No.

IN THE SUPREME COURT OF THE UNITED STATES

DAVID GARCIA,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Whether a circuit court of appeals has a duty to adjudicate the merits of a Sixth Amendment ineffective assistance of counsel claim raised by a defendant desiring a ruling solely on the basis of the existing record in a direct appeal?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no cases related to the case that is the subject of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

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Petitioner David Garcia ("Petitioner" or "Garcia") respectfully prays that a writ of certiorari will issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in Case No. 19-1496 on October 30, 2020.

OPINION BELOW

On October 30, 2020, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed an opinion and judgment affirming Petitioner's conviction and 10-year prison term for conspiracy to distribute methamphetamine. (App. 1a). The opinion is unpublished. The court denied a timely petition for rehearing by order filed on November

16, 2020. (App. 26a) The United States District Court entered its criminal judgment on April 26, 2019. (App. 18a).

JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on October 30, 2020. He invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1), which permits a party to petition the Supreme Court of the United States to review any civil or criminal case before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

28 U.S.C. §1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.] . . .

28 U.S.C. §2255:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

On October 5, 2016, a confidential informant ("CI") arranged to make a purchase of a half-pound of methamphetamine from a local California drug dealer named Hernandez Milan. Task force officers set up visual surveillance of his movements for the purpose of identifying his source of supply.

The officers watched Hernandez Milan drive to the 2100 block of North Fair Oaks Avenue in Altadena, California. After he exited his vehicle and walked down the street, the officers lost sight of him. A few minutes later, Hernandez Milan emerged and reentered his vehicle. He then drove to an agreed location and completed the sale of methamphetamine to the CI.

On November 15, 2016, one of the officers applied for a warrant to search two residences in the vicinity of the 2100 block of Fair Oaks Avenue, specifically 2094 and 2096. The affidavit for the warrant recited the details of the October 5, 2016 controlled methamphetamine purchase. The affidavit acknowledged the surveillance officers had "temporarily lost visual sight" of Hernandez Milan before they could ascertain the precise address from which he had obtained the methamphetamine.

The affidavit incorporated additional information obtained through a state wiretap warrant. The wiretap warrant authorized the interception of telephone communications of Javier Robles, a target of an interstate drug investigation encompassing both California and Michigan. Robles was suspected of being Hernandez Milan's supplier.

A California state magistrate issued a search warrant for 2094 and 2096 Fair Oaks Avenue. During the execution of the warrant, the officers seized two duffel bags containing an aggregate 6.1 kilograms of methamphetamine from common areas of the residences. They also seized bags containing small quantities of methamphetamine, heroin, and cocaine, and two drug scales, from a bedroom ostensibly used by Petitioner David Garcia, a nephew of Javier Robles.

A federal grand jury in the Eastern District of Michigan indicted Robles, Garcia, and others for conspiracy to distribute heroin, methamphetamine, and cocaine. The government alleged Robles sold drugs to customers in California and Michigan. Its case against Garcia rested on the contention that he assisted his uncle by shipping heroin to Michigan and delivering methamphetamine to local dealers in California.

Robles and Garcia filed motions to suppress the evidence seized from the Fair Oaks Avenue addresses. Their motions asserted that the issuance of the search warrant was tainted by information derived from an illegally-issued state wiretap warrant.

During the suppression hearing, the government agreed to strike the wiretap information from the affidavit. It next argued that the remaining information in the affidavit supplied an "independent source" for the issuance of the search warrant.

In response, Robles' and Garcia's attorneys conceded "there was no additional evidence that needed to be suppressed besides what the government had already agreed to exclude," and that when the tainted wiretap information was removed, "probable cause still existed." (App. 5a) This concession was a mistake.

At trial, the officer who had signed the probable cause affidavit again confirmed that the surveillance officers had not observed Hernandez Milan enter or leave 2094 and 2096 Fair Oaks[1]:

> Hernandez Milan then left his residence and drove to the area of 2100 North Fair Oaks Avenue. During that time, he was conducting counter surveillance. *We temporarily lost him*. His car was located in the 2100 block of North Fair Oaks Avenue.
>
> A member of my team observed Hernandez-Milan walking northbound on Fair Oaks back to his vehicle. Hernandez-Milan then drove directly to our confidential source and the buy-walk occurred.

The jury found Garcia guilty of the conspiracy count. It also submitted answers to two special interrogatories. One response stated Garcia was accountable for 500 or more grams of methamphetamine. The other response stated he was not accountable for any amount of heroin.

