

This case presents the Court with an ideal vehicle to further define the right to effective assistance of counsel under the Sixth Amendment. The facts in this case provide the court an opportunity to offer guidance to lower courts on the standards of effective representation when counsel's decisions, advice and conduct impact the defendant's right to counsel in both the trial

court and on appeal. Resolving this question will further guide counsel in circumstances where the defendant's desires to litigate may be at odds with counsel's judgment.

Garza teaches that the decision to litigate and the decision pursue an appeal belong to the defendant. *Garza*, – U.S.–, 139 S. Ct. at 749-50. This is so, even if counsel does not necessarily agree with the defendant that there are grounds to litigate or to appeal.

That fact that this case comes before the Court from direct appeal should not be an obstacle. The Ninth Circuit's decision to avoid addressing the ineffective assistance claim results in a decision that runs contrary to this Court's prior decisions. Resolution of the question will promote uniformity among lowers courts in the application of decisions of the Court and further provide necessary guidance to defense counsel.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 10th day of November, 2020.

Respectfully submitted,

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