On direct appeal, Garcia argued that his trial attorney violated his Sixth Amendment right to effective assistance of counsel by conceding the existence of probable cause for the warrant to search the Fair Oaks Avenue addresses. The court of appeals declined to resolve this claim. It reasoned that "[t]his Court does not generally review claims of ineffective assistance on direct review, and there is no reason to do so here." (App. 6a)

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[1]The court of appeals opinion *erroneously* assumes that the officers observed Hernandez Milan "leave the Fair Oaks property and sell half a pound of crystal methamphetamine to the confidential source." (App. 6a) The record discloses that the applicant for the warrant stated consistently in both the affidavit and in trial testimony that the surveillance unit lost sight of him while he was procuring his drug supply .

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

This Court's opinion in *Massaro v. United States* announced a general rule that "ordinarily" ineffective assistance claim should be litigated "in the first instance" in the district court "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* 538 U.S. 500, 505 (2003). The Court explained that the typical record in a direct appeal is not sufficiently developed for an appellate court to determine whether the two-pronged test for Sixth Amendment claims under *Strickland* can be satisfied. *Id.* citing *Strickland v. Washington*, 466 U. S. 668 (1984).

But *Massaro* also rejected a position, pressed by the government in other cases, that ineffective assistance claims *must* be brought in the first instance in a post-conviction motion under 28 U.S.C. §2255:

> We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal.

Id. at 508.

The question left unanswered by *Massaro* is whether a court of appeals has a *duty* to adjudicate an ineffective assistance claim that appellate counsel has elected to raise in the direct appeal, rather than defer it for resolution in a collateral relief proceeding under §2255? Under existing Sixth Circuit policy, the answer is no. (App. 6a)

The Sixth Circuit's position is unreasonable. A court of appeals has statutory jurisdiction to decide all appeals from final decisions rendered by the district courts in

criminal prosecutions. 18 U.S.C. §1291. Yet, the Sixth Circuit's policy leaves it entirely to the discretion of the three-judge panel to decide whether it will adjudicate a Sixth Amendment ineffective assistance claim in a direct appeal on the basis of the existing record. (App. 6a, n. 1, citing *United States v. Lewis*, 605 F.3d 395, 400 (6th Cir. 2010)).

A CIRCUIT COURT OF APPEALS HAS A DUTY TO ADJUDICATE THE MERITS OF A SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RAISED BY A DEFENDANT DESIRING A RULING SOLELY ON THE BASIS OF THE EXISTING RECORD IN A DIRECT APPEAL.

The Sixth Circuit's policy conflicts with the principle that "[j]udicial power is inseparably connected with the judicial duty to decide cases and controversies by determining the parties' legal rights and obligations." *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1014 (10th Cir. 2004), *aff'd*, 546 U.S. 418 (2006). This duty is rooted in a belief that "[b]asic fairness, avoidance of unwarranted delay and the imposition of additional costs on the parties, and conservation of judicial resources, all dictate that [an appellate court] should decide [a] case since on the law [it] can." *Toews v. United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004).

The Sixth Circuit's policy can result in excessive delay, additional cost, and waste of judicial resources in certain cases. A majority of circuits, including the Sixth Circuit, has adopted a rule that a district court may not consider a motion for collateral relief under §2255 while a direct appeal is pending. *Capaldi v. Pontesso*, 135 F.3d 1122, 1124 (6th Cir. 1998) (collecting cases). This rule rests on the premise that "[a] motion under Section 2255 is an extraordinary remedy and not a substitute for a direct appeal," and "determination

of the direct appeal may render collateral attack by way of a §2255 application unnecessary." *Womack v. United States*, 395 F.2d 630, 631 (D.C. Cir. 1968).

It is not uncommon for direct appeals from felony jury convictions to linger for a year or more from the filing of the notice of appeal to final decision. Under the Sixth Circuit's policy, a defendant in Garcia's position faces the Hobson's choice of forgoing a direct appeal and raising his Sixth Amendment claim in a §2255 motion, or delaying litigation of the claim until his other claims are adjudicated in a direct appeal.

Then there is the matter of fairness. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court considered an Arizona state procedure requiring a defendant to raise an ineffective assistance of trial counsel claim in a collateral proceeding. The Court described the collateral proceeding as "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 11.

The Court next considered the impediments faced by an indigent defendant in pursuing his ineffectiveness claim under this framework. He does not enjoy a constitutional right to the appointment of an attorney to assist him in a collateral proceeding. *Id.* at 12.In most instances, he "cannot rely on a court opinion or the prior work of an attorney addressing that claim." *Id.* at 11-12. And the defendant, being "unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law." *Id.* at 12.

The Court lamented that "[b]y deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed,

the State significantly diminishes prisoners' ability to file such claims." *Id.* at 13. Due to these impediments, the Court concluded that a procedural default in a jurisdiction requiring deferral of an ineffective assistance claim to a collateral proceeding will not bar the prisoner from pursuing the same claim in federal habeas. *Id.* at 17.

In *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court considered a procedure in Texas that, like the Sixth Circuit's policy, theoretically permits a criminal appellant to raise an ineffective assistance claim in a direct appeal, but that "by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise [the] claim" in that forum. *Id.* at 429. The Court concluded that the principles of *Martinez* apply with equal force in such jurisdictions. *Id.*

Federal prisoners do not have an absolute right to the appointment of an attorney to assist them in preparing a collateral attack on their convictions. *See* 28 U.S.C. §2255(g) (stating district court "may" appoint counsel).Thus, an indigent appellant may conclude that the advantage of pursuing an ineffectiveness claim in a direct appeal (in which he has an absolute right to appointed counsel) outweighs the disadvantage, if any, of having to rely on the existing district court record.

The Sixth Circuit's policy fails to appreciate that appellate counsel is in the best position to determine whether his client's interests would better be served by raising an ineffective assistance claim in the direct appeal. By reviewing the entire district court record as part of his duties in prosecuting the appeal, counsel on appeal can assess whether trial counsel's ineffectiveness is so apparent on the face of the record that the benefit of

presenting the claim to the appellate court in the first instance outweighs that of deferring it until after the appeal is concluded.

Garcia's ineffective assistance claim falls in the latter category. By filing a motion to suppress the drugs and paraphernalia seized from the Fair Oaks addresses, trial counsel had already made a strategic decision that exclusion of this evidence from the trial would benefit his client's defense.

During the suppression hearing, the government agreed to strike the information from the challenged state wiretap warrant. This concession eliminated any need for trial counsel to make any additional strategic decisions. All that remained was for trial counsel to argue that the "four corners" of the redacted affidavit failed to demonstrate probable cause.

There is a line of appellate authority holding that an observation of a drug dealer engaging in suspected trafficking activity in the vicinity of multiple habitations does not generate probable cause to search each and every habitation. *See e.g. United States v. Hinton*, 219 F.2d 324, 325 (7th Cir. 1955) (no probable cause for issuing warrant to search every unit in a multi-unit apartment building where "[t]he affidavit failed to identify the particular apartment or apartments in which the sales were made and it did not allege that the sales were made in apartments occupied by any of the alleged sellers.") The observation of Hernandez Milan, a drug dealer, in the area of a city block on Fair Oaks Avenue did not provide probable cause to search every residence in the vicinity.

The Sixth Circuit stated that a lack of information in the record regarding "trial counsel's preparation, strategy, or communication" precluded it from deciding the ineffective assistance claim. (App. 6a) This was a feeble excuse. No amount of preparation, strategy, or communications by trial counsel could alter the conclusion that he rendered deficient performance by conceding probable cause.

The prejudice prong of *Strickland* requires a defendant to demonstrate a reasonable probability that the trier of fact would have had a reasonable doubt if the evidence had been suppressed. *Kimmelman v. Morrison*, 477 U.S. 365, 390-91 (1986). This determination of the prejudice prong rests entirely on a review of the trial transcript.

The jury found that Garcia had conspired to distribute methamphetamine, but not heroin. The prosecution's case against him relied primarily on the 6+ kilograms of methamphetamine that was seized from the Fair Oaks addresses. The only other evidence against him consisted of a surveillance officer's testimony that he observed him delivering methamphetamine to another individual on one occasion.

Under the "single act" or "isolated transaction" rule, this delivery would not be sufficient, standing alone, to support Garcia's conspiracy conviction. *See United States v. Gallo*, 763 F.2d 1504, 1520 (6th Cir. 1985) ("For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act must be one from which such knowledge may be inferred.") Garcia plainly was prejudiced by his attorney's concession

of probable cause and the consequent admission of the drugs and paraphernalia from Fair Oaks Avenue.

CONCLUSION

Garcia is an indigent prisoner. He was appointed an attorney for his direct appeal from a drug conspiracy conviction and a ten year sentence. His counsel on appeal believed the existing district court filings and transcripts provided a sufficient record to raise a colorable claim of ineffective assistance of trial counsel. The Sixth Circuit arbitrarily declined to adjudicate this claim.

Instead, it instructed Garcia, a layperson, to raise it in a collateral motion under 28 U.S.C. §2255. If this ruling stands, Garcia must either prepare such a motion on his own, or seek the assistance of a "jail house lawyer." This is not fair, and it is not judicially efficient.

Judge Posner once wrote: "we cannot avoid the duty to decide an issue squarely presented to us. If our decision is wrong, may the Supreme Court speedily reverse it." *United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005). Garcia's direct appeal squarely presented an ineffective assistance claim that could have been decided on the existing record.

For these reasons, Garcia asks the Court issue a writ of certiorari to the Sixth Circuit for the purpose of clarifying a circuit court of appeals' duty to consider and decide Sixth Amendment ineffective assistance claims that are ripe for review in a direct appeal.

Respectfully submitted,

Dated: December 31 , 2020

s/Dennis C. Belli
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